

**IN THE COURT OF APPEALS OF IOWA**

No. 3-262 / 12-1307  
Filed May 15, 2013

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

**vs.**

**NICHOLAS CORBIN LEE WYGLE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Butler County, Chris Foy, Judge.

Nicholas Wygle appeals the sentence entered following his *Alford* plea.

**SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson,  
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney  
General, Gregory M. Lievens, County Attorney, and Martin Petersen, Assistant  
County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

**DANILSON, J.**

Nicholas Wygle appeals the sentence entered following his *Alford* plea to assault with intent to commit sex abuse. Wygle contends the sentencing judge abused his discretion in sentencing him to two years in prison and considering unproven allegations and his own childhood victimization as support for incarceration. Finding the district court considered an impermissible factor outside of the record, we vacate the sentence and remand for resentencing.

**I. Background Facts and Proceedings.**

Nicholas Wygle was charged with two counts of sexual abuse in the second degree, in violation of Iowa Code sections 709.1 and 709.3 (2009), and two counts of assault with intent to commit sexual abuse, in violation of sections 709.11 and 903B.2, after his five and fourteen-year-old step-daughters reported inappropriate sexual contact. Wygle submitted a written *Alford* plea to count III of the trial information in exchange for dismissal of the remaining counts.<sup>1</sup> During the plea proceedings, the court emphasized that it would not be bound by the recommendations of the parties. Pursuant to the plea bargain, the State did not resist Wygle's request for a deferred judgment and two years of supervised probation.

Wygle submitted to a psychosexual assessment in April 2012. The report noted Wygle "adamantly denied any sexual or otherwise inappropriate contact occurred between him and his accusers." However, his criminal history demonstrates that he has engaged in deviant sexual behavior with multiple

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<sup>1</sup> Wygle has cognitive limitations but was found competent to stand trial.

female minors. Wygle was convicted of assault for an offense against two female minors that occurred in June 2007. During an interview with investigating officers about that incident, Wygle “admitted he told the girls he would give them ten dollars if they would kiss him on the lips. He also admitted that he held both girls down on his bed, against their will, so he could kiss them on their lips and cheeks.” He later denied he ever engaged in inappropriate contact. Wygle also admitted to the evaluator that he was sexually abused as a child by an older male cousin.

A presentence investigation report was conducted June 4, 2012. The report noted Wygle’s juvenile record, which stemmed from punching holes in walls and threatening his mother and sister with a butcher knife. Wygle was placed in psychiatric hospitalization on three occasions after “acting out” and reports of suicidal ideation. Wygle also admitted to the investigator that he sexually assaulted his sister by touching her inappropriately when he was twelve or thirteen years old and she was eight years old. He later denied that he fondled his sister but claimed “I was getting ready to.” Wygle and his family attended counseling after the assault.

The investigator noted that the combined sex offender risk assessments conducted during the psychosexual evaluation placed Wygle in the “very high” range of risk to re-offend. The investigator further found:

Given the above information, this officer feels the defendant poses a significant risk to public safety. It is further believed that sentencing the defendant to a term of incarceration is the best option available to accomplish the goals of sentencing; protection of the community, deterrence to others and rehabilitation of the offender.

Ultimately, the investigator recommended incarceration for two years and a special ten-year sentence during which Wygle he would be required to register as a sex offender.

On July 13, 2012, the court sentenced Wygle to two years in prison. On appeal, Wygle contends the sentencing judge abused his discretion in sentencing him to two years in prison and considering unproven allegations and his own childhood victimization as support for incarceration.

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

We review a district court's sentence for correction of errors at law. Iowa R. App. P. 6.907; *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). Discretionary sentencing decisions are reviewed for an abuse of discretion. *State v. Barnes*, 791 N.W.2d 817, 827 (Iowa 2010). A sentence will not be upset unless the defendant demonstrates an abuse of the trial court's discretion or a defect in the sentencing procedure. *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). "An abuse of discretion is found when the court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable." *Barnes*, 791 N.W.2d at 827. The consideration by the trial court of impermissible factors constitutes a defect in the sentencing procedure. *Grandberry*, 619 N.W.2d at 401.

