IN THE COURT OF APPEALS OF IOWA

No. 0-918 / 10-1066
Filed February 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CLEOTHA YOUNG, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Thomas H. Preacher, District Associate Judge.

Cleotha Young Jr. appeals the sentence imposed upon his conviction for driving while barred. **SENTENCE VACATED; REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha Trout, Assistant Attorney General, Michael J. Walton, County Attorney, and Robert Bradfield, Assistant County Attorney, for appellee.

Considered by Mansfield, P.J., Danilson, J., and Miller, S.J.* Tabor, J., takes no part.

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

MILLER, S.J.

I. Background Facts and Proceedings.

Cleotha Young Jr. was charged with one count of driving while barred in violation of Iowa Code section 321.561 (2009), an aggravated misdemeanor. A jury found him guilty. The district court sentenced Young to a partially-suspended jail term and to pay a fine and surcharge. The court ordered him to pay restitution in the form of court costs and court-appointed attorney fees.

Upon appeal, Young claims:

> The sentencing court erred by considering an improper factor when it imposed sentence.

Young requests that his sentence be vacated and the case remanded for resentencing.

II. Scope and Standards of Review.

Ordinary rules of error preservation do not apply to a claim of sentencing error, and a defendant may raise such a claim for the first time on appeal. *State v. Shearon*, 660 N.W.2d 52, 57 (Iowa 2003); *State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998). We review a sentence for correction of errors at law. Iowa R. App. P. 6.907; *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). "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. Discussion.

When asked at sentencing whether the State had any recommendations, the prosecuting attorney stated:

> The State would recommend a fine of $1,500 and 240 days incarceration. Your Honor, that's based on the fact that . . . we had a plea agreement that had less than that. This is his fourth driving while barred. *The plea* agreement *proposal*, the agreement *was for . . . 90 days in jail*, *but because of the fact he has not admitted his culpability in this*, we withdraw that, of course, and therefore, *we believe that a more severe sentence is appropriate*.

(Emphasis added).

In discussing sentencing considerations, the district court commented, in relevant part:

> Well, any number of competing considerations on a matter like this, when somebody has a fourth driving while barred, that indicates that the prior penalties have not worked. *Had the defendant entered a plea under the plea agreement, I most likely would not have given him the full 90 days recommended by the State*, although he would be looking at a substantial amount of time. *Having chosen to take the matter to trial, he has forfeited the benefits that might have accrued under the plea agreement.* The current recommendation is 240 days.

(Emphasis added).

The court next announced the sentence it was imposing, stating:

> I'm going to sentence the defendant to pay a fine of $1,500. I'm also going to sentence the defendant to a term of 365 days in the Scott County Jail. I'm going to suspend all but 150 of those.
>
> I'm going to place the defendant on an unsupervised probation for a period of one year, with respect to the days that aren't suspended, that is. I won't do the math, but it's 365 less 150.

The court subsequently stated, as reasons for the sentence, the following:

> The reasons for the sentence are the defendant's history of recidivism with respect to this particular charge. As noted by the County Attorney, this is his fourth conviction on this matter.

> *Furthermore, the defendant's failure to take responsibility for his actions in this matter*.

(Emphasis added).

Young argues the district court erred in sentencing him "by taking into consideration the defendant's decision to exercise his right to require the State to prove his guilt."

> [T]he fact that a defendant has exercised the fundamental and constitutional right of requiring the state to prove at trial his guilt as charged and his right as an accused to raise defenses thereto is to be given no weight by the trial court in determining the sentence to be imposed after the defendant's guilt has been established.

State v. Nichols, 247 N.W.2d 249, 255 (Iowa 1987).

The State argues the district court considered all relevant factors, including Young's recidivism as well as the court's obligation to protect the community from further such acts by Young. The State quotes the court's statement that Young had failed "to take responsibility for his actions," and asserts this quoted language was the basis for the sentence imposed. The State argues that although the court said that had Young accepted the plea proposal the sentence would have been less than the amount that would have been recommended by the State, the gist of the court's statement was merely a statement of the obvious, that the plea offer was no longer available to Young.

We do recognize that, as argued by the State, courts in imposing sentence are ordinarily speaking extemporaneously and may use "unfortunate phraseology." *See Nichols*, 247 N.W.2d at 255 (stating the trial court's remarks at sentencing could not be shrugged off as merely "unfortunate phraseology"); *see also State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

(recognizing that sentencing "requires trial judges to detail, usually extemporaneously, the specific reasons for imposing the sentence"). In imposing sentence the district court did state and in part rely on some relevant and appropriate factors. Certain additional facts and conclusions, however, can readily be drawn from the record here.

First, the emphasized language in the prosecuting attorney's sentencing recommendation mentions the State's plea proposal; it immediately thereafter notes, even if somewhat indirectly, Young's rejection of the proposal ("he has not admitted his culpability in this"); and it then suggests that a more severe sentence is therefore appropriate.

Second, in discussing sentencing considerations the district court expressly mentioned and emphasized the plea proposal and Young's failure to accept it. The court stated that if Young had accepted the proposal the court "most likely" would have imposed a shorter jail sentence than the State would have recommended, a sentence that would have been much shorter than the sentence the court in fact thereafter imposed.

Third, in its brief the State quotes as part of the court's statement of reasons for its sentence that Young had failed "to take responsibility for his actions," and suggests the court was emphasizing and relying on Young's recidivism. Although the court clearly relied in part on Young's recidivism, it in fact stated as a reason Young's "failure to take responsibility for his actions *in this matter*." (Emphasis added). This statement must be viewed in the context of the prosecuting attorney's invitation to consider Young's rejection of the plea

proposal and accordingly sentence more severely, together with the court's express consideration of that rejection. When so viewed the most reasonable, and perhaps only reasonable, way to read this particular statement by the court is that in sentencing the court considered to some extent that Young rejected the plea proposal and went to trial.

We conclude Young has demonstrated that in imposing sentence the district court considered an impermissible factor, Young's rejection of a plea proposal and exercise of his right to trial. We will not speculate about the weight the court assigned this improper factor, because if any improper consideration occurs resentencing is required, even if the improperly considered factor was merely a secondary consideration. *Grandberry*, 619 N.W.2d at 401.

IV. Disposition.

We vacate the sentence imposed by the district court and remand for resentencing.

SENTENCE VACATED; REMANDED FOR RESENTENCING.