

IN THE COURT OF APPEALS OF IOWA

No. 2-847 / 12-0417
Filed December 12, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ARIC GAIL DUNN,
Defendant-Appellant.

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

Aric Gail Dunn appeals from the district court sentencing determination.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, Patrick Chambers, County Attorney, and Adria Kester, Assistant County
Attorney, for appellee.

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

TABOR, J.

Police pulled over Aric Gail Dunn for speeding and driving off without paying for gas, and found methamphetamine manufacturing equipment containing ephedrine residue in his car trunk. The State charged Dunn with possession of methamphetamine precursor, a class “D” felony, as well as four misdemeanors. In exchange for pleading guilty to the possession charge, the State dismissed the misdemeanor charges and recommended a deferred judgment. The district court denied Dunn’s request for a deferred judgment and imposed a suspended sentence of not less than five years imprisonment and probation. Dunn challenges the district court’s references to his unemployment and receipt of public assistance as impermissible factors in its sentencing determination.

Because Iowa law allows courts to consider a defendant’s employment status as a factor in determining whether to grant a deferred judgment, we find the court did not abuse its discretion when it contemplated Dunn’s job history. But because the Fourteenth Amendment protects against discrimination due to economic status, we find the trial court relied upon an impermissible factor when it considered that Dunn received food stamps as part of its sentencing rationale. We vacate Dunn’s sentence and remand for resentencing.

I. Background Facts and Proceedings

A little before midnight on October 24, 2011, Dunn filled his gas tank at the Kum and Go in Ellsworth, Iowa, then drove away without paying. A store employee notified the police, and a Hamilton County deputy sheriff responded to

the call. While travelling south on Highway 69, the deputy saw Dunn's vehicle speed by with its high-beam lights on. The deputy followed Dunn and stopped him after he turned onto Highway 20. Dunn did not have a valid driver's license and initially denied taking the gas, before admitting his actions. Dunn was taken into custody and charged with driving under suspension, speeding, failure to dim his headlights, and theft in the fifth degree.

Officers inventoried the contents of Dunn's vehicle before having it towed. In the trunk, the officers found a backpack containing several items used in the manufacturing of methamphetamine and a bottle of white crystalline substance, which field tested positive for ephedrine. Thereafter, Dunn also was charged with possession of methamphetamine precursor, a class "D" felony, in violation of Iowa Code section 124.401(4) (2011).

The State agreed to dismiss the misdemeanor charges against Dunn and recommend a deferred judgment if he pleaded guilty to the felony possession of a precursor. Dunn accepted this plea agreement and subsequently pleaded guilty to the possession charge at a hearing on January 4, 2012. At the sentencing hearing on February 29, 2012, Dunn requested a deferred judgment, but the court denied this request, citing his unemployment, lack of responsibility, history of drug use, and other reasons. The court instead sentenced Dunn to a term of imprisonment not to exceed five years, suspended the sentence, placed Dunn on probation for three years contingent on employment or school attendance and substance abuse treatment and counseling, revoked his driving

privileges for 180 days, and ordered him to pay fines. Dunn appeals, asking us to vacate his sentence and remand for a new sentencing hearing.

II. Standard and Scope of Review

We recognize a strong presumption in favor of a district court sentencing decision if it is within statutory limits. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). We will overturn sentencing determinations only for abuse of judicial discretion or consideration of inappropriate matters. *Id.* Abuse of discretion occurs when we discern that a court used clearly untenable or unreasonable grounds or reasons as part of its sentencing analysis. *State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999). Our “focus is whether an improper sentencing factor crept into the proceedings.” *State v. Thomas*, 520 N.W.2d 311, 314 (Iowa Ct. App. 1994). If a court considers an improper factor, we may not speculate about the influence of that factor in the sentencing determination. *State v. Carrillo*, 597 N.W.2d 497, 501 (Iowa 1999). The fact that a court used other permissible factors does not cleanse contamination from consideration of an improper factor in a sentencing determination. *Laffey*, 600 N.W.2d at 62. If we find a court has considered an improper factor, we must remand for resentencing. *Carrillo*, 597 N.W.2d at 501.

