IN THE COURT OF APPEALS OF IOWA

No. 8-777 / 08-0100
Filed October 15, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL JOHN BYARS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire, Judge.

Defendant appeals his sentence following a guilty plea. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Michael Walton, County Attorney, and Rob Cusack, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Eisenhauer, JJ.

EISENHAUER, J.

Michael J. Byars appeals his sentence of ten years imprisonment following his guilty plea to lascivious acts with a child. He claims the trial court abused its discretion by (1) imposing a prison term based on an impermissible factor; (2) basing the sentence on "one essential factor;" and (3) not employing a presumption of probation. We affirm.

Originally charged with sexual abuse in the third degree, Byars pled guilty to lascivious acts with a child and admitted he fondled or touched the pubes or genitals of a girl under the age of fourteen. Byars was eighteen at the time of the incident. At sentencing the court rejected Byars's request for probation and sentenced him to prison.

Our review of sentencing decisions is for correction of errors at law. Iowa R. App. P. 6.4; *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). A sentence will not be upset on appeal unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure. *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000).

> Sentencing decisions of the district court are cloaked with a strong presumption in their favor. Where, as here, a defendant does not assert that the imposed sentence is outside the statutory limits, the sentence will be set aside only for an abuse of discretion. An abuse of discretion is found only when the sentencing court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable.

Thomas, 547 N.W.2d at 225. When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose. *Id.* Iowa Rule of Criminal Procedure 2.23(3)(*d*) requires a sentencing court to

demonstrate its exercise of discretion by stating "on the record its reason for selecting the particular sentence." Failure to state on the record the reasons for the sentence imposed requires the sentence be vacated and the case remanded for amplification of the record and re-sentencing. *State v. Marti*, 290 N.W.2d 570, 589 (Iowa 1980); *State v. Freeman*, 404 N.W.2d 188, 191 (Iowa Ct. App. 1987). The sentencing court, however, is generally not required to give its reasons for rejecting particular sentencing options. *Thomas*, 547 N.W.2d at 225. In considering sentencing options, the court is to determine, in its discretion, which of the authorized sentences will provide both the maximum opportunity for the rehabilitation of the defendant and for the protection of the community from further offenses by the defendant and others. Iowa Code § 901.5 (2007); *see State v. Hildebrand*, 280 N.W.2d 393, 395 (Iowa 1979).

Byars first argues the court abused its discretion in imposing a prison term because it based its determination on only one sentencing factor.[1] More specifically, he contends the sentencing judge imposed a prison term based only on the age of the victim. The age of the victim is an essential element of the crime to which he pled guilty.

The record does not support Byars's claim the court "made it perfectly clear the victim's age was the controlling factor" in sentencing. Rather, the sentencing court made clear on the record, it had received, examined, and

[1] Byars makes a general allegation that the sentencing judge displayed a "prosecutorial bias." He supports this allegation with citation to prior appellate cases involving the sentencing judge. These citations provide no benefit and our review of the proceedings reveals no prosecutorial bias.

considered the presentence investigation report which recommended probation. It also received, from Byars, a letter from an organization Byars had volunteered for and a letter from the Davenport North Little League containing positive comments about Byars. From these documents, in particular the presentence investigation report, the court was aware of and considered the circumstances surrounding the crime: Byars's age, eighteen years; Byars's record of three convictions for speeding, two convictions for careless driving, two convictions for improper use of lanes, one conviction for failure to surrender plates, title or registration; and a conviction for fourth-degree theft. Additionally, the presentence report showed Byars had unpaid fines. The court also heard and considered a statement from both Byars and his attorney.

Further, in setting forth reasons for the sentence imposed, the court stated:

> Well, I've given the matter considerable thought. I have reviewed the presentence investigation, including the prior record of criminal convictions. And even considering the crime from the standpoint only of what the defendant is willing to acknowledge that he did, he knew this was a person who was not of legal age, whether he thought she was sixteen or, as he says in his version, that her friend said she was fifteen and going to be sixteen in four days, to me is of little consequence, and he knows what he did was wrong. It's a very serious matter. The reason why the State is not required in a criminal prosecution to prove that the defendant knew that is that we need to protect children of that age regardless of what are the things they're doing. We place the burden on the adult.
>
> My impression is that the defendant has very little direction in his life from the presentence investigation. He has accomplished very little in terms of any sort of recognized goals to achieve adulthood. He's just been running amok. Certainly that's evidenced by the fact that this crime occurred while other criminal

> charges, and serious criminal charges, were pending against him that he's pled guilty to in the interim period of time.
>
> The court finds that a deferred judgment would not be appropriate and probation is not appropriate in light of the needs of this defendant and the needs to protect society from his conduct. Accordingly, defendant is sentenced to a term of not to exceed ten years imprisonment.

The court's statement shows it not only properly considered the serious nature of the offense, an appropriate factor, *see State v. Dvorsky,* 322 N.W.2d 62, 67 (Iowa 1982) (stating the nature of the offense is a necessary factor to consider when exercising sentencing discretion), but also considered other appropriate factors such as the impact of the crime on the victim and others. In addition, the court expressly considered such things as Byars's need for and prospects for rehabilitation and what a proper rehabilitative plan might be, protection of the community, and deterrence. These are proper matters for consideration when weighing sentencing options. *See* Iowa Code §§ 901.5, 907.5.

We conclude, contrary to Byars's claim of error, the district court considered and weighed numerous, appropriate factors in arriving at a sentence.

Second, Byars repeats his argument about the victim's age and Byars's knowledge of the age as "the main reason for the sentence." We will not repeat our discussion above and find no abuse of discretion.

Finally, we address Byars's argument that when imprisonment is not mandatory, trial courts should employ a presumption in favor of probation. The only authority Byars cites for this contention is Iowa Code chapter 901B. The statute sets forth a continuum of correctional alternatives to be used in dealing

with probation violators, with jail and prison sentences being the last resort. Also, under this chapter reasons must be given when an individual is transferred between continuum levels. *See* Iowa Code § 901B.1(3).

Based on this statute, Byars argues the legislature has determined most offenders can be rehabilitated in the community and jail and prison sentences should be a last resort. We believe Byars reads more into this statue than was intended by the legislature.

First, this statute applies only to those persons already granted and on probation, not to those who have not yet been sentenced. Second, we believe establishing a preference for, or presumption in favor of, probation involves a matter of public policy more appropriately decided by the legislature than by the courts. Our role is "to give effect to the law as written." *State v Wagner*, 596 N.W.2d 83, 88 (Iowa 1999). If the legislature had intended to reduce jail and prison incarceration by requiring judges to employ a presumption of probation in sentencing, it would have done so expressly. It has not. Iowa statutes allow judges to impose sentences in their discretion, including exercising options such as probation. *See* Iowa Code §§ 901.5, 907.3. However, the legislature has not required courts to employ a presumption of probation. We will not substitute our judgment for that of the legislature on this policy issue.

Based on our review of the entire record, and for all of the reasons set forth above, we conclude the sentencing judge did not base his sentencing decision on only one factor or use inappropriate factors and thus did not abuse

his sentencing discretion. Further, the court was not required to employ a presumption in favor of probation.

AFFIRMED.