IN THE COURT OF APPEALS OF IOWA

No. 0-650 / 00-260
Filed November 8, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRIAN KEITH CASSATT,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Annette J. Scieszinski, Judge.

On appeal from his conviction for manufacturing methamphetamine, Cassatt argues the district court improperly considered unproven and unprosecuted charges when sentencing him. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel L. Mullins, Assistant Attorney General, Victoria Siegel, County Attorney, and Rose Anne Mefford, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Vogel, J., and C. Peterson, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (1999).

C. PETERSON, S.J.

Cassatt was charged with manufacturing methamphetamine, as a second or subsequent offense, and with possession with intent to deliver methamphetamine, as a second or subsequent offense. Pursuant to a plea bargain he plead guilty to the charge of manufacturing methamphetamine as a second offense.

Cassatt was adjudicated to be guilty of the charge and sentenced by the Honorable Annette J. Scieszinski. Pursuant to authority of Iowa Code sections 124.401(1)(c)(6), 124,411, and 902.9, Judge Scieszinski concluded that the discretionary ten-year sentence should be tripled and sentenced Cassatt to a term not to exceed thirty years and a fine in the amount of $1000 with surcharge. The DARE surcharge, driver's license revocation, and court costs were included as a part of the sentence. The court considered the provisions of Iowa Code section 124.413 regarding the mandatory minimum sentence and determined that no evidence of mitigating circumstances was presented to justify waiver of the mandatory minimum sentence.

The presentence investigation report contained attachments, including a letter from Sergeant Tom McAndrew. McAndrew was a member of the drug task force that had ultimately arrested and charged Cassatt with the offense to which Cassatt plead guilty.

The lengthy McAndrew letter described Cassatt as a known drug dealer and as a major source of methamphetamine for area drug dealers. The letter

described an April 28, 1999, search of the Cassatt residence by the drug task force, identifying the items seized, and drawing a conclusion:

> Looking at the totality of the items found in Cassatt's residence, vehicle and the vehicle itself, it is clear that Cassatt was organized and had put some serious thought into his methamphetamine manufacturing operation.

The charges to which Cassatt plead guilty arose out of the evidence seized as a result of a June 21,1999, search. No charges were filed from the information gathered on the April 28,1999, search.

At the time of the sentence hearing, the court asked Cassatt:

> Do you believe there's anything in that body of information [presentence investigation and attachments] that needs to be changed, added to it or taken from it?

Cassatt responded:

> The only thing I have is kind of a rebuttal to Mr. Tom McAndrew's statements and inaccuracies in his statements, and that's the only thing that I would like to add other than what's already there.

The court then allowed Cassatt to expand on his comments. Cassatt did not challenge the accuracy of the facts concerning the items seized on April 28 or June 21. He challenged the conclusions drawn from those seizures and the general conclusions in the letter concerning the intent of his activities.

Upon sentencing the court defined the sources from which it had drawn its conclusions concerning sentencing as follows:

> Mr. Cassatt, I want to tell you why I selected the sentencing options that I did ....I considered your prior record and specifically your 1989 conviction in Wapello County CR 1071-1189. I considered your prior employment, the level of your education, and the demonstrated intelligence. I considered your family circumstances and the nature of this offense. But in particular, I gave a lot of consideration to the needs that you demonstrate for a high degree

> of structure and some significant programming and some serious attempts at treatment to address your substance abuse and the attitude adjustments that are necessary for a successful rehabilitation. It's of considerable concern to me that you have not accepted responsibility for your actions and have not held yourself accountable for the predicament that you find yourself in, and I believe that the programming and structure the prison system provides to you will enable you to overcome the hurdles that are keeping you from realization and rehabilitation at this point.

The court acknowledged awareness of the authority to waive the mandatory minimum sentence but declined to do so.

On appeal Cassatt argues the sentencing judge erred when it considered unproven and unprosecuted charges referenced in McAndrew's letter when sentencing.

Our review is for the correction of errors at law. Iowa R. App. P. 4; *State v. Gonzales,* 582 N.W.2d 515, 516 (Iowa 1998). A sentence will not be upset upon appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as a trial court's consideration of impermissible factors. *State v. Wright,* 340 N.W.2d 590, 592 (Iowa 1993).

Cassatt contends the sentence is illegal because the trial court considered impermissible factors in its evaluation of the sentence to be imposed.

A sentencing court may not consider or rely on charges of unprosecuted offenses unless they are admitted by the defendant or otherwise proved. *State v. Sinclair,* 582 N.W.2d 762, 765 (Iowa 1998); *State v. Black,* 324 N.W.2d 313, 315 (Iowa 1982).

The imposition of a sentence is generally within the discretion of the trial court and will be disturbed only upon a showing of an abuse of discretion. *State v. Garrow,* 480 N.W.2d 256, 259 (Iowa 1992). The use of an impermissible sentencing factor is considered an abuse of discretion and requires resentencing. *State v. Pappas,* 337 N.W.2d 490, 494 (Iowa 1983). However, to overcome the presumption of the proper exercise of discretion, there must be an affirmative showing that the trial court relied on the uncharged offenses. *State v. Ashley,* 462 N.W.2d 279, 282 (Iowa 1990); *State v. Hansen,* 344 N.W.2d 725, 730 (Iowa App. 1983).

In this case the court very succinctly described the listed factors that it considered when arriving at the appropriate sentence. The McAndrew letter, or any information contained therein, was conspicuously absent from the factors identified by the court. In addition to the traditional facts considered, the court reflected on Cassatt's continued comments to the court that persisted in blaming others for his crime.

Cassatt extracts a comment made by the court in a discourse with Cassatt denying the waiver of the mandatory minimum one-third time served when the court stated:

> The Court's mindful that it has the option to choose a lesser enhancement and also has the option to ignore the enhancement altogether, but based upon the information available to the Court, it believes that the enhancement requested by the State is appropriate in this case.

Cassatt contends this reference indicates the reliance by the court on unproven and unprosecuted charges.

This comment must be considered in context of all comments made by the court and particularly the explicit language used to define the factors considered by the court. When the court has specifically described the factors upon which it relies to arrive at an appropriate sentence, it is not required to affirmatively disclaim those factors that were not considered.

Although Cassatt made extensive reference to the contents of the letter in his discussion with the court at the time of sentence, the court deliberately avoided any reference to the contents of the letter in the identification of factors it considered. The mere awareness of an uncharged offense is not sufficient to overcome the presumption that the court's discretion was properly exercised. *State v. Pappas,* 337 N.W.2d 490, 494 (Iowa 1983). Cassatt has failed to present an affirmative showing that the trial judge relied on uncharged or unprosecuted offenses when sentencing Cassatt to overcome the presumption of an appropriate sentence.

AFFIRMED.