IN THE COURT OF APPEALS OF IOWA

No. 1-352 / 90-1624

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

603

vs.

ARCHIE KOONTZ TRENT, JR.,

Appellant.

Appeal from the Iowa District Court for Lee County, John C. Miller, Judge.

Trent appeals the sentence imposed following his guilty plea to possession with intent to deliver marijuana. **REVERSED AND REMANDED FOR RESENTENCING.**

Barry M. Anderson of The Law Offices of Anderson & Krehbiel, Keokuk, for appellant.

Bonnie J. Campbell, Attorney General, Martha Boesen and Mark Joel Zbieroski, Assistant Attorneys General, and Michael P. Short, County Attorney, for appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

Archie Trent was charged with possession with intent to deliver a schedule II controlled substance and possession with intent to deliver marijuana. After plea negotiations, Trent pled guilty to possession with intent to deliver marijuana.

In making its sentencing decision, the trial court relied on evidence of Trent's involvement in controlled substances transactions over a period of time. This evidence included money transfers flowing through defendant's hands of approximately $100,000 during the previous year, large amounts of controlled substances found at Trent's residence, and Trent's association with another person who apparently has a history of drug-related activity. Based on this evidence, the court determined a sentence involving incarceration rather than a suspended sentence was appropriate and sentenced Trent to a term of five years. Trent appeals, claiming the trial court abused its discretion by relying on unproven crimes in imposing sentence and such reliance violated his right to due process.

That a sentencing judge was aware of an uncharged offense is not sufficient to overcome the presumption his discretion was properly exercised. State v. Pappas, 337 N.W.2d 490, 494 (Iowa 1983). In order to overcome this presumption, defendant must affirmatively show the trial judge relied on the uncharged offense in imposing

sentence. State v. Hansen, 344 N.W.2d 725, 730 (Iowa App. 1983).

In the present case, the court stated its reasons for sentencing as follows:

> What we have here is a record showing the transfers of [approximately] $100,000 over just a little bit more than a year on the basis of claimed annual income of [approximately] $8,500 . . . . When that evidence is tied together with the evidence concerning fairly large amounts of controlled substances at the Defendant's residence, his association with [another person] at that residence who . . . has apparently a history--I don't know the exact nature or extent of that history--but a history of drug-related offenses, . . . I think that the record clearly shows continuing involvement in controlled substances transactions over a period of time. I think those facts are sufficiently proven . . . with that essentially being the turning point in this case--I want that clear on the record--that is really the basis for the decision that incarceration rather than a suspended sentence is appropriate

The court may not rely upon prior unprosecuted offenses in imposing sentence, unless those offenses are admitted to by defendant or the facts before the court show the accused committed the offense. State v. Bragg, 388 N.W.2d 187, 191 (Iowa App. 1986). In the present case, defendant did not admit any prior unprosecuted offenses. Nor did the facts before the trial court show defendant committed a prior unprosecuted offense. Although the record reveals defendant was involved in transfers of money through money orders, there is no evidence where the money came from or whether it was used for illegal purposes. As to the controlled substances at defendant's residence, they were

found to be on the persons of two codefendants, but not on the person of defendant. Only bags of marijuana had any connection to defendant. Finally, the trial court relied on defendant's association with another who had an apparent drug-related history as a factor in imposing sentence. The court admitted it did not know the exact nature or extent of this individual's history.

Although all these facts taken together might give rise to a suspicion of illegal conduct, they do not establish defendant committed prior unprosecuted offenses. The colloquy of the trial court at sentencing discloses the court relied on the prior unprosecuted offenses in imposing sentence. This case is reversed and remanded for resentencing defendant in accordance with the principles set forth herein.

In light of our holding, it is unnecessary to reach defendant's due process claim.

REVERSED AND REMANDED FOR RESENTENCING.