IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)

Plaintiff-Appellee,)

vs.) 2-23
66622

DANIEL CULLIVAN,)

Defendant-Appellant.

Appeal from Johnson District Court, Ansel J. Chapman, Judge.

The defendant appeals from the concurrent sentences imposed after he pled guilty to the crimes of extortion in violation of § 711.4, The Code, and conspiracy to commit kidnapping in violation of §§ 706.1 and 706.3, The Code. AFFIRMED.

Philip B. Mears of Mears, Zimmerman & Mears, Iowa City, for defendant-appellant.

Thomas J. Miller, Attorney General, and Mary Jane Blink, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

The defendant appeals from the concurrent sentences imposed after he pled guilty to the crimes of extortion in violation of § 711.4, The Code, and conspiracy to commit kidnapping in violation of §§ 706.1 and 706.3, The Code. We affirm.

On August 18, 1980, the defendant was charged by trial information with (1) administering a harmful substance in violation of § 708.5, (2) second-degree sexual abuse in violation of §§ 709.1 and 709.3, (3) extortion in violation of § 711.4, (4) conspiracy to commit kidnapping, §§ 706.1 and 706.3, and (5) kidnapping in violation of §§ 710.1 and 710.3. On February 12, 1981, he entered a guilty plea to extortion and conspiracy to commit kidnapping in exchange for a dismissal of the remaining counts. The trial court sentenced the defendant to an indeterminate term not to exceed five years for extortion and for an indeterminate term not to exceed ten years for conspiracy, the two terms to run concurrently.

The defendant appeals the sentences, asserting that (1) the trial court abused its discretion in not placing the defendant on probation, specifically by not considering evidence of the condition of the Iowa prison system and by relying solely on the nature of the offense, and (2) the trial court impermissibly denied probation because it considered the defendant had committed the crimes dismissed by the State.

Initially we note that sentencing is within the trial court's discretion, and the sentence imposed will be overturned only upon an abuse of discretion. State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979).

The defendant asserts that the trial court erred by failing to consider the condition of the prison system in imposing sentence. A sentencing judge is to consider the nature of the offense, the attending circumstances, the defendant's age, character and propensities, the chances of defendant's reform, and "all pertinent matters." Id. Under § 901.5, The Code, the judge has the option of

incarcerating the defendant. The legislature has thus made a determination that in spite of its problems, imprisonment is an acceptable sentencing alternative.

The defendant argues that the trial court relied solely on the nature of the offense in determining the sentence to be given. The court stated on the record that he had considered other factors besides the nature of the offense. He considered the evidence, the defendant's statements, witnesses' statements, the statement made by defense counsel, the recommendation in the presentence investigation report, and the recommendation made by the prosecution. He considered the fact that rehabilitation was unlikely in this case, and that the likelihood of further participation in crime was slim and therefore protection of the community was a factor of little weight. He considered the effect of the sentence in deterring others from committing such crimes and the deterrent effect on the defendant himself. He stated that punishment was one of the primary concerns. He considered the particularly unpleasant nature of the facts and circumstances surrounding the case. He considered the other charges which the State was not prosecuting. It is obvious that the Court considered numerous factors in imposing sentence.

The defendant's second assignment of error is that the trial judge improperly considered the unprosecuted charges contained in the trial information in imposing sentence. A sentencing judge may impose a severe sentence for a lesser crime on the ground that the defendant actually committed a higher crime if the facts show the defendant actually committed the higher crime. State v. Thompson,275 N.W.2d 370, 372 (Iowa 1979). The defendant argues that the only evidence showing that he committed other crimes considered by the trial court was contained in the minutes of testimony. The State contends that these minutes are sufficient to show that defendant in fact committed these other offenses. We need not consider whether the minutes of testimony serve this purpose as contended by the

State. The record of defendant's plea of guilty to the offense for which he was sentenced reveals that defendant admitted that there was sufficient evidence from which a jury might find him guilty of the other offenses referred to by the trial court at the time of sentencing. Thus, there was an adequate factual basis so that the trial court could consider the fact that there were unprosecuted charges. Those charges and the facts surrounding them were relevant in determining the correct sentence to be imposed. The trial judge did not abuse his discretion in sentencing the defendant to concurrent five- and ten-year terms instead of probation.

AFFIRMED.