

IN THE COURT OF APPEALS OF IOWA

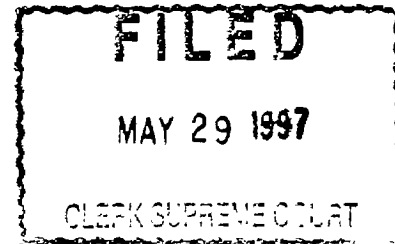
No. 7-243 / 96-1256

000403

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK CARR,
Defendant-Appellant.



Appeal from the Iowa District Court for Clinton County, Arlen J. Van Zee,
Judge.

Defendant appeals the sentence imposed upon his conviction of driving while
license suspended in violation of Iowa Code section 321.218 (1995). **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney
General, Lawrence H. Schultz, County Attorney, and Gary P. Strausser, Assistant
County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Vogel, JJ.

VOGEL, J.

Defendant Mark Carr appeals the sentence imposed following his conviction for driving while suspended or revoked. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

On May 7, 1995, Carr lost control of the vehicle he was driving. One of his passengers died as a result of the single vehicle accident that followed. A blood test revealed the presence of alcohol in Carr's system, but in an amount less than .10. An accident reconstructionist concluded Carr was driving well above the posted speed limit while attempting to negotiate the curve when the accident occurred. The State charged Carr with homicide by vehicle, but later moved to dismiss based on insufficient evidence. Six months later the State charged Carr with driving while suspended or revoked.

The State and Carr stipulated to the evidence in a bench trial. The court found Carr guilty and ordered a presentence investigation. The presentence investigation report revealed Carr had 21 simple misdemeanor traffic convictions and received a citation for driving while suspended the night before the accident. The seven page report recommended the maximum penalty and contained the statement, "A 16-year-old boy lost his life due to Mr. Carr's recklessness and complete disregard of the laws of the State of Iowa."

At the sentencing hearing, Carr's attorney alerted the court to the vehicular homicide charge and argued the charge could not be considered. The court fined Carr

\$250 and sentenced him to one year in jail. In its oral ruling on sentencing, the court found troubling Carr's conscious choices--choices to drive and to disregard the DOT's directive. The court also mentioned the extent of violations on Carr's driving record and the consumption of alcohol. The court determined the imposition of only a fine would minimize the case and its consequences.

Our review is for correction of errors at law. Iowa R. App. P. 4. The trial court's sentencing decision is cloaked with a strong presumption in its favor. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). Because Carr does not assert that the sentence falls outside statutory limits, we will set aside the sentence only for an abuse of discretion. *Id.* An abuse of discretion occurs "when the sentencing court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.* Carr has the burden to show an abuse of discretion. *State v. Harris*, 528 N.W.2d 133, 135 (Iowa App. 1994).

Carr argues the trial court abused its discretion by considering the charge of homicide by vehicle. Unless a defendant admits an offense or facts before the court show a defendant committed an offense, a sentencing court may not consider a prior unprosecuted offense in imposing sentence. *State v. Bragg*, 388 N.W.2d 187, 191 (Iowa App. 1986). The record does not support Carr's claim the trial court did so in this case.

Although the presentencing investigation report referred to Carr's recklessness and the death of his passenger, the trial court made no reference to this excerpt

beyond the general comment that Carr's choices "have resulted in certain unfortunate consequences to himself and his own injuries and to others." Instead, the court emphasized the troubling aspect of the citation received the night before the accident, Carr's lengthy record of violations, and his conscious choice to disregard the DOT's directive by driving. Carr has not met his burden to show the trial court relied on untenable grounds or exercised its discretion to a clearly unreasonable extent. Thus, no abuse of discretion has been shown.

AFFIRMED.