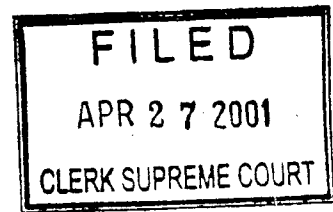


IN THE COURT OF APPEALS OF IOWA

No. 1-104 / 00-0609
Filed April 27, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

MONTRESE JERMAINE WILSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, John Bauercamper, Judge.

Montrese Wilson appeals from the sentence and restitution imposed following his guilty plea to assault by use or display of a dangerous weapon in violation of Iowa Code section 708.2(3) (1997). **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Zimmer and Hecht, JJ.

HECHT, J.

Montrese Wilson appeals from the sentence and restitution imposed following his guilty plea to assault by use or display of a dangerous weapon in violation of Iowa Code section 708.2(3) (1997). He contends: (1) the district court erred in considering unproven charges in determining the sentence to impose, and (2) the district court erred in ordering him to pay restitution in the amount of \$11,116.22. We affirm.

I. Factual Background and Proceedings. On the evening of October 10, 1998, Wilson and many other young people were at the New World Lounge in Waterloo, Iowa. On the dance floor in the bar, several men were making hand signals resembling gang signs. According to witnesses at trial, Wilson was one of the men in the group, along with his codefendants, Marlando Hoosman and Moriano Keys. Tensions escalated between several groups of people in the bar culminating in a fight involving many of the bar patrons and onlookers. Several shots were fired into and around the group, striking and injuring two victims, Joel Riley and Margaret Vanarsdale. Witnesses reported all three of the codefendants were carrying weapons on the evening in question and fired shots either into the air near the scene or randomly into the group of people outside of the bar.

The State charged Wilson, Hoosman, and Keys with willful injury, terrorism, going armed with intent, and criminal gang participation. On May 17, 1999, after three weeks of trial, the jury returned a not guilty verdict with respect to the criminal gang participation charge for all three codefendants. However,

the jury could not reach a unanimous verdict on the remaining charges, and the district court declared a mistrial as to those charges. On January 19, 2000, Wilson pleaded guilty to the amended charge of assault by use or display of a dangerous weapon pursuant to a plea agreement with the State. In exchange for the opportunity to plead guilty to a lesser charge, Wilson agreed to testify against Hoosman and Keys.

On April 3, 2000, the district court sentenced Wilson to a term of incarceration not to exceed two years. The district court further ordered him to pay a fine of \$500, a thirty-percent surcharge of \$150, and court costs totaling \$11,116.22. In its judgment and sentence order, the district court ordered Wilson to repay the State for the cost of court-appointed counsel "in an amount to be determined by later court order." Wilson appeals and challenges the imposed sentence and the restitution order.

II. Standard of Review. We review the sentence imposed by the district court for errors at law. *State v. Grandberry*, 619 N.W.2d 399, 400 (Iowa 2000). Sentencing decisions are cloaked with a strong presumption in their favor. See *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as trial court consideration of impermissible factors." *Id.*

III. Consideration of Unproven Charges. 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 by the

defendant nor otherwise proved. *State v. Sailer*, 587 N.W.2d 756, 762 (Iowa 1998). This rule prohibits a sentencing court from imposing a more severe sentence for a lower crime on the ground the accused actually committed a higher crime, even if the prosecutor originally charged the higher crime and reduced the charge. See *State v. Thompson*, 275 N.W.2d 370, 372 (Iowa 1979).

Wilson points to the following language used by the district court during the sentencing hearing to support his claim the court impermissibly relied on unproven offenses:

Now, in pronouncing Judgment and Sentence, the Court has considered all the factors provided in Section 907.5, Code of Iowa. The Court has also given special consideration to the plea agreement of the prosecutor, which resulted in the reduction of charges in this case, the recommendations in the PSI, and the nature of the offense.

Wilson argues the district court considered the original, more serious, charges when it sentenced him to incarceration as a sentence for assault by use or display of a deadly weapon. He contends the court's mention of "special consideration to the plea agreement" indicates the court relied upon the original charges of terrorism, willful injury, and going armed with intent, which were dropped by the State in exchange for the plea agreement, when sentencing him to a term of incarceration. Wilson did not admit to committing the higher crimes, and he argues the record does not support the conclusion he actually was guilty of the higher offenses.

In order to overcome the presumption the district court properly exercised its discretion, there must be an affirmative showing the court relied on improper evidence. *State v. Dake*, 545 N.W.2d 895, 897 (Iowa Ct. App. 1996). We

acknowledge the district court noted the plea agreement between Wilson and the State, which ultimately resulted in the reduction of the original charges. We cannot agree, however, with Wilson's assertion the court's consideration of the plea agreement necessarily denotes consideration of charges for which no conviction resulted. It is just as likely the court's comment was an acknowledgement of Wilson's cooperation with the State by testifying against his codefendants in exchange for a reduction of charges. While Wilson did receive the maximum sentence available for the charge he pleaded guilty to, the district court noted sufficient reasons for the length of the term of incarceration such as the PSI's recommendation of incarceration, Wilson's extensive juvenile criminal record, and the nature of the offense. We conclude Wilson failed to make the necessary affirmative showing the sentencing court impermissibly relied on uncharged and unproven offenses.

IV. Restitution. As noted above, the district court ordered Wilson to pay court costs and court-appointed attorney fees totaling \$11,116.22.¹ Wilson challenges the amount of the costs and fees he was ordered to pay on two grounds. First, he asserts the district court erred by ordering him to pay costs and fees attributable to the prosecution and defense of the charge he was acquitted of, the charges which resulted in a mistrial, and the costs of trial with his codefendants. Second, he contends the district court erred by ordering restitution without first making a determination of his ability to pay. The State

¹ This figure represents the total court costs and attorney fees up until April 3, 2000. Several costs and fines were added on April 3, 2000, including the \$500 fine, the \$150 surcharge, and a \$15 fee for court reporter services. These additional charges bring the total costs and attorney fees to \$11,781.50.

asserts Wilson's claims are premature. We agree. We cannot address this issue at this time because no plan of restitution was completed at the time Wilson filed his notice of appeal and the record before us on appeal contains no court order dictating a plan for payment of restitution. See *State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999). In addition, Wilson may challenge the amount of restitution required by the plan by petitioning the district court for a modification under the provisions of Iowa Code section 910.7. See *id.* The district court informed Wilson of his ability to file such a petition during the sentencing hearing and in the judgment order entered on April 3, 2000. Therefore, we do not consider Wilson's claims regarding the district court's order to pay costs and attorney fees.

AFFIRMED.