FILED
DEC 14 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-435 / 93-1752

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JOHN DAVID DOOLEY,

Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, Sandra J. Holien, District Associate Judge.

John David Dooley appeals the judgment and sentence entered upon his plea of guilty to possession of marijuana and second-degree harassment. **SENTENCE AFFIRMED IN PART AND VACATED IN PART; REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, Diann Wilder-Tomlinson, County Attorney, and Paul G. Crawford, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Huitink, JJ.

HABHAB, J.

In June 1993, John David Dooley was charged by trial information with the offenses of possession of marijuana and second-degree harassment in violation of Iowa Code sections 124.401(3), 708.7(1)(a) and 708.7(3) (1993).[1] Pursuant to a written plea agreement, Dooley pled guilty to the offenses as charged.

At Dooley's sentencing, the State introduced into evidence audio cassette tapes which contained recordings of harassing phone calls Dooley made to his former wife in February and April 1993. Dooley's counsel objected on relevancy grounds; however, the court overruled the objection and the tapes were admitted.

In its sentencing order the district court compared the phone calls made in February and April to the June phone call upon which the harassment charge was based. The court noted that the tapes were illuminating as to the ongoing nature of the threats and harassment Dooley had directed toward his former wife and her male companion. The district court also considered a victim impact statement given by the male companion of Dooley's former wife and the presentence investigation report. Contrary to the State's recommendation of probation, the court sentenced Dooley to concurrent sentences of ten-days on the marijuana charge and ninety-days on the harassment charge.

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1. The harassment charge stems from telephone calls made by defendant, Dooley, to his former wife on June 15, 1993.

On appeal Dooley claims the district court abused its discretion in considering the audio cassette tapes during sentencing.

Dooley challenges the legality of the sentence imposed based on the district court's consideration of unprosecuted charges when sentencing Dooley. The standard of review is for abuse of discretion. State v. Black, 324 N.W.2d 313, 315 (Iowa 1982). The district court's discretion in imposing sentences is not unlimited. State v. Messer, 306 N.W.2d 731, 732 (Iowa 1981).

A sentence will be set aside and remanded for resentencing if the district court relied on an unprosecuted offense that is neither admitted by the defendant nor sufficiently proven in the record. Black, 324 N.W.2d at 315; Messer, 306 N.W.2d at 732-33.

Dooley was charged with and pled guilty of making harassing telephone calls in June 1993. The unprosecuted harassment offenses which Dooley claims were improperly considered stem from the tape-recorded telephone conversations of February 1993 and April 1993 between Dooley and his former wife. Dooley was not charged with harassment for the telephone calls made in February and April. Any harassment offenses committed by Dooley due to these February and April telephone calls were unprosecuted. The mere playing of the tapes, even in the presence of the defendant, is not sufficient proof that an offense was committed by him.

The district court, in sentencing Dooley, expressly considered the telephone calls made in February and April. The sentencing court stated:

> The nature of the phone calls made to Kathleen Dooley's house on June 15th, 1993, appear to be annoying and more of a nuisance than they were actually threatening in nature. The tapes from February and April of this year have been illuminating to this Court in terms of the ongoing nature of the threats and harassment that has been conducted by the Defendant as against Kathleen Dooley and Craig Swanson. . . . In essence, Mr. Dooley has attempted to control and to direct the diections of the affections of these two people, their ability to associate with one another. He's attempted to do so by the use of threats and coercion. That's borne out by the tapes in this case.

There can be no doubt the court took the previous calls into consideration even though they were unprosecuted offenses. Since we can only speculate as to the weight these unprosecuted offenses were given in sentencing, we must set aside the sentence. Black, 324 N.W.2d at 316.

We will not consider Dooley's ineffective assistance of counsel claim due to our finding on the sentencing issue.

The grounds on which we base our vacation of the harassment sentence are not related to the drug possession sentence. As a result, we affirm the sentence for the drug possession conviction and vacate the sentence for the harassment conviction. The case shall be remanded for resentencing on the harassment conviction only. In resentencing Dooley on the harassment conviction, the district court is not to consider the tape-recorded telephone conversations covered in the plea bargain unless

independently proven. We do not suggest what the proper sentence should be. Id.

SENTENCE AFFIRMED IN PART AND VACATED IN PART; REMANDED FOR RESENTENCING.