FILED
OCT 23 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

DAVID EUGENE STURGEON,)

Defendant-Appellant.)

Filed October 23, 1984

428

4-377
84-216

Appeal from the Iowa District Court for Linn County—Lynn E. Brady, District Associate Judge.

Defendant appeals from judgment and sentence entered following his plea of guilty to operating a motor vehicle while intoxicated—second offense. SENTENCE VACATED. REMANDED FOR RESENTENCING.

Charles Harrington, Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

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

Considered by Oxberger, C.J., and Snell and Sackett, JJ.

On September 9, 1983, defendant was charged, by trial information, with the crime of operating a motor vehicle while intoxicated—second offense, in violation of Iowa Code 321.281 (1983). Defendant pled guilty to the charge on November 4, 1983.

In sentencing the defendant the trial court said:

> . . . , for the following reasons: he's age 27, single, has a son to support, has two old convictions which have now passed the six year time limit, however, this is his third charge and he does understand the consequences of that charge . . . further, under Iowa Code section 321.281(9)(a),[1] since this is the defendant's third plea of guilty or conviction for a violation of this section, the defendant's license or permits shall be revoked by the Department of Transportation and the defendant shall remain ineligible for a new license or permit for a period of six years.

The defendant contends and the State agrees that the record is void of any evidence of a third conviction. Both parties ask that the cause be remanded for resentencing.

A sentencing judge may not consider additional and unprosecuted charges in imposing a sentence unless the defendant admits the charge or the facts before the court show he committed it. See State v. Black, 324 N.W.2d 313, 315-316 (Iowa 1982); see also State v. Chesser, 306 N.W.2d 731, 732-733 (Iowa 1981).

The trial court improperly considered an unproven conviction in sentencing the defendant. We vacate the sentence and remand.

Defendant contends that the trial court erred in interpreting Iowa Code Section 321.281(9)(a)(1983), to require a sentencing court to consider a defendant's total lifetime convictions for a violation of the section. The state requests that

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[1]Section 321.281(9)(a) provides in part: Upon a plea or verdict of guilty of a third or subsequent violation of this section, the court in which the plea was entered or the verdict was returned shall order that the defendant's license or permit to operate motor vehicles be revoked by the department and that the defendant shall remain ineligible for a new license or permit for a period of six years.

we affirm the trial court's construction of the section as a guide upon resentencing. We have found no evidence of a third conviction and have vacated the sentence. The issue of interpretation of the section is therefore not before us.

SENTENCE VACATED. REMANDED FOR RESENTENCING.