

IN THE COURT OF APPEALS OF IOWA

FILED

AUG 27 1986

CLERK SUPREME COURT

Filed August 27, 1986

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6-201
85-1357

STATE OF IOWA,

)

Plaintiff-Appellee,

)

vs.

)

FRANCES CORBETT,

)

Defendant-Appellant.

)

Appeal from the Iowa District Court for Linn County (No. CRF 9187) -
Harold J. Swailes, Judge.

Defendant appeals from sentence imposed. **AFFIRMED.**

Charles Harrington, Appellate Defender, and Raymond E. Rogers, Assistant
Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Rebecca L. Claypool, Assistant Attor-
ney General; Denver D. Dillard, County Attorney; and Mona Knoll, Assistant
County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel, and Sackett, JJ.

SACKETT, J.

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Defendant Frances Corbett was charged with second-degree burglary. Defendant waived her right to a jury trial and she was tried to the court. The trial court found defendant guilty and imposed the maximum sentence possible, a term of imprisonment not to exceed ten years.

Defendant appeals challenging only the sentence imposed. She contends the trial court impermissibly considered prior unproven criminal charges in imposing sentence.

At the onset of the sentencing hearing the trial court asked both the state and defense counsel to give their sentence recommendations. Defendant's attorney asked the trial court to give defendant a suspended sentence. He also made the following statement:

Your Honor, I have represented Frances for a considerable number of years and throughout that period of time, she has compiled the record of which she is not proud. It's very clear here. I don't mean to make light of it by any means, and I am certain the Court will not misunderstand when I point out that for the most part, these have not been serious offenses. They have all been criminal activities, but Frances, in the large part, your Honor, has been more of a Tom Sawyer, Huckleberry Finn. Some of these things could have been serious. Many of them were dismissed. Many of them were knocked down to lesser charges. Part of that was a matter of plea bargain, your Honor, but in all fairness to both counsel for defense and counsel for the State, the State doesn't make a bargain unless it is warranted by the circumstances, and I think that the fact that a lot of these charges were dismissed or reduced is, to that extent, in Frances' favor. (emphasis added).

At the time of sentencing the trial court looked at defendant's criminal record and made the following statement:

The Court looks at the record, the adult record of the defendant. I am not considering the juvenile record, although that apparently is substantial. But looking at the adult record of the defendant which would extend from sometime apparently from 1976 until the present

time, I guess December of '76 to the present time, there — there are I don't know how many separate convictions. Oftentimes with each conviction, there was another case or cases dismissed or bargained out, and many of the pleas have been to lesser and included offenses. (emphasis added).

The trial court then went on to discuss the fact the defendant had paid fines, gone to jail and had not yet learned anything. The trial court rendered sentence and enumerated the following additional reasons for the sentence:

- (1) Defendant's family situation;
- (2) Defendant's financial position;
- (3) Defendant's employment circumstances;
- (4) The nature of the offences;
- (5) The opportunity of rehabilitation for the defendant;
- (6) Defendant's previous opportunities to change her life; and
- (7) The protection of the community.

Defendant claims the record reflects the trial court in sentencing relied on prior crimes defendant had not actually committed. The state contends the prior bargains were a part of defendant's plea for a suspended sentence and the trial court's reference to the plea bargain was precipitated by defense counsel's statement that the fact the charges were reduced was in defendant's favor.

In State v. Thompson, 275 N.W.2d 370, 371 (Iowa 1979) the court said:

It was the duty of the trial court to ascertain any and all facts that would assist in the proper exercise of its discretion in fixing defendant's sentence, whether in or out of the record. . . .

The trial court and we on review should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform. The courts owe a duty to the public as much as to defendant in determining a proper sentence. The punishment should fit both the crime and the individual. . . .

A sentencing court **may**, within statutory limits, impose a severe sentence for a lower crime on the ground that the accused actually committed a higher crime on the occasion involved **if** the facts before the court show the accused committed the higher crime or the defendant admits it—whether or not the prosecutor originally charged the higher crime. This is part of making the punishment fit the crime. 24B C.J.S. Criminal Law § 1980 at 562, 565 ("The court should give due regard to the nature of the offense and the attending circumstances. . . . Punishment should always be commensurate with the crime"). A sentencing court **may not** however impose a severe sentence for a lower crime on the ground that the accused actually committed a higher crime **unless** the facts before the court show the accused committed the higher crime or the defendant admits it—even if the prosecutor originally charged the higher crime and reduced the charge. The controlling consideration is whether the accused in fact committed the higher crime, not whether the prosecutor originally charged it. The original charge of the higher crime may or may not have been true, and the accused does not admit the higher charge by pleading guilty to the lower charge.

We determine the trial court's statement was no more than a factual rendition of defendant's record which included plea bargains already made a part of the record by defendant. The record in no way reflects the trial court relied on higher charges nor are we willing to make, as defendant would ask, an inference the trial court did.

AFFIRMED.