IN THE COURT OF APPEALS OF IOWA

No. 2-823 / 11-0778
Filed October 31, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WENDY WEINER RUNGE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas Staskal, Judge.

Wendy Weiner Runge appeals from her sentence following her guilty plea to first-degree fraudulent practices. **AFFIRMED.**

Matthew G. Whitaker and Kendra L. Arnold of Whitaker Hagenow & Gustoff LLP, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Thomas H. Miller, Deputy Attorney General, Rob Sand, Assistant Attorney General, and John Sarcone, County Attorney, for appellee.

Considered by Potterfield, P.J., Doyle and Danilson, JJ.

POTTERFIELD, P.J.

Wendy Weiner Runge appeals from her sentence following her guilty plea to first-degree fraudulent practices. She contends that the district court improperly considered her level of remorse in its sentencing, that her pre-plea statements should not have been considered on the issue of remorse, that the district court's reliance on these statements violated her right to free speech, and that the district court abused its discretion in imposing her sentence. We affirm the trial court's decision, finding that lack of remorse is properly considered in sentencing following a guilty plea, that her pre-plea statements were properly considered, that her constitutional right was not violated, and finally, that the district court did not abuse its discretion in her sentence.

I. Facts and Proceedings

The Film, Television, and Video Production Promotion Program (FTVPPP) was enacted in May of 2007. This legislation was aimed at promoting the expansion of the film industry in Iowa. It placed the administration of the initiative in the hands of the Iowa Department of Economic Development (IDED), which created a Film Office managed by Tom Wheeler. The Film Office was to provide for the registration of—and distribution of tax credits to—film projects to be shot on location in Iowa. The deadline for entering projects eligible for this tax credit was July 1, 2009.

Runge owned and operated a film company, Polynation Pictures, LLC, with three business partners. They began filming the movie "The Scientist" in Iowa in 2008. Runge submitted an application to IDED for "The Scientist" and was ultimately awarded a tax credit for that project. Before the July 1 deadline,

Runge filed an application for another $600,000 project entitled “Run.” After the deadline, Runge switched the “Run” application with one for a multi-million dollar project called “Forever.” In September of 2009, the State of Iowa conducted an investigation into the Film Office and its implementation of the FTVPPP, finding numerous problems; among them was the Run/Forever application switch.

In February of 2010, Runge; Mathias Saunders; Zachary LeBeau; Maximus Production Services, LLC; The Scientist, LLC; and Polynation Pictures, LLC were charged with one count of first-degree theft. In June of 2010, the State charged them with one count of ongoing criminal conduct and eleven counts of fraudulent practice in the first degree. The February and June charges were consolidated. In November the charges against Runge were reduced to five: one count of first-degree theft, three counts of first-degree fraudulent practice, and one count of ongoing criminal conduct. In February of 2011, Runge entered into a plea agreement with the State where, in exchange for her guilty plea to one count of fraudulent practices in the first degree, the State would dismiss all other charges. The State also agreed not to file further criminal charges against her regarding her involvement in Polynation Pictures, LLC or related entities, and to delay sentencing until resolution of the criminal charges involving the Film Office. There was no agreement as to Runge’s sentence. Runge also agreed to cooperate in the State’s investigation into the Film Office.

In her guilty plea, Runge admitted that, with Tom Wheeler, she caused the application for “Run,” completed in June of 2009, to be switched with the “Forever” application, completed in July—after the tax credit deadline. She acknowledged that some statements in the switched application were false and

that she expected to receive more than ten thousand dollars as a result. The court engaged her in a colloquy and determined her plea was knowing, voluntary, and intelligent. Though the Film Office prosecutions were not yet complete, sentencing moved forward in May of 2011.

Throughout the proceedings, Runge kept a blog chronicling her case's progress. Some of the posts expressed frustration, accused prosecutors of engaging in political games, and insinuated her charges were based upon anti-Semitism. She also criticized the judge hearing her case, alleging he did not read her motion to dismiss before denying it and that her lawyer found the judge unprofessional. The day of the plea she posted "I didn't steal or authorize anyone to steal from the citizens of Iowa. . . . I was duped by a state official and I accept my part." Excerpts from these blog posts were provided to the trial court judge prior to sentencing. The trial court noted the following at sentencing:

> [T]his defendant not just before her plea of guilty but even after her plea of guilty has not taken responsibility for her behavior. . . . What is sincere is the things that you said out of the court room, . . . in that setting you have attacked the judges who have presided in your case, you have attacked the prosecutors, you have blamed this on anti-Semitism, you have blamed it on some sort of political conspiracy, and you have not taken responsibility for what you did and what you did was a felony.

The court also noted it needed to "send a message to [Runge] and others who would engage in" the same behavior, that "[w]hether at some point in time I might be willing to reconsider my judgment in this case is open to question[.]" The court then sentenced Runge to a term not to exceed ten years in prison, suspending the fine. She filed a timely appeal from these proceedings.

