IN THE COURT OF APPEALS OF IOWA

No. 8-780 / 08-0164
Filed October 1, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LANCE EDWARD SUMMERS,
Defendant-Appellant.

Appeal from the Iowa District Court for Dallas County, Virginia Cobb, District Associate Judge.

Lance Summers appeals from the sentence imposed following his guilty plea to second-degree theft. **AFFIRMED.**

Alfredo Parrish and Andrew Dunn of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson and Robert Glaser, Assistant Attorneys General, Wayne Reisetter, County Attorney, for appellee.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

SACKETT, C.J.

Lance Summers appeals from the sentence imposed following his guilty plea to second-degree theft. He contends the court abused its discretion in imposing a prison term and in considering improper factors. He also contends counsel was ineffective in not presenting mitigating evidence at the sentencing hearing. We affirm.

I. Background.

The appellant served as a probation officer with the Iowa Department of Correctional Services first in district eight and later in district five. When probationers assigned to the appellant's supervision paid financial obligations, the appellant provided them a written receipt, but retained the funds for his personal use. The theft was exposed when a probationer was charged with violating probation by failing to pay court-ordered financial obligations. The probationer provided the receipts at the hearing. Investigation revealed no corresponding copy in the probationer's file and no record the funds had been paid to the State. The appellant was charged with second-degree theft both in Lee County and Dallas County.

He pled guilty in Lee County. At the sentencing hearing he presented testimony from several witnesses. The court sentenced the appellant to a term not to exceed five years; ordered appellant to pay a fine, court costs, surcharges, and restitution; and suspended the prison term, placing appellant on probation for five years.

He also pled guilty in the Dallas County proceeding. At the sentencing hearing, defense counsel described the Lee County proceedings to the court, then stated:

> We have elected to forego repeating that process here this morning of calling witnesses to testify under oath before the court. Not because we were taking anything for granted here today or because we just don't want to put the time in, but frankly rather because I believe it's very much an open book what Mr. Summers did, and how that's impacted him, and the changes that he's made in his personal life and financial life to make sure that we are not anywhere near this same sort of circumstance or territory again.

Counsel then detailed the testimony from the Lee County sentencing hearing, the changes appellant had made, the restitution paid, and the results of the Lee County hearing, that appellant's prison sentence was suspended. Counsel made an impassioned plea for a suspended sentence. The appellant also made a brief, apologetic statement. Both in Lee County and Dallas County, the State recommended incarceration.

The court ruled:

> In determining the sentence to be imposed against the defendant the court has taken into consideration the presentence investigation, as well as the facts and circumstances of this case, the recommendations of the county attorney, the recommendations of the PSI, comments of the defense attorney, defendant's age, education, prior record, what I know of employment and family circumstances.
>
> I can't help but think about this course of time while you were a probation officer and one of your jobs as a probation officer is to file reports of violations on the people who are answerable to you because they have failed to live up to the terms and conditions of their probation. They may have additional charges, or whatever reason they have violated the terms of their probation, and you are reporting that to the court, and you are probably in some instances recommending that their probation be revoked, that they may go to prison.
>
> And in fact, I can't help but wonder, it's not been addressed, and maybe this didn't happen, and I hope it didn't, as to whether or

> not the result of your taking these funds was that somebody got revoked because a fee wasn't paid or something wasn't paid. But you transferred, somebody else takes over the case, it's not paid.
>
> You are placed in a position of trust. I assume it's the same in every county. I rely on my probation officers at the very least to not only treat their probationers fairly but tell me the truth. So there's a pretty high expectation I think for honesty and fair dealing on the part of probation officers.
>
> And I agree with the comments that there are different professions that require a very high degree of reliability and inherent trustworthiness that not only the courts but the public places on them. And I'm not unaware of the reference to law enforcement as it relates to this county, and more money missing and so on. However, this involved a breach of trust that I think is very significant. And, in effect, it's like policing our own system.
>
> Mr. Summers, you have pled guilty to the charge and have been found guilty. The court therefore sentences you as follows: The court sentences you to a term not to exceed five years with the [department of corrections]. That will run concurrently with, to the extent it can, I don't know how that will work with the suspended sentence in Lee County, but I'm not going to run it consecutively.