III. Analysis

Dunn contends that in reaching its sentencing determination the district court considered improper factors: his lack of employment and acceptance of government assistance. When choosing a sentence, courts must consider all pertinent matters, including the nature of the offense; the attending

circumstances; defendant's age, character, and propensities; and chances for reform. *Formaro*, 638 N.W.2d at 725. "After receiving and examining all pertinent information," a court should determine which 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. In addition, before deferring judgment or suspending sentence, courts should also consider the defendant's prior record of convictions or deferred judgments, employment circumstances, family situation, mental health, and substance abuse history. Iowa Code § 907.5. Because Iowa law permits courts to weigh a defendant's employment status as a factor in determining whether to grant a deferred judgment, Dunn is not entitled to resentencing based on the court's reference to his unemployment.

But Dunn's claim that the court impermissibly considered the fact that he receives food stamps requires further inquiry. In reply to Dunn's request for a deferred judgment at his sentencing hearing, the court stated:

You're supporting yourself by receiving food stamps, which I don't fault anybody for taking advantage of public assistance, I don't mean it in that way, but I do mean it from the standpoint that I look at this, you've got no meaningful employment history, it appears to me that you're somebody that sits around smoking dope, using methamphetamine, and now you're possessing precursors with the intent to manufacture methamphetamine.

If this was the only mention of Dunn receiving public assistance, it could be viewed as merely an aside to the court's consideration of Dunn's lack of employment and attending circumstances. But the sentencing court returned to the topic of public assistance in its rationale for rejecting the State's

recommendation for a deferred judgment: “You haven’t completed school, you don’t work, you—you’re basically tapping more resources than you’re contributing to our community at this point and for those reasons, I believe that adjudicating you is appropriate and imposing the sentence is appropriate.”

Our court has recognized the rigors of the trial process and “the intensity of the moment may result in comments which greater deliberation would reject.” *Thomas*, 520 N.W.2d at 313. We also are aware “the sentencing process can be especially demanding and requires trial judges to detail, usually extemporaneously, the specific reasons for imposing the sentence.” *Id.*; see Iowa R. Crim. P. 2.23(3)(d). Fulfilling this requirement can, at times, result in “unfortunate phraseology” and misconstrued or unintended remarks. *Thomas*, 520 N.W.2d at 314. As an appellate court, we know the record only documents verbal expression and may lack context for a court’s statements. *See id.*

But in this case, the sentencing court’s reference to Dunn tapping community resources as a reason for rejecting a deferred judgment and its earlier statement about Dunn receiving food stamps are so similar and logically connected that we cannot dismiss them as a happenstance of unfortunate phraseology. Our courts have long held that “[d]istinctions in the administration of criminal justice between rich and poor are generally not likely to bear up under constitutional scrutiny. Such economic discrimination falls squarely within the protection of [the Fourteenth] Amendment.” *State v. Snyder*, 203 N.W.2d 280, 287 (Iowa 1972) (finding violation of Equal Protection Clause in imprisoning a defendant based on his inability to pay fine).

Because the Fourteenth Amendment protects against discrimination due to economic status, a defendant's receipt of public assistance is an impermissible reason to deny a deferred judgment. Acceptance of government assistance does not speak to matters pertinent in sentencing, such as a defendant's character, propensities, or chance of reform or rehabilitation, and does not affect a court's duty to protect the community from further offenses by the defendant or others. The sentencing court articulated several permissible bases for denying Dunn a deferred judgment, but we cannot disentangle the sound from the unsound reasons for the court's decision. See *Laffey*, 600 N.W.2d at 62. We vacate Dunn's sentence and remand for resentencing.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.