

IN THE COURT OF APPEALS OF IOWA

No. 1-211 / 10-1324
Filed June 15, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSHUA TIMOTHY WILSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Bobbi M. Alpers,
Judge.

Defendant, Joshua Timothy Wilson, appeals his sentences contending the
district court considering improper sentencing factors and imposed an illegal
sentence. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney
General, Mike Wolf, County Attorney, and Ross Barlow, Assistant County
Attorney, for appellee.

Considered by Sackett, C.J., Potterfield, J., and Zimmer, S.J.* Tabor, J.,
takes no part.

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

SACKETT, C.J.

Defendant, Joshua Timothy Wilson, appeals his sentences following his convictions for domestic assault abuse causing bodily injury, in violation of Iowa Code sections 708.1, 708.2A(1), and 708.2A(2)(b) (2009); eluding, in violation of section 321.279(2); and two counts of child endangerment, in violation of section 726.6(1)(a). Wilson asserts the trial court considered improper sentencing factors and imposed an illegal sentence by ordering him to pay his court-appointed attorney fees without setting a proper limit on the amount to be paid. We affirm.

I. BACKGROUND AND PROCEEDINGS. Wilson's convictions arise from two separate events. First, on July 19, 2009, Wilson was driving a vehicle with three passengers—his girlfriend, Tara Bruggenwirth, and two of her children. An officer recognized Wilson and confirmed warrants existed for his arrest. The officer attempted to stop Wilson's vehicle with the use of lights and sirens. Wilson failed to stop leading the officer on a chase through the town of Clinton, exceeding the speed limit by twenty-five miles per hour or more. When Wilson was unable to make a turn, he slid the vehicle into a residential yard, abandoning the vehicle while it was still in motion. The vehicle, with Bruggenwirth and her two children still inside, struck the front door of a house. Based on this incident, the county attorney filed a trial information on April 30, 2010, charging Wilson with driving while license barred, eluding, and two counts of child endangerment.

The second incident occurred on January 30, 2010, when Wilson kicked in the front door of his ex-girlfriend's, Veronica Hill's, apartment. Wilson found Hill

hiding in the apartment and dragged her into the hallway by her neck, causing bodily injury. The trial information filed April 29, 2010, originally charged Wilson with burglary in the second degree, a class C felony. However, on July 16, 2010, an amended trial information was filed charging Wilson with domestic abuse assault causing injury, a serious misdemeanor, instead of burglary.

Wilson pleaded guilty to eluding and two counts of child endangerment arising out of the July 19, 2010, incident. The driving while license barred charge was dismissed. He also pleaded guilty to domestic abuse assault arising out of the January 30, 2010 incident. On August 6, 2010, both cases came on for sentencing. The court sentenced Wilson to terms of incarceration not to exceed two years on the eluding charge and the two child endangerment charges. These sentences were to run consecutively. Wilson was sentenced to a term of incarceration not to exceed 365 days on the domestic abuse assault charge, and this sentence was to run concurrently with the other sentences. Wilson filed a notice of appeal on August 9, 2010.

II. SCOPE OF REVIEW. We review the imposition of a sentence for an abuse of discretion. *State v. Barnes*, 791 N.W.2d 817, 827 (Iowa 2010). We will find an abuse of discretion only when the district court “exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable.” *State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999).

III. CONSIDERATION OF IMPROPER SENTENCING FACTORS. Wilson argues the court considered improper factors during the sentencing. Specifically, he claims the court improperly considered the likelihood of minimal

probation supervision, a lack of probation officers, and the court's perception that he would be unlikely to serve the entire sentence if incarcerated. These complaints arise from the following statement made by the court during sentencing.

I'm -- I'm going to say that I think, unfortunately for Mr. Wilson, these are short-term sentences which typically probably would not be necessarily handled by incarceration, but I think the options that I'm left with today are incarceration and being in the community, probably with minimal probation supervision because of the misdemeanor level of the offenses. We're kind of in a spot right now where we don't have enough probation officers to supervise people in the community, and to send someone to prison for a period of six years or five years, whatever it is, seven years, is a -- a modest sentence, and I -- I don't know. I think if Mr. Wilson complies, I -- I -- it's hard to imagine that he will serve this whole period of time. And I'm not making any comment as to whether that's good or bad. I'm just saying I think that's part of our unfortunate lack of correctional options for people these days, not just Mr. Wilson, but in general.

A court is to weigh and consider all pertinent matters in determining a proper sentence including: the nature of the offense, the attending circumstances, the defendant's age, character, and propensities, and chances of reform. *Laffey*, 600 N.W.2d at 62. In addition, the court is required to consider what 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." Iowa Code § 901.5. "The use of an impermissible sentencing factor is viewed as an abuse of discretion and requires resentencing." *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). We find the court did not consider impermissible factors when sentencing Wilson.

First, the court's consideration of the likelihood of minimal probation supervision and the lack of probation officers is completely permissible, as the court is obligated to consider all sentencing options available including probation under Iowa Code section 901.5. We acknowledge it is impermissible for a court to manipulate a sentence in an effort to circumvent parole practices, *Thomas*, 520 N.W.2d at 313; however, that is not what the court did here.

The fighting issue at sentencing was whether or not the court should suspend Wilson's sentences and place him on unsupervised probation. It was proper for the court to consider whether the minimal supervision probation offers would provide the maximum opportunity for the rehabilitation of the defendant, and provide protection for the community from further offenses. While the wording in the above excerpt is a little confusing, we find the court clarified its reasoning for refusing to order probation later when it said, "After looking at the total picture, I don't believe, Mr. Wilson, that it's safe for the community to allow you to be at large in the community, and I believe that incarceration is really my only option here today."

Next, Wilson claims it was error for the court to consider he would be unlikely to serve the entire incarceration sentence. We find no error in this statement. The court was not attempting to manipulate Wilson's sentence to circumvent the parole board's exclusive authority over the minimum term of a prisoner's incarceration. *State v. Remmers*, 259 N.W.2d 779, 785 (Iowa 1977). The court was simply observing the possible effect parole will have on the time

he will likely serve. See Iowa Code § 901.5(9)(b) (requiring the court to inform the defendant he may be eligible for parole before the sentence is discharged).

We find the trial court did not consider impermissible factors in sentencing Wilson.

IV. ATTORNEY FEES. Wilson also claims the court entered an illegal sentence by ordering him to pay “the amount the State pays to his court-appointed attorney” without setting a limit pursuant to the Iowa Administrative Code. He claims this violates *State v. Dudley*, 766 N.W.2d 606, 622 (Iowa 2009), where the Iowa Supreme Court held acquitted defendants represented by contract attorneys cannot be ordered to pay more than the fee limitations applicable to defendants represented by state public defenders. He asks this court to remand the case so a revised order can be entered limiting the amount he has to pay to a maximum of \$1800 for the C felony charge and \$1200 for the aggravated misdemeanor charges. Iowa Admin. Code r. 493-12.6(1).

We agree with the State that this claim is premature. The district court did not order Wilson to pay an attorney fee in excess of the applicable limits, but ordered Wilson to re-pay the amounts the State will pay to his court-appointed counsel. Wilson’s trial attorney informed the court at sentencing that his fees would certainly be no more than the applicable fee amount. Since no order has been entered requiring Wilson to pay more than the applicable fee limit, this claim is not ripe for review. In the future, should Wilson be required to pay in excess of the applicable limits, he may challenge the order at that time.

AFFIRMED.