

FILED

JAN 29 1986

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

vs.

)

BOBBY JOE DOWNS,

)

Defendant-Appellant.)

Filed January 29, 1986

311

5-569
85-644

Appeal from the Iowa District Court for Marshall County - Sandra J. Holien,
Judge.

Defendant appeals from the sentence imposed following conviction of
theft in the fourth degree. **REVERSED AND REMANDED FOR RESENTENCING.**

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

Thomas J. Miller, Attorney General; Elizabeth E. Ciebell, Assistant Attor-
ney General; and Judy K. Parks, Assistant County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

Defendant appeals from the sentence imposed following conviction of theft in the fourth degree in violation of Iowa Code § 714.1(1) and § 714.2(4) (1985). The trial court sentenced defendant to a 270-day jail term. On appeal, defendant asserts the trial court erred in relying on unproven pending burglary charges in reaching its decision with regard to sentencing. The State asserts the trial court properly exercised its discretion in reaching the sentencing decision and did not rely on impermissible factors. We reverse and remand for resentencing.

Defendant Bobby Joe Downs was convicted by a twelve-person jury panel of the crime of theft in the fourth degree. The pre-sentence investigation report indicated Downs had a prior arrest record in Iowa, had pending burglary charges in Iowa, and was on parole from Utah for theft, third degree, and injury to a jail. He also had approximately \$425 in unpaid outstanding fines at the time of sentencing. He had a history of substance abuse.

Both parties agreed to the court's use of the pre-sentence investigative report in sentencing, but defendant's lawyer specifically requested that the court should not consider the pending burglary charges. The pre-sentence investigator recommended that defendant be incarcerated "in the Marshall County Jail . . . [as] required by law for this offense."

The court sentenced Downs to a period of incarceration in the Marshall County Jail not to exceed 270 days. In pronouncing sentence the court stated:

The pre-sentence investigation report reflects that Mr. Downs is presently unemployed. He resides in a home that is owned by his stepfather. He has a live-in relationship with a woman by the name of Perry; and it also reflects that Mr. Downs has had a number of prior contacts with the criminal justice system including intoxication arrests and prior theft arrests and convictions. He's presently on parole from the state of Utah; and while on parole to this state has become involved in the present

theft; and he has been charged with subsequent burglary offenses after his conviction on this charge.

The pre-sentence investigation indicates that Mr. Downs was not entirely helpful during the pendency of the pre-sentence investigation. He was difficult to locate. He was apparently incapable of keeping scheduled appointments; and based upon his performance on or during pretrial, it would appear that he is not a suitable candidate for probationary supervision within the community. Likewise the P.S.I. reflects that Mr. Downs already owes this county a good deal of money for outstanding fines. [approximately \$428.] Imposition of a fine in this case would be gratuitous. He would not pay it and would have no rehabilitative effect for the Defendant. The pre-sentence investigator recommends a period of incarceration; and this Court agrees with that recommendation. It is appropriate to proceed to sentencing in this case by way of imposition of a jail sentence. (emphasis added)

Although imposition of sentences is within the trial court's discretionary power and will be set aside only for an abuse of discretion, see State v. Gibb, 303 N.W.2d 673, 687 (Iowa 1981), that discretion is not unlimited. State v. Thompson, 275 N.W.2d 370 (Iowa 1979).

In State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981), the court stated:

[The trial court] relied on additional, unproven, and unprosecuted charges. No facts before the court showed those charges were valid, and defendant did not admit the additional charges by pleading guilty to this charge. Nor did trial court make any finding whether facts existed to substantiate the charges. See State v. McKeever, 276 N.W.2d 385, 389 (Iowa 1979). . . . We do not interpret trial court's statement to indicate the additional charges were in fact a secondary consideration. But even if they were, we cannot speculate about the weight trial court mentally assigned this factor, or whether it tipped the scales to imprisonment. Other grounds existed to support the sentence imposed in Thompson, see 275 N.W.2d at 372 (Harris, J., dissenting), but nonetheless we struck down the sentence because the trial court impermissibly also considered the higher charge. Thus, we remand the case to the trial court for resentencing without consideration of the other charges unless the facts before the court show defendant committed those offenses or they are admitted by him. We do not suggest what the sentence should be. See Gibb, 303 N.W.2d at 688.

In a later case, State v. Black, 324 N.W.2d 313 (Iowa 1982), involving a trial court which based its sentencing decision in part on a burglary charge the defendant did not admit to committing, the court held:

Even if the district court did not consider the dismissal of the burglary charge, the preceding statement indicates that he considered "the factual circumstances around which this offense occurred." The circumstances considered at the sentencing hearing related to the alleged illegal entry into the victim's home. We have stated that such consideration is improper. If there were additional factual circumstances considered, the district court has left us to speculate what these could be. As in Messer, we cannot speculate about the weight the sentencing court gave to these unknown circumstances. Since we cannot evaluate their influence, we must strike down the sentence. Messer, 306 N.W.2d at 733.

Id. at 316.

The State claims this case is governed by State v. Stanley, 344 N.W.2d 564 (Iowa Ct. App. 1983), where an allegation of sentencing impropriety was found to be without merit. Stanley is readily distinguishable because the defendant's argument in that case was that "because the same judge both received the guilty plea and imposed the sentence, the judge therefore may have improperly considered the dismissed charges." Id. at 567. The defendant argued, in essence, that knowledge of dismissed charges had to be imputed to the sentencing judge. The court stated:

In this case we need not decide whether the facts before the court show [the defendant] committed the crimes of kidnapping and terrorism absent some showing by [defendant] that the sentencing judge actually considered those crimes when imposing [the sentence]. While [the] judge must have been aware of the dismissed charges, there is absolutely no indication on the record that he impermissibly considered those charges at sentencing.

Id. at 568 (emphasis added).

As opposed to the facts in Stanley, our record indicates the sentencing judge did consider unproven charges. As previous opinions have held, we cannot

speculate about the weight the sentencing judge accorded to this impermissible factor. The fact that this factor appears in the record, under Iowa law, requires us to remand the case to the trial court for resentencing. The trial court shall not consider the dismissed charge nor the facts arising from it unless these are admitted to by the defendant or independently proved. However, we do not suggest what the sentence should be.

REVERSED AND REMANDED FOR RESENTENCING.