IN THE COURT OF APPEALS OF IOWA

No. 0-164 / 99-765
Filed September 13, 2000

FILED
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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RUSTY JAMES SMITH,
Defendant-Appellant.

Appeal from the Iowa District Court Polk County, Karen A. Romano, District Associate Judge.

Defendant appeals from the judgment and sentence entered upon his guilty plea to operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (1997). **SENTENCE VACATED AND CASE 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, John P. Sarcone, County Attorney, and Ralph Marasco, Assistant County Attorney, for appellee.

Considered by Zimmer, P.J., and Vaitheswaran, J. and Peterson, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

PETERSON, S.J.

Defendant-appellant Rusty James Smith appeals from the judgment and sentence entered upon his guilty plea to operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (1997). He contends the trial court erred in considering unproven offenses in determining his sentence. **SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.**

I. Background and Proceedings. Rusty James Smith was charged on October 15, 1998, with the crime of operating while intoxicated, second offense. He entered a plea of guilty to that charge and was sentenced to an indeterminate two-year term of incarceration and a fine of $2500.

The district court set forth several reasons for the sentence imposed in this case. The court stated:

> Mr. Smith, I have had an opportunity to fully review your presentence investigation. I have also talked to your attorney, and he has made some arguments and pleas on your behalf in the county attorney's statements as well. This is a difficult case. The most recent OWI prior to this one was in fact approximately ten years ago. However, I cannot ignore the fact that since 1977, you have had seven OWI offenses and various other criminal offenses interspersed among those. It is clear to me that for whatever reason, you have not been able to not only stop drinking but to stop driving while you are intoxicated. You also have several charges for driving while your license is under suspension. So you continue to drive whether you have a license or not and you continue to drive while you are intoxicated over these last twenty years.

(Emphasis added).

The presentence investigation contains prior correctional history. It shows that he was charged in August 1982, with the crime of operating a motor vehicle while license was under suspension. The disposition of that case was not shown. On November 24, 1982, he was charged with operating a motor vehicle

while license was under suspension. That case is shown as being dismissed on May 24, 1983. On February 13, 1983, he was charged with the crime of operating a motor vehicle while license was under suspension and there is no disposition shown for this charge. On July 6, 1984, he was charged with the crime of driving while license revoked and no driver's license. He pled guilty to the charge of no driver's license and was fined $50. On September 13, 1998, defendant was charged with the crime of driving while license suspended and failure to obey a traffic control device. The disposition of the driving while license suspended charge is shown as "open charge bond $650."

II. Discussion. Our review is for corrections of errors at law. Iowa R. App. P. 4. The sentence will not be upset on appellate review unless the defendant demonstrates an abuse of the court's discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors. A court may not consider the unproven or unprosecuted offense when sentencing a defendant unless (1) the facts before the court show the accused committed the offense or (2) the defendant admits it. *State v. Gonzalez,* 582 N.W.2d 515, 516 (Iowa 1998). The presentence investigation contains four charges of driving while license suspended. It does not show conviction of any of those four charges. It is the State's contention because the defendant was charged with motor vehicle offenses subsequent to the filing of those charges, they may be considered because the facts before the court show the accused committed the offense.

Gonzalez held the minutes of testimony attached to a trial information do not necessarily provide the facts that may be relied upon and considered by a

sentencing court. The sentencing court can only consider facts when they are admitted by the defendant or otherwise established as true. We believe the fact the defendant has been charged with other motor vehicle violations is not a fact the court can rely upon to determine the sentence for the present charge.

In conclusion, we find the trial court considered unproven or unprosecuted offenses when sentencing the defendant. Accordingly defendant's sentence must be vacated and the matter remanded to the trial court for resentencing. *State v. Messer,* 306 N.W.2d 731, 732-33 (Iowa 1981).

SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.