

IN THE COURT OF APPEALS OF IOWA

No. 2-717 / 11-2081
Filed October 3, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CAMILLA RENEE THOMPSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Hardin County, Paul B. Ahlers,
Judge.

Camilla Renee Thompson appeals from her sentence following her
conviction of operating while intoxicated, first offense. **SENTENCE VACATED;**
REMANDED FOR RESENTENCING.

Robert W. Thompson of Thompson Law Office, Reinbeck, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant
Attorney General, and Randall J. Tilton, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

TABOR, J.

Camilla Renee Thompson entered a plea of guilty to operating while intoxicated (OWI), first offense. Although she was eligible for a deferred judgment, the district court denied her request and sentenced her to the statutory minimum sentence. On appeal, she contends the court abused its discretion by relying on her failure to timely complete a substance abuse evaluation.

Because the State provides no authority for the court to order Thompson to complete a substance abuse evaluation before she was convicted, we find the court erred in citing her “repeated failure to obtain a substance abuse evaluation” as grounds for denying her request for a deferred judgment. Accordingly, we vacate her sentence and remand for resentencing.

I. Background Facts and Proceedings.

On June 3, 2011, a deputy sheriff stopped Thompson for having expired license plate tags. The deputy suspected she was intoxicated and asked her to complete field sobriety tests and submit to a preliminary breath test (PBT). Thompson exhibited several clues of intoxication during the field sobriety tests and the PBT indicated her blood alcohol concentration (BAC) was over the legal limit of .08. She registered a BAC of .089 on the DataMaster test. After making an initial appearance, she was released from custody on her own recognizance. Obtaining a substance abuse evaluation was not ordered as a condition of her release.

On July 6, 2011, the State filed a trial information charging Thompson with first-offense OWI, in violation of Iowa Code sections 321J.2(1)(a), (b), and

321J.2(2)(a) (2011). She filed a written arraignment on July 14, 2011, waiving her right to a speedy trial and pleading not guilty.

The court signed a July 19, 2011 order setting a pretrial conference; the order stated in bold type: "If Defendant has not already done so, Defendant shall obtain a substance abuse evaluation and file the report setting forth the results of the evaluation with the Clerk of Court at or before the hearing time set for the Pretrial Conference." The court set the pretrial conference for September 22, 2011.

At the pretrial conference, the parties advised the court they had reached a plea agreement wherein Thompson would plead guilty to the crime as charged and the State would dismiss a companion simple misdemeanor charge. The State would recommend Thompson serve forty-eight hours in jail and pay the minimum fine, but agreed it would not resist Thompson's request for a deferred judgment. On September 26, 2011, the court entered its order setting the plea hearing for October 18, 2011. The court ordered Thompson to obtain a substance abuse evaluation and file the results with the clerk of court at or before the plea hearing. The order further stated, "Failure to file such a report in a timely manner may be treated as contempt of court and/or be considered by the Court in terms of the sentence to be imposed."

On October 11, 2011, Thompson filed a written guilty plea, which memorialized the terms of the plea agreement. She waived her right to be present at the plea hearing and at sentencing. In an October 18, 2011 order, the

district court accepted Thompson's guilty plea. A sentencing hearing was scheduled for November 1, 2011. The order also stated:

Defendant shall obtain a substance abuse evaluation and file the written results with the Clerk of Court before or at the time of the Sentencing Hearing. Failure to obtain and file a timely substance abuse evaluation may be treated as contempt of court and/or may be considered by the Court as a factor in sentencing on the charge(s) to which Defendant has entered a guilty plea. The court notes that the Defendant has still not submitted a written substance abuse evaluation. Such evaluation was ordered to be filed by the pretrial conference date of September 22, 2011, and was again ordered to file such a report by the time of the plea hearing on today's date. Such past failure to file a timely substance abuse evaluation may be treated as contempt of Court and/or be considered by the Court in terms of the sentence to be imposed. Defendant's future failure to have the substance abuse evaluation on file by the time of the sentencing hearing will be further treated as additional contempt of Court and taken into consideration in terms of the sentence.

On November 1, 2011, Thompson requested her sentencing hearing be continued. The reason listed for the continuance was that she "was unable to complete her substance abuse evaluation."

The district court entered its judgment entry and sentencing order on November 14, 2011. The court denied Thompson's request for a deferred judgment, stating a deferred judgment was not appropriate under the circumstances: "Among other factors, the Court does not believe a deferred judgment is appropriate in light of Defendant's failure to diligently take responsibility for her actions in this case by repeatedly failing to procure a substance abuse evaluation report in a timely manner." The court sentenced Thompson to two days in jail and a \$1250 fine.

On November 22, 2011, Thompson requested the court reconsider its sentence and grant her a deferred judgment. She asserted she had filed only one motion to continue her sentencing hearing due to her inability to obtain a substance abuse evaluation. She alleged she was being disqualified for a deferred judgment because of her “poverty status”—stating she could not afford to pay for the evaluation—and that the court abused its discretion in failing to ask why she had failed to complete the evaluation.

The district court entered its order denying Thompson’s application to reconsider on November 28, 2011. The order states in part:

The Court acknowledges that Defendant’s failure to procure a substance abuse evaluation without any excuse given (prior to seeing the sentencing order) was one of the factors considered. However, contrary to Defendant’s assumption, it was not because Defendant was poor. The Court, in determining whether a deferred judgment is appropriate, takes into account a defendant’s apparent contrition, the seriousness with which a defendant takes the charge, and a defendant’s level of taking responsibility for the defendant’s conduct by, for example, getting a substance abuse evaluation done in a timely manner, doing things without being told (e.g., completing the drinking driver’s school or starting treatment, when recommended, before being ordered to do so), showing up to hearings on time, and otherwise showing that the defendant has learned the defendant’s lesson from the experience.

