IN THE COURT OF APPEALS OF IOWA

No. 1-353 / 10-1199
Filed June 15, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WADDAH IBRAHIM MOGHRAM,
Defendant-Appellant.

Appeal from the Iowa District Court for Muscatine County, James E. Kelley, Judge.

Appeal from the judgment and sentence on two counts of sexual abuse in the third degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha Trout, Assistant Attorney General, Alan Ostergren, County Attorney, and Korie Shippee , Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

SACKETT, C.J.

Waddah Moghram appeals from the judgment and sentence imposed following jury trial guilty verdicts of two counts of sexual abuse in the third degree. He contends the district court abused its discretion in sentencing him to prison instead of a suspended sentence or a deferred judgment. He also contends the court imposed an illegal or procedurally-defective sentence in (1) failing to provide reasons for the sentence imposed, and (2) in imposing a civil penalty of $250 on each count. We affirm.

Background and Proceedings. The defendant met S.T. online and they agreed to meet. On August 12, 2009, they met in a park. Defendant drove S.T. to another area where they had sexual relations several times. The defendant was twenty-three years old at the time and S.T. was fifteen years old. Police discovered the defendant and S.T. in a public restroom. The State charged the defendant with kidnapping in the first degree, two counts of sexual abuse in the second degree, and two counts of sexual abuse in the third degree. At trial, there was conflicting evidence as to S.T.'s online representation of her age. There also was conflicting evidence whether the sexual activity was consensual. The jury found the defendant not guilty of kidnapping or sexual abuse in the second degree, but found him guilty of two counts of sexual abuse in the third degree. *See* Iowa Code § 709.4(2)(c)(4) (2009) (defining a sex act between a person fourteen or fifteen years old and a person four or more years older as sexual abuse in the third degree).

At sentencing, defense counsel raised several objections to items in the presentence investigation and questioned the author of the investigation about his recommendation of incarceration based on "the defendant's perceived attitude that these offenses were the result of mistake rather than intended criminal actions, thereby mitigating culpability." Defense counsel argued against incarceration, noting the defendant's lack of any prior criminal record, his education, his family background, the significant penalty already incurred by serving 303 days in jail and losing his job, the availability of community-based sex offender programs, the court's previous grant of a deferred judgment to another of defense counsel's clients in similar circumstances, and the significant deterrence the court could apply as terms of probation.

The court stated its reasons for the sentence chosen:

> The Court in considering sentencing options starts with the statute that is involved. In this case section 709.4(2)(c)(4) provides that a person who is four or more years older than the person who is fifteen that commits a sex act with that fifteen year old commits the offense of sexual abuse in the third degree. This section indicates the policy of the state of Iowa to protect persons who are fifteen years of age from sexual activity with older persons where the older person may be more and probably is by the state's selection of the terms in the statute, more mature in the older person's judgment and experience than the fifteen year old.
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> In this case, there was no question of the age of [S.T.]. She was fifteen years old on August 12, 2009. There is no question the defendant was more than four years older on that date. The Court can consider the circumstances surrounding the event, which includes not only the testimony of the witnesses but also the exhibits received into evidence including the DVD.
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> In this case those circumstances include the fact that the DVD shows that [S.T.] was obviously not over fifteen years of age at the time, i.e. on August 12, 2009. The testimony of the defendant did not include that she told him personally on August 12, 2009, what her age was. The evidence is clear that the defendant did not know [S.T.] socially prior to August 12, 2009. No

> testimony was provided at trial that the defendant asked [her] what her age was on August 12, 2009.
>
> Testimony was presented that the defendant used internet social networking sites to meet women, one of whom testified as a defense witness that they had sexual relations.
>
> The Court therefore proceeds as follows, the Court finds that the pre-sentence investigation report has been distributed to counsel, it is now ordered as follows, ...

The court sentenced the defendant to two, concurrent terms of incarceration not to exceed ten years, a civil fine of $250 on each count pursuant to section 692A.6(2), and other terms not at issue on appeal.

Scope and Standards of Review.

> We review the district court's sentence for an abuse of discretion. An abuse of discretion is found when the court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable. Our rules of criminal procedure require a sentencing judge to state the reasons for a particular sentence on the record. . . . Although the reasons need not be detailed, at least a cursory explanation must be provided to allow appellate review of the trial court's discretionary action.

State v. Barnes, 791 N.W.2d 817, 827 (Iowa 2010) (citations and internal quotations omitted).

Merits. The defendant contends the court abused its discretion in ordering his incarceration instead of suspending the sentence or granting a deferred judgment. Sexual abuse in the third degree is not a forcible felony, so a deferred judgment or suspended sentence are possible sentencing outcomes. *See* Iowa Code §§ 702.11(2)(c); 907.3. The defendant argues he has no prior criminal history, no alcohol or drug abuse, a college degree, a supportive family, and (until jailed pending trial) stable employment. *See State v. Formaro*, 638 N.W.2d 720, 724-25 (Iowa 2002) (noting a court "must consider the defendant's prior record . . . , employment status, family circumstances, and any other

relevant factors" before deferring judgment or suspending sentence). He contends all the *Formaro* considerations weigh in favor of probation. He also notes that the presentence investigation recommended incarceration, but the judge stated at the sentencing hearing, "I am well-known for not following recommendations of the [presentence investigation] writers." Defense counsel also argued at the hearing that the sentencing judge had granted a deferred judgment to one of counsel's prior clients in similar circumstances.

None of the factors the defendant advances in argument require the court to grant him a deferred judgment or suspended sentence. The record shows the court considered the particular circumstances of this case in determining incarceration was the appropriate sentence. Of particular note to the court was the evidence S.T. "was obviously not over fifteen years of age," the defendant's past practice of using social networking sites to meet women and have sexual relations with them, and the lack of any prior contact or relationship between the defendant and S.T. We conclude the court did not abuse its discretion.

The defendant also contends the court imposed an illegal or procedurally defective sentence (1) in not giving reasons for the sentence imposed and (2) in imposing a $250 civil penalty on each count.

Iowa Rule of Criminal Procedure 2.23(3)(d) provides that a court "shall state on the record its reason for selecting the particular sentence." The reasons given "need not be detailed," though there must be "at least a cursory explanation" so we can review the court's exercise of discretion. *See Barnes*, 791 N.W.2d at 827. As noted above, the court considered and discussed the

circumstances of this case. It considered the statutory provisions, the evidence in the case, and the presentence investigation. The court heard the arguments of counsel. We conclude the court gave adequate reasons for the sentence imposed.

Concerning the civil penalty, the calendar entry states the civil fine was ordered "pursuant to section 692A.6(2)." The defendant contends the statute as amended in 2009 provides only for a $200 civil penalty. *See* Iowa Code § 692A.110(2) (Supp. 2009). Section 692A.110(2) provides for a civil penalty of $200 for offenses committed before July 1, 2009 and $250 for offenses committed on or after July 1, 2009. *Id.* The offense in this case occurred on August 12, 2009. The civil penalty imposed complies with the statute.

Finding no abuse of discretion, failure of the court to give reasons for the sentence, or imposition of a civil penalty in excess of the statutory amount, we affirm the judgment and sentence of the court.

AFFIRMED.