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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

527

STATE OF IOWA,)

Plaintiff-Appellee,) Filed December 26, 1984

vs.)

FRANKIE EUGENE ARMSTRONG,) 4-431
84-191

Defendant-Appellant.)

Appeal from the Iowa District Court for Adams County - M. C. Herrick, Judge.

Defendant appeals from sentence entered following conviction of theft in the second degree in violation of Iowa Code sections 714.1(4) and 714.2(2) (1981). SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.

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

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

Defendant, Frank Armstrong, was convicted of second-degree theft. At the sentencing proceeding a pre-sentence investigative report was submitted. Defendant objected to the report on the grounds that the report contained charges of which defendant had been acquitted and charges which were pending. Defense counsel objected to consideration of these matters. The court overruled these objections stating that it needed to be informed of such matters but that they would not affect defendant's sentence. Defendant presented several witnesses, including the defendant himself, who testified to defendant's good character. Defendant requested a deferred sentence.

The court sentenced the defendant to a term of imprisonment not to exceed five years. Defendant appeals from the sentence stating that the trial court improperly relied on two additional unprosecuted and unsubstantiated charges. The presentence report indicated that the defendant had been charged with second-degree burglary and escape, both of which were pending at the time of sentencing.

At the sentencing proceeding, the court set forth the reasons for the sentence:

> This has not been an easy matter, as far as the Court is concerned, in view of the defendant's age, twenty years of age. The Court would ordinarily be giving probation, but the defendant's attitude during the trial and his testimony and demeanor has been quite defiant and unwilling to recognize his mistake up until the time the jury found him guilty, and, of course, now he does profess to have a change of heart, but this is new, as far as the Court is concerned, in his attitude in this matter. And the Court, I think, has to take into account he has a pending charge of escape from custody which was after this offense and is still to be disposed of and a charge of burglary also subsequent to this offense, which is still pending in this county, and while I can't, of course, presume that he is guilty, especially of the burglary charge, these show an attitude, at least the escape charge, of his being unwilling to accept his responsibility as a citizen and to obey the laws and respect the officers who have a duty to enforce laws here. I mean, that is what has caused the Court to feel that he should be committed at

> this time; not the fact that he wanted a trial. He is entitled to a trial. But it has been his attitude and demeanor in respect to this matter that the Court feels is very serious. I am going to direct the county attorney to prepare a judgment in accordance with the sentence pronounced and I will sign it. (emphasis added)

At that point, defense counsel raised the following objection:

> MR. GLANZMAN: Your Honor, for further purposes of the record, and with all due respect to the Court, it is just the problem the Court saw he has pending charge of escape from custody and burglary, crimes of which he has not been convicted of, the Court is taking into consideration, in addition to the charges of which he had been found not guilty, that I think has violated my client's due process rights, and I again reassert my objection to those being contained in the pre-sentence investigation and assert my objection to the Court considering those matters.
>
> THE COURT: You have made your record, I guess.
>
> MR. GLANZMAN: Thank you, your Honor.

Despite defendant's request for a deferred judgment, the court imposed the most severe sentence available. The Iowa Supreme Court has consistently held that a trial court cannot consider additional unproven and unprosecuted charges:

> 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 of 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.

State v. Thompson, 275 N.W.2d 370, 372 (Iowa 1979).

In State v. Hagemeier, 310 N.W.2d 218 (Iowa 1981), resentencing was ordered when the trial court considered defendant's arrest on an unrelated matter the night before sentencing. Id. at 219.

The record of the sentencing proceedings indicates that the trial court improperly considered the pending charges of burglary and escape. We remand this case for resentencing.

SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.