IN THE COURT OF APPEALS OF IOWA

FILED
JUN 26 1984
CLERK SUPREME COURT

STATE OF IOWA, )

Plaintiff-Appellee, ) Filed June 26, 1984

vs. ) 4-165
83-1313

MARTIN D. BAKER, )

Defendant-Appellant. )

494

---

Appeal from the Iowa District Court for Pottawattamie County—Paul Sulhoff, Judge.

Defendant appeals the concurrent indeterminate five-year sentences imposed upon his guilty plea conviction of two counts of lascivious acts with a child in violation of Iowa Code section 709.8. REVERSED AND REMANDED.

Thomas L. Root of Podge, Root & Steege, Council Bluffs, for defendant-appellant.

Thomas J. Miller, Attorney General, and Sherie Barnett, Assistant Attorney General, for plaintiff-appellee.

Considered by Snell, P.J., and Schlegel, and Sackett, JJ.

Defendant, Martin D. Baker, appeals the two concurrent indeterminate five-year sentences imposed upon his guilty plea conviction of two counts of lascivious acts with a child in violation of Iowa Code section 709.8.

Baker, a Boy Scout troop leader, was charged with sexually abusing several members of his Boy Scout troop over a two-year period. The acts allegedly occurred at various camp sites in western Iowa.

Baker was originally charged with sexual abuse in the second-degree but ultimately pleaded guilty to the reduced charge of lascivious act. On appeal, defendant contends that the trial court failed to exercise properly its sentencing discretion.

Baker was, at the time of sentencing, a 40-year-old man. Though married, he and his wife were separated. He lived with his 15-year-old son and his mother. Baker was gainfully employed and supported his family financially. The presentence investigation showed that defendant had been charged with similar offenses in the past. He had not been convicted of any prior charges, however, and denied committing any of the crimes charged except one. The district court, in sentencing the defendant, indicated that the court had considered the defendant's past record, the need to protect young people from further conduct of this nature, and the hope that he could receive the necessary services to avoid future conduct of this nature. The trial court also made the statement, "if this was the first case that defendant had been involved in conduct of this nature, the Court would not have any trouble granting probation."

The defendant contends this statement indicates that the court relied upon only one factor in denying probation, his past record, and that sentences based upon any single factor are prohibited.

The district court, prior to pronouncing sentence, reviewed the presentence investigation and a psychiatric evaluation of the defendant. The defendant, his

mother and son testified.

We interfere in discretionary sentencing only if there has been an abuse of discretion. An abuse will not be found unless the defendant shows that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. State v. Stanley, 344 N.W.2d 564, 567 (Iowa App. 1983).

The record does not support defendant's argument that the trial court considered only one factor in denying probation. The record clearly reflects that the court also considered other factors. The statement of the trial court leaves little doubt, however, that the court did consider defendant's involvement in previous unproven and unprosecuted charges in making a sentencing decision.

Baker denied all of the other charges except a 1963 incident of molesting two Boy Scouts. We have searched the record but find insufficient facts to substantiate the charges. The trial court did not make any finding as to whether facts existed to substantiate the earlier charges. See State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981).

We will set aside a sentence and remand a case for resentencing if the sentencing court relied upon charges of an unprosecuted offense that was neither admitted by the defendant nor otherwise proven. State v. Black, 324 N.W.2d 313, 315 (Iowa 1982).

Because the trial court improperly relied upon such charges, we remand the case for resentencing. On remand, the sentencing court shall not consider the prior charges made against this defendant unless the charges are admitted by the defendant or are independently proven. We do not, however, suggest what the sentence should be. See State v. Black, 324 N.W. 2d at 316; State v Gibb, 303 N.W.2d 673 (Iowa 1981); and State v. Chesser, 306 N.W.2d at 733.

REVERSED AND REMANDED.