IN THE COURT OF APPEALS OF IOWA

No. 8-664 / 98-0482

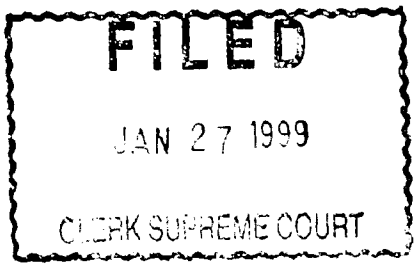
STATE OF IOWA,

Plaintiff-Appellee,

vs.

DEBORAH LOU GILMORE,

Defendant-Appellant.



Appeal from the Iowa District Court for Jasper County, Thomas W. Mott, District Associate Judge.

Deborah Gilmore appeals from her conviction for possession of methamphetamine. **CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.**

Katherine Spencer of the Law Offices of Ta-Yu Yang, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Steven Johnson, County Attorney, and Michael K. Jacobsen, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ. Zimmer, J., takes no part.

MAHAN, J.

Deborah Gilmore appeals her sentencing following conviction for possession of methamphetamine. We affirm the conviction, vacate the sentence, and remand for resentencing.

Gilmore was arrested on October 15, 1997, and subsequently charged with possession of methamphetamine.[1] The arrest followed a search of her person in which a deputy sheriff found .12 grams of methamphetamine in a candy wrapper in the front small pocket of the jeans she was wearing.[2]

The matter proceeded to trial by jury on March 2, 1998. Gilmore testified she had obtained the jeans at a church clothing drive and was unaware of the methamphetamine. She further testified she had never used methamphetamine. Gilmore was convicted of the offense as charged. She was sentenced by the court on March 18, 1998, to ninety days in jail, all but thirty days suspended; one year of probation; a fine of $250 plus surcharge and court costs; and revocation of her driving privileges for a period of six months.

Gilmore has appealed the sentence claiming the district court abused its discretion by considering an improper factor. She also claims the district court failed to exercise its discretion by setting forth the reasons for the sentence.

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[1] Gilmore had no prior criminal record.

[2] Gilmore does not challenge the search in this appeal.

I. STANDARD OF REVIEW. Our review of the sentencing in this case is for an abuse of discretion. *State v. Boltz*, 542 N.W.2d 9, 11 (Iowa App. 1995). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as trial court consideration of impermissible factors." *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995). The sentencing court may not consider facts which have not been admitted to by the defendant or independently proved in the record. *State v. Black*, 324 N.W.2d 313, 315 (Iowa 1982). The remedy, when it appears the sentencing court has considered an improper factor, is to vacate the sentence and remand for resentencing. *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa App. 1994). We are not free to independently speculate on the weight the sentencing court gave to the improper factor. *State v. Floyd*, 466 N.W.2d 919, 925 (Iowa App. 1990).

II. IMPROPER SENTENCING FACTOR. The record in this case fails to disclose any evidence indicating Gilmore used methamphetamine or had a substance abuse problem. Indeed, the only evidence in the record is to the contrary. Gilmore testified, in part:

> Q. Tell me something, do you know how those drugs were packaged? A. No, I don't do them.
> Q. How many times have you used methamphetamine? A. Never.

At sentencing, the following dialogue occurred between the court, Gilmore, and her attorney:

> THE COURT: Are you *still using* methamphetamine?
> MS. GILMORE: No. I wasn't then.

> THE COURT: Pardon?
> MS. GILMORE: No.
> THE COURT: When did you *quit using*?
> MS. GILMORE: I wasn't using.
> MS. SPENCER: Your Honor, I know the jury convicted her of possession of approximately a quarter teaspoon or less of methamphetamine, but her testimony was that it was not hers and that she had not used it in her lifetime.
> THE COURT: Right. It was found in the jeans; right?
> MS. SPENCER: That's correct.
> THE COURT: Which I believe you told the jury, and they didn't believe. All right. Have you ever had any substance abuse counseling or treatment?
> MS. GILMORE: No.
> THE COURT: I gather you don't feel you need any then?
> MS. GILMORE: No.

(Emphasis added.)

It is clear, despite the trial record, the district court was concerned about Gilmore's use of methamphetamine. Subsequent to the above dialogue, the court, in pronouncing sentence, stated as follows:

> *I understand that it's difficult to stop using methamphetamine, that some people say they do it just by themselves. To encourage the defendant's rehabilitation*, to deter her and others, the Court will impose a sentence of ninety days in jail, all but thirty days suspended, for a year on probation, plus $250 fine, the minimum, plus surcharge and court costs, order revocation of driving privileges for six months.

(Emphasis added.)

We conclude the district court considered a factor in sentencing which had not been admitted to by Gilmore or independently proved in the record. Since we are not free to speculate on the weight given to this improper factor by the district court, we must vacate and remand for resentencing.

III. REASONS FOR SENTENCE. We find it unnecessary to address this issue based upon the remand directed above.

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.