

IN THE COURT OF APPEALS OF IOWA

No. 1-122 / 10-1188
Filed March 30, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AMY JO ESSARY,
Defendant-Appellant.

Appeal from the Iowa District Court for Jefferson County, Randy S. DeGeest, District Associate Judge.

Defendant appeals from the sentence following her guilty plea and conviction for operating while intoxicated, third offense. **AFFIRMED.**

Jeffrey L. Powell of Tindal Law Office, P.L.C., Washington, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, and Timothy W. Dille, County Attorney, for appellee.

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

DANILSON, J.

Defendant Amy Jo Essary appeals from the sentence following her guilty plea and conviction for operating while intoxicated, third offense, in violation of Iowa Code section 321J.2 (2009). She contends the court erred in relying on an inaccurate presentence investigation report and that trial counsel was ineffective.

I. Background Facts.

Essary pleaded guilty to operating while intoxicated (OWI), third offense. The minutes of testimony reflect that at about 11 a.m. on April 11, 2010, Essary was driving her vehicle in the wrong lane of Highway 34. Her front driver's side tire was missing, and she was driving only on the rim. When stopped, she provided two breath samples, both of which indicated an alcohol level of more than three times the legal limit. At the plea hearing she was informed the maximum sentence that could be imposed was a prison term of five years. The prosecutor and the defendant agreed they would abide by the sentencing recommendation of the Iowa Department of Corrections' presentence investigation (PSI). The court also stated it would follow the recommendation of the PSI.

A PSI was prepared and filed with the court. The PSI provided accurate information about Essary's lengthy criminal history—much of it alcohol-related; her mental health issues; and her history with several treatment programs. An "OWI Program Worksheet" was attached, which indicated the "Placement Decision" was "Prison—Full Term." The comment section stated "the only place that could deal with both her substance abuse issues as well as her mental health issue is in prison." The recommendation contained in the PSI was that

“Defendant be committed to the custody of the Director, Division of Adult Corrections, State of Iowa for a period not to exceed five (5) years.”

At the sentencing hearing, Essary’s counsel pointed out errors in the PSI. The PSI contained an erroneous statement that Essary had failed to report in person to the probation office. The prosecutor acknowledged that Essary had appeared, and the district court stated, “I won’t weigh that at all.”

Defense counsel noted the prosecutor “was willing to allow Ms. Essary to be placed in a halfway house rather than going to prison,” but the department was recommending prison due to the lack of mental health care available at the halfway house. Counsel stated:

I did go check with the CPC office to see if Jefferson County could fund mental health treatment at the halfway house in Ottumwa.

I did not get to speak with . . . Ms. Stever, but I spoke with her assistant, who told me that no counties fund mental health treatment when people are a part of the Department of Corrections.

Essary then informed the court of the intensive out-patient treatment regimen she was following and asked that she not be sentenced to prison.

The prosecutor acknowledged he assumed the recommendation would be “the continuum program and placement in the facility through the OWI continuum program.”¹ The prosecutor stated his understanding after reading the PSI was that “due to the fact that Ms. Essary has been diagnosed with some mental

¹Iowa Code section 904.513 governs the “assignment of OWI violators to treatment facilities.” That statute provides that the department of corrections shall establish in each judicial district a continuum of programming for the supervision and treatment of offenders convicted of violating chapter 321J who are sentenced to the custody of the director. *The continuum shall include a range of sanctioning options that include, but are not limited to, prisons and residential facilities.*

Iowa Code § 904.513(1)(a) (emphasis added). Both counsel appeared to mistakenly believe that “the continuum” did not include prison as a sanctioning option.

health issues, there is a funding issue with that.” The prosecutor agreed with the recommendation in the PSI as required by the plea agreement.

Defense counsel pointed out that at the top of page eleven of the PSI, male pronouns were used in one paragraph,² and at the bottom of the same page the recommendation paragraph stated the “Defendant should be transported directly to IMCC by the Lee County Sheriff,” when the proceedings were in Jefferson County. The district court, too, noted the inaccuracies in the PSI. The prosecutor suggested these were simply typographical errors resulting from the use of forms. Defense counsel acknowledged that Essary’s name was on the bottom of each page of the PSI.

