IN THE COURT OF APPEALS OF IOWA

No. 0-964 / 10-1119
Filed February 23, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MAYNARD RICHARDSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Maynard Richardson appeals from the sentence imposed upon his convictions of nonfelonious misconduct in office and false imprisonment. **AFFIRMED.**

Alfredo Parrish of Parrish Kruidenier Dunn Boles Gribble Parrish Gentry & Fisher, L.L.P., Des Moines, for appellant.

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

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

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

DANILSON, J.

Maynard Richardson appeals from the sentence imposed upon his convictions following his pleas of guilt to nonfelonious misconduct in office and false imprisonment. He contends that in denying him a deferred judgment the district court (1) abused its discretion by using a fixed sentencing policy and (2) considered an improper factor. The record does not support either contention, and we therefore affirm.

I. Background Facts & Proceedings

According to the minutes of testimony, Des Moines police officers Becirovic, Paulson, and Richardson were called to the scene of a fight or an assault at about 2 a.m. on February 5, 2010. An intoxicated, twenty-two-year-old woman, T.W., was at the scene. An officer transported T.W. to a location to make a telephone call as she was advised not to drive. Pursuant to police procedure, another officer—Richardson—followed the transporting officer. Unable to arrange for a ride, T.W. walked to her car. She had driven just a short distance before she was stopped by Richardson.

Richardson performed a breath test and informed T.W. she had failed. He handcuffed her and told her she was going to jail. However, he removed the handcuffs and allowed her to lock her parked vehicle. When T.W. returned to the patrol car, Richardson asked her, “What would you be willing to do to not go to jail?”

Subsequently, Richardson placed T.W. in the back of his squad car and then drove to a deserted warehouse area. When they arrived at the area, Richardson got into the back of his squad car, lay on top of T.W., kissed her, and

grabbed her face. She pushed him away, and ultimately Richardson stopped kissing her and instead drove her home and warned her to keep quiet.

Following an investigation of T.W.'s allegations, Richardson was charged with assault with intent to commit sexual abuse, nonfelonious misconduct in office, and false imprisonment, in violation of Iowa Code sections 709.11, 721.2(4), and 710.7 (2009).

As part of a plea agreement, Richardson entered a written guilty plea to nonfelonious misconduct in office and false imprisonment. Also as part of the plea agreement, on each count the State would recommend a one-year suspended sentence, probation, and counseling, a thirty-five percent surcharge, and court costs; Richardson would request a deferred judgment, a six-month probationary period, and no assessment of a fine. The parties agreed the two sentences would run concurrently and Count I, assault with intent to commit sexual abuse, would be dismissed. Richardson filed a written request for a deferred judgment.

With respect to Count II, nonfelonious misconduct in office, Richardson stipulated:

> On February 5, 2010 while serving as a public officer, and officially on duty as a City of Des Moines police officer, I transported T.W. from an initial location to a secondary location knowing I had no reasonable basis to do so at the time. While transporting T.W., she was confined to the rear of the police care which had no interior handles for T.W. to exit the vehicle during the transport. At the time I transported her in the vehicle, I did not have a reasonable belief that T.W. could be confined by me.

As to Count III, false imprisonment, Richardson stipulated:

> On February 5, 2010, I placed T.W. in the rear of a City of Des Moines police car that had no interior handles for T.W. to exit

> the vehicle. I had no reasonable basis for placing T.W. in the rear of the police vehicle at the time I did so. T.W. was confined in the rear of the police vehicle and could not exit the vehicle at the time I transported her from the initial location to a secondary location. I did not have a reasonable belief that T.W. could be confined by me at the time I transported her.

At the sentencing hearing, T.W. stated she now fears law enforcement officers: "[I]t's not that I believe every officer is like how Richardson was, but I live in fear of not knowing if there is any more like he was." T.W. also explained that she experienced panic attacks and nightmares. She expressed her opinion that the incident had "destroyed my life." She also felt in constant fear of law enforcement. Richardson addressed the court, and the attorneys presented argument. The district court denied Richardson's request for deferred judgments, suspended the sentences, placed defendant on probation, and ordered defendant to pay a fine on each count of $315, plus a thirty-five percent surcharge.

Richardson now appeals the denial of deferred judgment, contending the district court (1) abused its discretion in applying a fixed policy of denying deferred judgment to a police officer convicted of nonfelonious misconduct in office and (2) considering defendant's position as a police officer because this factor was within the "heartland"[1] of sentencing for a violation of Iowa Code section 721.2(4).

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[1] The term "heartland" derives from the original introduction to the United States Sentencing Guidelines. *See* U.S.S.G. Ch.1, Pt. A, 4(b) (1987) ("The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes.").

