IN THE COURT OF APPEALS OF IOWA

No. 6-737 / 05-1802
Filed October 25, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LINDA LEE KNUTSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Delaware County, Alan L. Pearson and Monica Ackley, Judges.

Linda Lee Knutson appeals from the sentence imposed following her guilty pleas to theft in the third degree and fraudulent practices in the third degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, and John Bernau, County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

HUITINK, P.J.

Linda Lee Knutson appeals from the sentence imposed following her guilty pleas to theft in the third degree in violation of Iowa Code sections 714.1 and 714.2(3) (2003) and fraudulent practices in the third degree in violation of section 714.8(4) and 714.11. We affirm.

I. Background Facts and Proceedings.

Knutson was originally charged with theft in the first degree, fraudulent practice in the first degree, and money laundering. These charges were filed after an independent audit of the activity and nutrition accounts at the Maquoketa Community School concluded $105,956 was missing from those accounts. The audit implicated Knutson because she was the employee responsible for the receipt, deposit, and other bookkeeping details associated with the district's activity and nutrition accounts.

Knutson denied any wrongdoing and entered a not guilty plea to each offense charged. On the day set for trial, Knutson reached a plea agreement with the State. The terms of the plea agreement as recited by the prosecutor were:

> Your Honor, my understanding is that at this time the defendant would be willing to enter an *Alford* plea of guilty to the reduced charge or lesser included charge of Count I, Theft in the Third Degree, an aggravated misdemeanor; that she would be willing to enter an *Alford* plea to the lesser or reduced charge of Fraudulent Practices in the Third Degree, an aggravated misdemeanor, in which return for the State of Iowa would dismiss Count III at defendant's cost; that she would be required to make restitution for the deductible paid out by the school.
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> . . . .
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> She would be in a position to ask for a deferred judgment, I understand, if she felt that was appropriate, and the State would be in a position to ask for whatever sentence the State felt was

> appropriate with the understanding that the State's recommendation itself would not go beyond that in the presentence investigation. Also, with the understanding that the school may have an individual or individuals come over and make a recommendation to the Court regarding what their position is on this.

The trial court thereafter accepted Knutson's *Alford* plea to the lesser offense of theft in the third degree and fraudulent practice in the third degree. The court also ordered completion of a presentence investigation (PSI) and set a date for sentencing. The resulting PSI report recommended Knutson be sentenced to two consecutive two-year terms of incarceration. Following an October 7, 2005, sentencing hearing, the court sentenced Knutson to two concurrent two-year terms of incarceration and ordered her to pay restitution as provided, as well as related court costs. The trial court's stated reasons for the sentence imposed included the following:

> The things that I have read with regard to how this incident occurred, and what exactly happened, as your attorney indicated, you've taken responsibility for the things that are within the plea negotiation that you've entered into with the County Attorney, and I have taken that fully into consideration.
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> . . . .
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> REASONS FOR SENTENCE: In imposing sentence, the Court has considered those factors set out in Section 907.5 of the Iowa Code. Although all such factors are important in this case, the Court gives special significance to: the negotiations of the parties, the nature of the offenses, the PSI, the witnesses offered by both parties, the impact the offense has in the educational setting and on the families and children involved and the underlying nature of the gambling that may have had a significant impact on the Defendant's rationalization and involvement in the crimes.

On appeal, Knutson argues:

> I. The district court considered and relied upon an improper factor in determining the defendant's sentence.
> II. Trial counsel provided ineffective assistance of counsel.

II. Standard of Review.

A sentence imposed in accordance with applicable statutes will be overturned only for an abuse of discretion or a defect in the sentencing procedure, such as consideration of impermissible factors. *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995). Sentencing decisions of the trial court are cloaked with a strong presumption in their favor, and an abuse of discretion will not be found unless the defendant shows that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id*. When a challenge to the trial court's sentencing decision implicates an ineffective assistance of counsel claim, our standard of review is de novo. *State v. Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004).

III. Sentencing.

Knutson claims the foregoing statements from the sentencing record indicate the trial court improperly considered the greater offenses originally charged in arriving at the court's sentencing decision. We disagree.

