

IN THE COURT OF APPEALS OF IOWA

No. 2-239 / 11-1477
Filed April 25, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AARON BREWINGTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Steven C. Gerard
II, District Associate Judge.

Aaron Brewington appeals from the sentence entered following his plea of
guilty to operating while intoxicated. **AFFIRMED.**

Mark C. Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, Janet M. Lyness, County Attorney, and Rachel Zimmerman, Assistant
County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

Aaron Brewington appeals from the sentence entered following his plea of guilty to operating while intoxicated (first offense), in violation of Iowa Code section 321J.2 (2011). He contends the district court abused its discretion in sentencing him to a 365-day jail sentence with all but ninety days suspended. His argument hinges on his claim the court assumed it had no discretion to impose the sentence he sought: suspending all but the minimum two days on the condition of residing at a community corrections center. Because the record shows the court exercised its discretion in sentencing, we affirm.

I. Background Facts and Proceedings.

Brewington was charged with and pled guilty to operating while intoxicated (OWI). Although he was only twenty-six years old at the time of sentencing, Brewington has a lengthy criminal record extending back to 2001. His record includes multiple convictions for crimes involving illegal substances or intoxication. In 2006, he was convicted of serious injury by vehicle after he was involved in an accident while intoxicated. The accident left one of his passengers blind and injured two others.

Based on Brewington's criminal record and history of crimes involving intoxication and substance abuse, the State requested the court impose the maximum jail sentence of 365 days. The court stated that although it was inclined to agree with the State, it would continue the sentencing hearing to allow for a presentence investigation report to be completed so that it could determine "the entire range of corrections options" before deciding Brewington's sentence.

Specifically, the court was interested in “whether the OWI residential program is available to someone with this kind of sentence.”

The presentence investigation report noted Brewington’s criminal history but also the fact that he was gainfully employed and had just purchased a home. It recommended a 365-day jail sentence with all but ninety days suspended. The report further recommended the decision on the appropriate level of supervision be left to the Department of Correctional Services, “which may include correctional facility placement.” When the sentencing hearing resumed, Brewington’s attorney informed the court that when he had asked the presentence investigator about the possibility of his client being placed in an OWI residential facility, the investigator stated Brewington did not qualify.

The district court accepted the recommendation of the presentence investigation report and sentenced Brewington to 365 days in jail with all but ninety days suspended. It also left the decision as to placement with the Department of Correctional Services. The court recommended that Brewington’s counsel talk with the department and, “[i]f they should determine that residential correctional facility placement is appropriate, then the Court would reconsider the 90-day jail sentence and suspend all but the minimum sentence . . . so that that placement could be achieved.”

II. Scope and Standard of Review.

We review the district court’s sentence for an abuse of discretion. *State v. Barnes*, 791 N.W.2d 817, 827 (Iowa 2010). An abuse of discretion occurs when the court exercises its discretion on grounds clearly untenable or to an extent

clearly unreasonable. *Id.* The sentencing judge is required 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 the appellate courts to review the trial court's discretionary action. *Id.*

III. Analysis.

Brewington contends the district court abused its discretion in sentencing him to a 365-day jail term and suspending all but ninety days of the sentence. He claims the district court mistakenly believed it lacked discretion to suspend all but the minimum sentence on the condition that he reside at a community corrections facility. Failing to exercise discretion in determining what sentence to impose when a sentence is not mandatory is a defective sentencing procedure, which requires vacation of the sentence and a remand for resentencing. *State v. Kramer*, 773 N.W.2d 897, 989 (Iowa Ct. App. 2009).

We conclude the district court exercised its discretion in sentencing Brewington. The court cited his "extensive criminal history, especially in the area of substance abuse." The court also stated its concern that although he had been convicted of serious injury by motor vehicle as a result of injuring friends while driving intoxicated, Brewington still believed it was okay to drive after drinking—a decision the court found "incomprehensible." The court found there were mitigating factors with regard to Brewington's employment and his family circumstances but didn't think that "[overcame] the penalties which must be imposed based up on the offense committed and all the background facts and

circumstances.” It then sentenced Brewington to 365-days in jail, suspending 275 days of the sentence.

Brewington’s argument centers on the court’s statement regarding the Department of Correctional Services decision concerning his supervision. The court said, “If they should determine that residential correctional facility placement is appropriate, then the court would reconsider the 90-day jail sentence and suspend all but the minimum sentence . . . so that that placement could be achieved.” Contrary to Brewington’s contention, the court’s statement shows it knew it had discretion to suspend all but the minimum sentence; what the court was uncertain of is whether the department would determine that a residential correctional facility placement was appropriate for Brewington. The court urged Brewington and his counsel to consult with the department about a residential correctional facility placement and allowed Brewington one month to do so before the mittimus would issue.

The court allowed for reconsideration of the suspended sentence if the department chose a residential correction facility for placement. Brewington argues this option is inadequate because he could not file a motion to reconsider until he began serving his sentence, and unless reconsidered within two days of the date he began serving the sentence, he would remain in custody longer than the statutory minimum. We reject this claim. Iowa Code section 903.2 provides that the court retains jurisdiction to revisit a sentencing decision for up to thirty days from the date a defendant begins serving a sentence of confinement. It does not prohibit filing an application for reconsideration before the sentence is

served. *State v. Wrage*, 279 N.W.2d 4, 5 (Iowa 1979) (“The State suggests there was no way for trial court to order him returned for reconsideration until he was serving. But we find no prohibition against filing the application before the sentence was being served.”).

Because the court properly exercised its discretion in sentencing Brewington, we affirm.

AFFIRMED.