IN THE COURT OF APPEALS OF IOWA

No. 22-1805
Filed February 21, 2024

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTONIO JAMAL KITCH,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Monica Zrinyi Ackley, Judge.

A defendant appeals the sentences imposed following his guilty plea to neglect or abandonment of a dependent person and *Alford* plea to child endangerment resulting in bodily injury. **AFFIRMED.**

Martha J. Lucey, State Appellate Defender, and Michelle E. Rabe, Assistant Appellate Defender, for appellant.

Brenna Bird, Attorney General, and Joshua A. Duden, Assistant Attorney General, for appellee.

Considered by Bower, C.J., and Greer and Chicchelly, JJ.

GREER, Judge.

Antonio Kitch pled guilty to neglect or abandonment of a dependent person, a class "C" felony, in violation of Iowa Code section 726.3 (2022), and entered an *Alford* plea[1] to child endangerment resulting in bodily injury, a class "D" felony, in violation of section 726.6(7), in September 2022. On appeal, he argues that the sentencing court abused its discretion in sentencing him to a fifteen-year term of imprisonment. We affirm.

I. Background Facts and Prior Proceedings.

Kitch's daughter A.K. was born in March 2020. She has Down syndrome and is Kitch's third child. In May 2022, when A.K. was two years old, Kitch's paramour found A.K. struggling to breathe and unresponsive in her crib. She had bruising around her left eye and blood coming from her left ear. She weighed 12.5 pounds, which was significantly underweight for her age. After testing conducted at the hospital, doctors determined that she had a brain bleed. She was med flighted to University of Iowa Hospitals and Clinics (UIHC) where testing returned positive results for alcohol, methamphetamine, cocaine, and tetrahydrocannabinol (THC) in her system. Medical staff determined that the cocaine and alcohol had been metabolized, meaning that A.K. ingested, inhaled, or had been injected with them. Kitch consented to a drug test in June, which came back positive for the presence of methamphetamine, cocaine, and THC.

[1] *See North Carolina v. Alford*, 400 U.S. 25, 37–38 (1970) (permitting a criminal defendant to enter a guilty plea without admitting guilt by acknowledging strong evidence of guilt and voluntarily, knowingly, and understandingly agreeing to allow the court to consider such strong evidence of guilt in accepting the guilty plea).

After Kitch pled guilty to the charges, in October the court held a sentencing hearing. A family pediatric nurse practitioner[2] from UIHC testified at the hearing and described four exhibits offered by the State: (1) a photograph of A.K. at UIHC with a breathing tube, monitor, drain, cervical spine collar, abrasions, and bruising; (2) a letter from UIHC describing the results of a drug test of A.K.'s hair follicle; (3) Kitch's June drug test results; and (4) pictures of A.K. in June at 12.5 pounds and October at around twenty-four pounds. The family pediatric nurse practitioner noted that A.K. had not received any medical attention since June 2021, about a year before her treatment at UIHC. In addition, the State discussed the presentence investigation (PSI) report, which recommended incarceration for ten years on the conviction for neglect or abandonment of a dependent person and five years on the conviction for child endangerment resulting in bodily injury; it also recommended that the sentences run concurrently. Kitch did not object to the PSI report or correct any information it contained.

While advocating for her son at sentencing, Kitch's mother stated that Kitch accepted "responsibility for his choices and actions or lack of actions that were dangerous for the health and safety of his daughter, [A.K.]." She added:

> [H]e is determined to improve himself as a person and as a father. He has already started this process while in jail by educating himself [in] both child development and the needs of a child with [Down syndrome] . . . . [H]e knows he needs to change some of the kinds

[2] The witness's qualifications were outlined as:

> I have a Doctor of Nursing Practitioner, I have my Nursing Doctorate. I am Board-certified as a Family Nurse Practitioner, and I am Board-certified as a Pediatric Nurse Care Provider, and I am a pediatric care practitioner. As part of that training, part of my clinical rotation was in child abuse and that type of family medicine, and then after I got done with that program, I had an internship where all of my cases were reviewed for eighteen plus months.

> of people he sometimes hangs around with and therefore exposes his daughter to.

Finally, she requested that the court "consider suspending the sentence and granting a deferred judgment." In his allocution, Kitch addressed the court and said, "I was mixed emotionally or even nowhere near educated enough from the start, way before this case. That doesn't make me a bad person—that doesn't make me a bad parent. That just makes me a parent—an ill-informed parent and person." Kitch asked for a deferred judgment, probation, and substance-use-disorder counseling. In support of that request, he stated:

> I truly believe I deserve a deferred judgment through formal probation mainly because this is my first offense. Yes, a big one, but still my first, and I can promise you, my last. I am more than ready and willing to work and to show that I am not the person that I've been made out to be.

He added that he "even became more spiritual in jail."