The court continued to explain that Thompson “did nothing prior to being ordered to do so.” The court continued:

She was repeatedly reminded of her obligation to get an evaluation, repeatedly warned of the fact that her failure to get the evaluation would be taken into account in sentencing, and repeatedly given additional chances to fulfill her obligations. She neither fulfilled her obligations nor requested relief from them. The Court took this lack of responsibility into account in deciding to not grant the deferred judgment and impose the statutory minimum penalty.

The sentencing court also pointed to the fact Thompson was twenty-six years old at the time of the offense, stating: “The Court also took the other circumstances of the case into account, including the fact that Defendant is of an age where she should be expected not to commit such a crime, meaning this is not a case that can be brushed aside as a ‘youthful mistake.’” The court then imposed the statutory minimum penalties.

Thompson appeals the sentence, contending the court abused its discretion in denying her a deferred judgment. She argues the court lacked authority to order her to obtain a substance abuse evaluation until it accepted her guilty plea on October 18, 2011. Thompson alleges the court placed an undue financial burden on her by requiring her to pay the cost of that evaluation within thirty days or be considered in violation of a court order. She also argues the court improperly based its denial of the deferred judgment on her repeated failure to obtain a substance abuse evaluation.

II. Scope and Standard of Review.

We apply two different standards of review for challenges to a sentence. See *State v. Valin*, 724 N.W.2d 440, 443-44 (Iowa 2006). Where a defendant challenges the legality of a sentence, our review is for correction of errors at law. *State v. Shearon*, 660 N.W.2d 52, 57 (Iowa 2003). And where a defendant challenges a sentence that falls within the statutory limits, as is the case here, our review is for an abuse of discretion. *State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998). An abuse of discretion occurs when the court’s sentencing decision

was “exercised on grounds or for reasons that were clearly untenable or unreasonable.” *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008).

In general, an abuse of discretion and the consideration of improper factors stand as separate issues when we review a sentence imposed by the district court. *State v. Grandberry*, 619 N.W.2d 399, 401 n.1 (Iowa 2000). If a court uses an improper consideration when sentencing a defendant, resentencing is required, even if the improper factor is deemed a “secondary consideration.” *Id.* at 401.

III. Analysis.

Thompson was eligible under Iowa Code section 321J.2(3)(b) (2011) to receive a deferred judgment. She contends the district court erred in denying her request for that sentencing option based on its observation that she repeatedly failed to obtain a substance abuse evaluation.

Iowa Code section 321J.2(7)(a) states: “All persons convicted of an offense under subsection 2 shall be ordered, at the person’s expense, to undergo, prior to sentencing, a substance abuse evaluation.” The statute goes on to say the court shall order the convicted person to follow the recommendations proposed in the substance abuse evaluation as provided in section 321J.3.

In this case, the district court ordered Thompson to obtain a substance abuse evaluation first in the record of arraignment and again in the order setting

a plea hearing.¹ Both of these orders preceded Thompson's conviction for OWI. Thompson contends on appeal the court did not have authority to order her to undergo a substance abuse evaluation before her conviction.

It is true Thompson did not object to the court's orders that she undergo a substance abuse evaluation before entering her plea of guilty. But it was not until the court's sentencing order issued on November 15, 2011, that her delay in obtaining an evaluation was used to her detriment. When defendants are "on the threshold of being sentenced," we do not require them to question the district court's rationale for choosing a certain sentencing option or waive the right to assign the error on appeal. See *Cooley*, 587 N.W.2d at 754. The State acknowledges we can consider Thompson's claim on appeal.

We find no statute or case law granting a district court authority to order a defendant charged with, but not yet convicted of, OWI to undergo a substance abuse evaluation. In its briefing, the State addresses the court's authority under section 321J.2(7)(a) to order an evaluation "prior to sentencing" but does not offer a statutory basis for the court's mandate that Thompson obtain an evaluation prior to her conviction.

We recognize a substance abuse evaluation may be ordered as a condition of pretrial release in an OWI prosecution. See *State v. Ludley*, 465 N.W.2d 912, 913 (Iowa Ct. App. 1990). But the orders directing Thompson to obtain a substance abuse evaluation before the pretrial conference and before

¹ It appears to us that the directive to obtain a substance abuse evaluation before conviction is boilerplate language in form orders that do not cite the authority for such a requirement.

the plea hearing were not framed as conditions of her release. She was released on her own recognizance on June 3, 2011.

In denying Thompson's request for a deferred judgment, the district court focused on her failure to complete a substance abuse evaluation for nearly four months after first being ordered to do so following her arraignment. Thompson argues that because the court lacked authority to order her to undergo a substance abuse evaluation, before accepting her plea (which occurred only two weeks before the sentencing hearing was scheduled), it was impermissible for the court to rely on her delay in obtaining an evaluation in declining to grant a deferred judgment. We agree.

The sentencing court erred in faulting Thompson for not undergoing a substance evaluation at a point in time when she could have no valid requirement to do so.² By the time of the sentencing hearing, Thompson had obtained a substance abuse evaluation and the court properly ordered her to follow any recommendations for treatment or counseling made by the evaluator. Because the court based its denial of the deferred judgment, in part, on an impermissible factor, we vacate Thompson's sentence and remand to the district court for resentencing. See *State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999) (noting that sentencing court's consideration of other, permissible factors does not overcome reliance on impermissible consideration).

SENTENCE VACATED; REMANDED FOR RESENTENCING.

² We do not address the question whether Thompson could have been held in contempt of court for not obtaining an evaluation by the deadlines set in the earlier court orders. See generally *Opat v. Ludeking*, 666 N.W.2d 597, 606 (Iowa 2003) (discussing the difference between void and voidable orders).