IN THE COURT OF APPEALS OF IOWA

No. 1-685 / 01-67
Filed November 28, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIMOTHY MICHAEL SCOTT,
Defendant-Appellant.

FILED
NOV 2 8 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Washington County, Robert Bates, Judge.

Timothy Scott appeals from the sentence imposed following a guilty plea to forgery in violation of Iowa Code sections 715A.1(1) and 715A.2(1)(b) (1999). **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender for appellant.

Thomas J. Miller, Attorney General Thomas S. Tauber, Assistant Attorney General, and Barbara A. Edmondson, County Attorney, for appellee.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

Timothy Michael Scott pled guilty to forgery. *See* Iowa Code §§ 715A.1(1), 715A.2(1)(b) (1999). The district court sentenced him to a prison term not exceeding five years. Scott appeals, contending the court in its sentencing decision: 1) failed to give due consideration to his changed character and 2) considered an unproven and unprosecuted offense. We agree with Scott's second challenge and, accordingly, vacate his sentence and remand for re-sentencing.

A court may not consider an unproven or unprosecuted offense when sentencing a defendant, unless the facts before the court show the accused committed the offense or the defendant admits committing the offense. *State v.* Jose, ___ N.W.2d ___ (Iowa 2001); State *v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998).

In sentencing Scott, the district stated in pertinent part:

> The court's considered the sentencing options available to it in 901.5, and my judgment relative to sentence is now calculated to rehabilitate the defendant and protect the community and society in general from further acts of this nature. I have considered his prior record and particularly his prior record of convictions. I've also considered his employment circumstances and the fact that he's indicated that he's a roofer and he's worked as a roofer and he worked as a roofer in Ohio for the same company. . .
>
> I've also considered the defendant's family circumstances and the fact that he has a child that he acknowledges and indicated that he cares about and purports to now change his outlook and his entire demeanor. The court has also considered his financial circumstances, his need for rehabilitation, and the types of crimes involved, and while the court notes that it's $40, it's a crime that the State of Iowa, in making legislation, making its criminal code, views as a serious offense because it breaches commerce and trust that merchants and people that deal generally in goods and services must rely upon, and injures the public interest, too, regardless of the amount.

000444

> The defendant's record is—does not reveal to the court—although the defendant's sworn statement indicates he now sees the light, but the court doesn't view his record as being one of reliability and one that the court could place a lot of reliance or trust in, as fast as what he would do. His past indication, he's indicated that he cannot. *There's a pending count of a similar nature in Johnson County, which is troubling to the court. And considering all those matters, it leads the court to believe that a suspended sentence would not be appropriate in this case.* Therefore, the defendant shall be committed to the custody of the Department of Corrections, State of Iowa, for a period not to exceed five years and to pay the costs of prosecution.

(emphasis added).

We conclude the court considered the charge pending in Johnson County. See Cf. *State v.* Jose, ___ N.W.2d at ___ (court's language showed it considered only prior convictions and not unproven offenses.) Our conclusion is based on the court's statement that the pending count was "troubling" and the court's subsequent reference to its consideration of "all those matters."

The next question is whether the pending charge was proven or admitted. *See State v. Sailer*, 587 N.W.2d 756, 762 (Iowa 1998). Scott's attorney stated, "[t]here are other charges in Johnson County that are pending. We believe that those would be run concurrently with whatever is here." This statement suggests defense counsel anticipated the Johnson County charges would be resolved against Scott. However, when the district court in this matter asked Scott about the Johnson County charges, Scott only admitted they were pending. He did not admit to committing the offense or offenses. Additionally, the prosecutor, while noting the pending charges, stated, "and, of course they can do what they want with those charges", suggesting the Johnson County charges had not been resolved. On this record, we conclude the pending charge in Johnson County was neither proven nor admitted.

006445

Accordingly, we conclude the district court's reliance on the unproven Johnson County charge was improper. We vacate the sentence and remand for resentencing, without intimating what the sentence should be. *See State v. Ashley*, 462 N.W.2d 279, 283 (Iowa 1990); *State v. Messer*, 306 N.W.2d 731, 733 (Iowa 1981). In light of our conclusion, we need not address Scott's first claim that the court did not adequately consider his changed character.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.

000446