FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed February 26, 1986
vs.	)	263
TROY SCOTT BARUTH,	)	5-676 85-918
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Cerro Gordo County (17013) - L. L. Boomhover, Judge.

Defendant appeals the sentence imposed by the district court. **REVERSED AND REMANDED FOR RESENTENCING.**

Charles Harrington, Chief Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Christie J. Scase, Assistant Attorney General; William Vanderpool, Cerro Gordo County Attorney, and Thomas C. McNinch, Assistant County Attorney; for plaintiff-appellee.

Heard by Schlegel, P.J., Hayden, and Sackett, JJ.

Defendant appeals the sentence imposed by the district court. We remand for resentencing.

Defendant Baruth was arrested and charged with driving while intoxicated in violation of Iowa Code section 321.281 (1985). Defendant was arrested by a police officer originally dispatched to the home of defendant's father to investigate an alleged assault by defendant upon his father. The trial court accepted defendant's guilty plea, and sentenced him to sixty days in the county jail. All but seven days were suspended and defendant was placed on probation for one year. Immediately following the imposition of the sentence, the following exchange occurred between the sentencing judge and defendant:

> THE COURT: . . . Now I understand from the minutes here there was some assaults between you and your father going on here, is that right?
>
> THE DEFENDANT: At the time, yes, Your Honor.
>
> THE COURT: So there was some violence involved in this crime. Now, I don't ordinarily give anybody probation if there's a violent crime. So I'm going to provide that you serve seven days in the County Jail and the balance of that sentence will be suspended and you be placed on probation.

The trial court later responded to defense counsel's requests to reconsider the sentence by stating that the sentence was based upon language in the arrest report stating that defendant was leaving his father's home ". . . after the third assault . . ." on his father. The trial court then stated, "anybody that gets in [sic] assault with his father three times should serve a little bit of time to teach him that he's not to do those kinds of things."

Defendant explained that the physical violence was in response to his attempts to protect his stepmother from being attacked by his father. No charges were filed concerning the assault and no injuries were incurred by either defendant or his father. The only evidence regarding the alleged assault was

the above cited language in the police report which was attached to the minutes of testimony.

Based upon this record, defendant alleges on appeal that the trial court improperly considered the reference to "assaults" on the police report in deciding the terms of his sentence.

Although imposition of sentences is within trial court's discretionary power and will be set aside only for an abuse of discretion, see State v. Gibb, 303 N.W.2d 673, 687 (Iowa 1981), that discretion is not unlimited. State v. Black, 324 N.W.2d 313, 315 (Iowa 1982). In Black, at 315, the supreme court further stated, "We will set aside a sentence and remand a case to the district court for resentencing if the sentencing court relied upon charges of an unprosecuted offense that was neither admitted to by defendant nor otherwise proved."

In the case before us there was no mention of an assault included in the trial information or in defendant's guilty plea. As was stated earlier, the allegations of assault appeared in the record via an unsubstantiated written remark on a police report that eventually became attached to the minutes of testimony. The supreme court, in Black, addressed essentially these same factual issues and said:

> However, where portions of the minutes are not necessary to establish a factual basis for the guilty plea, they are denied by the defendant, and they are otherwise unproved, we find no basis to allow the sentencing court to consider and rely on those portions. No evidence is before the court that shows the alleged facts contained in these portions of the minutes to be valid.

State v. Black, 324 N.W.2d at 316.

The minutes could not be used to establish a factual basis for the guilty plea because there was no mention of an assault in the plea or the information. Moreover, we are convinced that defendant's attempt to explain why he became involved in the physical altercations demonstrates more a layman's attempt

to plead self-defense or defense of another rather than admitting to being guilty of unprovoked assault. In Black, the supreme court could only speculate about the weight the sentencing court gave to the improper and unknown circumstances. Here, there is no doubt the sentencing court relied heavily upon the unproven circumstances. Therefore, because we find the sentencing court abused its discretion, we must strike down the sentence. State v. Black, at 316; State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981).

We remand the case to the district court for resentencing and with the instruction that it shall not consider the alleged assaults in determining the terms of the sentence unless defendant clearly admits to the alleged assaults or they are independently proved. However, we do not suggest what the sentence should be. See State v. Black, 324 N.W.2d at 316; State v. Messer, 306 N.W.2d at 733; State v. Gibb, 303 N.W.2d at 688.

REVERSED AND REMANDED FOR RESENTENCING.