FILED
SEP 6 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed September 6, 1984 276

vs.) 4-266
83-1495

CLIFFORD STANLEY BARNHART,)

Defendant-Appellant.)

Appeal from the Iowa District Court for Linn County - Harold J. Swailes, Judge.

Defendant appeals from his guilty plea conviction of operating a motor vehicle without the owner's consent, in violation of Iowa Code section 714.7. Defendant asserts that the district court improperly considered a pending charge of driving with a suspended license in refusing to grant a suspended sentence. AFFIRMED.

Charles Harrington, Appellate Defender, and Luann White, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Snell, P.J., and Hayden and Sackett, JJ.

PER CURIAM

After an incident involving a stolen motorcycle and a high speed chase by police officers, defendant Clifford Stanley Barnhart was charged with second degree theft. He entered a plea of guilty to a charge of operating a motor vehicle without the owner's consent, an aggravated misdemeanor punishable by a term of imprisonment not to exceed two years. The incident also gave rise to a charge of operating a motor vehicle with a suspended driver's license; that charge was still pending when defendant was sentenced.

At the sentencing hearing on the charge of operating a motor vehicle without the owner's consent, the defendant petitioned the court for a suspended sentence. The trial court refused and sentenced him to the maximum term. On appeal, the defendant asserts that the trial court improperly considered the pending charge of operating a motor vehicle with a suspended license in refusing to grant him a suspended sentence.

When a sentence is imposed within the statutory limits, it will be set aside only for an abuse of discretion. State v. Gibb, 303 N.W.2d 673, 687 (Iowa 1981). The determination of whether to grant a suspended sentence is within the discretion of the trial court. State v. Noonan, 246 N.W.2d 236, 237 (Iowa 1976). The defendant argues that the trial court's sentence should be vacated because the trial court improperly referred to the pending charge of driving a motor vehicle with a suspended license in refusing to grant a suspended sentence.

At the sentencing proceeding, the district court stated:

> This is some indication that the defendant doesn't pay much attention to the rules that require that he not drive when he doesn't have a license. He has been, I believe, twice convicted of driving while his license was under suspension, and I believe that, in fact, based upon what's contained here, that he was driving without a license on this occasion. (emphasis added)
>
> [W]hat we are faced with is a — is the fact that he did knowingly take this vehicle; that he knowingly took it without consent; that he not only did that, he then

> operated it without a license knowing that he didn't have a license; that he had twice been convicted before of operating without a license. Then he — After being signaled to stop for excessive speed, he attempted to elude the pursuing officers and eventually lost control of the vehicle and entered a ditch. (emphasis added)

Because of bias against the defendant on the part of the presentence investigator, the court had agreed, prior to sentencing, to limit its consideration of the presentence investigation report. In part, the court agreed not to give weight to or rely on "any conviction data prior to October 17, 1981," and "any charges made against the defendant where there has been no conviction." The defendant argues that by referring to the fact that the defendant was driving without a license in connection with this incident, the trial court improperly considered charges where there had been no conviction. They do not dispute the reference to the two previous convictions for driving with a suspended license.

A sentence will be set aside and be remanded for resentencing if "the sentencing court relied on charges of an unprosecuted offense that was neither admitted by the defendant nor otherwise proved." State v. Black, 324 N.W.2d 313, 315 (Iowa 1982).

In determining the proper sentence, the trial court should consider all pertinent matters including the nature of the offense, the attending circumstances, the defendant's age, character, propensities and changes of reform. State v. Kendall, 167 N.W.2d 909, 911 (Iowa 1969). A reading of the record indicates that the trial court acted properly in sentencing the defendant.

Before pronouncing sentence the court stated:

> What really concerns me is — here and what has concerned me when I first looked at this file is what actually happened in connection with this particular incident. It is apparent that the defendant, at times, traveled at speeds up to 100 miles an hour. It's apparent that the defendant ran stop signs; that the defendant failed to respond to the officers who were pursuing him and attempting to get him to stop. It is — In my opinion, he created a situation that was extremely dangerous, not only to himself which is bad, of course, but also to others

> using the highway and the other — I believe there was some county roads that were involved in this case. I suppose they are highways too as far as that's concerned, but persons using the highways other than himself were also in danger.

The court also articulated its reasons for the sentence:

> The reasons I have for sentencing as I have in this case are the age of the defendant; the defendant's prior record of convictions, but I want to make it absolutely clear I have not considered any conviction or any — anything that's been filed in respect to the defendant — charged against the defendant in his juvenile record or in any other record before this Court except actual convictions had after October 16 — sorry — 17, 1981, October 17 and thereafter, 1981, and I note that there are not a lot of convictions. (emphasis added).

In view of the court's emphatic statement that it did not consider anything except the actual convictions, we find that the reference to the pending charge of driving with a suspended license did not taint the sentencing proceeding whereby a remand for resentencing is required.

The sentence of the trial court is affirmed.

AFFIRMED.