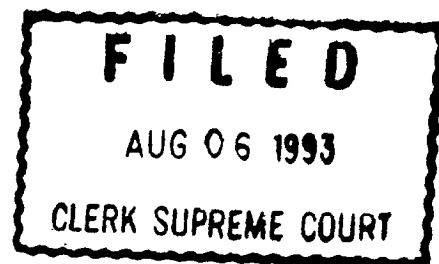


IN THE COURT OF APPEALS OF IOWA

No. 3-327 / 92-1875



STATE OF IOWA,

Appellee,

vs.

KEVIN DEAN HULEN,

Appellant.

000809

Appeal from the Iowa District Court for Wapello County,
E. Richard Meadows, Judge.

Hulen appeals the sentences imposed upon his guilty
pleas to third-degree criminal mischief and third-degree
theft. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, for
appellant.

Bonnie J. Campbell, Attorney General; Richard J.
Bennett, Assistant Attorney General; William H. Appel,
County Attorney; and R. Timothy Starken and Ron Kelly,
Assistant County Attorneys, for appellee.

Considered by Donielson, P.J., and Hayden and Habhab,
JJ.

DONIELSON, P.J.

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The State charged Kevin Dean Hulen with second-degree criminal mischief and third-degree theft. Pursuant to a plea agreement, Hulen pleaded guilty to third-degree criminal mischief and third-degree theft. In exchange, the State agreed to recommend suspended concurrent sentences with conditions of release to be determined by the sentencing court.

At the sentencing hearing, the prosecutor informed the court of the plea bargain. The prosecutor then stated:

It came to my attention, Your Honor, that -- that the Defendant yesterday was -- had an initial appearance on an additional charge of Criminal Mischief in the Second Degree; admitted on August 29th -- or alleged to have been committed on August 29th of this year.

As a result, the prosecutor recommended that Hulen be required to reside at a halfway house for up to 180 days as a condition of probation. Hulen's counsel responded that it would be better for the court to wait until after the trial on the charge before placing the defendant in a halfway house.

The district court imposed suspended concurrent sentences and ordered Hulen to be placed at a residential correctional facility for 180 days or until maximum benefits had been achieved as a condition of probation. In support of its sentencing decision, the court stated:

I sentenced you the way I did because of the nature of the offenses. I also considered your age. . . . I think that you have demonstrated over

the years a fairly consistent ⁰⁰⁰⁸¹¹ lack of responsibility. And I don't know what it is going to take to get your attention. At the time of the training school, apparently that wasn't sufficient. I don't think you are ready to return to society. I think some time in jail may give you an opportunity to pause and think about what you have done.

Hulen appeals, contending the district court improperly considered the unproven charge in imposing the sentences.

On appeal, we interfere with discretionary sentencing only if there has been an abuse of discretion. State v. Dvorsky, 322 N.W.2d 62, 67 (Iowa 1982). Abuse of discretion will be found if a trial court considers charges not admitted or proved when sentencing a defendant. See State v. Hill, 306 N.W.2d 731, 733 (Iowa 1981). Decisions of the trial court, however, are cloaked with a strong presumption in their favor, that the discretion of the trial court was correctly exercised. State v. Pappas, 337 N.W.2d 490, 494 (Iowa 1983). Overcoming this presumption of regularity requires an affirmative showing of abuse by the party complaining. Id.

In this case, the fact that the sentencing court was aware of the unproven charge is not sufficient to overcome the presumption that the court's discretion was properly exercised. State v. Ashley, 462 N.W.2d 279, 282 (Iowa 1990); State v. Pappas, 337 N.W.2d at 494. Appellant must show affirmatively that the court relied on the unproven charge. State v. Ashley, 462 N.W.2d at 282; State v. Hansen, 344 N.W.2d 725, 730 (Iowa App. 1983).

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The court expressly considered the nature of the offenses and appellant's age. The offenses to which appellant pleaded guilty occurred while appellant was on leave from the boys' training school. The statements concerning a "lack of responsibility over the years," "the time of the training school," and "an opportunity to pause and think about what you have done" clearly show the court's consideration of appellant's history of juvenile delinquency. Since the statements by the court in sentencing appellant show consideration of proper factors, we do not believe appellant has sustained his burden to show the sentencing court improperly considered the unproven charge. Therefore, we affirm the sentence of the district court.

AFFIRMED.