II. Scope and Standards of Review.

We review sentences for correction of errors at law. Iowa R. App. P. 6.4; *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998). Because the sentence imposed does not fall outside statutory limits, our review is for abuse of discretion. *State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998). Sentencing decisions are cloaked with a strong presumption in their favor. *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). We will not reverse the decision of the district court absent an abuse of discretion or some defect in the sentencing procedure. *Witham*, 583 N.W.2d at 678. An abuse of discretion will not be found unless we are able to discern that the decision was exercised on grounds or for reasons that were clearly untenable or unreasonable. *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995).

When a challenge to the trial court's sentencing decision implicates an ineffective assistance of counsel claim, our review is de novo. *State v. Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004). To establish ineffective assistance, appellant must overcome a strong presumption of counsel's competence. *State v. Nucaro*, 614 N.W.2d 856, 858 (Iowa Ct. App. 2000). He has the burden to prove counsel's performance fell below "an objective standard of reasonableness" and "the deficient performance prejudiced" him. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Prejudice is shown by a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Atwood*, 602 N .W.2d 775, 784 (Iowa 1999).

Typically, ineffective-assistance-of-counsel claims are preserved for possible postconviction proceedings to allow a full development of the record regarding counsel's actions. *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001). We address such a claim on direct appeal only where the record establishes that either (1) as a matter of law the defendant cannot prevail on this claim or (2) both prongs of the *Strickland* test are satisfied and a further evidentiary hearing would not change the result. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

III. Merits.

A. Abuse of Discretion. Appellant contends the court abused its discretion "by relying on one factor at sentencing, the nature of the offense" and not properly considering other factors. "Reasoned exercise of discretion is the

hallmark of any proper sentencing procedure." *State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998). "Each sentencing decision must be made on an individual basis, and no single factor alone is determinative." *State v. Johnson*, 513 N.W.2d 717, 719 (Iowa 1994). Judicial discretion imparts the power to act within legal parameters according to the dictates of a judge's own conscience, uncontrolled by the judgment of others. *See State v. Pappas*, 337 N.W.2d 490, 493-94 (Iowa 1983).

> In applying the abuse of discretion standard to sentencing decisions, it is important to consider the societal goals of sentencing criminal offenders, which focus on rehabilitation of the offender and the protection of the community from further offenses. It is equally important to consider the host of factors that weigh in on the often arduous task of sentencing a criminal offender, including the nature of the offense, the attending circumstances, the age, character and propensity of the offender, and the chances of reform. Furthermore, before deferring judgment or suspending sentence, the court must additionally consider the defendant's prior record of convictions or deferred judgments, employment status, family circumstances, and any other relevant factors, as well as which of the sentencing options would satisfy the societal goals of sentencing. The application of these goals and factors to an individual case, of course, will not always lead to the same sentence. Yet, this does not mean the choice of one particular sentencing option over another constitutes error. Instead, it explains the discretionary nature of judging and the source of the respect afforded by the appellate process.

State v. Formaro, 638 N.W.2d 720, 724-25 (Iowa 2002) (citations omitted).

The sentence imposed is within the statutory bounds. *See* Iowa Code § 902.9(5) (setting forth the maximum sentence for a class D felony). Although the appellant received a suspended sentence in Lee County for substantially the same crime, the court in Dallas County appropriately exercised its broad discretion in not suspending the sentence imposed. We recognize the court found the appellant's breach of trust "very significant," but the court expressly

considered the presentence investigation report and its recommendations, the recommendations of the State and defense counsel, the appellant's age, education, prior record, employment, family circumstances, and the facts and circumstances of this particular case. *See Formaro*, 638 N.W.2d at 724 (giving a non-exclusive list of factors a court may consider). The court did not improperly base its decision *only* on the nature of the offense, but used it as one, albeit significant, factor it considered. *See State v. McKeever*, 276 N.W.2d 385, 387 (Iowa 1979). No single factor, including the nature of the offense, was solely determinative of the sentence imposed. *See id.* We find no abuse of discretion.

B. Consideration of Improper Factors. The appellant contends the court abused its discretion by considering improper factors in sentencing.

