IN THE COURT OF APPEALS OF IOWA

No. 0-416 / 08-1530
Filed June 30, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JERRY LEE GLENN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

The defendant appeals following resentencing for two counts of lascivious acts with a child in violation of Iowa Code section 709.8(1), (2), and (3) (2003). **AFFIRMED.**

Andrea M. Flanagan of Sporer & Flanagan, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor, J., takes no part.

MANSFIELD, J.

Jerry Lee Glenn appeals following resentencing for two counts of lascivious acts with a child. He asserts that the imposition of consecutive sentences demonstrates vindictiveness in sentencing, the district court failed to state its reasons for imposing consecutive sentences, and the district court considered improper factors in sentencing. Because we find no error in Glenn's resentencing, we affirm.

I. Procedural History.

In 2004, Glenn was charged in a seven-count trial information alleging sexual offenses involving two different girls under the age of twelve. In 2005, Glenn entered into a plea agreement, wherein he agreed to participate in the Intra-Family Sexual Abuse Treatment Program (IFSAP), and assuming his successful participation, would then plead guilty to the reduced charges of two counts of lascivious acts with a child in violation of Iowa Code section 709.8(1), (2), and (3) (2003). The plea agreement did not obligate the State to take any position as to sentencing and specifically provided, "The court can impose any legal sentence for the reduced charge."

On August 31, 2007, following his completion of the IFSAP, Glenn pled guilty to two counts of lascivious acts involving one of the girls. On October 15, 2007, the district court sentenced Glenn to two five-year terms of imprisonment to be served concurrently. As part of the sentence, the district court also ordered that upon release from prison, Glenn would be required to register as a sex offender. Additionally, it imposed a special ten-year sentence pursuant to Iowa Code section 903B.2.

On December 4, 2007, the district court entered an order correcting Glenn's sentence. The special ten-year sentence pursuant to section 903B.2 was removed because Glenn's crimes had occurred before that statute became effective. However, Glenn was sentenced to an additional term of parole or work release not to exceed two years pursuant to section 709.8.

Meanwhile, Glenn had already appealed his sentence, and the State itself moved for the reversal of Glenn's sentence and a remand for resentencing. On April 29, 2008, our supreme court entered an order stating:

> The defendant was originally charged with one count of second-degree sexual abuse, two counts of lascivious acts with a child, two counts of child endangerment, and two counts of assault with intent to commit sexual abuse in violation of Iowa Code sections 709.1, 709.3, 709.8(3), 726.6(1)(a), 726.6(6) and 709.11. The defendant pleaded guilty to two counts of lascivious acts with a child in violation of Iowa Code sections 709.8(1), 709.8(2), and 709.8(3). In sentencing the defendant, the district court considered statements he made while in his sexual abuse program. The plea agreement suggests that the defendant's statements he made in his treatment program would not be used against him if he successfully completed his treatment, which he did. Moreover, the district court considered his abuse of the victim's sister, which was not part of the guilty plea.
>
> Accordingly, the motion to reverse is granted. We vacate the defendant's sentence and remand the matter to the district court for resentencing without considering the defendant's IFSAP statements or the victim impact statement from [the victim's sister].

On August 28, 2008, a resentencing hearing was held before a different judge than the one who originally sentenced Glenn. At the hearing, the victim and her parents provided victim impact statements, all requesting that Glenn receive jail time, and the prosecution requested that Glenn be sentenced to two five-year prison terms to be served consecutively. Glenn read a letter he had

written to his victim and requested he be sentenced to two five-year prison terms to be served concurrently.

At the conclusion of the hearing, the district court stated that it would impose consecutive sentences, explaining as follows:

> Well, it comes to the point of decision, as I sit here on this day. This is a tough morning for everybody in the courtroom, and I wish I had the wisdom of Solomon in a position like this in a situation like this, but I don't.
>
> I can only call upon my wisdom within the context of what is best to protect the public and what's best for the defendant's rehabilitation. And based on the pre-sentence report I've read and based upon the Victim Impact Statement, which I believe I can consider fully under Iowa law, I am going to impose a period of imprisonment, but I'm not going to impose the original sentence.
>
> I believe the law allows me to impose five-year consecutive sentences, and I'm concerned about protecting the public.
>
> Also, I think, Mr. Glenn, you need more time than what you would serve pursuant to a concurrent sentence arrangement to continue your rehabilitation. I know I've disappointed some and I've satisfied some, but that is my decision. . . .
>
> The Court imposes five years, Count 1; five years, Count 2. . . the sentences shall run consecutively.
>
> . . . .
>
> And I'm not going to add any editorial comments, because I don't want this sentence to come back again. I believe what I've done is fair and it protects the public and ensures your rehabilitation, as much as possible.

