

IN THE COURT OF APPEALS OF IOWA

No. 7-323 / 06-1103
Filed June 27, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GARY RAY HENO,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Steven P. Van Marel, District Associate Judge.

Gary Heno appeals from his sentences for two counts of delivery of a controlled substance. **JUDGMENT AFFIRMED, SENTENCES VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Stephen Holmes, County Attorney, and Stephen Owen, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

HUITINK, P.J.**I. Background Facts and Proceedings.**

Gary Heno was charged with two counts of delivery of a controlled substance (marijuana), in violation of Iowa Code section 124.401(1)(d) (2005). A jury convicted Heno on both counts. The district court sentenced Heno to five-year prison sentences on each count and ordered the sentences run consecutively. Heno was ordered to pay fines and restitution, and his driving privileges were revoked for 180 days.

On appeal, Heno argues:

- I. The trial court erred in not providing sufficient reasons for giving the defendant a consecutive sentence.
- II. The sentencing court abused its discretion when it considered unproven offenses in sentencing the defendant.
- III. The trial court abused its discretion by lengthening Heno's sentence to prevent his early release on parole.

II. Standard of Review.

When a failure to exercise sentencing discretion is alleged, our standard of review is for abuse of discretion. *State v. Craig*, 562 N.W.2d 633, 634 (Iowa 1997). An abuse of discretion will be found only when a court acts on grounds clearly untenable or to an extent clearly unreasonable. *Id.* Appellate review of a sentence in a criminal case is for correction of errors at law when consideration of improper factors is alleged. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). The normal rules of error preservation do not apply to void, illegal, or procedurally defective sentences. *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994).

III. Discussion.

Consecutive Sentences. When sentencing a defendant, the district court must exercise the sentencing option that would best accomplish justice for both society and the individual defendant. *State v. Fink*, 320 N.W.2d 632, 634 (Iowa Ct. App. 1982). The district court should weigh all pertinent factors in determining a proper sentence, including the nature and the seriousness of the offense, the attending circumstances, defendant's age, character, and propensities and chance for reform. *State v. Johnson*, 476 N.W.2d 330, 335 (Iowa 1991).

The district court is required to state on the record its reasons for imposing consecutive sentences. *State v. Jacobs*, 607 N.W.2d 679, 690 (Iowa 2000). A statement may be sufficient, even if terse and succinct, so long as the brevity of the court's statement does not prevent review of the exercise of the trial court's sentencing discretion. *State v. Johnson*, 445 N.W.2d 337, 343 (Iowa 1989). Furthermore, the district court is permitted to express its reasons for imposing consecutive sentences as part of the overall sentencing plan. *Id.*

The following is the relevant portion of the sentencing transcript:

THE COURT: Mr. Heno, as I impose your sentences today, there are two things I hope these sentences will accomplish and those two things are your rehabilitation and protection for our community from further offenses from you. Mr. Heno, the evidence here establishes on the one hand that you are maintaining employment, you have a family, and you have their support.

On the other hand, the record shows that in 2002 you were put on probation for this very same offense. Then in 2003 you were convicted of harassment. You got a year suspended jail sentence, and later on after that in 2004 you were convicted or pled guilty to a charge of simple misdemeanor assault. Now you're back in court on two more charges of selling marijuana. It's pretty clear, Mr. Heno, that in 2002 that probationary period was not successful. I

can't believe that probationary period didn't have a requirement that you get a substance abuse evaluation and go to treatment when it was a felony charge of delivery of a controlled substance. Now you're back here again committing the same offense.

Mr. Heno, as I brought up earlier in this hearing, you need to understand that your actions do pose a threat to the safety of the community. You have no idea who grew the marijuana you sold. You don't know where it came from; you don't know how many hands it passed through to get to you. As a person willing to buy a controlled substance, you bear some responsibility for other people selling controlled substances. They are filling the demand that you create; and then to make it worse, you sold it again. Then you have absolutely no idea what happens to that marijuana. As you mentioned, it could easily end up in the very school where your children are.

Mr. Heno, this isn't just a possession charge. This is a situation where you sold twice to people working for law enforcement or undercover law enforcement agents after having done the same thing just a few years ago. Mr. Heno, even given the support that you have here with your family, I don't understand how continued probation is going to do anything to rehabilitate you or to protect our community from further offenses from you when, by your own actions, you have demonstrated that probation simply didn't work. You were more interested in taking care of your own needs than you were in protecting your family and the community.

Even though you have your family support here, Mr. Heno, I am going to send you to prison because I think that is the only appropriate sentence. I don't think that continued probation or another probationary period is appropriate. I don't think that a residential facility is appropriate. I think that you need to go to prison. Realistically, Mr. Heno, given credit for good time and honor time and credit for time served, you are not going to spend anywhere close to the maximum prison terms in prison, but I think prison here is appropriate because finally, Mr. Heno, you will understand what the consequences are of selling controlled substances and those consequences are you go to prison.

While in prison, you can and will receive substance abuse treatment. While in prison our community will be protected from your actions. I think by the time you complete this prison term you will have a full and complete understanding about how dangerous and how serious your actions are and how important it is that you do a better job making decisions in your life.

It is the order of this court that you are adjudged guilty of two counts of delivery of a controlled substance, marijuana, in violation of Section 124.401(1)(d)(2) of the Iowa Code. On each of these charges you are committed to the custody of the Director of the

Iowa Department of Corrections for an indeterminate term not to exceed five years with credit for time served. . . .

You are ordered on each charge to pay a \$750 fine, 32 percent surcharge, \$10 DARE surcharge, and a \$125 law enforcement initiative surcharge. Your driving privileges on each charged are revoked for a period of 180 days. You shall pay restitution in the total amount of \$135. It is the further order of this court that these sentences shall be served consecutively. You shall immediately report to the Story County Sheriff's Office to begin service of these sentences.

Although the trial court expressed its reasons for incarcerating rather than placing Heno on probation, the court failed to state its reasons for imposing consecutive sentences. *See State v. Jacobs*, 607 N.W.2d at 670. Moreover, the trial court's stated reasons for the sentences imposed fail to explain how the imposition of consecutive sentences would facilitate the court's overall sentencing objectives. Heno correctly notes that more is required to enable the court to perform its duty. *State v. Uthe*, 542 N.W.2d 810, 816 (Iowa 1996).

Heno's convictions are accordingly affirmed, the sentences imposed are vacated, and the case is remanded for resentencing. Because the foregoing is dispositive, we need not consider the remaining issues raised on appeal.

JUDGMENT AFFIRMED, SENTENCES VACATED AND REMANDED FOR RESENTENCING.