IN THE COURT OF APPEALS OF IOWA

No. 1-1005 / 11-1015
Filed February 1, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMIKA JASMINE McMULLEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil, District Associate Judge.

Jamika McMullen appeals her conviction and sentence, following a guilty plea, for possession of marijuana, first offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Dustin Lies and Brian Williams, Assistant County Attorneys, for appellee.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

DANILSON, P.J.

Jamika McMullen appeals her conviction and sentence, following a guilty plea, for possession of marijuana, first offense, in violation of Iowa Code section 124.401(5) (2009). She contends the district court failed to consider all relevant sentencing factors and failed to order a complete presentence investigation. She also argues the State committed misconduct and the court relied on an unproven offense. Upon our review, we conclude the sentence entered by the district court was not based on untenable reasons, and the court did not abuse its discretion in reaching its decision. We are unable to discern any reliance by the district court on improper facts that would overcome the presumption the court properly exercised its discretion. We affirm the sentence entered by the district court.

I. Background Facts and Proceedings.

Shortly after 2:00 a.m. on November 28, 2010, Waterloo police officers observed a purple PT Cruiser strike the curb at an intersection in East Waterloo, then shortly thereafter, nearly strike the curb on two more occasions. Officers conducted a traffic stop and observed the driver, McMullen, "appeared intoxicated." Officers noticed two bottles of beer in the center console, one open and partially consumed. McMullen consented to a search of the vehicle. Officers discovered ripped plastic bags consistent with narcotics. McMullen admitted smoking marijuana three days earlier. Officers discovered a bag of marijuana inside McMullen's purse.

McMullen was charged with possession of marijuana and an open container violation. McMullen pleaded guilty as charged. The district court accepted her plea. The court ordered McMullen to undergo a substance abuse

evaluation and file its report, and ordered the Iowa Department of Corrections to prepare an "informal report."

The substance abuse evaluation report indicates McMullen acknowledged that on the night of her arrest she had been out drinking with friends to celebrate her twentieth birthday. She admitted she had smoked marijuana that night and stated one of her friends left the marijuana in her car. She stated she had been smoking marijuana and drinking since age seventeen. She acknowledged stealing alcohol at age eighteen.

At the sentencing hearing, the State recommended a 180-day suspended sentence and one year of supervised probation. The State resisted a deferred judgment on the basis of "the facts and circumstances of the offense." The State set forth that McMullen "appeared intoxicated" when she was arrested, "there was an open container in the vehicle," and marijuana was found "in the vehicle" and "in her purse as well." The State also observed that in July 2009, McMullen had committed theft in the fifth degree and harassment of a public official and she was arrested again for theft in the fifth degree approximately one week later.

Defense counsel argued for a deferred judgment, mainly to accommodate McMullen's plans to attend Iowa State University's pre-veterinary program the following fall. Defense counsel stated McMullen was currently attending Hawkeye Community College, and related that a drug-related conviction might "jeopardize" McMullen's ability to receive financial aid. Defense counsel also requested self probation.

The district court sentenced McMullen to a ninety-day suspended sentence, and placed her on supervised probation for twelve to twenty-four months.[1] As the court observed:

> Ms. McMullen, I believe the sentence is appropriate based upon the nature and circumstances of this offense as well as you as an offender. You do have two prior theft charges on your record. I think there's another aggravating circumstance in this case, that you were driving with an open container as well, which is another law violation, as well as having the marijuana in your possession.
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> So under all those circumstances, I think that this is an appropriate sentence. I did consider granting your request for a deferred judgment, but given the aggravating circumstances of this offense and your prior record, I don't believe that that is appropriate.

McMullen now appeals.

II. Scope and Standard of Review.

Appellate review of the district court's sentencing decision is for an abuse of discretion. *State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999). An abuse of discretion is found when the court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable. *Id.* A court considers all pertinent matters in determining a sentence including the nature of the offense, the attending circumstances, defendant's age, character, propensities, and chances of his reform. *Id.* Iowa Code section 901.5 requires that "after receiving and examining all pertinent information, including the presentence investigation and victim impact statements," the court is to determine which sentence "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."

[1] The court also imposed fines and surcharges, which are not at issue on appeal.

III. Consideration of Relevant Sentencing Factors.

McMullen contends the district court abused its discretion in "failing to consider all relevant criteria and circumstances prior to pronouncing sentence." She argues the court considered only the nature of the offense and her prior record, and not her age, character, or chances for rehabilitation or reform. The State counters that these factors are "self-evident" and were "apparent in court records" considered by the court in reaching its decision. The State further notes the court's decision to "award a suspended sentence itself recognizes McMullen has the ability to reform."

When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). The court demonstrates a proper exercise of discretion by stating upon the record the reasons for the particular sentence imposed. *Id.*; *see* Iowa R. Crim. P. 2.23(3)(*d*). "A statement may be sufficient, even if terse and succinct, so long as the brevity of the court's statement does not prevent review of the exercise of the trial court's sentencing discretion." *State v. Johnson*, 445 N.W.2d 337, 343 (Iowa 1989).