In the subsequent written order, the district court stated that in addition to the protection of the public and maximum opportunity for rehabilitation of the defendant, the district court further considered the defendant's age, prior criminal record, and that probation would lessen the seriousness of the offense. Thus, Glenn was resentenced to two five-year terms of imprisonment, to be served consecutively. Glenn appeals. He argues that (1) the district court improperly imposed a more severe sentence on him following his successful appeal, (2) the district court failed to provide adequate reasons for the sentence it imposed, and

(3) the district court improperly considered references in one of the victim statements to sexual offenses that were not part of the guilty plea.

II. Standard of Review.

We review a district court's sentencing decision for the correction of errors at law. Iowa R. App. P. 6.907; *State v. Bolsinger*, 738 N.W.2d 643, 647 (Iowa Ct. App. 2007). However, where a defendant's claim implicates his constitutional rights, our review is de novo. *State v. Mitchell*, 670 N.W.2d 416, 418 (Iowa 2003).

III. Analysis.

A. Alleged Sentencing Vindictiveness.

Glenn first asserts that the district court's imposition of consecutive sentences on remand amounted to impermissible vindictiveness in violation of his constitutional due process guarantees. Under *North Carolina v. Pearce*, 395 U.S. 711, 725-26, 89 S. Ct. 2072, 2080-81, 23 L. Ed. 2d 656, 669-70 (1969), a defendant who successfully attacks his original conviction on appeal may not after reconviction receive a harsher sentence as punishment for exercising his appeal rights. *Bolsinger*, 738 N.W.2d at 645-46.

> Accordingly, a more severe sentence after retrial is allowed only if the record contains reasons for the harsher sentence based on "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." This rule has since been read to "[apply] a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence."
>
> *Pearce*'s holding has been limited by subsequent cases, however, which have found due process is not violated when the harsher sentence following a second trial was imposed by a different judge or jury, or where the same judge imposed a harsher sentence following trial than had been imposed following a now

> overturned guilty plea. As summarized by our supreme court, "[W]hen a different judge sentences a defendant after a retrial, and that judge articulates logical, nonvindictive reasons for the sentence, there simply is no sound basis to presume that the sentence is the product of judicial vindictiveness." However, this does not mean that the examination of an increased sentence is toothless, for if a defendant is able to show actual vindictiveness on the part of the second judge, he or she may still prevail on a claim of judicial vindictiveness.

Bolsinger, 738 N.W.2d at 645-46 (citations omitted).

Glenn contends this case involves unconstitutional vindictiveness because he was originally sentenced to concurrent five-year terms, but on remand was sentenced to consecutive five-year terms. After reviewing the record, we decline to accept Glenn's claim of a due process violation.

As an initial matter, we note that the sentences were imposed by two different judges. The "concerns first identified in *Pearce* are simply less likely to arise when a different judge sentences a defendant at each stage." *Mitchell*, 670 N.W.2d at 424-25.

> [I]n a case such as this one, in which two different judges have produced the disparity in sentencing, a presumption of vindictiveness does not apply. For that reason, we must further consider whether his second sentence was tainted by actual vindictiveness.

Id. at 425. We see no indication of actual vindictiveness here. To the contrary, the district court's statements reflect that it carefully weighed the sentencing options and decided to impose consecutive sentences for logical, non-vindictive reasons—protection of the public and to ensure Glenn would continue rehabilitation efforts. The judge acted within the discretion normally accorded the court in sentencing. "The mere fact that two judges viewed the situation

differently and ordered different sentences does not indicate actual vindictiveness." *Id*.

