

**IN THE COURT OF APPEALS OF IOWA**

No. 8-848 / 08-0854  
Filed November 13, 2008

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**NORMAN WATERS JR.,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, Gary D. McKenrick and Mark J. Smith, Judges.

Norman Waters Jr. appeals from his conviction, judgment, and sentence following pleas of guilty for a drug tax stamp violation and driving under suspension. **CONVICTIONS AFFIRMED; SENTENCE AFFIRMED IN PART AND VACATED IN PART AND REMANDED FOR RESENTENCING.**

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

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly G. Cunningham, Assistant County Attorney, for appellee.

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

**DOYLE, J.**

Norman Waters Jr. appeals from his conviction, judgment, and sentence following pleas of guilty for a drug tax stamp violation and driving under suspension. He claims the district court abused its discretion in considering only one factor in its sentencing decision and the sentence imposed for driving while suspended was illegal and void. Upon our review, we affirm his convictions, affirm in part and vacate in part his sentence, and remand for resentencing.

***I. Background Facts and Proceedings.***

According to the Minutes of Testimony, on September 22, 2007, Davenport police officers stopped a vehicle registered to Shebra Waters, who had an outstanding arrest warrant. The officers were unsure whether the driver was male or female. They noticed the driver had a ponytail, consistent with that of a female. After pulling the car over, they discovered Defendant Norman Waters was driving and that he also had an active warrant for his arrest. He was arrested and then processed at the Scott County Jail. When Waters was searched at the jail, a bag of marijuana, weighing 87.9 grams, was found stuffed in his groin area inside his underwear. It is no surprise that a drug tax stamp was not affixed to the bag.

On October 10, 2007, Waters was charged by trial information with possession with intent to deliver marijuana (Count I), a drug tax stamp violation (Count II), and driving under suspension (Count III). Pursuant to a written plea agreement, Waters plead guilty to a class "D" felony drug tax stamp violation and a serious misdemeanor charge of driving under suspension. The charge for felony possession with intent to deliver marijuana was dismissed, and the State

did not seek to enhance Waters's sentence on his third felony drug conviction. Waters plead guilty in open court on March 26, 2008. He filed no motion in arrest of judgment. On May 8, 2008, Waters was sentenced to an indeterminate term of incarceration not to exceed five years on the drug tax stamp charge, and to an indeterminate term of incarceration not to exceed one year on the driving under suspension charge. The court ordered the sentences to run concurrently.

Waters appeals. He argues the court based its sentencing decision on only one factor, Waters's criminal history. He also argues the indeterminate sentence imposed for the driving under suspension charge was illegal and void.

## ***II. Scope and Standards of Review.***

We review sentencing challenges for errors at law. Iowa R. App. P. 6.4; *State v. Liddell*, 672 N.W.2d 805, 815 (Iowa 2003). A sentence will not be reversed unless there has been an abuse of discretion or a defect in the sentencing procedure. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). "An abuse of discretion is found when the court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable." *State v. Evans*, 672 N.W.2d 328, 331 (Iowa 2003). Sentencing decisions of the district court are cloaked with a strong presumption in their favor. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). Challenges to the legality of a sentence are reviewed for errors at law. *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001).

## ***III. Merits.***

### ***A. Sentencing Factors.***

When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose. *Thomas*, 547 N.W.2d at 225.

The sentencing court may not base its decision on one factor. *State v. DeWitt*, 426 N.W.2d 678, 680 (Iowa Ct. App. 1988). Iowa Rule of Criminal Procedure 2.23(3)(d) requires a sentencing court to demonstrate its exercise of discretion by stating “on the record its reason for selecting the particular sentence.” Failure to state on the record the reasons for the sentence imposed requires the sentence be vacated and the case remanded for amplification of the record and resentencing. *State v. Marti*, 290 N.W.2d 570, 589 (Iowa 1980); *State v. Freeman*, 404 N.W.2d 188, 191 (Iowa Ct. App. 1987). While the reasons need not be detailed, the court must provide enough explanation to allow appellate review of the district court’s discretion. *State v. Jacobs*, 607 N.W.2d 679, 690 (Iowa 2000). The sentencing court, however, is generally not required to give its reasons for rejecting particular sentencing options. *Thomas*, 547 N.W.2d at 225. In considering sentencing options, the court is to determine, in its discretion, which of the authorized sentences will provide both the 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 (2007); see also *State v. Hildebrand*, 280 N.W.2d 393, 395 (Iowa 1979).

At the sentencing hearing, Waters requested probation based on his favorable family relationships, work history, and treatment for substance abuse. The State requested the maximum terms of incarceration on each count, making reference to Waters’s criminal history. Waters contends the district court impermissibly based its denial of probation on only one essential factor—Waters’s criminal history.

Indeed, the sentencing court took into consideration Waters's sixteen convictions since 2000. However, a thorough review of the court's sentencing comments reveals the court also took note of Waters's drug treatment and claimed recovery from drug use, the need to protect the community, circumstances surrounding Waters's arrest, and Waters's propensities and chances of reform. There is no basis for Waters's assertion the court only considered one factor in sentencing him. Accordingly the court did not abuse its discretion.

***B. Void Sentence.***

The district court sentenced Waters to an indeterminate term of incarceration not to exceed one year for the driving under suspension conviction, a serious misdemeanor. Iowa Code § 321J.21. Waters argues, and the State agrees, that the district court imposed an illegal sentence because Iowa's indeterminate sentencing statute does not apply to serious misdemeanors. *State v. Englebrecht*, 316 N.W.2d 415, 417 (Iowa Ct. App. 1981). We agree. Accordingly, this matter should be remanded for the limited purpose of resentencing on the driving under suspension conviction to establish a fixed period of confinement under Iowa Code section 903.1.

***IV. Conclusion.***

Based upon the foregoing, we affirm Waters's sentence for the drug tax stamp violation, vacate the driving under suspension sentence as void, and remand for resentencing on the driving under suspension conviction.

**CONVICTIONS AFFIRMED; SENTENCE AFFIRMED IN PART AND VACATED IN PART AND REMANDED FOR RESENTENCING.**