

**IN THE COURT OF APPEALS OF IOWA**

No. 2-308 / 11-1625  
Filed May 23, 2012

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**DARREN L. WARREN SR.,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, Gary D. McKenrick (guilty plea) and John D. Telleen (sentencing), Judges.

Darren Warren appeals from the sentence imposed following his guilty plea to theft in the first degree. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

**BOWER, J.**

Darren Warren appeals from the sentence imposed following his guilty plea to theft in the first degree, in violation of Iowa Code section 714.2(1) (2011). He contends the district court erroneously considered a charge without a conviction, an impermissible factor, in imposing his sentence. Upon our review, we find the sentencing court made a specific reference to an unproven charge set forth in Warren's criminal history. We therefore vacate Warren's sentence and remand for resentencing.

**I. Background Facts and Proceedings.**

On April 27, 2011, the State charged Darren Warren with theft in the first degree as a habitual offender. Pursuant to the plea agreement, Warren pled guilty to theft in the first degree. The State agreed it would not seek the habitual offender enhancement and would make no sentencing recommendation. A presentence investigation report (PSI) was completed. Warren's arrest history was included in the PSI, and set forth some charges for which no specific disposition was provided. Sentencing was held on September 29, 2011. When imposing the sentence, the district court stated:

I've reviewed the pre-sentence investigation report and have considered the information in that report. I had not given any consideration to entries in the criminal history section of that report that do not show an admission of guilt or an adjudication of guilt.

However, when I look through your criminal history, sir, it runs from—well, there's like seven or eight pages of criminal history and I see that you have been given repeated chances to abide by the law and it's just not made an impact on you.

Starting when you were a juvenile, you know, burglary in the second degree in 1987, robbery in the second degree, 1989. Assault with injury in 1989. I'm just hitting some of the highlights. 1989 criminal mischief. On your eighteenth birthday, theft in the

second degree, you pled guilty to theft in the second degree. You had five years in the Department of Corrections suspended, two years probation, and you were placed at the RCF previously.

That apparently didn't have an impact on you. Your probation was revoked and you were sentenced to five years in the Department of Corrections. When I go through—I mean I'm skipping over a lot of them. Theft third degree, 1995, pled guilty, two years Department of Corrections, but later you were given a second chance, the sentence was reconsidered. You were ordered to do 465 hours of community service. You got a second chance there; that didn't have apparently an impact on you.

1995, robbery first degree, you were found guilty by a jury of that in 1996, sentenced to twenty-five years with the Department of Corrections on a number—twenty-five years with the Department of Corrections. You were eventually released to a work release facility and you escaped from there. Your work release was revoked. Again in 1995, guilty of robbery in the first degree.

Sir, you've had many opportunities to comply with the law, you've been given rehabilitative chances, you've been to the RCF and it just has not made an impact on you. So I need to protect the community and provide punishment for this crime.

The court sentenced Warren to a term of imprisonment not to exceed ten years. Warren now appeals, contending the district court erroneously considered a charge without a conviction, an impermissible factor, in imposing his sentence.

## **II. Scope and Standard of Review.**

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. Alloway*, 707 N.W.2d 582, 584 (Iowa 2006), *overruled on other grounds by State v. Johnson*, 784 N.W.2d 192 (Iowa 2010); *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). "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.*

### **III. Discussion.**

In imposing Warren’s sentence, the district court stated it had reviewed the PSI, and noted Warren had been “given repeated chances to abide by the law and it’s just not made an impact on [him].” The court proceeded to list a number of Warren’s prior offenses, including “robbery in the second degree, 1989,” the charge at issue in this appeal. Indeed, the PSI provides Warren was charged in a delinquency petition with robbery in the second degree on June 13, 1989. The criminal history report, however, does not indicate Warren was ever convicted of an offense related to that charge.

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); 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”). We are required to follow this reasoning even here, where the district court specifically observed it “had not given any consideration to entries in the criminal history section of that report that do not

show an admission of guilt or an adjudication of guilt.” This is because, “we cannot speculate about the weight trial court mentally assigned this factor, or whether it tipped the scales to imprisonment.” *State v Messer*, 306 N.W.2d 731, 733 (Iowa 1981) *but see Jose*, 636 N.W.2d at 43 (observing that a court’s generalized “reference to ‘additional crimes’ is not ‘an affirmative showing’ that the court considered unproven charges”); *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.”). Consequently, we are required to vacate Warren’s sentence and remand for resentencing. *State v. Thomas*, 520 N.W.2d 311, 314 (Iowa Ct. App. 1994).

We observe the district court also considered permissible factors, such as Warren’s extensive record of convictions, probation violation, community service, and imprisonment. 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.**