II. Scope and Standard of Review.

We review defects in the sentencing procedure for an abuse of discretion. *State v. Evans,* 672 N.W.2d 328, 331 (Iowa 2003). An abuse of discretion will be found if the court acts on grounds clearly untenable or to an extent clearly unreasonable. *State v. Leckington,* 713 N.W.2d 208, 216 (Iowa 2006). In applying its discretion, the court should weigh and consider all pertinent matters in determining a proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character, and propensity, and chances for reform. *State v. Laffey,* 600 N.W.2d 57, 62 (Iowa 1999).

III. Did the Court Evince a Fixed Policy?

Richardson pled guilty to nonfelonious misconduct in office as defined in Iowa Code section 721.2(4), which provides:

> Any public officer or employee, or any person acting under color of such office or employment, who knowingly does any of the following, commits a serious misdemeanor:
>
> . . . .
>
> 4. By color of the person's office and in excess of the authority conferred on the person by that office, requires any person to do anything or to refrain from doing any lawful thing.

Richardson also pled guilty to false imprisonment as provided in section 710.7, which provides:

> A person commits false imprisonment when, having no reasonable belief that the person has any right or authority to do so, the person intentionally confines another against the other's will. A person is confined when the person's freedom to move about is substantially restricted by force, threat, or deception. False imprisonment is a serious misdemeanor.

We note that false imprisonment does not include an element of status as a public officer or police officer.

In pronouncing judgment and sentence, the district court is to receive and examine all pertinent information and determine the sentencing option 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." Iowa Code § 901.5; *see also State v. Hildebrand*, 280 N.W.2d 393, 395 (Iowa 1979) (examining sentencing procedures and alternatives under the Iowa Corrections Code). The court may defer judgment or sentence if authorized by section 907.3. *See* Iowa Code § 901.5(1). "[S]entencing remains within the trial court's discretionary power." *Hildebrand*, 280 N.W.2d at 396.

But a sentencing court must actually apply its discretion. *State v. Jackson,* 204 N.W.2d 915, 917 (Iowa 1973). And the court must exercise its discretion without application of a fixed policy to govern in every case. *State v. Lathrop*, 710 N.W.2d 288, 299 (Iowa 2010); *Hildebrand,* 280 N.W.2d 393, 397 (Iowa 1979). For example, in *Jackson*, the supreme court concluded a district court failed to exercise its discretion when it imposed a sentence directed by a general order in that district. 204 N.W.2d at 917. Similarly, in *Hildebrand*, 280 N.W.2d at 396, the supreme court vacated a sentence, noting:

> it is plain the sentencing court, instead of considering the minimal essential factors we consistently have identified, impermissible selected only, one an attending circumstance which triggered the court's previously-fixed sentencing policy. It is equally clear the court's personal, well-defined rule precluded the exercise of its discretion in rendering judgment.

"The exercise of discretion in the area of imprisonment and freedom has been one of the hallmarks of our judicial system." *State v. Hager,* 630 N.W.2d 828, 834 (Iowa 2001).

Here, Richardson attempts to characterize the trial court's focus on defendant's status as a police officer as a fixed sentencing policy. He argues the court's reasoning

> comes down to the idea that because he was acting under the color of his office as a police officer when he committed the offense, he is not entitled to deferred judgment. This exact same reasoning would apply any time a police officer is convicted of this offense.

We disagree with Richardson's characterization.

Richardson pled guilty to two serious misdemeanors, for each of which "there shall be a fine of at least" $315, but not more than $1875. Iowa Code § 903.1(1)(b). "In addition, the court may also order imprisonment not to exceed one year." *Id.* Under section 907.3, Richardson was eligible to be considered for deferred judgment or sentence.

Here, the sentencing court stated:

> The record will reflect that the Court has carefully considered the brief that your attorneys have submitted on your behalf, as well as your statement and the victim impact statement that the court heard, and the arguments of counsel.
>
> In sentencing the Court considers all of the factors set forth in Iowa Code section 907.5, and those are set forth in your brief. And in this case the *Court focuses on the nature of the offense and the impact that this crime has had on your victim*.
>
> On February 5th of 2010, you were on duty as a Des Moines police officer, in uniform, driving a marked patrol car. Your duty was to protect and defend the community from crimes. You were wearing a badge, a gun belt and a service weapon. You came into contact with a person over whom you assumed unequal power and control. You had the power to take this person to jail. Instead, you victimized her, you abused your position as a police officer, and you committed the crimes alleged in Counts II and III of the Trial Information.
>
> . . . . [The court read stipulated facts.]
>
> Now the Court has considered all of the sentencing factors set forth in the Code and as argued in your brief, including your age, your lack of prior criminal record, your eligibility for deferred judgment, your employment circumstances, including your

> honorable service in the military, your family circumstances and your financial circumstances.
>
> Your brief and able argument of your attorney set[] forth convincing reasons why you should receive a suspended sentence and probation instead of incarceration. However, *considering the nature of the offenses as an aggravating factor, the Court finds that you let your community, your department and, most importantly, the victim of this crime down. Deferred judgment or deferred sentence would unduly depreciate the serious nature of these crimes*. Therefore, your request for deferred judgment or deferred sentence is denied and judgment will be entered on your guilty pleas.

