

IN THE COURT OF APPEALS OF IOWA

No. 1-278 / 10-1651
Filed May 25, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BURGANDY LYNN FIGUEROA,
Defendant-Appellant.

Appeal from the Iowa District Court for Sioux County, James D. Scott, Judge (Guilty Plea) and Robert J. Dull, District Associate Judge (Sentencing).

A defendant appeals her sentence for operating while intoxicated, third offense, in violation of Iowa Code section 321J.2 (2009). **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Coleman McAllister, County Attorney, and Jared Weber, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Mahan, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VOGEL, P.J.

On March 18, 2010, the State charged Burgandy Figueroa with operating while intoxicated, third offense, in violation of Iowa Code section 321J.2 (2009) and driving while license was denied or revoked under chapter 321J in violation of Iowa Code section 321J.21. Pursuant to a plea agreement, Figueroa pleaded guilty to the operating while intoxicated charge and the driving while license was denied or revoked was dismissed. A presentence investigation report (PSI) was completed. Attached to the PSI was an attachment setting forth Figueroa's arrest record, which included charges that she was not prosecuted for. A sentencing hearing was held on September 2, 2010. At the sentencing hearing, the prosecutor informed the court that the day after pleading guilty to the current charge, Figueroa was arrested for driving while barred, to which defense counsel responded that Figueroa would be "fighting" that charge. When imposing the sentence, the district court stated,

The Court has reviewed the presentence investigation and three addendums and does note that your client is a threat to society. She's been arrested 22 times in the last ten years. The addendum also indicates that she had refused to comply with the substance abuse recommendations and treatment. I do not believe there is any way that any leniency is entitled in this case.

I appreciate the difficulty of her position, but she has created it, and she has to be stopped. I am going to order that she be sentenced to five years in the State penitentiary for placement in the OWI continuum

Figueroa appeals and asserts the district court erroneously considered unprosecuted and unproven crimes in imposing her sentence.

We review sentencing decisions for correction of errors at law. *State v. Valin*, 724 N.W.2d 440, 444 (Iowa 2006); *State v. Sailer*, 587 N.W.2d 756, 758

(Iowa 1998). A district court's sentencing decision to impose a sentence within the statutory limits is cloaked with a strong presumption in its favor and will only be overturned for an abuse of discretion or defect in the sentencing procedure, such as considering impermissible factors. *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000); *Sailer*, 587 N.W.2d at 758–59. “It is a well-established rule that a sentencing court may not rely upon additional, 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). “If a district court improperly considers unprosecuted and unproven additional charges, we will remand the case for resentencing.” *Id.*

In imposing her sentence, the district court stated that it reviewed the PSI and addendums attached and that Figueroa had been arrested twenty-two times in the past ten years. See *State v. Barker*, 476 N.W.2d 624, 627 (Iowa Ct. App. 1991) (finding the sentencing court “considered matters which it legally should not have considered, such as the defendant’s record of arrests without convictions”). Where a sentencing court makes a specific reference to unprosecuted and unproven charges it is an affirmative showing the district court considered those charges. *State v. Jose*, 636 N.W.2d 38, 43 (Iowa 2001). Consequently, we find the district court abused its discretion by considering unprosecuted and unproven charges. Compare *id.* (“When considered in context with the remainder of the court’s explanation for imposing sentence, the reference to ‘additional crimes’ is not an ‘affirmative showing’ that the court considered unproven charges.”), with *State v. Ashley*, 462 N.W.2d 279, 282

(Iowa 1990) (“The fact that the sentencing judge was merely aware of the uncharged offense is not sufficient to overcome the presumption that his discretion was properly exercised.”). We are required to vacate Figueroa’s sentence and remand for resentencing. *State v. Thomas*, 520 N.W.2d 311, 314 (Iowa Ct. App. 1994). We note that the district court also considered permissible factors, such as Figueroa’s extensive record of convictions, probation violations, and being found in contempt. By vacating and remanding, we do not imply that permissible factors would not support the sentence imposed and make no judgment as to what the sentence should be.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.