In pronouncing the sentence, the court asked about Kitch's other children and then stated, "As soon as your significant other became pregnant, you became a father. That means you're supposed to know how to bathe, care for, and most importantly, feed your newborn." The court added, "The drug use is abhorrent. The fact that this child had alcohol and cocaine being digested by her system is atrocious. You could have killed her." In addition, the court said, "I used to have the opinion that God gave special needs children to special people. God thought about where he was placing children who needed special care, and when God made the choice to have those children brought into this world . . . he knew they would be protected."

The court then rejected the option of a deferred judgment and a suspended sentence, telling Kitch, "[N]ot only would I never consider a deferred judgment under these circumstances, you won't be given a suspended sentence. And I don't agree with the State that this term should be concurrent. This term should be consecutive. You failed this child in every way." Then the court imposed a term of ten years of imprisonment on the conviction for neglect or abandonment of a dependent person[3] and five years of imprisonment on the conviction for child endangerment resulting in bodily injury.[4] The sentences are to run consecutively for a total term of imprisonment of fifteen years. The court suspended the fines. In its sentencing order, the court wrote that the

> sentence is most likely to protect society and rehabilitate the defendant based upon the nature of the offense, defendant's prior record, and the recommendation of the parties and for the reasons stated in the PSI, if any. The nature of the offenses dictates a sever[e] penalty. The child was a special needs child and suffered for a considerable period of time, which will result in more struggles for her in the future. The record contains more of the reasons for the sentence.

Kitch appeals.[5]

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[3] Ten years is the maximum sentence. *See* Iowa Code § 902.9(1)(d) ("A class 'C' felon, not an habitual offender, shall be confined for no more than ten years . . . .").
[4] Five years is the maximum sentence. *See* Iowa Code § 902.9(1)(e) (A class 'D' felon, not an habitual offender, shall be confined for no more than five years . . . .").
[5] Although Kitch pled guilty, because he is challenging the sentence imposed and not the guilty plea, he has good cause for appeal. *See* Iowa Code § 814.6(1)(a)(3) (granting the right of appeal "where the defendant establishes good cause"); *State v. Damme*, 944 N.W.2d 98, 105 (Iowa 2020) ("We hold that good cause exists to appeal from a conviction following a guilty plea when the defendant challenges his or her sentence rather than the guilty plea.").

II. Standard of Review.

"[T]he decision of the district court 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. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). To establish an abuse of discretion, the defendant bears the burden to affirmatively show that the district court relied on improper factors or clearly untenable grounds. *State v. Sailer*, 587 N.W.2d 756, 759, 762 (Iowa 1998). "The test for whether a sentencing court abused its discretion is not whether we might have weighed the various factors differently." *State v. Gordon*, 998 N.W.2d 859, 863 (Iowa 2023). A ground is untenable if it is based on an erroneous application of law. *See Willard v. State*, 893 N.W.2d 52, 58 (Iowa 2017). "[M]ere disagreement with the sentence imposed, without more, is insufficient to establish an abuse of discretion." *State v. Pena*, No. 15-0988, 2016 WL 1133807, at *1 (Iowa Ct. App. Mar. 23, 2016).

III. Analysis.

On appeal, Kitch argues that the court abused its discretion by (1) using a fixed sentencing scheme, (2) considering improper factors including personal religious beliefs, and (3) failing to consider the factors in Iowa Code section 907.5(1) along with other mitigating factors.

"The societal goals of sentencing are to provide maximum opportunity to rehabilitate the defendant and to protect the community." *Damme*, 944 N.W.2d at 106. "A sentencing court weighs multiple factors, 'including the nature of the offense, the attending circumstances, the age, character and propensity of the offender, and the chances of reform,'" which encompass mitigating factors as well

as aggravating. *Id.* (quoting *Formaro*, 638 N.W.2d at 725). These factors must be specific to the individual defendant—not for specific types of crimes or groups of defendants. *See State v. Kirk*, No. 16-1930, 2017 WL 2875695, at *1 (Iowa Ct. App. July 6, 2017). The court may also consider the recommendations of the parties and the PSI report. *See State v. Hopkins*, 860 N.W.2d 550, 557 (Iowa 2015) (stating that the PSI report sentencing "recommendation is a factor that could influence the sentencing decision"). But the court need not "give its reasons for rejecting particular sentencing options"—it "need only explain its reasons for selecting the sentence imposed." *State v. Russian*, 441 N.W.2d 374, 375 (Iowa 1989); *see also State v. Boltz*, 542 N.W.2d 9, 11 (Iowa Ct. App. 1995) (stating the sentencing court is not "required to specifically acknowledge each claim of mitigation urged by a defendant").