Furthermore, there is an additional reason why actual vindictiveness would be unlikely to exist here. In this case, after Glenn appealed his sentence, the State moved to vacate Glenn's sentence and remand. Thus, all parties were in agreement that a new sentencing hearing was required. Under these circumstances, where both sides *agreed* the original sentence was improper, it is difficult to see why a district court would choose to "punish" just one side.

Glenn seizes on the district court's statement that it was "not going to add any editorial comments, because I don't want this sentence to come back again." He asks us to interpret this statement as meaning the district court may have harbored some intent to punish him, but was astute enough not to make such comments on the record. We disagree with the proffered interpretation. The district court had already provided its non-vindictive reasons for the sentence imposed, and was simply making the point that it was not going to add anything else that could be misconstrued by an appellate court. The district court's statement was, in effect, a statement that the court was done speaking and the hearing was concluded. Accordingly, we find Glenn's claim of vindictiveness in sentencing fails.

B. Reasons for Imposing Consecutive Sentences.

Glenn next asserts that the district court failed to state on the record its reasons for imposing consecutive sentences. Under Iowa Rule of Criminal Procedure 2.23(3)(*d*), a district court must disclose on the record its reasons for selecting a particular sentence, which includes the reasons for imposing

consecutive sentences. *State v. Jacobs*, 607 N.W.2d 679, 690 (Iowa 2000). "Although the reasons need not be detailed, at least a cursory explanation must be provided to allow appellate review of the trial court's discretionary action." *Id*. Even a "terse and succinct" statement of reasons is sufficient if review is possible. *State v. Boltz*, 542 N.W.2d 9, 11 (Iowa Ct. App. 1995).

At the sentencing hearing, the State requested consecutive five-year prison terms and Glenn requested concurrent five-year prison terms. Hence, the only fighting issue was whether the sentences should run consecutively or concurrently. In imposing Glenn's sentence, the district court stated it was imposing consecutive sentences because it was "concerned about protecting the public" and that Glenn needed "more time that [he] would served pursuant to a concurrent sentence arrangement to continue [his] rehabilitation." This was sufficient.

C. Victim Impact Statements.

Finally, Glenn asserts that the sentence imposed by the district court should be vacated and the case remanded for resentencing because the district court considered improper matters in imposing sentence. Glenn specifically refers to certain aspects of the in-court statement made by the victim's mother. In particular, she told the court that Glenn "got away with a lot more than what he's facing right now. Because of interstate laws, and laws, and how this happened, he doesn't get charged with those things." These comments, Glenn claims, were references to Glenn's alleged abuse of the victim's sister.

A district court's sentencing decision enjoys a strong presumption in its favor. *State v. Peters*, 525 N.W.2d 854, 859 (Iowa 1994). To overcome the

presumption in favor of a sentencing decision, a defendant must affirmatively show that the district court relied on improper evidence. *State v. Jose*, 636 N.W.2d 38, 41 (Iowa 2001). Glenn asserts that because the victim's mother referred to other unproved offenses when she addressed the court, we must assume the district court considered those offenses. We disagree. Where a victim impact statement refers to an unprosecuted or unproved crime, there must be affirmative evidence the district court considered that alleged crime in imposing sentence. *See State v. Sailer*, 587 N.W.2d 756, 763 (Iowa 1998); *State v. Phillips*, 561 N.W.2d 355, 359 (Iowa 1997) (upholding the defendant's sentence where the victim impact statements referenced unprosecuted and unproven offenses, but there was no showing the district court relied on those statements). In this case, the court relied on permissible factors in imposing sentence, including protection of the public and the defendant's rehabilitation. The district court stated generally it had considered the victim impact statements, but there is nothing to demonstrate the district court specifically relied upon alleged abuse of the victim's sister. In fact, the mother's reference to other offenses in her statement was vague, oblique, and fleeting (i.e., that Glenn "got away with a lot more than what he's facing right now"). As the supreme court held in *Sailer*, a district court's mere statement that it took into consideration a victim impact statement does not – without more – establish that the district court considered any unproven offenses that may have been discussed in that statement:

> Without further proof. . . , we take this statement at face value to mean the court merely considered the impact on the victim when setting the sentence.

Sailer, 587 N.W.2d at 763. We affirm the defendant's sentence.

AFFIRMED.