

IN THE COURT OF APPEALS OF IOWA

No. 2-863 / 11-1889
Filed November 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MALCOLM JAMAL CARTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Charles H. Pelton,
Judge.

The defendant appeals from his conviction for theft in the third degree asserting the district court abused its discretion in sentencing him. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, Michael J. Walton, County Attorney, and Dion Trowers, Assistant
County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

VOGEL, P.J.

Malcolm Carter appeals the sentence he received after being convicted of theft in the third degree under Iowa Code section 714.2(3) (2009), an aggravated misdemeanor. He claims the district court abused its discretion by improperly considering dismissed charges in rendering its sentence. Carter also claims the district court abused its discretion when it denied his request for a deferred judgment. For the reasons stated below, we affirm.

Carter was convicted by a jury on October 11, 2011, of theft in the third degree after possessing a bicycle that was stolen from the open garage of Maurice Gomez. At the sentencing hearing on November 22, 2011, the district court sentenced Carter to 180 days in jail with all but thirty days suspended and an additional two years' probation. Carter was also ordered to pay the minimum fine of \$625, various costs, and restitution to the victim. The district court then stated the following:

The reasons for this sentence are these: He's, I think only eighteen years of age, and he has a lot of scrapes in the juvenile court, and they've tried to work with him there and it hasn't been successful. And he's been waived into the district court, and rightly so and correctly so, and there's—the Court imposes punishment on purpose in this case. It's—He's—should be punished for the Theft, and then he's gonna have about 150 days of probation hanging over your head, and that's to coerce you to comply with the law. That is to stay within the boundary of the law, and during this period of probation you'll have to do that or you'll be coming back to serve that additional five months in jail. And my purpose is to deter you, specifically, from any further offenses during this period of time.

. . . You don't want to forget that the Court has the power of two years in the men's penitentiary, and that wouldn't be appropriate under your—either the nature of the offense or your history, but I took a very minor approach to the matter. But I did not suspend the whole thing intentionally, because I think you should get some punishment, and then realize that you're going to go back

if you commit more offenses. I hope you understand that. That's for your benefit, I hope.

While Carter agrees the court could consider his juvenile adjudications under Iowa Code section 232.55(2)(a),¹ he asserts the district court considered not only his adjudications, but also improperly relied on his juvenile arrests when it mentioned he had “a lot of scrapes in juvenile court.” In doing so, he has extended the court's use of the word “scrapes” to mean “arrests.” Our review of the record does not indicate this broad reading such that we could conclude the court improperly relied on Carter's juvenile “arrest” record.

The presentence investigation report did note Carter's juvenile record, which included eight charges that had been dismissed. However, it also noted three charges—riot, assault, and interference with official acts—resulted in an “Informal Adjustment Agreement”; one charge—trespass—resulted in jail time; and one charge—harass public official—resulted in a fine. These last five offenses were properly considered by the court in sentencing Carter as he was convicted of an aggravated misdemeanor. See Iowa Code §§ 232.2(24) (“‘Informal adjustment’ means the *disposition* of a complaint without the filing of a petition” (emphasis added)), 232.55(2)(a) (“Adjudication and *disposition* proceedings . . . are not admissible as evidence against a person in a subsequent proceeding . . . except in a sentencing proceeding after conviction of the person for an offense other than a simple or serious misdemeanor.”

¹ This code section provides:

Adjudication and disposition proceedings under this division are not admissible as evidence against a person in a subsequent proceeding in any other court before or after the person reaches majority except in a sentencing proceeding after conviction of the person for an offense other than a simple or serious misdemeanor.

Iowa Code § 232.55(2)(a).

(emphasis added)); *State v. Cheatham*, 569 N.W.2d 820, 822 (Iowa 1997) (finding the defendant's juvenile record could be considered as part of his sentencing on subsequent felony and aggravated misdemeanor convictions).

A sentence will be set aside when the district court "relied upon" unprosecuted or uncharged offenses that were "neither admitted to by the defendant nor otherwise proved." *State v. Sailer*, 587 N.W.2d 756, 762 (Iowa 1998). However, sentences within the statutory limits "are cloaked with a strong presumption in their favor, and an abuse of discretion will not be found unless the defendant shows that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.* at 759. "In order to overcome the presumption the district court properly exercised its discretion, there must be an affirmative showing the court relied on the improper evidence." *State v. Dake*, 545 N.W.2d 895, 897 (Iowa Ct. App. 1996).

Carter has not overcome the presumption that the court did not rely on improper evidence. The court's statement regarding "a lot of scrapes in the juvenile court" was accurate and permissible considering the five juvenile court dispositions that were proper to consider. There is no indication in the record that the court relied on the eight dismissed juvenile charges. Carter has failed to affirmatively show the court's discretion was exercised on impermissible grounds.

Carter next asserts the court abused its discretion in denying his request for a deferred judgment and imposing a thirty-day jail sentence. He claims the sentence was unusually harsh considering he had only two simple misdemeanor convictions, was eighteen years old, and was gainfully employed at the time of sentencing. The record made at sentencing indicates the judge considered all

the pertinent matters in determining the proper sentence. *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999). The court was clearly concerned about Carter's criminal history at only eighteen years of age. Consequently, it tailored and then explained the sentence, which focused on deterring Carter from committing future offenses. We find no abuse of discretion.

AFFIRMED.