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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-028 / 93-0655

STATE OF IOWA,

Plaintiff-Appellee,

vs.

ANTON JERMAINE BROWN,

Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Sylvia A. Lewis, Judge.

Anton J. Brown appeals from his conviction and sentence, following a jury trial, for possession of schedule I and II controlled substances, in violation of Iowa Code sections 203.301(3), 204.206(2)(d), 204.401(3), and 204.204(4)(m) (1991). **REVERSED AND REMANDED.**

Edward J. Ennis, West Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, J. Patrick White, County Attorney, and Kelly Steele, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., Sackett, J., and Critelli, S.J.*

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

SACKETT, J.

Defendant-appellant Anton J. Brown appeals from a sentence imposed after a jury found him guilty of (1) possession of a schedule II controlled substance (cocaine) in violation of Iowa Code sections 203.301(3) and 204.206(2)(d) and (2) possession of a schedule I controlled substance (marijuana) in violation of sections 204.401(3) and 204.204(4)(m). Defendant contends (1) he had no notice of the evidence the State intended to present and (2) the judge considered unproven charges in pronouncing his sentence. We remand for resentencing.

Defendant first contends the district court should not have allowed the State to present evidence at the sentencing hearing when he was given no prior notice the State planned to offer evidence. Defendant's attorney did comment she learned the morning of the sentencing hearing that the county attorney was making a sentencing recommendation stronger than what she had prepared for and the county attorney had not informed her of the basis for his recommendation. Defendant's attorney at sentencing did not, however, object to the procedure that was being employed. Error was not preserved on this issue. We will not consider an issue on appeal not preserved in the trial court. See State v. Johnson, 272 N.W.2d 480, 484 (Iowa 1978).[1]

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1. No presentence investigation was ordered in this case, consequently, defendant did not have the advanced benefit of the report. Therefore we distinguish State v. Ashley, 462 N.W.2d 279, 282 (Iowa 1990), where court said

Defendant was sentenced to 365 days and 60 days to run concurrently. Defendant contends the trial court, in imposing that sentence, improperly considered evidence of unprosecuted crimes he was alleged to have committed.

In sentencing defendant, the trial court said:

> Well, the Court considers the testimony of all the witnesses who have testified this morning. Also the Court notes that testimony that was offered at trial wherein the jury found the defendant guilty of both Counts. The Court considers the defendant's age, his prior criminal record. The Court considers the social information that has been provided by Mr. Brown's witnesses and by the officers who have testified. Particularly, the Court considers the testimony of Officer Jackson remains unrefuted regarding Mr. Brown's most recent activity involving the youth of this community and continued use of Marijuana. The court finds that the defendant does pose a threat to the welfare of the population in this county. The Court notes that Mr. Brown has been involved in two incidents that involve shooting. One where he was the victim[1] and one where he was simply involved. And all of those facts go to indicate to the court that he does present a danger to the community. . . .

We review for an abuse of discretion. State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983). A sentence will be set aside and remanded for resentencing if the court in sentencing the defendant has relied on an unprosecuted offense that is neither admitted by the defendant nor proven in the record. See State v. Black, 324 N.W.2d 313, 315

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as to evidence of alleged misrepresentations made by defendant, "We believe that such information, if available to the State prior to hearing, must be a part of the presentence investigation report."

1. While not raised by the defendant as an issue, there is no basis for considering the fact defendant was a victim of a crime adversely to him.

(Iowa 1982); State v. Messer, 306 N.W.2d 731, 732-33 (Iowa 1981).

As to a sentencing court using unproven charges in sentencing defendant, the Iowa Supreme Court has said:

> We will set aside a sentence and remand a case to the district court for resentencing if the sentencing court relied upon charges of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved.

Black, 324 N.W.2d at 315.

And:

> 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. . . .

Messer, 306 N.W.2d at 732.

The fact a sentencing judge is merely aware of the uncharged offenses is not sufficient to overcome the presumption his or her discretion was properly exercised. State v. Pappas, 337 N.W.2d 490, 494 (Iowa 1983). To overcome the presumption of a proper exercise of discretion, there must be an affirmative showing the judge relied on the uncharged offenses. State v. Hansen, 344 N.W.2d 725, 730 (Iowa App. 1983).

A reading of the trial court's sentencing order reveals it considered activity involving the youth of the community, continued use of marijuana, and two shooting incidents in determining defendant's sentence. The order

does not reveal whether the court found these acts proven. See State v. Ashley, 462 N.W.2d 279, 282 (Iowa 1990).

Defendant did not admit to the court he committed any of these crimes or was involved in them. The question, therefore, is whether there were facts before the court to support a finding defendant had committed the other offenses. Defendant argues the evidence before the sentencing court was not sufficient to prove he committed the offenses.

The officers who appeared as witnesses, including Officer Jackson, testified to personal knowledge of statements defendant had made to them that indicated his use of cocaine. One officer testified to seeing a marijuana cigarette fall from defendant's pocket. He did not charge defendant for possession of marijuana. An officer testified defendant said he shot a gun. The officer determined defendant shot at a vehicle through his investigation and from statements of unidentified witnesses.

The officers also gave substantial testimony subject to a hearsay objection that they had learned from confidential informants and unidentified witnesses that defendant bought, sold, and gave away crack cocaine. One officer testified confidential informants had told him defendant was a Black Gangster Disciple but the officer himself was not certain defendant was a member. See id.

While there is testimony in the record defendant admitted certain things to the officer and evidence the officer saw a marijuana cigarette, there also is substantial evidence from the officers, which the trial court admitted over defendant's hearsay objection, that implicates defendant in substantial illegal activity through the testimony of confidential informants and unknown witnesses.

The trial judge in the sentencing order said she considered the fact Officer Brown's testimony regarding defendant's recent activities was not refuted. Defendant's failure to refute the State's testimony does not prove he committed the charges.

Sentencing hearings need not conform with all of the requirements of a criminal or even of the usual administrative hearing; but . . . the hearing must measure up to the essentials of due process and fair treatment. Id. at 281; State v. Delano, 161 N.W.2d 66, 72 (Iowa 1968); see also State v. Stanley, 344 N.W.2d 564, 570 (Iowa App. 1983).

While the State made some showing defendant had involvements with these other activities, the proof was weak and in large part based on alleged statements of unidentified persons. Whether the statements of the unidentified persons were admissible or not is not the issue. As the Iowa court has said in addressing a similar issue, "it is also clear fair treatment is a part of our

law as well." Ashley, 462 N.W.2d at 282. A sentencing hearing must measure up to the essentials of due process and fair treatment. Delano, 161 N.W.2d at 72.

The proof here did not rise to that level necessary to support a finding defendant was guilty of the unprosecuted charges.

As the court said in Black, 324 N.W.2d at 316, "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."

We remand for resentencing. We do not suggest what the sentence should be.

REVERSED AND REMANDED.