IN THE COURT OF APPEALS OF IOWA

No. 1-021 / 10-0496
Filed March 7, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

VINCENT EDWARD HARLAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, John D. Ackerman, Judge.

A defendant appeals his judgment and sentence, contending the district court abused its discretion in sending him to prison rather than granting him a deferred judgment. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Patrick Jennings, County Attorney, and Jill R. Esteves, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

VAITHESWARAN, P.J.

Seventeen-year-old Vincent Harlan pleaded guilty to going armed with intent and was sentenced to a prison term not exceeding five years. On appeal, he contends the district court abused its discretion in sending him to prison rather than granting him a deferred judgment. *See State v. Gibb*, 303 N.W.2d 673, 687 (Iowa 1979) (stating a sentence imposed within statutory limits is only set aside upon an abuse of discretion).

The district court reasoned as follows:

> Thank you very much. Well, as I have indicated, I have reviewed the entire file, I have read the PSI and the other information and I have considered all the sentencing options.
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> This Court does not believe that this case is one that calls for a deferred judgment given the nature of the acts. And then the decision becomes whether to suspend the sentence or impose a period of incarceration. He was 17 when he did this act. He has done well while in custody, but the act itself is the kind of act that cannot be accepted in society.
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> And as I read the PSI, you have had out-of-home placements, two or three of them prior to this. And the argument was made, well, you have now learned that this behavior won't be tolerated. You knew that long before you did this. I mean they didn't—they taught you those things at the out-of-home placement. They taught you how to act in society and that you need to follow the rules. And frankly, this is just an act that along with this prior history of your out-of-home treatment and apparent gang membership, all of that adds up to in my mind that the most appropriate disposition is a term of incarceration. So that's what I'm going to do.
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> . . . .
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> The sentence will provide for the maximum opportunity for rehabilitation of the defendant and protect the community from further offenses by this defendant.
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> I have considered your age, the record, the plea agreement, the contents of the presentence investigation as well as the reasons set out by the county attorney. And as I tried to tell you, I have taken what you and your lawyer have said and balanced that against what the State has said. And you do have some good things, but I have come to the conclusion that this is the most appropriate disposition. Mittimus will issue forthwith.

Harlan first takes issue with the following statement, "This court does not believe that this case is one that calls for a deferred judgment given the nature of the acts". He contends "[t]he district court's reasoning reveals a fixed policy against a deferred judgment for a going armed with intent offense." *See State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979) (stating court "impermissibly selected only one [factor] which triggered the court's previously-fixed sentencing policy").

When the highlighted statement is read in conjunction with the court's entire discussion, it is clear the court did not invoke a fixed policy. After mentioning the nature of the offense, the court went on to cite other factors, including Harlan's age and his chances for reform. *See id.* at 396 (noting the factors that a court should weigh and consider before imposing sentence). Based on this record, we conclude the district court did not abuse its discretion in sentencing Harlan. *See State v. Johnson*, 445 N.W.2d 337, 343 (Iowa 1989) (noting that an overall sentencing plan was revealed in "the sentencing colloquy, sentencing order, and presentence investigation report referred to by the district court"); *State v. Harris*, 528 N.W.2d 133, 135 (Iowa Ct. App. 1994).

Harlan next challenges the district court's reference to his adolescent out-of-home placements. He maintains the district court either abused its discretion or considered an impermissible factor in relying on these placements. *Cf.* Iowa Code § 232.55(2) (2009) (stating juvenile proceedings not admissible against a person in a subsequent proceeding in any other court); *State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998) (addressing court's consideration of impermissible factors). The State responds that the court considered these placements "simply

on the issue of whether defendant had been taught society's expectation that defendant behave and follow the rules."

The court's discussion supports the State's assertion. The court referred to Harlan's presentence investigation report, noted the out-of-home placements referenced in the report, and then stated, "They taught you how to act in society and that you need to follow the rules." We conclude the district court neither abused its discretion nor considered an impermissible factor in citing the out-of-home placements.

Harlan finally complains that the district court improperly considered his "apparent gang membership" in imposing a prison term. He concedes he joined a gang at age eleven but argues there is no indication his present offense was gang-related. The PSI report indicates that Harlan was still a gang member at age seventeen, although he told the PSI preparer that he had every intention of getting out of the gang. On this record, we conclude the district court did not abuse its discretion in referring to his apparent ongoing gang membership.

We affirm Harlan's judgment and sentence for going armed with intent.

AFFIRMED.