FILED
JUN 26 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

507

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed June 26, 1984
vs.	)	
LARRY DEAN DAYE,	)	4-223 83-1323
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County - Gene L. Needles and J. P. Denato, Judges.

Defendant appeals from the sentence imposed on his guilty-plea conviction of possession of a firearm by a felon in violation of Iowa Code section 724.26. VACATED AND REMANDED FOR RESENTENCING.

Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

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

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

DONIELSON, J.

Defendant appeals from the sentence imposed on his guilty-plea conviction of possession of a firearm by a felon in violation of Iowa Code section 724.26. He contends that the court erred in basing its decision to deny probation in part on the fact that he had been charged with another crime without determining whether defendant in fact committed that crime. We vacate the sentence and remand for resentencing.

Defendant was charged with extortion and being a felon in possession of a firearm. Pursuant to a plea bargain, defendant pleaded guilty to the possession charge in exchange for the State agreeing to dismiss the extortion charge. At the sentencing hearing, the court denied defendant's request for probation and sentenced him to a term not to exceed two years. The court gave the following reasons for its decision:

> Mr. Daye, you are entitled to know the reasons that I have not granted the probation that was requested by your attorney. It is entirely based upon the fact that your prior record is quite extensive and, among other things, you have just been released from parole four months before this offense took place, and because of the fact that apparently a second count in this charge was dismissed in conjunction with your plea of guilty to Count 2. And those are the reasons that I have chosen, that I relied on, in assessing imprisonment rather than probation in this case.

Defendant brought this appeal from this sentence.

The controlling principles were stated by the supreme court as follows:

> Although imposition of sentences is within 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. In State v. Thompson, 275 N.W.2d 370 (Iowa 1979), the defendant originally was charged with second-degree burglary, but in accordance with a plea bargain the charge was reduced to third-degree theft. In imposing a sentence of imprisonment, trial court considered the fact a higher crime originally had been charged. Id. at 371. Remanding the case for resentencing, we stated:
>
> > A sentencing court may not . . . impose a severe sentence for a lower crime on the ground that the

> accused actually committed a higher crime unless the facts before the court show the accused committed the higher crime or the defendant admits it—even if the prosecutor originally charged the higher crime and reduced the charge .... [T]he accused does not admit the higher charge by pleading guilty to the lower charge.

Id. at 372.

State v. Messer, 306 N.W.2d 731, 732 (Iowa 1981). A sentencing court, in other words, may not consider a dismissed charge on the facts arising thereunder "unless these are admitted to by the defendant or independently proved." State v. Black, 324 N.W.2d 313, 316 (Iowa 1982).

In this case, defendant did not admit to the extortion charge which was dismissed. In addition, we do not believe the facts arising under that charge were sufficiently proved. The only basis at all supporting the extortion charge is found in the minutes of testimony attached to the presentence report. The minutes of testimony alone, however, are not necessarily sufficient to provide the requisite factual basis for an unproved offense to be considered in sentencing. Black, 324 N.W.2d at 316. The State argues that defendant's failure to deny the extortion charge in the face of the minutes of testimony provides a sufficient factual basis for consideration of this charge. We do not believe this circumstance is enough to make the charge "independently proved" as required by Black. The sentencing court here did nothing at all to establish the veracity of the minutes of testimony relating to the extortion charge and did not make any finding whether facts existed to substantiate this charge. See Messer, 306 N.W.2d at 733. Instead, the court appeared merely to rely on the fact that this charge was made and later dismissed. This was impermissible.

Because we cannot speculate as to the weight given this impermissible consideration, we must vacate the sentence imposed and remand for resentencing. This result, although required by the case law, is unfortunate for it appears that the other reasons given by the sentencing court (e.g., defendant's extensive prior

criminal record) would have sustained the sentence imposed. In addition, we do not mean to imply by this opinion that the sentencing court is absolutely precluded from considering the extortion charge in imposing sentence nor do we imply what the sentence should be. We merely state that, in the absence of defendant's admitting to that charge, the court must make a determination that the facts underlying the charge are sufficiently and independently proved before it may be considered in the sentencing decision.

SENTENCE VACATED; REMANDED FOR RESENTENCING.