(Emphasis added.)

This colloquy does not evidence a fixed policy. Rather, after considering all relevant factors, the court determined a deferred judgment would "unduly depreciate the serious nature of these crimes," which included a misuse of Richardson's position where he "assumed unequal power and control" over the victim. Contrary to the defendant's contention, this is consistent with section 907.5, which provides:

> Before deferring judgment, deferring sentence, or suspending sentence, the court first shall determine which option, if available, will provide maximum opportunity for the rehabilitation of the defendant and protection of the community from further offenses by the defendant and others. *In making this determination the court shall consider* the age of the defendant; the defendant's prior record of convictions and prior record of deferments of judgment if any; the defendant's employment circumstances; the defendant's family circumstances; *the nature of the offense committed; and such other factors as are appropriate.* The court shall file a specific written statement of its reasons for and the facts supporting its decision to defer judgment, to defer sentence, or to suspend sentence, and its decision on the length of probation.

(Emphasis added.)

IV. Claim of Improper Factor.

Richardson contends that even if we should determine that the sentencing court did not follow a fixed policy, that consideration of Richardson's job as a

police officer was an inappropriate sentencing factor. However, our supreme court has noted, "We are unable to understand how, in considering the nature of the crimes, defendant's professional status could be ignored." *State v. Pappas*, 337 N.W.2d 490, 495 (Iowa 1983) ("It was his professional status [as a lawyer], and especially the fiduciary nature of it, that put him in close proximity with the funds he embezzled."). In *State v. Morrison*, 323 N.W.2d 254, 256–257 (Iowa 1982), the court rejected the defendant's argument that the trial court abused its discretion in denying him probation:

> A sentence must fit the person and circumstances. Each decision must be made on an individual basis, and no single factor is alone determinative. In this case the trial court was required to consider that defendant was a judge at the time of the offense. Defendant's status was integral to the offense and its gravity. The offense was more serious because defendant was a judge than it would otherwise have been. The seriousness of the offense is an important sentencing consideration. Probation may be refused when it would unduly depreciate the seriousness of the crime.

In the case at bar, the court did not rely upon one factor or exhibit a fixed policy. It did, however, consider a number of factors, including the nature of the offense and the impact on the victim. "Defendant's status was integral to the offense and its gravity." *Id.* The court did not abuse its discretion in considering Richardson's status as a police officer as integral to the nature of the offense.

Under section 721.2(4), "[a]ny public officer or employee or any person acting under color of such office or employment," who knowingly "by color of the person's office and in excess of the authority conferred on the person, requires any person to do anything or to refrain from doing any lawful thing" commits a serious misdemeanor. Richardson argues that his status as a police officer cannot be considered at sentencing because it has already been considered as

an element of the nonfelonious misconduct in office offense. Citing *Koon v. United States*, 518 U.S. 81, 111, 116 S. Ct. 2035, 2052, 135 L. Ed. 2d 392, 420 (1996), Richardson argues that "[w]hen a factor or circumstance has already been considered by the Legislature in establishing a sentencing range, it is inappropriate to use these factors again to vary from the sentence."

In *Koon*, Los Angeles police officers (who, after beating a suspect during an arrest, were convicted of violating the victim's constitutional rights under color of law under 18 U.S.C. § 242) appealed the sentences imposed by the district court. *See Koon*, 518 U.S. at 85–88, 116 S. Ct. at 2040–42, 135 L. Ed. 2d at 405–07. *Koon* addresses the boundaries of a federal district court's sentencing discretion under the sentencing guidelines promulgated by the United States Sentencing Commission, which was created by the Sentencing Reform Act of 1984. *See id.* at 92–95, 116 S. Ct. at 2043–2045, 135 L. Ed.2d at 409–11.

Because *Koon* pertains to federal sentencing guidelines, the case has no direct application here. But Richardson urges us to consider it for its "analogous facts and persuasive authority." Richardson would have us read section 721.2(4) as a "guideline . . . carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes." *See United States v. McCart*, 377 F.3d 874, 877 (8th Cir. 2004) (quoting U.S.S.G. Ch.1, Pt. A, 4(b), p.s., which continues, "When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted."). But we decline to superimpose principles related to federal sentencing guidelines to our

review of the factors considered, and the sentencing discretion exercised, in this case.

The district court stated that it had considered all the statutory factors and recited them. The court then specifically referenced the nature of the offense as an aggravating factor, the impact that the crime had on the victim, and that a deferred judgment or deferred sentence would "unduly depreciate the serious nature of these crimes." These are appropriate considerations in determining a sentence. Iowa Code §§ 901.5, 907.3; *see Laffey*, 600 N.W.2d at 62.

V. Conclusion.

We find no indication of a fixed sentencing policy or use of an impermissible factor in sentencing Richardson in this record. The district court did not abuse its discretion in denying defendant's request for a deferred judgment. We therefore affirm.

AFFIRMED.