

IN THE COURT OF APPEALS OF IOWA

No. 9-645 / 88-1805

FILED

JAN 25 1990

CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

CHARLES RICHARD NEAVIN,

Defendant-Appellant.

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Appeal from the Iowa District Court for Webster County,
Louie F. Beisser, Judge.

Defendant appeals his convictions and sentences,
challenging the imposition of sentence on several grounds.

REVERSED AND REMANDED FOR RESENTENCING.

Robert M. Sherman, Fort Dodge, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber,
Assistant Attorney General, and James J. Koll, County
Attorney, for appellee.

Considered by Schlegel, P.J., and Hayden and Sackett,
JJ. Habhab, J., takes no part.

SACKETT, J.

Defendant-appellant Charles Richard Neavin entered guilty pleas to one count of possession of marijuana with intent to deliver and one count of possession or transportation of a firearm by a convicted felon. He was sentenced to imprisonment for up to five years on the first count and imprisonment for up to two years on the second count, with the two terms to be served concurrently. Defendant has appealed his convictions and sentences. He challenges the imposition of sentence on several grounds.

The trial court's exercise of discretion in sentencing is subject to only limited review; its decisions will be affirmed unless it has abused its discretion. State v. Pappas, 337 N.W.2d 490, 494 (Iowa 1983). That discretion is not unlimited, however. We will remand a case for resentencing if a trial court makes an error of law in sentencing a defendant. See State v. Black, 324 N.W.2d 313, 315 (Iowa 1982); State v. Messer, 306 N.W.2d 731, 732-33 (Iowa 1981); State v. Thompson, 275 N.W.2d 370, 372 (Iowa 1979).

Defendant first contends the district court erred in considering certain other offenses for which defendant was never prosecuted. The entire sentence in the record to which defendant refers reads as follows: "And the Court feels that for rehabilitation, assuming that North Central Alcoholism Research Foundation made a determination that

you should have substance abuse counseling, you have a daily use of marijuana, have more of a problem than on an outpatient basis, the charges of the crime start with Count I and go through Count IX, the fact is is that it was plea bargained out to just two charges to your benefit." (emphasis added). Defendant contends the trial court erred by relying on the seven unprosecuted charges.

"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). If a court does rely upon such charges, we must set aside the sentence and remand for resentencing. Black, 324 N.W.2d at 315; Messer, 306 N.W.2d at 732-33; Thompson, 275 N.W.2d at 372. Defendant here did not admit to any of the seven unprosecuted charges, nor were there facts before the court proving he was guilty of those offenses. We find the trial court erred in using the seven charges as a basis for the sentence. We remand the case to the trial court for resentencing. The trial court shall not consider any of the defendant's unprosecuted charges upon resentencing.

Defendant also contends the sentencing court abused its discretion by failing to tailor the sentence to his specific situation and by failing to state reasons why the sentence chosen was appropriate for him specifically, as

distinguished from others convicted of drug delivery. In addition, defendant contends the sentencing court improperly employed a fixed policy of imposing prison sentences in all drug delivery cases.

We find no merit in these arguments. An examination of the record reveals that the trial court expressly considered the drug dependency problems of this specific defendant and stated that this dependency problem was one of the reasons the court considered probation to be inappropriate here. As for the contention that the trial court employed a fixed policy of prison sentences for all drug delivery convictions, we do not find as clear a proclamation in the trial court's language as the defendant does. The trial court stated it had three main reasons for sentencing defendant to prison: to help defendant's rehabilitation, to deter defendant from commission of further crimes and drug use and to deter others from selling drugs, and finally, to protect society from the defendant. We presume the discretion of the trial court was rightfully exercised. State v. Pappas, 337 N.W.2d at 494. We find the trial court properly based its decision on several factors, and not solely on one factor, as the defendant contends.

Finally, defendant contends the sentencing court abused its discretion by imposing sentence without receiving and examining a written substance abuse evaluation. He asserts

it was error for the court to rely on a telephone summary of the evaluation, rather than a written report. He argues the district court thereby violated Iowa Code section 901.5 (1987), which directs the sentencing court to receive and examine "all pertinent information." He also argues the district court violated Iowa Code section 901.4, which directs the sentencing court to "make all of the presentence investigation report available for inspection to the defendant's attorney"; he complains that his attorney was unable to inspect the substance abuse evaluation relied on by the court because that evaluation was in oral and telephonic form rather than written form.

We find the requirements of section 901.4 were not met here. By the time of resentencing, a written copy of the report shall be made available for review by the defendant's attorney. We find it unnecessary to address defendant's complaint regarding section 901.5. We assume the trial court will also be able to review the report before resentencing.

We remand to the trial court for sentencing without consideration of defendant's unprosecuted offenses.

REVERSED AND REMANDED FOR RESENTENCING.