A court's decision to impose a particular sentence within the statutory limits is cloaked with a strong presumption in its favor. *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008). However, if a court considers unprosecuted and

unproven charges, we remand for resentencing. *State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002).

### III. Discussion.

“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.” *Id.* (emphasis added). 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. There is no general prohibition against considering other criminal activities by a defendant as factors that bear on the sentence to be imposed.” *State v. Longo*, 608 N.W.2d 471, 474 (Iowa 2000).

In discussion of appropriate sentencing considerations, our supreme court found:

In applying the abuse of discretion standard to sentencing decisions, it is important to consider the societal goals of sentencing criminal offenders, which focus on rehabilitation of the offender and the protection of the community from further offenses. See Iowa Code § 901.5. It is equally important to consider the host of factors that weigh in on the often arduous task of sentencing a criminal offender, including the nature of the offense, the attending circumstances, the age, character and propensity of the offender, and the chances of reform. Furthermore, before deferring judgment or suspending sentence, the court must additionally consider the defendant’s prior record of convictions or deferred judgments, employment status, family circumstances, and any other relevant factors, as well as which of the sentencing options would satisfy the societal goals of sentencing.

*Formaro*, 638 N.W.2d at 724-25 (citations omitted); see also Iowa Code § 907.5 (standards for release on probation).

Here, the sentencing court considered Wygle's juvenile record; his adult criminal history, including a 2007 incident resulting in a deferred judgment; Wygle's admission to the presentence investigator that he assaulted his eight-year-old sister when he was twelve or thirteen; and Wygle's own childhood history of victimization. The court referenced the psychosexual evaluation and expressed concern regarding Wygle's lack of insight into his emotional and sexual needs, and minimization of his prior offenses. Citing an "overriding concern" for protection of the community, the court denied Wygle's request for deferred judgment.

Clearly, the court properly considered Wygle's adult criminal history. We find the voluntary statements Wygle made to the presentence investigator constitute an admission to the assault on his sister; therefore, the district court did not abuse its discretion in considering that incident when it imposed the sentence. Moreover, both the psychosexual evaluator and the presentence investigator emphasized Wygle's denial and minimization of his repeated inappropriate sexual contact with minors, even after his voluntary admission to the same.

With respect to the use of Wygle's own victimization as a child, the district court stated,

The fact that you yourself had been abused causes the Court concern. I couldn't cite you the particular statistics but the Court's understanding is that somebody who has been abused as a child is significantly more likely to then abuse others and abuse other children than somebody who didn't undergo that kind of abuse as a child.

The State contends there are many factors sentencing courts are required to consider that are outside the defendant's control, similar to his own victimization, including mental health diagnoses, family dynamics, and even age. Thus, the State contends Wygle's history of victimization was properly considered by the district court as it was a critical event in Wygle's life. However, there is nothing in the record before the district court that supports the conclusion that Wygle was more likely to commit sexual abuse because of his own victimization. Wygle's psychosexual evaluation only states, "[a]dditional assessment of the genesis of [Wygle's] behavior is needed, including his self-reported victimization as a child/adolescent."

We conclude the court's explanation reveals it improperly considered facts outside Wygle's case record. We are not free to "speculate about the weight the trial court mentally assigned to [the improper factors]." *State v. Messer*, 306 N.W.2d 731, 733 (Iowa 1981). If a court uses any improper consideration in determining a sentence, resentencing is required. *Grandberry*, 619 N.W.2d at 401. This is true even if the improper factors are a "secondary consideration." *Id.* Consideration of information obtained from outside the record is a defect in the sentencing procedures that requires a remand for resentencing. *Id.* Accordingly, Wygle's sentence is vacated, and we remand for resentencing.

**SENTENCE VACATED AND REMANDED FOR RESENTENCING.**