IN THE COURT OF APPEALS OF IOWA

No. 2-310 / 11-1888
Filed June 13, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DUSTIN PHILIP VANNESS,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Bryan H. McKinley, Judge.

Defendant appeals from the sentences imposed following his guilty pleas to two counts of possession with intent to deliver or delivery of a controlled substance (marijuana). **VACATED AND REMANDED FOR RESENTENCING.**

Russell Schroeder Jr. of Schroeder Law Office, Charles City, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Carlyle D. Dalen, County Attorney, and Steven D. Tynan, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Danilson, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

ZIMMER, S.J.

Defendant Dustin VanNess appeals the judgment and sentence imposed by the district court for two felony drug offenses. He claims the sentencing court abused its discretion by denying him a deferred judgment because he refused to name his source for obtaining a controlled substance (marijuana) at his sentencing hearing. We vacate the court's judgment and remand for resentencing.

I. Background Facts & Proceedings.

On April 18, 2011, the State filed a trial information charging VanNess with seven drug related offenses. VanNess reached a plea agreement with the State, and on August 30, 2011, he pleaded guilty to two counts of delivery of or possession with intent to deliver a controlled substance (marijuana), in violation of Iowa Code section 124.401(1)(d) (2011), a class "D" felony. VanNess also pleaded guilty to one count of possession of a controlled substance (marijuana), a serious misdemeanor.[1] The district court accepted his guilty pleas. The State agreed to dismiss the remaining four counts of the trial information as part of the plea agreement.

The case proceeded to a sentencing hearing on October 24, 2011. The sentencing court heard evidence that VanNess was twenty-three years old and had college degrees in recording engineering and live sounds technology. At the time the sentencing hearing was held, VanNess was living with his mother, his sister, and his mother's fiancé. He had a full-time job working on a road crew. The prosecutor recommended VanNess be given a suspended sentence and

[1] He did not appeal his conviction or sentence for this offense.

placed on probation. VanNess asked that he be given deferred judgments on the two felony offenses. VanNess did not have a significant prior criminal record.

The district court began its consideration of the issue of sentencing by stating: "The issue is whether or not the Court, should first of all, consider a deferred judgment in this case." After stating it would consider VanNess's age, employment, and the nature of the offense, the court continued:

> Mr. VanNess, when I deal with people who come before me dealing with drug offenses and they asked for a deferred, oftentimes I ask one very serious question to determine whether or not their drug days are over or not, and especially in a case such as yours where the charge before me is delivery of a controlled substance, so you set yourself up as a small business person selling an illegal substance with the goal of making some money for yourself. So my question to you is who gave you the marijuana?

VanNess replied, "I can't answer that today." In response, the court informed VanNess that his reply to the question, "tells me that you're not willing to go through the successful rehabilitation of yourself, and you're keeping your options open for dealing drugs in the future."

The court then called for a recess to permit VanNess to consult with his attorney. The court stated, "I will come back and ask you that question again. And this will be highly determinative as to whether or not you receive a deferred judgment here today." The court also stated that if VanNess wanted to write the name of his supplier on a piece of paper, instead of stating it in open court, the court would accept that procedure.

After the recess, VanNess's attorney informed the court VanNess was concerned about the safety of himself and his family and remained unwilling to name his source. Defense counsel advised the court he believed VanNess was

responding honestly to the court's questions. In a statement to the court before sentence was imposed, VanNess informed the court he and his family were going to remain in the community if he was placed on probation. VanNess stated, "[T]hey should not have to sacrifice anything for my actions, and I'm not going to put them in jeopardy." The court replied, "It's interesting now that you're so concerned about your family's safety when you decided on your own to become involved with this kind of drug activity to begin with."

The court then rejected VanNess's request for a deferred judgment and sentenced him to a term of imprisonment not to exceed five years on each of the two counts of possession of a controlled substance with intent to deliver, to be served concurrently. The sentences were suspended, and VanNess was placed on probation for a period of three years. VanNess appeals his sentences.

