

IN THE COURT OF APPEALS OF IOWA

No. 9-975 / 09-0630
Filed January 22, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRUCE KELLY LACHMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Lawrence E. Jahn,
District Associate Judge.

Defendant appeals his sentence and the restitution order entered following his guilty plea to operating while intoxicated. **SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.**

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

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Stephen Holmes, County Attorney, and Brendan Greiner, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., Potterfield, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MAHAN, S.J.**I. Background Facts & Proceedings**

Bruce Lachman was charged with operating while intoxicated, first offense, in violation of Iowa Code section 321J.2(1) (2007), a serious misdemeanor. As part of a plea agreement, he entered a written guilty plea. Also as part of the plea agreement, the State agreed to stand silent at sentencing. Lachman filed a written request for a deferred judgment.

At the sentencing hearing, the State offered a copy of the defendant's criminal history. Defense counsel objected on the grounds the criminal history had not been authenticated under section 622.53. The court determined the criminal history was admissible. The court denied Lachman's request for a deferred judgment, and sentenced him to two days in the county jail. He was also required to pay a fine and complete a course for drinking drivers.

Judgment for \$1231.88 was entered against Lachman for legal assistance pursuant to section 815.9(3). Lachman appeals the sentence and restitution order entered following his guilty plea.

II. Sentence

Lachman contends the district court abused its discretion in entering the sentence in this case because the court did not actually exercise its discretion in sentencing him. He claims the court did not grant him a deferred judgment because he did not fit the court's fixed policy of who was eligible to receive a deferred judgment—those who were young, could lose a job or benefit, and had

a clean criminal record. He asserts the court had a predetermined fixed policy it employed in giving deferred judgments.

We review a sentencing decision for an abuse of discretion. *State v. Evans*, 672 N.W.2d 328, 331 (Iowa 2003). An abuse of discretion will be found if the court acts on grounds clearly untenable or to an extent clearly unreasonable. *State v. Leckington*, 713 N.W.2d 208, 216 (Iowa 2006). In applying its discretion the court should weigh and consider all pertinent matters in determining a proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character, and propensity and chances for reform. *State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999).

A sentencing court must actually apply its discretion. *State v. Jackson*, 204 N.W.2d 915, 917 (Iowa 1973). The court must exercise its discretion without application of a personal, inflexible policy relating only to one consideration. *State v. Hildebrand*, 280 N.W.2d 393, 397 (Iowa 1979); *State v. Kelley*, 357 N.W.2d 638, 640 (Iowa Ct. App. 1984). The sentencing court should engage in an independent consideration in each case, and reject the use of fixed policies. *State v. Hager*, 630 N.W.2d 828, 834 (Iowa 2001).

The sentencing court stated it considered that Lachman had a relatively low blood alcohol concentration, and he had been visiting old friends. The court stated it also considered "your age, your employment, what your family circumstances are, and your prior criminal record." The court stated it considered the need "to protect people in the community from those that drink and drive because that is a dangerous thing."

After discussing the specifics of Lachman's sentence, the court went on to give further explanation as to why it was denying his request to defer judgment, stating:

Mr. Lachman, if you want more explanation as to why I'm doing this, I don't think deferral of judgment – *I will do that for people who maybe are young and have made a mistake or who might lose permanently some job or some benefits if they have judgment entered against them and who have otherwise clean records.* Some of those things that I've just mentioned indicate to me that deferral of judgment would not be appropriate in your case, just so I explain to you why I haven't done that. I think it's a close question, but in light of all of the other people for whom I've given deferred judgment, I try to treat you the same as them.

(Emphasis added.)

While the court's statements tend to show a fixed policy to deny a deferred judgment to those who were not young, those who would not lose a job or benefits, and who did not have a criminal record, we doubt that is the actual policy of the court. Unfortunately, however, the court's words certainly give the appearance of such a policy. We conclude the better course in this case is to vacate the sentence and remand for resentencing.

III. Ineffective Assistance

Lachman asserts he received ineffective assistance because his defense counsel did not object to the State's breach of the plea agreement. He claims that because the plea agreement provided, "the State will stand silent at sentencing," defense counsel should have objected to the State's introduction of his criminal history. Because of our decision we find it unnecessary to address this issue. The parties' intentions concerning the plea agreement may be

addressed on remand at a resentencing hearing, if this issue also arises on resentencing.

IV. Legal Assistance Fees

Lachman claims the court erred by requiring him to reimburse the State \$1231.88 for legal assistance fees. Operating while intoxicated, first offense, is a serious misdemeanor. Iowa Code § 321J.2(1)(a). Lachman received assistance from a court-appointed attorney. The compensation rate for court-appointed attorneys is governed by rules adopted by the State Public Defender. *State Public Defender v. Iowa Dist. Ct.*, 745 N.W.2d 738, 740-41 (Iowa 2008). The State Public Defender establishes the fee limitations for particular categories of cases. Iowa Code § 13B.4(4)(a); *State v. Dudley*, 766 N.W.2d 606, 621 (Iowa 2009). A defendant's restitution for a public defender "shall not exceed the fee limitations established in section 13B.4." Iowa Code § 815.14.

Lachman asserts he was improperly required to pay more than the amount established by the State Public Defender for a serious misdemeanor, which is \$600. See Iowa Admin. Code r. 493-12.6(1). The State agrees that the amount of restitution ordered for legal assistance should have been \$600, and not \$1231.88. We therefore vacate the restitution order and remand for entry of a new restitution order at the time of sentencing.

We vacate the sentencing order previously entered and remand this case for resentencing.

SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.