In sentencing Essary to prison, the district associate judge (who was familiar with Essary and had taken her plea) stated:

There’s obviously things going on in your life that need work. And you’re going to have to dig down and do those. To send you to a halfway house, I’m very concerned that that might be one of the worst things I could do to you. . . .

. . . .
 . . . I appreciate all the things that you’ve done. I just can’t see that I can send you to a halfway house and then not have any work done on your—on your bipolar or mental issues, whatever they may be.

So I am going to—considering all those factors, I am going to accept the recommendation of the county attorney and the PSI, send you to Oakdale Classification Center.

And, . . . sentence you per their recommendation, which is a five-year sentence.

² The offending paragraph provides: “The defendant stated he had no disability that would limit him from performing community service work. He stated he would be available and willing to comply if ordered by the Court.” Defense counsel noted that Essary was in fact disabled. The prosecutor asked if the disability would preclude community service work as defendant’s disability was not physical. Defense counsel stated, “I guess it would depend on the—what the community service work was.” Earlier in the PSI it was accurately noted Essary received social security disability and correctly stated her income therefrom on page eleven.

Essary appeals only the sentence imposed. She contends the court erred in relying upon an inaccurate PSI and that trial counsel was ineffective in failing to request a continuance to address the errors in the PSI. Essary also argues counsel was ineffective in failing to assert she was denied equal protection because her sentencing options were dictated by the funding available.

II. Standard of Review.

Review of a sentence imposed in a criminal case is for correction of errors at law. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). “We will not reverse the decision of the district court absent an abuse of discretion or some defect in the sentencing procedure.” *Id.*

We review constitutional claims de novo. *See State v. Lane*, 726 N.W.2d 371, 392 (Iowa 2007).

III. Sentence Imposed.

The sentencing court’s decision to impose a particular sentence within the statutory limits is cloaked with a strong presumption in its favor, and will only be overturned for an abuse of discretion or the consideration of inappropriate matters. *Formaro*, 638 N.W.2d at 724.

Essary pleaded guilty to OWI, third offense. Essary was sentenced to a five-year term of imprisonment, which she concedes is within the statutory limits. *See* Iowa Code § 321J.2(2)(c) (“A class ‘D’ felony for a third offense and each subsequent offense, and shall be committed to the custody of the director of the department of corrections for an indeterminate term not to exceed five years, shall be confined for a mandatory minimum of thirty days, and shall be assessed

a fine . . .”). The sentencing court provided legitimate reasons for following the recommendation of the PSI.

Defendant argues however that “[w]hen as in this case, the resulting sentence almost exclusively depends upon the accuracy of the PSI, it is unacceptable that the sentence may have been imposed based upon erroneous information.” For the following reasons, we disagree.

The primary function of the PSI report is to provide pertinent information to aid the district court in sentencing a defendant. *State v. Grandberry*, 619 N.W.2d 399, 402 (Iowa 2000); *State v. Uthe*, 541 N.W.2d 532, 533 (Iowa 1995). When a PSI report is ordered by a district court, the investigator is required to include the defendant’s characteristics, family and financial circumstances, needs, and potentialities, criminal record, social history, circumstances of the offense, the harm to the victim and community, and mitigating circumstances. Iowa Code § 901.3. In determining a defendant’s sentence, a district court is free to consider portions of a presentence investigation report that are not challenged by the defendant. See *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998) (explaining that district court was free to consider the portions of the presentence investigation report not challenged by defendant); *State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998) (finding that district court properly relied on defendant’s statements in the presentence investigation report that amounted to an admission of other criminal activity because the statements were not challenged by defendant); *State v. Townsend*, 238 N.W.2d 351, 358 (Iowa 1976) (finding the district court acted properly in considering the presentence investigation report

because defendant left the report “unchallenged as to accuracy except in two minor particulars”).