II. Standard of Review.

We review a sentence for the correction of errors at law. *State v. Liddell*, 672 N.W.2d 805, 815 (Iowa 2003). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as trial court consideration of impermissible factors." *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995).

III. Merits.

VanNess contends the district court abused its discretion in this matter by requiring him to name the source of the controlled substance he delivered in order to receive consideration for deferred judgments. He argues the court's requirement was unreasonable in light of his concerns for his personal safety and the safety of his family. VanNess also contends the decision to grant or deny a

deferred judgment should not be used by the court as a method to gather evidence, because doing so, in effect, makes the court a partner with the prosecution.

A deferred judgment is "a sentencing option whereby both the adjudication of guilt and the imposition of a sentence are deferred by the court and whereby the court assesses a civil penalty . . . upon the entry of the deferred judgment." Iowa Code § 907.1(1). In considering whether to grant a deferred judgment, a court should consider the maximum opportunity for the rehabilitation of the defendant and the protection of the community. *Id*. at § 907.5. Other factors the court should consider are the "age of the defendant; the defendant's prior record of convictions and prior record of deferments of judgment if any; the defendant's employment circumstances; the defendant's family circumstances; the nature of the offense committed; and such other factors as are appropriate." *Id.*

The State contends the sentencing court properly considered VanNess's lack of cooperation in refusing to grant deferred judgments in this case. In support of this argument, the State relies in large part upon a case decided by the United States Supreme Court, *Roberts v. United States*, 445 U.S. 552, 558 (1980). In *Roberts*, a criminal defendant appealed, claiming the sentencing court should not have considered his failure to name his supplier for a controlled substance. 445 U.S. at 556. The Supreme Court stated:

> Unless his silence is protected by the privilege against self-incrimination, . . . the criminal defendant no less than any other citizen is obliged to assist the authorities. The petitioner, for example, was asked to expose the purveyors of heroin in his own community in exchange for a favorable disposition of this case. By declining to cooperate, petitioner rejected an "obligatio[n] of community life" that should be recognized before rehabilitation can

> begin. Moreover, petitioner's refusal to cooperate protected his former partners in crime, thereby preserving his ability to resume criminal activity upon release. Few facts available to a sentencing judge are more relevant to "'the likelihood that [a defendant] will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, [and] the degree to which he does or does not deem himself at war with his society.'"

Id. at 558 (citations omitted). The Supreme Court concluded the sentencing court did not err by considering the defendant's failure to cooperate with the Government in selecting a sentence. *Id.* at 561.

We agree with the general proposition that a defendant's cooperation, or lack thereof, will often have relevance at sentencing. However, the question remains whether the sentencing court abused its discretion in this case by denying VanNess's request for a deferred judgment based solely on his refusal to name his source in light of VanNess's concerns for his personal safety and the safety of his family. For the reasons which follow, we believe an abuse of discretion occurred and resentencing is required.

We begin our analysis by pointing out two important distinctions between the facts in the case before us and the facts in *Roberts*. First, in *Roberts*, the government affirmatively resisted the defendant's request for leniency at sentencing because the defendant had refused to cooperate with an ongoing investigation for "many, many, years." *Id*. at 555. In the case before us, the State made no claim at sentencing that VanNess had not been cooperative or should be denied consideration for a deferred judgment because he had failed to name his drug supplier.[2]

[2] At sentencing, the assistant county attorney acknowledged VanNess would be requesting a deferred judgment, but he did not join in that recommendation because of

Second, in *Roberts*, the majority opinion noted the defendant had not raised at the time of sentencing his claims on appeal that "his failure to cooperate was justified by legitimate fears of physical retaliation and self-incrimination."[3] *See id.* at 559. The court acknowledged that, "[t]hese arguments would have merited serious consideration if they had been presented properly to the sentencing judge." *Id.* Unlike the defendant in *Roberts*, VanNess specifically informed the sentencing court he would not identify his source because of concerns about putting himself and his family in danger. Because VanNess properly presented his justification for silence to the sentencing court, we conclude his claim was entitled to "serious consideration." Before we review the manner in which the court considered and then rejected the justification VanNess presented for his silence, we find it necessary to address one preliminary matter.

