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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed September 27, 1983

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.) 3-174
) 83921
THOMAS NEAL HENDRICKSON,)
Defendant-Appellant.)

Appeal from Humboldt District Court, Russell J. Hill, Judge.

Defendant appeals from the sentence imposed on his conviction of burglary in the second degree, Iowa Code § 713.3 (1981), asserting that the court improperly considered a charge against him which had been dropped. AFFIRMED.

Charles L. Harrington, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden, JJ. Sackett, J., takes no part.

PER CURIAM

Defendant Thomas Neal Hendrickson was charged with two counts of second-degree burglary; he was accused of breaking into two farmsteads on December 8, 1981. As part of a plea bargain, defendant agreed to plead guilty to one charge in return for the State's dismissal of the other charge. At the plea proceeding, the county attorney indicated that he had made the plea bargain because he did not believe there was sufficient corroboration of accomplice testimony on the charge to convict defendant.

The district court sentenced defendant to a prison term of not exceeding ten years, stating that it had decided not to grant probation for several reasons. First, defendant was thirty-three years old, and his accomplice was a "very young person." Also, the court noted that defendant had had two parole violations as a juvenile, and as an adult, two felony convictions; probation had been revoked on one of the felony convictions. The court also noted that defendant had been on parole at the time he committed the current offense, and that he had not been cooperative with the presentence investigator. At one point, the court stated:

> [T]he burglary involved herein was not just an isolated offense. It was one of two and the record could support the conclusion that they were committed on the same time or on the same date within a very close proximity of time. From this particular conduct the Court can and does conclude that this particular offense was one of premeditation, volition and planning.

Defendant claims this statement by the court indicates the court impermissibly considered the dismissed second burglary charge. He maintains he had not admitted committing the other burglary and the facts before the sentencing court did not show he had committed it. He requests that we remand the case for resentencing.

We review the case on assigned error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975). Generally, it is within the trial court's discretionary power to impose sentences. Sentences will be set aside when a court abuses its discretion. State v. Messer, 306 N.W.2d 731, 732 (Iowa 1981). A court may not consider allegations of another offense charged as a basis for more stringent punishment unless the facts before the court show the accused actually had committed the offense. State v. Swartz, 278 N.W.2d 22, 26 (Iowa 1979). When a court considered an unproven charge in sentencing, an appellate court should remand the case for resentencing unless the facts before the court show defendant committed those offenses or they are admitted by him. Messer at 732.

The county attorney admitted that the flaws in the case of the second burglary charge probably would make it difficult to convict defendant on that charge. There was no corroboration of the accomplice testimony, and the merchandise stolen from the second farmhouse had not been recovered. The trial court did not make any finding as to whether facts existed to substantiate the charges. If the trial court had considered the dismissed charge in imposing sentence, we would have to strike down the sentence. Messer at 733. However, the record indicates the trial court considered the fact that a second burglary occurred only in determining the premeditative nature of the crime to which defendant had pleaded guilty. The punishment was imposed because of the defendant's prior criminal record, his parole violation, and his general bad attitude towards authority. The trial court evidently found defendant had abused the leniency previously shown to him by other courts; therefore, trial court considered a punishment more severe than probation or suspended sentence was necessary to protect the public and to provide effective correctional treatment. Trial court did not abuse its sentencing discretion.

AFFIRMED.

All judges concur except Oxberger, C.J., and Hayden, J.

OXBERGER, C.J. (dissenting).

I must respectfully dissent from the majority opinion, as I believe this case is controlled by the holding of State v. Schwartz, 278 N.W.2d 22 (Iowa 1979). The trial court's comments about the second offense were made after the plea discussion had been completed and during the sentencing procedure. The defendant had been found guilty on the one offense and the State had dismissed the second offense. I believe that the court's comments during the sentencing procedure indicate that the allegations of the other offense were used as a basis for an enhanced punishment. Without facts before the court to show that the accused actually committed the crime, this practice is impermissible. Schwartz at 26. I would remand the case for resentencing.

Hayden, J., joins in this dissent.