The error in the PSI in respect to the defendant failing to appear was conceded by the State to be erroneous. Further, the court indicated it would give it no weight, and there is nothing in the record to suggest the court gave it any weight.

In respect to page eleven of the PSI, the inaccuracies noted were minor and in all likelihood were transpositional errors. The court was aware of the inaccurate use of pronouns and the misidentification of the wrong sheriff’s office that should be ordered to transport. The only other “issue” with the PSI was the expectation of both the defense counsel and the prosecutor that the PSI writer would recommend a residential placement when in fact prison was recommended.

Essary does not claim the PSI inaccurately states her criminal, mental health, or substance abuse and treatment background. This history includes six prior traffic convictions for open container or alcohol consumption, three convictions for domestic abuse, two convictions for contempt, and one conviction for violation of a no-contact order. Essary has participated in twelve treatment programs. She has several psychiatric diagnoses and takes several medications for anxiety. The comment section of the PSI stated, “the only place that could deal with both her substance abuse issues as well as her mental health issue is in prison.” The sentencing court stated, “I can’t in my good conscience send you to the halfway house and not have your other needs met.” We conclude the

sentencing court did not consider inappropriate matters. We find no abuse of discretion.

IV. Ineffective Assistance Claim.

The right to assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 10 of the Iowa Constitution is the right to “effective” assistance of counsel. To establish a claim of ineffective assistance of counsel, the defendant must prove by a preponderance of the evidence: (1) that trial counsel failed to perform an essential duty, and (2) that prejudice resulted from this failure. The claim fails if the defendant is unable to prove either element of this test.

State v. Fountain, 786 N.W.2d 260, 265-66 (Iowa 2010) (citations omitted).

Essary first argues counsel was ineffective in not requesting a continuance so the PSI could be corrected. Yet, as already discussed, the inaccuracies were noted at the sentencing hearing and did not affect her sentence. This ineffectiveness claim fails for lack of prejudice.

Essary next argues she was denied equal protection because “had [she] been a resident of Wapello County she may have been able to reside in the Ottumwa Halfway House.” She contends trial counsel was ineffective in not raising the issue.

Essary’s assertion is grounded upon the following statement in the “comments” of the OWI Program Worksheet:

Margo Bilanin reported because of the defendant’s mental health problems she would not be able to reside in the Ottumwa Halfway House successfully as there would be no mental health provisions available for her as she is a resident of Jefferson County and Wapello County would not pay for those services. Therefore the only place that could deal with both her substance abuse issues as well as her mental health issues is in prison.

We observe that at the sentencing hearing defense counsel stated she was told “that no counties fund mental health treatment when people are a part of the Department of Corrections.” This negates a claim that Essary was treated differently than others sentenced to the custody of the director. See Iowa Code § 904.513(3) (requiring department of corrections and judicial district departments to cooperate to establish a continuum of programming for the supervision and treatment of OWI offenders);³ Iowa Admin. Code ch. 201-47.

Essary has failed to establish counsel was ineffective in not raising an equal protection claim.

V. Conclusion.

We find no abuse of discretion in the sentence imposed: it was within the statutory limits, and the sentencing court did not consider inappropriate matters. The defendant has failed to establish trial counsel was ineffective in not raising an equal protection claim. We therefore affirm.

AFFIRMED.

³ Funding for that programming is governed by rules adopted by the department of corrections. See Iowa Code § 904.513(3). Iowa Administrative Code rule 201-47.3(3) provides:

The district department shall not enter into a subcontract for custody or treatment of offenders without the written approval of the regional deputy director.

a. Subcontractors shall be paid only for services provided on a reimbursement basis.

b. The district department shall not pay for substance abuse treatment otherwise available and funded from other sources.

c. The district department and any subcontractor shall, whenever possible, offset the cost of providing substance abuse treatment with third-party reimbursements.

d. The district department shall include, in any contract for housing or treatment, provisions to protect the district department and the department of corrections from liability arising from the actions of any subcontractor.