

IN THE COURT OF APPEALS OF IOWA

No. 9-246 / 98-0492

Filed May 26, 1999

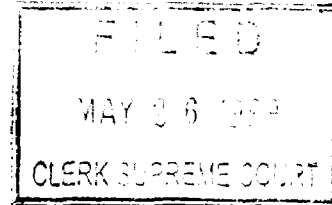
STATE OF IOWA,

Plaintiff-Appellant,

vs.

GREGORY TAYLOR,

Defendant-Appellant.



Appeal from the Iowa District Court for Buchanan County, James C. Bauch,
Judge.

Defendant appeals from his conviction for possession of marijuana.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Allan W. Vanderhart, County Attorney, and Andrea Dryer, Assistant County
Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Mahan, JJ. Sackett, C.J., takes no
part.

MAHAN, J.

Gregory Taylor appeals his conviction for possession of marijuana. He contends the judge improperly considered a crime not charged and not proven in sentencing him. We affirm.

At approximately 6:00 p.m. on June 13, 1997, Taylor was pulled over, along with other drivers, for a random check of his vehicle at a safety checkpoint set up by the Iowa State Patrol on southbound I-380. A state trooper requested Taylor's license and registration. Taylor produced the registration but not his driver's license.

Taylor gave the state trooper his correct name and social security number but the state trooper felt the description he received upon running the information through the computer did not match Taylor's appearance. Taylor consented to a search of his pockets and then his truck for an ID. While looking for an ID, the state trooper noticed marijuana on the floorboard of the truck.

Nearly forty grams of marijuana was discovered in the truck, as well as marijuana residue scattered throughout the truck. Residue was found in a duffle bag in the cab area, a suitcase containing another duffle bag and a plastic bag,¹ and inside a hat in the truck's hat rack. Taylor also had two dogs in cages and a safe containing over \$12,000.

¹ This second duffle bag and plastic bag also contained residue.

Taylor's defense was that a friend had borrowed the truck, left the marijuana and residue, and he had no knowledge the marijuana, the bags, or the suitcase was in the truck.

The jury convicted Taylor of possession of marijuana. The State recommended a 180-day jail sentence with thirty days to be served. The district court imposed a 180-day jail sentence with sixty days to be served. Taylor appeals.

I. STANDARD OF REVIEW. Our review is for the correction of errors at law. Iowa R. App. P. 4. A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as the trial court's consideration of impermissible factors. *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998).

A court may not consider an unproven or unprosecuted offense when sentencing a defendant unless (1) the facts before the court show the accused committed the offense, or (2) the defendant admits it. *Id.* (citing *State v. Mateer*, 383 N.W.2d 533, 538 (Iowa 1986); *State v. Black*, 324 N.W.2d 313, 315-16 (Iowa 1982); *State v. Messer*, 306 N.W.2d 731, 732-33 (Iowa 1981)). The fact the sentencing judge was merely aware of the uncharged offense is not sufficient to overcome the presumption his discretion was properly exercised. *State v. Ashley*, 462 N.W.2d 279, 282 (Iowa 1990). In order to overcome the presumption of the proper exercise of this discretion, there must be an affirmative showing the trial judge relied on the uncharged offenses. *Id.*

II. PROPRIETY OF THE SENTENCE. In the case at bar, the district court

stated its reasons for the sentence in the following language:

Mr. Taylor, I'm required to state my reasons for the sentence upon the record. And the Court has listened to the arguments of counsel and has also reviewed the Presentence Investigation and some of the facts of this case. Frankly, it doesn't leave very much doubt in my mind that this was something more than just somebody who has a little reefer that they're going to smoke. This is a much more serious matter when you look at the scales of possession of controlled substances. This is much more serious whether you think so or not. And the Court has weighed that and taken that into consideration in its sentence in this case.

And, frankly, the only question was whether I would give you a lesser sentence than 180 days because actually my inclination is to give you six months in jail. There isn't too much doubt in my mind what you were doing. You had a trial on it, and of course you contested those issues, and that's fine. That's fine. That's the way our system operates.

But the Court isn't obliged to be blind or stupid with regard to the circumstances surrounding arrests and possession of controlled substances. It seems pretty obvious to the Court you were pretty actively involved in this certainly for a longer period of time than you probably want the Court to know about

I sentenced you on the fact that you had a lot of marijuana, and the residue in suitcases indicates there were larger quantities at some time. Based on the circumstances I think it's an appropriate sentence

Taylor contends he was improperly ordered to serve sixty days in jail as opposed to the thirty days which the State had recommended. We disagree.

We note the district court's sentence certainly fell within the maximum sentence allowed by law of 180 days. We note, also, the district court stated it was considering a 180-day sentence but opted instead for sixty days. The district court did not abuse its discretion in this regard. *State v. Martens*, 569 N.W.2d 482, 483 (Iowa 1997); *State v. Smith*, 552 N.W.2d 163, 164 (Iowa App. 1996).

Taylor claims the record "clearly" demonstrates the district court improperly considered the uncharged offense of possession with intent to deliver.² However, the district court never mentioned this offense in its reasons. The district court did state it found this case was more serious "when you look at the scales of possession of controlled substances." The district court specifically referred to the large amount of marijuana found within the truck and Taylor's attitude about the lack of seriousness of such an offense.

We have carefully reviewed the record in this case. We conclude Taylor has failed to make an affirmative showing that the district court improperly relied upon an uncharged offense when sentencing him. At most, Taylor has shown the district court was merely aware of the uncharged offense. This is not sufficient to overcome the presumption that the district court properly exercised its discretion. *Ashley*, 462 N.W.2d at 282.

For these reasons, we affirm Taylor's conviction and sentence for possession of marijuana.

AFFIRMED.

² Counsel made no objection at the sentencing hearing.

No. 98-0492. [9-246] STATE v. TAYLOR

Appeal from the Iowa District Court for Buchanan County, James C. Bauch, Judge. **AFFIRMED.** Considered by Huitink, P.J., and Streit and Mahan, JJ. Sackett, C.J., takes no part. Opinion by Mahan, J. (5 pages \$2.00)

Gregory Taylor appeals his conviction for possession of marijuana. After pulling over Taylor for a random check of his vehicle at a safety checkpoint, a state trooper noticed marijuana on the floorboard of the truck. Ultimately, nearly forty grams of marijuana was discovered in the truck, as well as marijuana residue scattered throughout the truck. Taylor was convicted and sentenced to serve sixty days in jail as opposed to the thirty days which the State had recommended. **OPINION HOLDS:** Taylor contends the judge improperly considered a crime not charged and not proven in sentencing him. Specifically, he asserts the record "clearly" demonstrates the district court improperly considered the uncharged offense of possession with intent to deliver. We disagree. The district court never mentioned this offense in its reasons. The district court did state it found this case was more serious "when you look at the scales of possession of controlled substances." The district court specifically referred to the large amount of marijuana found within the truck and Taylor's attitude about the lack of

seriousness of such an offense. Also, we note the sentence certainly fell within the maximum sentence allowed by law of 180 days. We have carefully reviewed the record in this case. We conclude Taylor has failed to make an affirmative showing that the district court improperly relied upon an uncharged offense when sentencing him. This is not sufficient to overcome the presumption that the district court properly exercised its discretion.