Here, the court explained its reasons for imposing the maximum sentences and requiring that they run consecutively. It did so while making an individualized sentencing determination specific to Kitch, and in that way did not rely on a fixed sentencing scheme. *See Kirk*, 2017 WL 2875695, at *2 (citing *State v. Hildebrand*, 280 N.W.2d 393, 397 (Iowa 1979), and *State v. Kelley*, 357 N.W.2d 638, 640 (Iowa Ct. App. 1984)); *State v. McKeever*, 276 N.W.2d 385, 387 (Iowa 1979) ("[T]he punishment must fit the particular person and circumstances under consideration . . . ."). It also gave multiple reasons for imposing the sentence—including the need to protect society, the seriousness of the crime, the opportunity for rehabilitation, the recommendation of the parties, and the defendant's prior record, demonstrating that it did not fail to exercise its discretion. *See id.* (citing *State v. Jackson*, 204 N.W.2d 915, 917 (Iowa 1973)). Although Kitch objects to

the court asking about his other children, his family information is included in the PSI report, and Kitch made no objections to any information there. *See State v. Grandberry*, 619 N.W.2d 399, 402 (Iowa 2000) (holding it was not improper for the sentencing court to consider the defendant's prior offenses listed in the PSI report when the defendant did not contest that data). And the question about the other children was a lead-in to the court's discussion that exposing the child to alcohol and cocaine was not because Kitch "didn't know" but was because he "cared so little." Thus, the court was permitted to consider it. *See* Iowa Code § 907.5(1)(d) (listing "the defendant's family circumstances" as a proper sentencing consideration).

Turning next to the court's comments about God, our courts do not require parties or judges to leave their religious beliefs at the door. *U.S. v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991) ("Our Constitution, of course, does not require a person to surrender his or her religious beliefs upon the assumption of judicial office."). We have not found an Iowa case that holds the court's invocation of God or personal religious beliefs automatically requires resentencing. *Cf. State v. McGhee*, No. 18-1879, 2019 WL 5424949, at *2 (Iowa Ct. App. Oct. 23, 2019) (recognizing there are certain improper considerations—like relying on unproven offenses—that require resentencing because a court cannot "unring the proverbial bell"). Relying on our general principles for reviewing sentences, we conclude we will only vacate and remand for resentencing when the court improperly relied on religious beliefs as a factor in determining the sentence. *See State v. Majors*, 940 N.W.2d 372, 386 (Iowa 2020) (holding the reviewing court will reverse if the sentencing court abuses its discretion by—among other options—giving significant

weight to an improper factor). *See also United States v. Hoffman*, 626 F.3d 993, 998 (8th Cir. 2010) (affirming the sentence when the court made statements referring to "higher and greater judge" and "[m]ay he have mercy on your soul" because religion did not "appear to have been an inappropriate driving force or improper consideration during the court's sentencing"); *Arnett v. Jackson*, 393 F.3d 681, 687–88 (6th Cir. 2005) (finding no due process violation when the sentencing judge referenced a Bible verse but the judge's personal religious principles were not the "basis" of the sentence and the Bible was not, as alleged, the judge's "final source of authority").

In viewing the words in the context given at Kitch's sentencing, the court's comments were not specific to the victim in this case but referenced a general hope for children with special needs. The religious phrases did not tie back to any sentencing consideration, and there is no evidence in the record that the court's comments about God giving special-needs children to special people so the children would be protected influenced the sentence imposed beyond noting the vulnerability of special-needs children, which is an appropriate factor for the sentencing court to weigh. *See, e.g.*, *State v. Kirkland*, No. 00-1427, 2001 WL 1043200, at *2 (Iowa Ct. App. Sept. 12, 2001) (affirming sentence after court noted the defendant "perpetrated a fraud on one of the most vulnerable grounds of our society" before imposing incarceration); *State v. Terwilliger*, No. 98-1781, 1999 WL 1136677, at *3 (Iowa Ct. App. Dec. 13, 1999) (affirming the defendant's conviction when the court ordered consecutive sentences, in part, because the defendant's crimes involved a vulnerable victim); *see also United States v. Madison,* 689 F.2d 1300, 1314–15 (7th Cir. 1982) (noting that the sentencing process can consider

societal interests such as protecting vulnerable members of the community). Rather here, there was ample evidence in the record that the court relied on permissive factors to reach the sentence imposed—the maximum sentence authorized. Likewise, there was evidence that the court considered mitigating factors including that Kitch had no prior convictions and the availability of rehabilitation. The court also considered both Kitch's and his mother's statements at the sentencing hearing. Although Kitch argues that the court should have listed all mitigating factors, including those in Iowa Code section 907.5(1),[6] the court was not required to do so. *See Russian*, 441 N.W.2d at 375; *see also Boltz*, 542 N.W.2d at 11 ("[A] failure to acknowledge a particular sentencing circumstance does not necessarily mean it was not considered.").

While this sentence was more harsh than Kitch may have expected, "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." *Formaro*, 638 N.W.2d at 725. To Kitch's credit, he stated that he was ready and willing to work on improving himself and learning how to care for A.K. And the State and the PSI report recommended the sentences run concurrently, but the plea agreement acknowledged that the plea negotiations set forth in the document were "non-binding" on the court. So, while we express no approval for the religious comments made by the district court, without more, the court did not abuse its discretion and Kitch has not overcome the strong presumption in favor of the sentences set within the statutory limits. *See id.* at 724.

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[6] These factors are for a deferred judgment, deferred sentence, or suspended sentence.

IV. Conclusion.

We affirm the sentences imposed.

AFFIRMED.