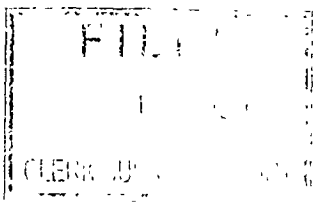
# IN THE COURT OF APPEALS OF IOWA

No. 1999-198 (9-422) / 98-1761
Filed September 15, 1999



**STATE OF IOWA,**
Plaintiff-Appellee,

vs.

**DANA DELL FOUTS,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Hardin County, Carl D. Baker, Judge.

Fouts appeals from his conviction for causing a serious injury by vehicle, arguing the district court erred in sentencing him to prison. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Richard N. Dunn, County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

**HUITINK, J.**

Dana Fouts appeals from the sentence imposed following his guilty plea to unintentionally causing a serious injury by driving a motor vehicle in a reckless manner in violation of Iowa Code section 707.6A(4).

***I. Background Facts and Proceedings.***

Fouts was originally charged with committing this offense under any one of three alternatives, operating while intoxicated, eluding a police officer, or driving a motor vehicle in a reckless manner with a willful or wanton disregard for the safety of persons or property. In exchange for Fouts's guilty plea, the State agreed to charge only the reckless driving alternative. The State also agreed not to charge Fouts with operating while intoxicated and recommend any prison sentence imposed be suspended.

At the sentencing hearing the State and Fouts's attorney both urged the court to follow the department of cor ections' recommendation that Fouts receive a suspended sentence and probation. Prior to pronouncing judgment and sentence, the court made the following observations:

> Your conduct on the day this occurred was outrageous. You knew there was an officer behind you, trying to stop you, and you purposely took off trying to elude him. And eventually ended up having an accident that resulted in a fairly serious injury to one of the occupants of the car. Now, thankfully, and due to nothing that you did, nobody was killed. But somebody could have easily been killed by your reckless conduct.
>
> The problem of drinking and driving is pointed out vividly in your conduct. You made a choice, and it was a terrible choice, to try to

> escape the officer. And fortunately, you didn't strike another vehicle which could have injured or killed somebody else. But what happened was bad enough. And in reading the presentencing report, it appears to me you attempt to minimize your conduct. You don't think you were really intoxicated although you describe it as being "legally intoxicated." Now, that's splitting hairs, as far as I am concerned, Mr. Fouts. You were intoxicated. You shouldn't have been driving a vehicle.
>
> The recommendation made by the County Attorney is one that I cannot follow, Mr. Fouts. I think your conduct in this case requires that you be placed in prison. I don't think that a suspended sentence with probation is appropriate in this case at all. The danger you placed others in, and yourself, as well, is inexcusable. You can't expect to act in that way, conduct yourself that way, and simply not suffer any consequences.

The district court sentenced Fouts to an indeterminate five-year term of incarceration.

On appeal Fouts contends the district court impermissibly considered uncharged offenses in making its sentencing decision. Fouts alternatively contends he was denied effective assistance of counsel.

***II. Standard of Review.***

A sentence imposed by the district court will not be overturned absent a failure to exercise or abuse of its sentencing discretion. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996) (citations omitted). The use of an impermissible sentencing factor is viewed as an abuse of discretion and is reviewed in accordance with that standard. *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983).

Because Fouts's ineffective assistance of counsel claims implicates constitutional rights, our review is de novo. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980).

***III. Sentencing.***

Fouts argues the district court impermissibly considered the higher unproven charge that Fouts was under the influence of alcohol at the time of the offense. Fouts correctly notes consideration of uncharged offenses is proscribed unless the offense is admitted or the facts before the court show the accused committed the uncharged offense. *State v. Bragg*, 388 N.W.2d 187, 191 (Iowa App. 1986) (citations omitted). Similar rules limit the court's consideration of more serious charges originally brought, but later reduced or dismissed. *State of Ludemann*, 484 N.W.2d 611, 613 (Iowa App. 1992) (citation omitted).

The presentence report includes Fouts's statement that he was legally intoxicated at the time of the offense although he did not feel he was intoxicated. Contrary to Fouts's contention, we find this admission provides sufficient support for the court's consideration of Fouts's intoxication at the time of the offense as a sentencing factor. Additionally, Fouts's intoxication is among those circumstances surrounding the offense that a sentencing court in this situation may properly consider. *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979) (attending circumstances are among minimal sentencing considerations the court is required to make). Moreover, intoxication is an element of recklessness and in our view

appropriately considered in measuring the seriousness of the offense committed. *State v. Graff*, 290 N.W.2d 97, 101-12 (Iowa 1940) ("when one is charged with careless, reckless conduct, or with conduct indifferent to the rights of others, or showing that he was intoxicated at the time, is a very persuasive factor in leading the mind to the conclusion that the charge is well founded").

We find no abuse of discretion and affirm on this issue.

*V. Ineffective Assistance of Counsel.*

Fouts contends his attorney was ineffective because no objection was made to the presentence report's reference to Fouts's admission of intoxication at the time of this offense.

To prevail on a claim of ineffective assistance of counsel, Fouts must prove by a preponderance of the evidence: (1) his counsel failed to perform an essential duty, and (2) resulting prejudice. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). The prejudice prong of this test is satisfied if:

> [T]here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). It is not necessary to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance of counsel claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

Our disposition of Fouts's sentencing claims is dispositive of this issue. Fouts cannot show but for counsel's allegedly deficient performance the result of the sentencing proceeding would have been different.

The judgment and sentence of the district is affirmed.

**AFFIRMED.**