FILED
OCT 25 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed October 25, 1983
vs.	)	
FRANK C. GATTO,	)	3-161 / 69449
Defendant-Appellant.	)	

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Appeal from Linn District Court - Larry J. Conmey, Judge.

Defendant appeals from judgment entered on his guilty plea to a charge of possession of a firearm as a convicted felon. AFFIRMED.

James E. Bennett of Keyes, Bennett & Kucera, Cedar Rapids, Iowa, for defendant-appellant.

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

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, Hayden, and Sackett, JJ.

SCHLEGEL, J.

Defendant appeals from judgment entered on his guilty plea to a charge of possession of a firearm as a convicted felon. Defendant asserts that the sentencing court erroneously relied upon facts connected with an unprosecuted charge of going armed with intent in imposing sentence. We affirm.

I. The defendant was accused of pointing a loaded gun at some bar patrons and pulling the trigger. The gun misfired because the bullets had been loaded improperly. The defendant was initially charged with both going armed with intent and possession of a firearm as a convicted felon. The charge of going armed with intent was dismissed pursuant to plea bargain and defendant pled guilty to possession of a firearm as a convicted felon, an aggravated misdemeanor. The trial court, in imposing sentence, noted as reasons for the sentence the nature of the offense, the indication in the presentence report that defendant had pulled the trigger of a loaded gun, the defendant's need for rehabilitation, and protection to the community.

On an appeal from a sentence which is within the statutory maximum, we will not interfere with the sentence imposed unless an abuse of discretion is shown. State v. Gibb, 303 N.W.2d 673, 687 (Iowa 1981). Ordinarily an abuse of discretion will be found only where there is no support for the decision in the record. Id. A trial court has the discretion to select a sentence that "will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others." Iowa Code § 901.5 (1983). A trial court may not, however, impose a severe sentence on a lower crime on the ground the accused actually committed a higher crime or on the ground that there are other unprosecuted offenses, unless the facts before the court show the accused committed the crime or the defendant admits it. State v. Black, 324 N.W.2d 313, 315 (Iowa 1982); State v. Messer, 306 N.W.2d 731, 732 (Iowa 1981). In the absence of evidence to the contrary, this court

assumes that the trial court made the proper use of the presentence report and did not give consideration to anything based on speculation or conjecture. State v. Waterman, 217 N.W.2d 621, 623 (Iowa 1974).

We do not interpret the trial court's statements or its reliance on the presentence report to indicate that it based its decision in whole or part on the dismissed charge. Furthermore, the facts relied upon by the sentencing court were admitted to by defendant at the entry of the guilty plea. Defendant admitted in the guilty plea proceeding that the minutes of testimony attached to the information were accurate. Defendant also admitted that he got the shotgun and returned to the bar to scare his girlfriend with whom he had been arguing. The sentencing court did not abuse its discretion.

II. This matter was previously remanded by us for the limited purpose of reentry of sentence. At the time the sentence was originally entered, an indeterminate sentence for the violation of Iowa Code section 724.26 (1981), was illegal. State v. Wilson, 294 N.W.2d 824, 826 (Iowa 1980). Upon remand, the district court on August 12, 1983, reentered sentence for an indeterminate term not to exceed two years. A recent statutory amendment effective July 1, 1983, requires sentences for aggravated misdemeanors which exceed one year to be indeterminate. 1983 Iowa Acts ch. 183, §§ 2, 3. This act applies retroactively to January 1, 1978. Although the original indeterminate sentence was void, resentencing of the defendant after the effective date of the act to an indeterminate sentence not to exceed two years was within the sentencing court's discretion.

AFFIRMED.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, C.J., (dissenting).

I dissent. In State v. Black, 324 N.W.2d 313, 315 (Iowa 1982), the court said:

> 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. . . . The sentencing court should only consider those facts contained in the minutes that are admitted to or otherwise established as true.

In this case the majority finds that the defendant admitted the statements in the minutes. The trial information has one set of minutes for two charges. The defendant pleaded not guilty to the going armed with intent charge. He pleaded guilty to the possession of a firearm by a convicted felon charge. His plea of not guilty is a denial of the statements in the minutes relating to the "going armed" charge.

I would remand this case to the district court for resentencing because the trial court relied on facts not proven.