When exercising its discretion, "the district court is to weigh all pertinent matters in determining a proper sentence including the nature of the offense, the attending circumstances, the defendant's age, character, and propensities or chances for reform." *State v. Johnson*, 513 N.W.2d 717, 719 (Iowa 1994). "The courts owe a duty to the public as much as to the defendant in determining a proper sentence." *State v. Kendall*, 167 N.W.2d 909, 911 (Iowa 1969). "A court may not consider any unproven or unprosecuted offense when sentencing a defendant unless (1) the facts before the court show the accused committed the offense, or (2) the defendant admits it." *State v. Witham*, 583 N.W.2d 677, 678

(Iowa 1998). If the defendant admits it or the facts before the court show the accused committed the offense, "[a] sentencing court may, within statutory limits, impose a severe sentence for a lower crime on the ground that the accused actually committed a higher crime." *State v. Thompson*, 275 N.W.2d 370, 372 (Iowa 1979). "The controlling consideration is whether the accused in fact commited the higher crime, not whether the prosecutor originally charged it." *Id.* "[A] sentencing court is not required to give its reason for rejecting a particular sentencing option." *Loyd*, 530 N.W.2d at 714. "We will set aside a sentence and remand a case to the district court for resentencing if the sentencing court relied upon charges of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved." *State v. Black*, 324 N.W.2d 313, 315 (Iowa 1982).

Contrary to Knutson's claims, the court's reference to having read all the information regarding the incident does not establish an impermissible consideration of other crimes unproven or admitted in the minutes of testimony. The statement that the sentencing court considered the plea negotiations does not indicate that higher offenses alleged in the trial information were considered. The statement suggests that the sentencing court considered the parties' agreement and that the State would not make a recommendation more severe than that contained in the PSI report. "We will not draw an inference of improper sentencing considerations which are not apparent from the record." *State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002).

Additionally, the sentencing court imposed a more lenient sentence than that in the PSI report by making the terms for each charge concurrent, instead of

consecutive, as recommended in the PSI report. "Our task on appeal is not to second guess the decision made by the district court, but to determine if it was unreasonable or based on untenable grounds." *Formaro*, 638 N.W.2d at 725. The sentencing court considered the nature of the offense to which Knutson pleaded guilty and the fact that Knutson admitted taking the money from an institution established to educate the community's youth. The sentencing court acted well within its discretion when the court sentenced Knutson to a term not to exceed two years for each charge to be served concurrently.

IV. Ineffective Assistance of Counsel.

Knutson claims her counsel was ineffective for failing to obtain an express ruling on the following objections to the content of the PSI report made by her counsel:

> (1) the official version of the offense (2) the inaccurate amount of money owed defense counsel (3) the reference to "lifestyle while living in Iowa"; (4) the inaccurate statements that the friends listed were all from Iowa; (5) the statement of the amount of money spent, won, or lost at the casinos; and (6) the statement by Lori Kramer regarding the amount of subsequent deposits.

Knutson also claims that because of the information in the PSI report the following facts were implied: (1) Knutson stole the amount of money missing, not the $1000 disclosed in her plea; (2) her plea encompassed a longer time period; and (3) Knutson was responsible for a larger amount of restitution rather than the $2000 insurance deductible she agreed to pay. Knutson maintains her counsel was ineffective for not objecting to these implications in the PSI report.

For Knutson to prevail on her ineffective assistance claim on direct appeal, she must establish as a matter of law that counsel failed to perform an essential

duty and prejudice ensued. *State v. Martinez,* 679 N.W.2d 620, 625 (Iowa 2004). We will not second guess reasonable trial strategy. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). The second prong is satisfied if a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Davis v. State*, 520 N.W.2d 319, 321 (Iowa Ct. App. 1994).

Even if we assume counsel breached an essential duty, Knutson has failed to establish the prejudice prong of her ineffective assistance of counsel claim. The record indicates the court admitted Knutson's exhibits identifying the claimed inaccuracies included in the PSI. We find nothing in the record indicating the trial court's sentencing decision was improperly influenced by the cited inaccuracies. We therefore reject Knutson's claim that there was a reasonable probability of a different sentencing result if the allegedly incorrect information included in the PSI was deleted or corrected.

The judgment of conviction and resulting sentence imposed by the trial court are affirmed.

AFFIRMED.