"The nature of the offense alone cannot be determinative of a discretionary sentence." *State v. Dvorsky,* 322 N.W.2d 62, 67 (Iowa 1982). However, the district court enjoys the latitude to place greater importance on one sentencing consideration over others. *State v. Wright*, 340 N.W.2d 590, 593 (Iowa 1983). "The application of these goals and factors to an individual case, of course, will not always lead to the same sentence." *State v. Valin*, 724 N.W.2d 440, 445 (Iowa 2006). In determining whether the district court considered

pertinent matters in imposing a particular sentence, we look to all parts of the record to find supporting reasons. *State v. Jason*, 779 N.W.2d 66, 76 (Iowa Ct. App. 2009).

Based on our review of the entire record, including the transcript of the sentencing hearing, we conclude the sentencing court relied upon, and provided, adequate reasons for the sentence imposed. In reaching its decision, the court was informed and aware of information regarding McMullen's age, education, employment, rehabilitation, future plans, alcohol and drug use, criminal history, as well as the nature and circumstances of the offense. It is clear the "nature of the offense alone," *Dvorsky*, 322 N.W.2d at 67, was not the only factor determinative of the court's discretionary sentence. The sentencing order recites the reasons for the sentence were the nature and circumstances of the offense and the defendant's prior record. At the sentencing hearing, the court stated the sentence was appropriate "based on the nature and circumstances and you as an offender." The court then noted McMullen's two prior theft convictions as well as the open-container violation that occurred at the time of the possession of marijuana. The court viewed these violations as aggravating circumstances. The court also stated it gave consideration to McMullen's request for a deferred judgment, but rejected it due to the nature and circumstances of the offense and her prior record. Under these facts, we conclude the sentence was not based on untenable reasons, and therefore, the court did not abuse its discretion in reaching its decision.

McMullen also contends the court erred in "ordering the Department of Corrections to create a presentence investigation which was not in conformity

with the language of Iowa Code section 901.2," and argues the court should have instead ordered a presentence investigation. We disagree. McMullen was charged with possession of marijuana, first offense, a serious misdemeanor. In the case of serious misdemeanors, informal reports are an alternative to presentence investigations, as a presentence investigation can only be ordered "upon a finding of exceptional circumstances warranting an investigation." *See* Iowa Code § 901.2 ("The court may order a presentence investigation when the offense is a serious misdemeanor only upon a finding of *exceptional circumstances* warranting an investigation." (Emphasis added.)). McMullen does not contend such exceptional circumstances exist in this case. The court did not err in ordering an informal report.

IV. Consideration of Unproven or Uncharged Offenses.

McMullen contends the State committed misconduct at the sentencing hearing that "exposed the district court to an impermissible sentencing factor," and the court "appears" to have relied on the unproven offense in reaching its sentencing determination.[2] Specifically, McMullen alleges in arguing against her request for deferred judgment, "the State implied that the district court should take into account that defendant was driving while intoxicated," despite the fact McMullen was never charged for that offense. The particular colloquy by the State that McMullen refers to provides as follows:

[2] McMullen alternatively argues her trial counsel was ineffective should we find she failed to preserve error on this claim. Indeed, the State argues McMullen failed to preserve error on this issue. We will bypass the State's error preservation concern and proceed to the merits. *State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999); *State v. Sailer*, 587 N.W.2d 756, 762 (Iowa 1998).

> STATE: The basis for the resistance [against a deferred judgment], Your Honor, are a couple of reasons. First and foremost, the facts and circumstances of this offense. It appears as though Ms. McMullen had been pulled over by the Waterloo Police Department. *She appeared intoxicated*. There was an open container in the vehicle and then the marijuana that they found not only in the vehicle but I believe in her purse as well.
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> The officer notes in his report that Ms. McMullen *did appear intoxicated* even though she was behind the wheel.

(Emphasis added.)

Despite the State's remarks, the district court does not mention McMullen's appearance of intoxication as a reason for its sentencing determination. "In order to overcome the presumption the district court properly exercised its discretion," there must be "an affirmative showing" the court relied on improper evidence. *Sailer*, 587 N.W.2d at 762. Under the facts and circumstances of this case, we are unable to discern any reliance by the district court on an unproven or uncharged offense which would overcome the presumption the court properly exercised its discretion. As set forth above, the court considered only permissible factors in reaching its sentencing determination. The court did not mention any improper factors in its explanation of its decision. Without any clear evidence to the contrary, we assume the district court properly exercised its discretion in this case.[3] We affirm the sentence entered by the district court.

AFFIRMED.

[3] We do not find, as McMullen alleges, that she "has been prejudiced by the prosecutor's suggestions regarding impermissible sentencing factors and the district court's reliance on the State's argument." Thus, even under the guise of an ineffective assistance of counsel claim, McMullen's assertion fails.