In its brief on appeal, the State notes the sentencing court gave VanNess the opportunity to write the name of his supplier on a piece of paper rather than naming the supplier in open court. We reject any suggestion that this offer somehow resolved VanNess's fears of retaliation. The record reveals the court made the offer because there were a "number of people" present for VanNess's sentencing. Obviously, all those present in the courtroom would have known VanNess gave the name of his supplier to the court even if he did not say the name out loud. It is reasonable to believe those present would have assumed

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the ongoing nature of VanNess's offenses. He did not recommend VanNess be sent to prison. The assistant county attorney recommended VanNess receive suspended sentences and a term of probation. He acknowledged there were mitigating factors that showed leniency was appropriate.

[3] VanNess has not raised a claim regarding self-incrimination under the Fifth Amendment.

the court intended to share the name written down by VanNess with the prosecutor or other law enforcement authorities. In addition, the sentencing judge informed VanNess that if he wrote the name of his supplier on a piece of paper and gave it to the court, the court might have questions for VanNess without referring to the name of his supplier. There is no indication in the record whether the piece of paper would have become part of the court file. No assurances of confidentially or anonymity were made. We conclude the court's offer was not a sufficient basis for rejecting VanNess's concerns that revealing his drug source would put himself and his family at risk.

We now return to VanNess's claim of abuse of discretion. The record reveals the district court drew a negative inference about VanNess's chances for rehabilitation based on his refusal to name his drug supplier. The court informed VanNess his refusal "tells me that you're not willing to go through the successful rehabilitation of yourself, and you're keeping your options open for dealing drugs in the future." As we have mentioned, the court also informed VanNess his failure to disclose his supplier would be "highly determinative" of whether or not he received a deferred judgment. VanNess persisted in his refusal to name his supplier, citing concerns about putting himself and his family in danger. When the supplier's name was not provided, the court denied the defendant's request for deferral of judgment.

The propriety of making a negative inference such as the one made by the sentencing court in the case before us was addressed in a special concurrence by Justice Brennan in the *Roberts* case. 445 U.S. at 562. Justice Brennan stated, "[T]he problem of drawing inferences from an ambiguous silence is

troubling. As a matter of due process, an offender may not be sentenced on the basis of mistaken facts or unfounded assumptions." *Id.* at 563. Justice Brennan asserted that if a defendant proffered a justification for his silence, "the judge would then proceed to determine its veracity and reasonableness." *Id.*

In a dissent in *Roberts*, Justice Marshall expressed similar concerns. He stated that if a defendant's refusal to become an informer was motivated by fear of retaliation, "the failure to identify other participants in the crime is irrelevant to the defendant's prospects for rehabilitation, and bears no relation to any of the legitimate purposes of sentencing." *Id.* at 565. He noted that the relevant factor was the defendant's subjective fear, not whether the fear was objectively reasonable, because "[i]t is when the defendant is actually afraid of reprisal that his failure to cooperate has no relevance to the legitimate purpose of sentencing." *Id.* at 565 n.2. Justice Marshall, like Justice Brennan, felt a bare failure to cooperate could not justify a negative inference about the defendant's conduct without further inquiry. *Id.* at 567. With these comments in mind, we now examine whether the sentencing court's consideration of VanNess's justification for his silence was adequate.

The district court rejected VanNess's claim of fear of reprisal against himself and his family because VanNess had decided on his own "to be involved in this kind of drug activity to begin with." The court continued, "I'm sure there were safety issues during the time you were involved in drug activity." In response, VanNess admitted the crimes he committed were selfish and he was not thinking of others when they were committed. Because the court concluded VanNess's prior involvement with drug activity posed safety issues, it rejected

VanNess's claim without further evaluation of the veracity and reasonableness of his justification for his silence. We believe the court's basis for rejecting the justification VanNess proffered for his silence was too simplistic. The fact VanNess was involved in "drug activity" some eight months prior to his sentencing was not a sufficient basis, standing alone, for concluding his claim of fear of reprisal was not legitimate. The court's rationale for rejecting VanNess's claim could be used to countervail virtually every claim of fear of reprisal made by a defendant at sentencing in a drug-related case.

