IN THE COURT OF APPEALS OF IOWA

No. 8-992 / 08-0912
Filed December 31, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

FREDRICK DEVONE VESEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

Appeal from the sentences imposed following guilty pleas to a class C and class D felony. **AFFIRMED.**

Matthew A. Leddin of Soper Law Firm, P.C., Davenport, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly G. Cunningham, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

The defendant-appellant, Fredrick Vesey, appeals from the sentences imposed following his guilty pleas to a class C and class D felony for drug possession with intent to deliver. He contends the court abused its discretion by considering impermissible factors in sentencing and this procedural defect requires resentencing. We affirm.

I. Background

The State charged the defendant with five drug-related offenses following a consent search of an apartment where he was staying. He agreed to plead guilty to two of the charges and the State agreed to ask the court to dismiss the three remaining charges. At sentencing, the court reviewed the presentence investigation, allowed the defendant to speak, and heard arguments of counsel.

Defense counsel asked the court to grant a deferred judgment, or, alternatively, to waive the mandatory minimum sentence on the class C felony and place the defendant on probation. Counsel stated that the defendant qualified for the waiver of the mandatory minimum sentence and to be placed on probation because of his minimal criminal record, his assistance to police, and because this was his first felony drug conviction. Counsel noted that the defendant has substantial physical and mental disabilities and subsists on social security disability.

Defense counsel reported that he unsuccessfully attempted to have the defendant placed in two community-based programs—drug court and the residential correctional facility—as an alternative to incarceration. Defendant's

mental and physical disabilities and his placement on the sex offender registry prevented his acceptance into either community-based program.

The presentence investigation noted the defendant has borderline intellectual functioning, received burns over eighty percent of his body as a child—resulting in the amputation of all of his toes, is diagnosed with adjustment disorder with depressed mood, was diagnosed with HIV in 2006, and needed to abstain from alcohol and drug use. The investigation also reported the defendant's criminal history and his successful discharge from probation on a 2006 sexual abuse conviction. The investigation recommended incarceration:

> It is unfortunate that there are no programs within the community for the defendant. He obviously needs supervision and cannot get it from his family, as they are all criminally oriented. Unfortunately, the best place to put him so he gets the services that he needs is the Iowa Prison System.

The State agreed with the recommendation of the presentence investigation, noting that the defendant admitted having a drug problem that was best dealt with in a structured setting.

The court sentenced the defendant to up to ten years on the class C felony and up to five years on the class D felony, to be served concurrently. It waived the mandatory minimum sentence, imposed the recommended fines and required surcharges, and ordered a 180-day revocation of the defendant's license to drive. The court gave the following reasons for the sentences imposed:

> Mr. Vesey, I read through your presentence investigation, and it does appear to me as though the recommendation for this sentence is almost based upon the fact that we don't really have resources available directly in the community that meet your needs

> at this time, especially in light of the fact these are two serious felony drug charges.
>
> I can appreciate the fact the you've tried to do what you could to assist law enforcement and to be as cooperative as possible, and that's why I'm waiving your mandatory minimum sentence in count 1.
>
> I do believe that, after reviewing the matters that are contained within this presentence investigation—you did have a couple of prior just simple possession of controlled substances and you did have a previous sexual abuse third degree, which as I understand you have completely discharged your probation—but unfortunately that leaves you with limitations of where you can live in the community, as you've pointed out, and those are all very complicated factors.
>
> Given the whole picture, I think that what I'm left with is that I don't have community resources for you at this time and I must use the alternative of incarcerating you. And again, that's supported by how serious these charges are.

The defendant appeals, contending the court abused its discretion by considering impermissible factors in sentencing.

II. Scope and Standards of Review

We review a sentence imposed in a criminal case for correction of errors at law. Iowa R. App. P. 6.4; *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). The decision to impose a particular sentence within the statutory limits is cloaked with a strong presumption in its favor, and will only be overturned for an abuse of discretion or the consideration of inappropriate matters. *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983). We will not reverse the decision of the district court absent an abuse of discretion or some defect in the sentencing procedure. *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998). In applying its discretion the court should weigh and consider all pertinent matters in determining the proper sentence, including the nature of the offense, the attending circumstances, the defendant's age, his character and propensities,

and his chances of his reform. *State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999). Iowa Code section 901.5 (2007), requires the court to determine the sentence that "will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others." "The punishment should fit both the crime and the individual." *State v. Leckington*, 713 N.W.2d 208, 216 (Iowa 2006) (citation omitted). An abuse of discretion will not be found unless the sentencing 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). Thus, 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. *See State v. Gartin*, 271 N.W.2d 902, 910 (Iowa 1978).

III. Merits

The defendant asserts the court considered impermissible factors—the defendant's mental and physical disabilities and the lack of community-based programs suitable for the defendant. Paraphrasing *Laffey*, 600 N.W.2d at 62, he argues:

> Neither factor goes to the nature or severity of the offense. They are unrelated to the circumstances of the crime. Neither factor reflects on Mr. Versey's character or propensities. They are not indicative of his chances for reform or rehabilitation. Neither factor has any bearing on the sentencing court's duty to protect the community from further offenses by Mr. Versey and others.

The district court did not abuse its discretion in sentencing the defendant. The court properly considered the defendant's mental and physical disabilities in that they bear on the defendant's chances for reform, *Laffey*, 600 N.W.2d at 62,

and the court's duty to provide the maximum opportunity for rehabilitation of the defendant, Iowa Code section 901.5. The same is true of the lack of community-based programs appropriate for the defendant. That lack is a proper consideration because it bears on the defendant's chances for reform and where the court should place the defendant to provide him the maximum opportunity for rehabilitation. Neither consideration is improper. We affirm the defendant's sentences.

AFFIRMED.