

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

BETTY A. FERGUSON,)

Defendant-Appellant.)

8-378
87-1580

FILED

SEP 28 1988

CLERK SUPREME COURT

315

Appeal from the Iowa District Court for Scott County
(130890-02), J.L. Burns, Judge.

Defendant appeals from her sentence, following a guilty
plea, of ten years imprisonment for first-degree theft.
REVERSED AND REMANDED FOR RESENTENCING.

Raymond E. Rogers, Acting Chief Appellate Defender, for
defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Julie
Ann Halligan, Assistant Attorney General, for
plaintiff-appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

PER CURIAM

Betty A. Ferguson pleaded guilty to a charge of first-degree theft in violation of section 714.2(1), The Code, a nonforcible felony, and was sentenced to the maximum term of incarceration, ten years. Iowa Code § 902.9(3) (1987). Ferguson now contends the court erred in determining her sentence by giving consideration to a robbery charge that had been dismissed pursuant to a plea bargain. We agree. We therefore remand this case for resentencing.

On appeal Ferguson contends the district court abused its discretion in rejecting probation and instead imposing the maximum sentence of ten years' imprisonment after improperly giving consideration to a higher unproved charge of first-degree robbery. She urges the district court clearly assumed she was guilty of the original charge of robbery and believed she had already been given a "break" by being allowed to plead guilty to theft. Ferguson denied any involvement with the robbery, however, and urges it is reversible error for the district court to consider higher unproved charges in imposing sentence.

The State responds considering the seriousness of the offense, citing facts known to the court, and the recommendation contained in Ferguson's presentence investigation (PSI) report, the trial court was well within

its discretion in sentencing her to ten years' imprisonment.

Our scope of review is assigned error at law. Iowa R. App. P. 4.

Appellate courts will set aside a sentence and remand the case to district court for resentencing if sentencing court relied upon charges of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved. State v. Black, 324 N.W.2d 313, 315 (Iowa 1982). Further, we will not speculate about the weight which the sentencing court gave to unknown circumstances. Id. at 316.

At sentencing, defendant requested she be granted probation, relying on her lack of prior criminal record and her limited role in the crime. The court denied defendant's request for leniency. Among the reasons given by the district court were the following:

THE COURT: Now, for whatever reason, there was a plea agreement here which reduced this from First-Degree Robbery to First-Degree Theft. Whether that decision was made on the basis of evidence or whether that decision was made simply to keep it from being a forcible felony with a firearm involved, I don't know.

Are you aware that if you were convicted -- and that you very well might be convicted of First-Degree Robbery as an aider and abettor -- that that carries a mandatory minimum sentence of five years? That carries a sentence of more than that, but you have to serve a minimum of five. Were you aware of that?

Now, you were allowed to plead to something that does not carry that kind of sentence. If you were sentenced at this time, it is highly unlikely that you would ever serve anything close to that. So you have already, perhaps, been given a break by being given the opportunity to plead to theft. Do you understand what I'm saying?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: Under normal circumstances, there's no question, somebody before this Court with the record that Miss Ferguson has would certainly be a prime candidate for probation. I view it entirely different where you take a situation where someone has in fact had a gun held to them while they were tied up, electrical tape put across their mouth. What might have happened had someone else come in that store at that time is anybody's guess. Might very well have been here on something other than robbery charges. Now, fortunately that did not happen. And when you go beyond that another step and have a plea to theft instead of robbery, which makes it something other than a forcible felony, I am not too sure how far you go or how many breaks someone really is entitled to.

These statements indicate the trial court may have relied on the assumption defendant was guilty of the original charge of robbery and had been given a break by being allowed to plead guilty to theft. We believe these are impermissible grounds to be considered in sentencing Ferguson. Our reading of the record indicates defendant never admitted commission of either robbery as the State alleges, and we refuse to guess as to precisely what factual circumstances the court relied upon in making its sentence. Black, 324 N.W.2d at 516. Because we cannot speculate about the weight the sentencing court

gave to these unknown circumstances, and since we cannot evaluate their influence, we must strike down defendant's sentence. Id.

We remand this case to the district court for resentencing. The district court shall not consider the dismissed charge nor facts arising from it unless these are admitted by defendant or independently proved. However, we do not suggest what the sentence should be.

REVERSED AND REMANDED FOR RESENTENCING.