Once VanNess explained to the court that he would not name his source for obtaining marijuana due to the fear of reprisal or retaliation against himself and his family, the court was required to give serious consideration to his claim. *See id.* at 559. At a minimum, such consideration should include an inquiry to determine the veracity and reasonableness of defendant's claim. If VanNess did have a legitimate fear of reprisal, then his failure to name his source would not be a valid factor for the court to consider in determining whether to grant a deferred judgment. *See id*.

We believe the court should have considered the specific facts of this case to determine whether VanNess's expressed claims of fear of reprisal were credible and reasonable.[4] *See United States v. Bell*, 905 F.2d 458, 462 (D.C. Cir. 1990) (finding defendant's stated fears of mob reprisals "were too tenuous to command serious attention"); *In re Josh W.*, 63 Cal. Rptr. 701, 705 (Cal. Ct. App.

[4] Among other things, we believe the court's allocution procedure should have addressed the State's position regarding VanNess's claim of fear of reprisal. We find nothing in the appellate record in this case indicating the State contended VanNess should have been asked to name his source in open court.

1997) (noting court properly considered juvenile's concerns about fear of retaliation for naming accomplices); *Commonwealth v. Wright*, 410 N.E.2d 738, 739 (Mass. Ct. App. 1980) (stating "serious consideration" should be given to defendant's fears of testifying against a codefendant when defendant had already been beaten after he expressed a willingness to cooperate); *State v. Langford*, 529 P.2d 839 (Wash. Ct. App. 1974) (requiring defendant to identify sources as a condition for granting probation was unreasonable in light of the defendant's genuine fear for her personal safety); *State v. Kaczynski*, 654 N.W.2d 300, 305 (Wis. Ct. App. 2002) (noting that in addressing a defendant's claim of fear of reprisal when asked to name an accomplice, the trial court was in the best position to assess the defendant's sincerity). Because the sentencing court did not engage in this process, we conclude an abuse of discretion occurred.

Finally, we would be remiss if we did not mention that this case illustrates that there are many potential problems lurking when a sentencing judge requires a defendant to identify a source in open court at sentencing in return for a sentencing concession. We will mention a few. As this case demonstrates, the procedure may result in morally defensible claims of concern for safety by the defendant and may implicate concern for the safety of third parties as well. The procedure also invites the claim that the court is improperly gathering evidence for the prosecution. The procedure may generate Fifth Amendment claims by defendants who are fearful of being exposed to additional charges if they answer the court's questions. The procedure also complicates the sentencing process, where, as here, the State is making no claim the defendant has been

uncooperative.[5] In addition, if the court establishes a fixed policy denying all defendants charged with drug offenses consideration for a deferred judgment if they do not identify suppliers, then the court invites the claim that the court has failed to exercise discretion at the time of sentencing. *See State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979). As Justice Marshall suggests in his dissent in *Roberts*, other methods such as grants of immunity or the plea bargaining process may be more suitable for securing such information from a defendant. *See Roberts*, 445 U.S. at 568.

In summary, we conclude the trial court's consideration of VanNess's claim of fear of reprisal was inadequate and the basis for the rejection of his claim was insufficient. We further find the court then abused its discretion by requiring VanNess to name the source of the controlled substance he delivered in order to receive consideration for deferred judgments. We vacate the judgment and sentence of the district court and remand for sentencing procedures consistent with this opinion.

We offer no opinion regarding the sentences that should be imposed on remand.

VACATED AND REMANDED FOR RESENTENCING.

[5] In some cases, the State might not want the court to ask the defendant to reveal information of the sort requested here because of an ongoing criminal investigation.