IN THE COURT OF APPEALS OF IOWA

No. 1-201 / 00-1177
Filed May 9, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NATHANIEL AARON KANE,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil, District Associate Judge.

Nathaniel Kane appeals from his conviction and sentence following his guilty plea to possession of marijuana in violation of Iowa Code section 124.401(5) (1999). **CONVICTION AFFIRMED; SENTENCE VACATED; AND REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Danielle Davis, Assistant County Attorney, for appellee.

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

HECHT, J.

Nathaniel Kane appeals from his conviction and sentence following his guilty plea to possession of marijuana. We affirm his conviction, vacate his sentence, and remand to the district court for resentencing.

I. Factual Background and Proceedings. On February 23, 2000, Kane and several other people were in the residence of Matt Westendorf. While Kane was at the residence, several Black Hawk County Sheriff's Deputies arrived at the residence and knocked on the door. Westendorf allowed the deputies to enter the apartment and, upon entering, the deputies detected a strong smell of marijuana. One of the officers spoke to Kane in the living room of the apartment and Kane admitted he and Westendorf had been smoking marijuana immediately prior to the arrival of the deputies. Kane voluntarily gave a marijuana pipe to the officer and, after patting him down, the officer located another pipe, a plastic bag containing marijuana, and a lighter in Kane's clothing. The State subsequently charged Kane with possession of a controlled substance, in violation of Iowa Code section 124.401(5) (1999).

Kane filed a written guilty plea to the charge on April 19, 2000. On June 16, 2000, the district court adjudged Kane guilty of the offense, sentenced him to a thirty-day suspended jail term, fined him $200, court costs, and attorney fees, and suspended his driver's license. On appeal, Kane contends the district court erred in considering unproven offenses in determining his sentence.

II. Standard of Review. Our review is for the correction of errors at law. *State v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998). 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 the trial court's consideration of impermissible factors. *State v. Witham,* 583 N.W.2d 677, 678 (Iowa 1998).

III. Merits. A court may not consider unproven or unprosecuted offenses when sentencing a defendant unless the facts before the court show the accused committed the offense, or the defendant admits it. *See State v. Mateer,* 383 N.W.2d 533, 538 (Iowa 1986). If the defendant affirmatively shows the district court impermissibly considered unproven offenses, we will vacate the sentence and remand for resentencing. *State v. Sinclair,* 582 N.W.2d 762, 765 (Iowa 1998).

During the sentencing hearing, the district court stated:

> Well, Mr. Kane, I believe that the sentence is appropriate in this instance based upon the nature and circumstances of the offense in this case. Although you do not have any substantial prior record with the exception of a couple of traffic citations, you evidently were with other individuals in, I guess, their home or someone's home smoking marijuana in a group. It would – I guess, *the circumstances lead me to believe that that certainly wasn't the first time that you had engaged in that type of behavior,* and under those circumstances I simply don't believe that a deferred judgment would be appropriate.

(Emphasis added). There is no evidence in the record indicating Kane admitted committing this type of offense in the past nor does the record show Kane was in fact guilty of other offenses beyond the one charge of possession to which he pleaded guilty. Therefore, the district court's statements on the record at the sentencing hearing clearly indicate it considered unproven offenses in sentencing Kane, specifically assuming drug use prior to the incident in question. Because

of this consideration of improper factors, we vacate the sentence and remand the case for resentencing. Kane's conviction is otherwise affirmed.

CONVICTION AFFIRMED; SENTENCE VACATED; AND REMANDED FOR RESENTENCING.