IN THE COURT OF APPEALS OF IOWA

FILED
MAY 30 1995
CLERK SUPREME COURT

No. 5-208/94-529

STATE OF IOWA,

Appellee,

vs.

DOUGLAS J. HAYS,

Appellant

Appeal from the Iowa District Court for Marshall County, Timothy J. Finn, Judge.

Defendant appeals the judgment and sentence entered upon his convictions, following a jury trial, of serious trespass, domestic abuse assault, and criminal mischief. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Diann Wilder-Tomlinson, County Attorney, and Paul Crawford, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Habhab and Huitink, JJ.

DONIELSON, C.J.

The defendant, Douglas Hays, appeals two issues. He contends the trial court abused its discretion in considering an unproven charge in sentencing him. He also alleges his trial counsel was ineffective for failing to present evidence that the victim had a reputation for untruthfulness. We affirm on the former issue and preserve the latter for consideration in postconviction proceedings.

I. SENTENCING.

The defendant was charged with burglary in the first degree, serious trespass, aggravated domestic abuse assault, and criminal mischief. The defendant was acquitted of the burglary charge and convicted of the remaining offenses. The defendant contends the sentencing judge abused his discretion by considering an unproven charge in sentencing him. During the sentencing proceeding the judge stated--

> I get the very distinct impression listening to you here today that you have no idea, first of all, how serious this crime was and, secondly, how close you came to being in prison for 25 years. If this case had been tried in virtually any other county in the district, you would be going to prison.
>
> I say that not because of the County Attorney, because he did a good job, because of the makeup of this community and the people that serve on the jury. I can guarantee you if this was tried one county over, you would be in prison for 25 years; and it's due to two things. It's due to the makeup of the jury panel and it's due to your lawyer; and so I started from a premise that is obvious to me that you don't really

> understand what serious trouble you're in and how close you came to taking a very long trip to the penitentiary.

The defendant argues these remarks show the court considered the burglary charge in sentencing him. He contends this case should be remanded to the district court for a new sentencing hearing.

A trial court has considerable discretion in sentencing. *State v. Le Grand*, 501 N.W.2d 59, 64 (Iowa App. 1993). "There is a strong presumption in favor of a sentence given by a trial court that is rebutted only by an affirmative showing of an abuse of discretion." *Id.* The burden of showing an abuse of discretion is on the defendant. *Id.*

It is an abuse of discretion for a sentencing court to consider unprosecuted offenses which have not been admitted by the defendant or sufficiently proven in the record. *State v. Black*, 324 N.W.2d 313, 315 (Iowa 1982). Mere awareness of unprosecuted or unproven offenses, however, is not sufficient to overcome the presumption that the sentencing court properly exercised its discretion. *See State v. Ashley*, 462 N.W.2d 279, 282 (Iowa 1990). In order to overcome the presumption of the proper exercise of this discretion, there must be an affirmative showing that the sentencing court relied on the uncharged or unproven offenses. *See id.*

A review of the record indicates several factors affected the court's sentencing decision. The trial judge was concerned the defendant did not understand the

seriousness of his conduct. The court was also concerned because the defendant appeared to believe the victim was at fault for the resulting charges. The judge indicated he felt the defendant posed a threat to the community and needed to control his temper.

The sentencing judge did allude to the longer prison term to which the defendant would have been subjected had he been convicted of burglary. However, the judge's comments were made in the context of his overriding concern that the defendant really did not comprehend the seriousness of his conduct. The judge made it clear to the defendant he would later reconsider the defendant's sentence if he saw a change in the defendant's attitude. Rather than relying on the burglary offense as a consideration in his sentencing decision, we believe the tenor of the judge's comments indicate he was trying to get the defendant to recognize the seriousness of his conduct and instill some motivation in him to modify his behavior.

We cannot find the judge relied on the acquitted offense in rendering his sentence. There was no abuse of discretion in the imposition of the sentence and we affirm.

II. INEFFECTIVE ASSISTANCE OF COUNSEL.

The defendant contends his trial counsel was ineffective for failing to present evidence that the victim had a reputation for untruthfulness. Prior to the trial the

defendant's counsel had indicated to the court she might introduce such evidence. However, no testimony of that kind was elicited from the defendant's witnesses.

Generally, claims of ineffective assistance of counsel claims are preserved for postconviction proceedings. *See State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981), *cert. denied*, 459 U.S. 841 (1982); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). Preserving the matter for postconviction relief allows the facts to be developed and gives the allegedly ineffective attorney an opportunity to explain his or her conduct, strategies, and tactical decisions. *See State v.Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

We conclude there is an inadequate record to adjudicate the defendant's claim. We reserve his claim of ineffective assistance of counsel for postconviction proceedings.

AFFIRMED.