IN THE COURT OF APPEALS OF IOWA

No. 6-353 / 95-2007

STATE OF IOWA,

Appellee,

vs.

LARRY DONELL JONES,

Appellant.

FILED
JUL 26 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Robert C. Clem, Judge.

Larry Donnell Jones challenges the sentence imposed upon his guilty plea to aggravated assault. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Jill Pitsenbarger, Assistant County Attorney, for appellee.

Considered by Cady, P.J., and Streit and Vogel, JJ.

STREIT, J.

The defendant, Larry D. Jones, appeals his sentence, following a guilty plea, on a conviction of aggravated assault in violation of Iowa Code sections 708.1 and 708.2(1) (1993). Jones claims the district court erred by considering more serious unprosecuted and unproven charges in his sentencing. We affirm.

Jones was originally charged with going armed with intent in violation of Iowa Code section 708.8 (1993) and assault while committing a felony in violation of Iowa Code sections 708.1 and 708.3 (1993). Jones later pled guilty to the crime of aggravated assault. He was sentenced to a term not to exceed two years. The district court stated the reasons for the sentence included the protection of the community, rehabilitation of the defendant, and the nature of the offense. After explaining the reduction of time to be served because of good conduct time, work credits, and parole, the court stated:

> Mr. Jones, this is a very serious incident. It's been reduced down to a misdemeanor so you will not have a felony conviction as a result of this incident, which is a substantial break. The amount of time you actually serve is going to be up to you, and also there might be some services available. I know there will be some services available to you through the system which I would urge you to take advantage of.

Jones claims the district court improperly relied on the original charges in its sentencing.

Our standard of review is for abuse of discretion.

"The district court enjoys a strong presumption in its favor which will not be overcome absent an affirmative showing of abuse by the defendant." *State v. Sumpter*, 438 N.W.2d 6, 10 (Iowa 1989).

Jones cites *State v. McKeever*, 276 N.W.2d 385 (Iowa 1979), and *State v. Thompson*, 275 N.W.2d 370 (Iowa 1979), in support of his position. They are, however, clearly distinguishable. In *McKeever*, it was held improper for the sentencing court to state, "When this defendant was allowed to plead guilty . . . , the clemency that could be extended at this level was exhausted." *McKeever*, 276 N.W.2d at 387, 389. In *Thompson*, the sentencing court stated explicitly that it was considering the initial charge in its sentencing for the charge eventually pled to. *Thompson*, 275 N.W.2d at 371. Consideration of the initial charge without proof of that charge was found to be impermissible. *Id.* at 372.

The instant case differs from both *McKeever* and *Thompson* in that here the sentencing court gave no indication its sentencing decision was influenced by the higher original charge. The court was merely informing Jones of his good fortune and not that the court was refusing to exercise its discretion in sentencing. The court's comment about the serious nature of the "incident" pled to gives no reason to believe that the sentence actually imposed reflects consideration of the original charges. The comment was made in the context of the time the defendant may actually spend in prison and that the time served could have been worse under the original charges.

We find Jones has failed to provide sufficient evidence that the sentencing court considered the more serious unprosecuted charges in its sentence. We affirm defendant's sentence, following a guilty plea, of a term not to exceed two years.

AFFIRMED.