IN THE COURT OF APPEALS OF IOWA

No. 0-784 / 09-1895
Filed December 8, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LOUIS CHARLES JOHNSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor, Judge.

A defendant appeals his sentence, contending (1) the district court improperly considered unproven acts in pronouncing his sentence and (2) the State failed to produce a confidential informant for deposition and trial. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, David A. Adams, Assistant Appellate Defender, and Gavin Quill, Student Legal Intern, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Julie C. Carlin, County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

VAITHESWARAN, J.

Louis Johnson appeals his sentence for possession with intent to deliver a controlled substance, possession of drug paraphernalia, and driving while barred. He contends (1) the district court improperly considered unproven acts of drug distribution in pronouncing his sentence and (2) the State failed to produce a confidential informant for deposition and trial. The second issue was not preserved for our review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). For that reason, our opinion will focus exclusively on the sentencing issue.

The district court "may not rely upon . . . unproven, and unprosecuted charges unless the defendant admits to the charges or there are facts presented to show the defendant committed the offenses." *State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002). When a sentence is challenged on the basis of improperly-considered, unproven criminal activity, "the issue presented is simply one of the sufficiency of the record to establish the matters relied on." *State v. Longo*, 608 N.W.2d 471, 474 (Iowa 2000); *accord State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000).

The challenged portion of the district court's sentencing statement relates to the possession with intent to deliver count. Johnson asserts the district court considered other instances of delivery of controlled substances despite the fact that he was never previously convicted of a crime involving delivery. In support of this assertion, he points to the following portion of the court's statement:

> You seem to misunderstand what it means to deliver. Deliver includes sharing with other people. That's been *the history of your life.* You are *transferring this to other people and assisting in their addictions and assisting in their downfalls*.
>
> That's what makes it so serious. It's just not about you anymore when you do that. In this case that's why I found that I agree with the jury that there was enough evidence for them to—there was evidence to sustain their verdict of delivery based on the evidence of this case. Due to your *long history* and connected with your heroin and illegal substance addictions, I believe that the sentence enhancement, I'm not gonna go the three times, but I think two times is appropriate.

(Emphasis added). Read in a vacuum, the highlighted language might support Johnson's contention. Read in the context of what preceded this statement, we are convinced the district court did not rely on unproven charges. *See State v. Jose*, 636 N.W.2d 38, 43 (Iowa 2001) (considering challenged statements "in context with the remainder of the court's explanation for imposing sentence").

The State began the sentencing hearing by referring to Johnson's "criminal history going back as early as 1970." Johnson's attorney responded by acknowledging Johnson's "significant record" going back "40 years as a juvenile." The sentencing judge followed up with a reference to Johnson's "30-year adult history of criminal behavior" as recounted in his presentence investigation report. The judge also mentioned his history of substance abuse, attempts at treatment and rehabilitation, and prison terms. Only then did she make the challenged statements.

In this context, the reference to Johnson's "long history" was simply a reference to his long criminal history rather than any unproven acts of drug distribution. The remaining challenged language was a generic reference to Johnson's long involvement with drugs. *See Formaro*, 638 N.W.2d at 725–26

(rejecting contention that reference to defendant's "history" was reference to an unproven charge); *Jose*, 636 N.W.2d at 43 (rejecting contention that reference to "additional crimes" was reference to unproven charges); *cf. State v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998) (vacating sentence and remanding for resentencing where court stated, "[T]he concession provided in the plea agreement provides for actually the dismissal of, what would probably be easily provable, five additional counts, so there is a substantial concession that's already been made to the defendant"); *State v. Black*, 324 N.W.2d 313, 316 (Iowa 1982) (vacating a sentence where district court considered the factual basis giving rise to a charge that was dismissed); *State v. Messer*, 306 N.W.2d 731, 733 (Iowa 1981) (remanding for resentencing where district court stated it was "taking into consideration the fact that there were two other charges that were not prosecuted in this matter as part of a plea bargaining").

We conclude the sentencing judge did not rely on unproven or unprosecuted charges in imposing sentence on Johnson. Accordingly, we affirm his sentences.

AFFIRMED.