

IN THE COURT OF APPEALS OF IOWA

FILED

SEP 25 1984

CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

JOHN RICHARD SHAWHAN, JR.,)

Defendant-Appellant.)

Filed September 25, 1984 198

4-259
83-1344

Appeal from the Iowa District Court for Polk County—Gene L. Needles,
Judge.

Defendant appeals from the sentences imposed on his conviction of three
counts of false use of a financial instrument. AFFIRMED.

Charles Harrington, Appellate Defender, and Raymond E. Rogers, Assistant
Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General and Steven K. Hansen, Assistant
Attorney General, for plaintiff-appellee.

Considered en banc.

Defendant, John Richard Shawhan, Jr., appeals from judgment entered on his guilty pleas to three counts of False Use of a Financial Instrument (FUPI), in violation of Iowa Code section 715.6. He asserts the trial court abused its discretion in considering the "police department comments" section of the presentence investigation report on the ground that those comments involved unproven charges based only on hearsay and gossip. We affirm.

The defendant was originally charged by the State with a total of twenty-one (21) counts of FUPI, one (1) count of Delivery of a Controlled Substance, and a Habitual Offender allegation. Plea bargaining was entered into between the prosecution and the defendant. Due to defendant's guilty plea to the three counts of FUPI, the other pending charges were dismissed.

At the sentencing proceeding, the defendant objected to the trial court's consideration of the recommendations of the police department. The police report, which encompassed one-third of a page in a 100 plus page report, read as follows:

The defendant has been the main person behind thousands of dollars worth of checks passed in the Des Moines area. This has been going on since his discharge from prison. From checks that we have been receiving at this time, 7-19-83, he is still involved and will be until he is locked up. His network is so large that it is very possible that others will continue in his absence with his tutoring. His involvement would account for 75% of the bad checks passed. Also involved in cocaine traffic. He also could be credited for getting many others involved and arrested for False Use of a Financial Instrument, with the defendant taking the major portion of the checks passed.

The investigating officer got along with the defendant, but his code of ethics would not allow him to cooperate in any way.

Numerous charges of False Use of A Financial Instrument have been charged in connection with this particular case. The defendant is also suspected of arranging B&E's, larcenys, credit card frauds, fencing merchandise and drugs. He should be charged as an habitual criminal!

We DO NOT recommend probation for this individual.

The objection was grounded in a purported violation of defendant's due process rights, since "those matters were bare allegations, hearsay, gossip, unproven and would severely impair [the defendant's] right to be fairly sentenced." In response, the trial judge stated in part: "I did read [the police recommendation] as part of the presentence report. I read it as I read the rest of [the presentence report]."

The district court denied the defendant's request that he be placed on probation, or that any sentences of imprisonment be served concurrently. Defendant was then sentenced to imprisonment for a period not to exceed five (5) years on each of the three counts. Shawhan appeals from this sentencing determination.

We interfere in discretionary sentencing only if there has been an abuse of discretion. State v. Zaruba, 306 N.W.2d 772, 774 (Iowa 1981). An abuse of discretion will be found when it is shown that discretion was exercised on grounds or for reasons clearly untenable, or to an extent clearly unreasonable. State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979); State v. Stanley, 344 N.W.2d 564, 567 (Iowa Ct. App. 1983). The supreme court has specifically recognized that it is an abuse of discretion for the sentencing court to rely on other unproven crimes or charges. State v. Black, 324 N.W.2d 313, 315 (Iowa 1982). The whole import of Black is the relying or reliance factor and not a consideration factor as the dissent suggests.

Defendant claims the trial court abused its discretion in relying on the unproven crimes or charges in the police report. However, we find no basis for this contention in the record. After imposing the sentence, the trial judge explained, "... I have considered the matters in the presentence report, including your past criminal record. I have also considered that to do anything less would depreciate from the seriousness of these crimes." Essentially, there is no indication that the trial judge relied on the police recommendation at all.

Pursuant to the standard set forth in Black, we will set aside a sentence and remand it for resentencing only if the sentencing court relied upon charges of an unprosecuted offense. This court is not willing to presume reliance in this case merely based on a reference to the defendant's past criminal record. Aside from the police recommendation, the presentence report contains documents which detail the defendant's past criminal record of prosecuted offenses. Certainly, it would be permissible for the trial court to consider this factor. Furthermore, a review of the extensive presentence report reveals medical and psychological evaluations, comments on the defendant's social adjustment and family background, as well as information on his extensive criminal history. Any number of these items would more than adequately support the sentencing determination made by the lower court. We are not willing to vacate the sentence on the basis of a simple one-third page addendum to a very extensive presentence report encompassing over 100 pages of detailed information, some of which would be relied on by the judge and much that should not.

The only specific reference to the police recommendation was the judge's indication that he had read it as part of the presentence report. The fact that the trial judge thoroughly reviewed the report is not a sufficient reason to vacate, absent any indication of reliance on an impermissible factor.

AFFIRMED.

All judges concur except Sackett and Schlegel, JJ., who dissent.

SACKETT, J. (dissenting)

I cannot agree with the analysis employed by the majority in reaching their decision to affirm the sentences handed down by the trial court in this case. They correctly cite the case of State v. Black, 324 N.W.2d 313 (Iowa 1984) as outlining the correct standard to use in deciding whether to set aside the sentence given to a convicted defendant or remand the case for resentencing. However, the majority opinion has ignored the express language of Black in order to arrive at their decision to affirm the trial court. The relevant wording used in Black is as follows: ". . . where portions of the minutes are not necessary to establish a factual basis for the guilty plea, they are denied by the defendant, and they are otherwise unproved, we find no basis to allow the sentencing court to consider and rely on these portions." Black at 216. (emphasis added).

The trial judge in his very own words stated, ". . . I have considered the matters in the presentence report . . ." In the present case the defendant has admitted only those three (3) counts by way of his voluntary guilty plea, for which judgment has been passed, and has admitted no others. Further, there is no factual evidence in the record to show that the defendant committed any other crimes. No facts before the court validated the accusations contained in the police department comments of the presentence report. The defendant did not admit to these accusations, or plead guilty to any of the twenty (20) charges ultimately dismissed by the State. Nor did the trial court make any finding whether facts existed to substantiate the accusations or charges.

The presentence report contained numerous references to unproven charges, and claims by the police that were denied by the defendant. It is improper for a sentencing court to consider unproven charges. It is, likewise improper for a sentencing court to rely on these matters.

Because the trial judge considered impermissible information in the presentence report in arriving at the sentence given the defendant in this case, I

would set aside the sentence. We cannot speculate about the weight the trial court mentally assigned to the comments in the presentence report, or whether they tipped the scale toward the particular consecutive prison sentences given to the defendant. See State v Messer, 306 N.W 2d 731, 733 (Iowa 1981). This case should be remanded for resentencing so that it may be clear the trial judge only considered and relied on "proven" present and past criminal charges. It is imperative that we not infringe on a defendant's constitutional right to be sentenced on the basis of what is, rather than what may be, or what might have been.

Schlegel, J., joins this dissent.