In the court's statement quoted above, the court thought about the possible effects the thefts may have had on probationers, such as revocation of probation and serving time in prison. The court mused, "I can't help but wonder, it's not been addressed, and maybe this didn't happen, and I hope it didn't . . . ." The appellant argues there was no evidence presented at sentencing that might verify the court's concerns and the State did not argue for prison based on the concerns the court mentioned. He acknowledges the minutes of testimony can be considered by the court, but argues he "should have been given the chance to rebut or challenge these factors relied on by the court when the court explained the reasons for the sentence given." He implies the court considered unproven or unprosecuted offenses, which generally are improper factors to consider "unless the defendant admits to the charges or there are facts presented to show

the defendant committed the offenses." *See Formaro*, 638 N.W.2d at 725. Here, the appellant admitted theft from probationers under his supervision. The minutes of testimony reveal a violation of probation was filed against one probationer, supervised by the appellant, for failure to pay financial obligations. We will not infer improper sentencing considerations that are not apparent from the record. *Id.* We conclude the court did not consider unproven or unprosecuted offenses or other improper factors.

C. Ineffective assistance. The appellant contends defense counsel rendered ineffective assistance in not introducing mitigating evidence at the sentencing hearing, resulting in the prejudice of a harsher penalty. The test for determining whether the appellant received effective assistance of counsel is "whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency." *See Snethen v. State*, 308 N.W.2d 11, 14 (Iowa 1981). The appellant must prove (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Id.* The only authority the appellant offers for the proposition that defense counsel has a duty to present mitigating evidence at a sentencing hearing is an unpublished opinion by this court. The State responds that defense counsel reviewed at length the evidence provided by the witnesses at the Lee County hearing, so the court in Dallas County had the same information before it.

Typically, ineffective assistance of counsel claims are preserved for a possible postconviction proceeding to allow a full development of the record regarding counsel's actions. *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa

2001). We prefer to give defense counsel an opportunity to explain the reasons, if any, for his acts or omissions. *See State v. Lane*, 743 N.W.2d 178, 183 (Iowa 2007). However, we address such a claim on direct appeal where the record establishes that either (1) as a matter of law the defendant cannot prevail on this claim or (2) both prongs of the *Strickland* test are satisfied, and a further evidentiary hearing would not change the result. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

Defense counsel summarized for the court the events in the Lee County hearing, noting how he

> was put in the increasingly rare position of having too many witnesses and having to tell people, no, we're not going to bring you all in to state over and over again that Lance is a good man, that he's a good father, that he's active in his community, that this is extremely out of character for him.

Counsel related the result obtained in Lee County and the court's basis for granting a suspended sentence. Counsel then said:

> We have elected to forego repeating that process here this morning of calling witnesses to testify under oath before the court. Not because we were taking anything for granted here today or because we just don't want to put the time in, but frankly rather because I believe it's very much an open book what Mr. Summers did, and how that's impacted him, and the changes that he's made in his personal and financial life to make sure that we are not anywhere near this same sort of circumstance or territory again.

Counsel described at length what the character witnesses said, noted the changes the appellant had made in his life, and offered the appellant to the court and the State for examination. Counsel also invited the prosecutor and an investigating officer who was at the sentencing hearing to correct any errors or

misstatements counsel might make concerning the evidence introduced in Lee County or concerning the appellant.

We conclude the record before us is sufficient to allow us to address this claim on direct appeal. *See State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990). Counsel made a reasonable decision to provide the court with the information it needed without calling a host of character witnesses. We cannot say this action fell below "an objective standard of reasonableness." *See Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. The court had all the same information from counsel's statement, the PSI, and the case file. The appellant has not overcome the "strong presumption of his counsel's competence." *See Nucaro*, 614 N.W.2d at 858. The appellant's claim counsel was ineffective fails.

IV. Conclusion.

The district court properly exercised its considerable discretion in sentencing the appellant. We conclude the court did not consider improper factors in determining the sentence. The appellant has failed to demonstrate defense counsel rendered ineffective assistance at the sentencing hearing. Accordingly, we affirm the sentence of the district court.

AFFIRMED.