II. Analysis

Runge argues three ways in which her sentencing was improper. One alleges a violation of constitutional rights, which we review de novo. *State v*. *Bower*, 725 N.W.2d 435, 440 (Iowa 2006). The other two present questions of consideration of improper factors at sentencing. We review claims of improper or illegal sentence for the correction of errors at law; sentences are cloaked in a strong presumption in their favor. *State v*. *Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). A sentence will not be upset unless the defendant demonstrates an abuse by the trial court of its discretion or a defect in the sentencing procedure, including the consideration by the trial court of impermissible factors. *Id.*

A. Evidence of Remorse

Runge first contends the district court improperly considered her level of remorse in its sentencing. She asserts that after a defendant has accepted responsibility in a guilty plea, lack of remorse becomes an inappropriate factor in sentencing. Pre-plea statements should especially not be considered, she argues, as they are made in the context of "defendants defending themselves and putting the State to its burden of proof."

Runge believes the guilty plea inherently accepts responsibility and demonstrates remorse. She explains that a lack of remorse is only properly considered in the context of a trial and *Alford* proceedings. *See State v*. *Knight*, 701 N.W.2d 83, 87–88 (Iowa 2005) (finding a defendant's lack of remorse an appropriate factor in sentencing after an *Alford* plea).

In *Knight*, our supreme court discussed the essential nature of evaluating a defendant's remorse at sentencing. *Id.* at 88 (stating "a defendant's lack of

remorse is highly pertinent to evaluating his need for rehabilitation and his likelihood of reoffending"). While the court then analyzes whether *Alford* pleas should be treated any differently for sentencing, the opinion has broader implications than Runge now contends. *See id.* at 88–89. It adopts language from other courts which conclude that after an *Alford* plea, a trial, or a guilty plea, the defendant stands before the sentencing judge as guilty. *Id.* ("[R]eality and common sense require the sentencing judge to act upon the basis of the central presumption that the defendant *is* guilty. Following a plea of guilty or a trial, a convicted defendant stands before the sentencing judge no longer clothed with the presumption of innocence."). At that juncture it is appropriate to consider the factors pertinent to sentencing. *Id.*

The court in *Knight* concluded: "The decision to allow *Alford* pleas does not mean, however, that such defendants are not subject to the same assessment for purposes of sentencing as are other defendants, including an evaluation of the factors relevant to their need for rehabilitation and their likelihood to reoffend." *Id.* Guilty pleas, *Alford* or otherwise, are not exempted from this rule. We therefore affirm the trial court's use of this consideration in sentencing.

Runge next contends that even if consideration of her lack of remorse was proper, the use of her pre-plea statements was improper. She argues her pre-plea statements were off-limits because they were written at a phase of the proceedings during which the prosecution was held to its burden of proof. Our supreme court differentiates between the demonstration of a lack of remorse and putting a prosecution to its proof, noting:

> [A] trial court must carefully avoid any suggestions in its comments at the sentencing stage that it was taking into account the fact defendant *had not pleaded guilty but had put the prosecution to its proof*. But this prohibition does not preclude a sentencing court from finding a lack of remorse based on facts other than the defendant's failure to plead guilty. A defendant's lack of remorse can be discerned by any admissible statement made by the defendant *pre-trial*, *at trial*, *or post-trial*, *or by other competent evidence properly admitted at the sentencing hearing*.

Id. at 87–88 (citations and quotations omitted) (emphasis added). Runge's pre-plea statements were therefore properly considered by the trial court in its sentencing.

B. Political Speech

Runge next contends the trial court's consideration of her blog-post statements was improper because they constitute political speech. Therefore, she argues, her constitutional right to free speech was violated. Prior to sentencing, a judge may conduct a broad inquiry which is largely unlimited as to the source or kind of information he or she may consider. *United States v*. *Tucker*, 404 U.S. 443, 447 (Iowa 1972).

However, "a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge . . . [Where] the evidence proved nothing more than [the defendant's] abstract beliefs, we [have] held that its admission violated the defendant's First Amendment rights." *State v*. *McKnight*, 511 N.W.2d 389, 394 (Iowa 1994) (quoting *Wisconsin v*. *Mitchell*, 508 U.S. 476, 486 (1993)). This does not mean consideration of evidence protected by the First Amendment is per se improper. *Id.* For example, a judge can take into account a defendant's membership in a political group and desire to provoke a race war as evidence of his racial hatred which was an

aggravating factor at sentencing. *Id.* Similarly, here, the court properly considered Runge's statements criticizing the court's process and disparaging the prosecutors and the judge personally in considering her lack of remorse.

C. Illegal Sentence

Finally, Runge argues the district court abused its discretion in sentencing her to imprisonment not to exceed ten years. A district court abuses its discretion in imposing a sentence where its discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Johnson*, 513 N.W.2d 717, 719 (Iowa 1994).

We find no such abuse of discretion here. The district court clearly considered the mitigating factors against incarceration, noting "[h]ere is a defendant who has no prior criminal history, who has a family and so isn't the person who ordinarily the court would consider as a candidate for incarceration." He notes that a suspended sentence and probation would not result in the maximum opportunity for Runge's rehabilitation or deter the commission of the offense by her or others. "[Rehabilitation and deterrence] cannot happen by placing someone on probation who does not accept responsibility for what she did, who publicly proclaims that what she did was not wrong and it certainly will not deter others from doing that." Instead, the district court found the sentence would send a message that Runge's behavior is "not accepted, that it's criminal and it won't be tolerated." The court also noted the possibility of reconsideration at a later time. The judge chose to sentence her on these clearly articulated reasons and grounds, which we find are not clearly untenable or unreasonable.

AFFIRMED.