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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed May 22, 1984 190
vs.)
EDITH MAE DAVIS,) 4-84 / 69603
Defendant-Appellant.)

Appeal from the Iowa District Court for Polk County - Rodney J. Ryan, Judge.

Defendant appeals from the sentences imposed on her guilty plea convictions of second-degree burglary in violation of Iowa Code section 713.3 (1981), and attempted second-degree burglary in violation of 1981 Iowa Acts chapter 204, section 8. REVERSED AND REMANDED.

Charles L. Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Valencia Voyd McCown, Assistant Attorney General, for plaintiff-appellee.

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

Defendant, Edith Mae Davis, appeals from the sentences imposed on her guilty plea convictions of second-degree burglary in violation of Iowa Code section 713.3 (1981), and attempted second-degree burglary in violation of 1981 Iowa Acts chapter 204, section 8. Davis contends on appeal that the court erroneously considered additional and unproven charges against her in determining her sentence and that the court did not allow her to address it in mitigation of punishment. She does not appeal her guilty plea convictions. We find the record made at the sentencing hearing indicates that the district court based its sentence in part on an unprosecuted theft charge. We reverse and remand for resentencing.

Davis was originally charged with second-degree burglary, attempted second-degree burglary, and first-degree theft after several incidents in which items of photographic equipment were taken from two retail photographic equipment stores. Davis pleaded guilty to the burglary charges in return for the State's agreement to dismiss the theft charge and an unrelated charge of assisting a prisoner to escape.

The district court sentenced Davis for a period not to exceed ten years on the burglary charge and for a period not to exceed five years on the attempted burglary charge. The sentences were to be served concurrently. The court stated that it had decided not to grant probation mainly because Davis had involved teenage children in the incidents. The court also mentioned defendant's 1974 suspended sentence on a felony conviction and the numerous charges which had apparently been filed against her after she had successfully completed probation. The district court stated:

> And then you got involved in quite a series of criminal charges, a great number of which have been dismissed. And the only charges that I am here concerned with today are your pleas of guilty to Attempted Burglary in the Second Degree and Burglary in the Second Degree.
>
> I can't ignore the fact that the record shows involvement in other matters. That cannot be and will not be any basis for the sentencing in this matter. But it can't be ignored. It's

> part of the record. And it can conceivably be said to be, without any contradiction, that I am sure that you and your attorney would agree that through plea discussions and your voluntary plea here in these matters that the County Attorney decided not to pursue those other matters filed.

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. State v. Black, 324 N.W.2d 313, 315 (Iowa 1982). No facts before the court showed those charges were valid, and Davis did not admit the additional charges by pleading guilty to this charge. Nor did the court make any finding whether facts existed to substantiate the charges. Id. at 316; State v. Messer, 306 N.W.2d 731, 732 (Iowa 1981). Although the court correctly stated that those other matters "cannot be and will not be any basis for the sentencing in this matter," this statement was both preceded and followed by the court's remarks that the other matters "can't be ignored." In context, it is clear that the court did consider Davis's alleged involvement in other unproved crimes. The fact that there were other reasons given in the record to support the sentences given does not affect our decision. State v. Messer, 306 N.W.2d at 733. We cannot speculate about the weight trial court mentally assigned the additional unprosecuted charges, or whether they tipped the scales to imprisonment. Id.

The State asserts, however, that Davis failed to preserve error on the issue at sentencing. The State contends that Davis had an opportunity to challenge the court's statements, but failed to do so. However, the supreme court, in State v. Wilson, 294 N.W.2d 824, 825-26 (Iowa 1980), refused to adopt a rule requiring a defendant to raise any alleged sentencing defect in the trial court in order to preserve the right to appeal on that ground. Wilson involved the failure of the sentencing court to state reasons upon the record for the sentence imposed. Id. at 824. However, we believe the rule is equally applicable in situations such as this where the sentencing court illegally relies upon unprosecuted offenses in imposing

sentence See State v. Young, 292 N.W.2d 432, 435 (Iowa 1980). Thus, the issue was properly before us on this appeal.

We remand the case to the district court for resentencing. The district court shall not consider the dismissed charges nor the facts arising from them unless they are admitted to by Davis or independently proved. However, we do not suggest what the sentence should be. State v. Black, 324 N.W.2d at 316.

We do not find it necessary to determine whether or not Davis was denied her right to address the court to make a statement in mitigation of punishment, because the case must be remanded for resentencing. See Iowa R. Crim. P. 22(3)(d) This matter can be corrected at the sentencing hearing. State v. Worley, 297 N W 2d 368, 372 (Iowa 1980).

REVERSED AND REMANDED.