

IN THE COURT OF APPEALS OF IOWA

No. 2-446 / 11-2053
Filed June 27, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DYLAN LEE GRAHAM,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Michael J. Schilling, Judge.

A defendant challenges the portion of his sentence requiring him to submit a physical specimen for DNA profiling. **AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Lisa K. Schaefer, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

VAITHESWARAN, P.J.

An intoxicated Dylan Graham smashed windows in his fiancé's car while his fiancé's infant was strapped into a car seat within the vehicle. The State charged Graham with several crimes arising from this incident, and he eventually pleaded guilty to third-degree criminal mischief and child endangerment. The district court ordered the preparation of a presentence investigation report and scheduled a sentencing hearing.

Following the sentencing hearing, the court imposed prison terms not exceeding two years on each of the charges, along with fines and surcharges. The court suspended the prison terms, the fines, and surcharges and placed Graham on probation, subject to several enumerated terms including completion of a program at a residential correctional facility. Finally, the court ordered Graham to "submit a physical specimen for DNA profiling."

On appeal, Graham only challenges this final sentencing provision. He contends "the district court did not provide any reasons for its decision to order DNA profiling." Our review is for an abuse of discretion. *State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998).

Iowa Code section 901.5(8A) (2011) addresses DNA profiling. Section 901.5(8A)(a) requires DNA profiling when a defendant is convicted of certain offenses identified in section 81.2. Section 901.5(8A)(b) allows the court to order DNA profiling "if appropriate." The provision continues, "In determining the appropriateness of ordering DNA profiling, the court shall consider the deterrent effect of DNA profiling, the likelihood of repeated offenses by the defendant, and the seriousness of the offense." Iowa Code § 901.5(8A)(b). Graham and the

State agree that the crimes involved here do not implicate the mandatory profiling provision. Instead, the court's DNA profiling order stands or falls under the discretionary provision, section 901.5(8A)(b). See *State v. Shearon*, 660 N.W.2d 52, 57 (Iowa 2003).

The district court set forth detailed reasons for suspending the sentence, granting probation, and requiring Graham's completion of a program at a residential correctional facility. Those reasons are as follows:

In fashioning this sentence I've taken into account the recommendations made by the State of Iowa and the Department of Correctional Services and the statements made by your attorney on your behalf, and I've reviewed very carefully the presentence investigation, and the Court—the Court struggles in cases like yours with on the one hand recognizing that young people like you, ages 17, 18, 19, are impulsive, in other words, they don't think through the decisions they make, they just do it, and I recognize that many of your brushes with the law are likely due to your impulsivity, coupled with the use of alcohol. That's a bad combination.

The other side of that is I have to look at the pattern of conduct here, and there's a—there's an alarming pattern, a pattern that indicates to me that it's time—it's time for the court system to send a real clear message to you that it's gotta stop. You know, you did some jail time back in March. The incident we're here for today occurred in May.

This incident is very serious. You lost control of your emotions, probably due in part to alcohol. By your plea of guilty you admitted that you put the welfare of a—the young child, a defenseless child, at risk, and I just can't overlook that, particularly considering the pattern of your behavior.

I didn't consider any offenses in your juvenile record unless they were waived to adult court, but we go back over two years of theft, interference with official acts, OWI, driving with your license revoked, several alcohol-related offenses, driving while barred, trespass, disorderly conduct, and really, as I said, it's time—the time has come now where you have to make a decision in your life whether you're going to obey the rules, be responsible, or whether you're going to continue to violate the law and find yourself coming back to court and jeopardizing your relationship with your girlfriend, jeopardizing your employment and so on.

And I think that—I think that it’s important for the Court to—in trying to balance those two considerations, the impulsivity with making you accountable, is that I put you in a structured environment. It will accomplish a couple things. Number one, it will make sure that you go to work and you have a job. What you need to do is support yourself and your girlfriend, and to the extent that you’re helping support the child, support that child. Number two, it will give you an opportunity to talk to people about your emotions and your inability to control your anger, which has been a problem. Number three, it will—you’ll be in an environment where you will be held accountable for completing any recommendations by the person that evaluated you for substance abuse.

And even though you may have stopped using alcohol for a long period of time but for May 13th, 2011, if you think that you’re out of the woods simply by the fact that you didn’t use, you’re kidding yourself. You’re really kidding yourself, because you’ve—you’ve abused alcohol and used alcohol for a number of years now, and there may be a connection between your anger problem and your use of alcohol. In other words, you may drink because you’re angry about things, I don’t—I don’t know, but you need to get to the bottom of it, so that it doesn’t get you in any further trouble.

The court did not explicitly tie these reasons to the order requiring DNA profiling.

The Iowa Supreme Court has sometimes overlooked the absence of explicit tie-in language. See, e.g., *State v. Hennings*, 791 N.W.2d 828, 839 (Iowa 2010) (concluding district court ordered consecutive sentences as a part of “an overall sentencing plan” (citation omitted)); *State v. Johnson*, 445 N.W.2d 337, 343 (Iowa 1999) (same). But see *State v. Uthe*, 542 N.W.2d 810, 816 (Iowa 1996) (noting court gave reasons for refusal to grant probation but no reasons for why it imposed consecutive sentences). Given the wording of section 901.5(8A)(b), we cannot take that approach here.

Section 901.5(8A)(b) states the court “shall” (not “may”) consider the enumerated factors in deciding whether DNA profiling is appropriate. The court’s stated reasons touched on two of the three factors identified in section 901.5(8A)(b): the likelihood of repeated offenses and the seriousness of the

offense. No mention was made of the third factor: the deterrent effect of DNA profiling. As this was a mandatory factor for consideration in deciding whether to order DNA profiling under section 901.5(8A)(b) and the court did not consider it, we vacate that portion of the sentencing order requiring DNA profiling and remand for resentencing on that portion of the sentence. See *State v. Hutt*, 548 N.W.2d 897, 898–99 (Iowa Ct. App. 1996) (severing invalid portion of sentence from proper portion and remanding for resentencing only on the invalid portion). In light of our remand order, we decline to independently apply the enumerated factors, as Graham requests.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR RESENTENCING.