FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed March 31, 1986
vs.	)	
DANIEL EDWARD MURPHY,	)	5-727 85-1103
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Johnson County (No. 16180) - John Sladek, Associate District Judge.

Defendant appeals his conviction for driving while his license was revoked, asserting that the district court abused its sentencing discretion. **REVERSED AND REMANDED FOR RESENTENCING.**

Jean C. Lawrence of Mears, Zimmerman & Mears, Iowa City, for defendant-appellant.

Thomas J. Miller, Attorney General; David L. Dorff, Assistant Attorney General; and Greg Lippolis, Assistant Johnson County Attorney, for plaintiff-appellee.

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

PER CURIAM

Defendant Daniel Murphy entered a plea of guilty to a charge of driving while his license was revoked pursuant to Iowa Code section 321B.38 (1985). The district court sentenced him to serve ten days in the Johnson County Jail and also fined him $500 plus a 15% surcharge. The court stated as reason for its sentence:

> The Court remembers from the suppression hearing that one of the reasons the officers were watching Mr. Murphy's residence was that a week or two weeks earlier they'd observed Mr. Murphy driving, and they were concerned that he didn't have a license and checked it out and he didn't in fact have a license at that time based upon the chemical test.
>
> The Court further notes this offense took place either during or just prior or just after another trial under the reason that Mr. Murphy originally lost his license. The Court takes that into consideration as to the defendant's continuing to drive during a period of time that he was facing charges.

On appeal, Murphy contends that the district court abused its sentencing discretion by imposing an unduly severe sentence and by relying on impermissible sentencing factors. He argues that the court erred in considering unproven charges and in punishing him for exercising his right to trial.

Where the sentence imposed is within the statutory maximum, we will only interfere if an abuse of discretion or defect in the sentencing procedure is shown. State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983); State v. Luedtke, 279 N.W.2d 7, 8 (Iowa 1979). "The decisions of the trial court are cloaked with a strong presumption in their favor, and until the contrary appears, the presumption is that the discretion of the trial court was rightfully exercised." State v. Hansen, 344 N.W.2d 725, 730 (Iowa Ct. App. 1983). "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." Id. at 729. Defendant's burden is a heavy one because he must demonstrate abuse and prejudice. State v. Pappas, 337 N.W.2d 490, 494 (Iowa 1983). In sentencing a defendant, the trial court and we on review

> . . . should weigh; and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform. The courts owe a duty to the public as much as to the defendant in determining a proper sentence. The punishment should fit both the crime and the individual.

State v. Carey, 306 N.W.2d 740, 742 (Iowa 1981) (emphasis added) (quoting State v. Kendall, 167 N.W.2d 909 (Iowa 1969).

Operating a motor vehicle while license is revoked is classified as a serious misdemeanor under Iowa Code section 321B.38 (1985). Iowa Code section 903.1(1)(b) (1985) provides that the maximum sentence for serious misdemeanants is "imprisonment not to exceed one year, or a fine not to exceed one thousand dollars, or both." Section 901.5 spells out what a criminal sentence should try to accomplish:

> After receiving and examining all pertinent information, including the presentence investigation report, if any, the court shall consider the following sentencing options. The court shall determine which of them is authorized by law for the offense, and of the authorized sentences, which of them or which combination of them, in the discretion of the court, will provide maximum opportunity for rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others.

There is no question that the sentence imposed in this case is well within the statutory guidelines for a serious misdemeanor conviction.

However, Murphy is correct in asserting that a sentencing court cannot enhance a sentence based on charges of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved. State v. Stanley, 344 N.W.2d

564, 567 (Iowa Ct. App. 1983); State v. Black,324 N.W.2d 313, 315 (Iowa 1982); State v. Messer, 306 N.W.2d 731, 732-33 (Iowa 1981).

Although the trial court's statement of reasons is somewhat ambiguous, it is apparent that the court did consider impermissible information in arriving at Murphy's sentence. The court's reference to other instances when police officers suspected that Murphy was driving while his license was revoked indicates that the court relied on these unproven accusations to increase Murphy's sentence for the present charge. The court's reliance on the officer's accusations was improper because the facts before the court did not show that Murphy committed other offenses and Murphy never admitted that he drove on other occasions while his license was revoked. Consequently, the trial court erred by relying upon the unproven, unprosecuted claims of the officers to enhance Murphy's sentence.

We conclude that this case must be reversed and remanded for resentencing on this basis, at which time the sentencing court may give weight to the nature of other offenses only to the extent that they are established by the evidence presented.

Murphy also correctly asserts that a sentencing court may not punish a defendant more severely because he in good faith defended himself when charged with a crime rather than entering a guilty plea. State v. Dalton, 254 Iowa 96, 102, 116 N.W.2d 451, 454 (1962). However, this principle has no application in the case at bar. The trial court gave no indication during Murphy's sentencing that his sentence was enhanced because of his decision to stand trial on the original OWI charge. The court's stated concern was for Murphy's disregard for the law, as evidenced by the fact that he continued to drive during a period when his privilege to drive had been revoked. We conclude that Murphy has failed to demonstrate an abuse of sentencing discretion on this second ground.

REVERSED AND REMANDED FOR RESENTENCING.