

IN THE COURT OF APPEALS OF IOWA

No. 3-306 / 12-1424
Filed June 26, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL ERIC GRAHAM,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Colleen D. Weiland, Judge.

Michael Graham appeals following his guilty plea, judgment, and sentence to the charges of domestic abuse assault, second offense, and burglary in the second degree. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Carlyle D. Dalen, County Attorney, and William Hoekstra, Assistant County Attorney, for appellee.

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

VAITHESWARAN, J.

We must decide whether the district court considered an unproven charge at sentencing.

I. Background Proceedings

Michael Graham pled guilty to domestic abuse assault, second offense, and second-degree burglary. Prior to sentencing, a presentence investigation report was prepared and filed with the district court. At the sentencing hearing, Graham's attorney took issue with two convictions listed in the criminal history portion of the report. He asserted:

[T]here is an allegation listed as Floyd County on 12/27/03. The next one down on 2/7/04 is Cerro Gordo County, if the court notes, this exact same number. And we believe that those are not true. I have removed from the clerk's office FECR017895 from Cerro Gordo County, and it has something to do with Andre Wells, Senior; has nothing to do with my client.

. . . .

And so we believe that neither of those should be considered because my client does not ever recall, first of all, doing—having a case in Floyd County; and, secondly, that he had probation revoked or that he was sentenced and probation terminated at that time.

Before imposing sentence, the district court checked the Iowa Courts Online electronic docketing system to determine the status of the Floyd and Cerro Gordo County cases flagged by Graham's attorney. The court found a listing in Floyd County but not in Cerro Gordo County. The court then stated,

I'd like to address Count II first before I address Count I. Count II is a charge of burglary, a Class C felony. Mr. Graham, I have reviewed your criminal history in regard to the PSI. The only reason I take note of the Iowa Courts Online was to try to clear up that number issue between Floyd County and here. You have a significant criminal history. You have a very significant criminal history in regard to assault. Obviously, the sentences that we've imposed on you until now have not been effective in changing that. The—there may be two unsuccessful probations, but there appears

to be at least one. I'll take your word for the '99 one that was a mix-up somehow. But I'm not willing to endanger the community, individuals or the community as a whole, by sentencing you to further probation.

[On Count II,] I'm imposing a term of up to ten years in the Iowa prison system. That term is not suspended.

With respect to Count I, the court sentenced Graham to a prison term not to exceed two years and declined to suspend the term.

II. Sentencing Decision

On appeal, Graham contends “[t]he State did not present evidence to prove the disputed facts—that Graham had a prior conviction in Floyd County and his probation was terminated.” When a defendant claims the sentencing court 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). The record contains sufficient evidence to support the existence of the Floyd County conviction and the termination of Graham’s probation in that case.

First, the PSI report listed the Floyd County offense and Graham’s statement that he did not “recall” committing that offense was, at best, an equivocal denial of its existence. Accordingly, the listing in the report could be deemed to have established the existence of the conviction by a preponderance of the evidence. See *State v. Grandberry*, 619 N.W.2d 399, 401-02 (Iowa 2000) (stating “[i]n determining a defendant’s sentence, a district court is free to consider portions of a presentence investigation report that are not challenged by the defendant” and stating facts supporting a sentencing decision must be established by a preponderance of the evidence).

Second, on hearing Graham's tepid denial of the Floyd County conviction, the district court did not simply assume the PSI report was correct; the court confirmed the existence of the conviction before proceeding with the sentencing decision, corroborating the date, county, case number, crime, and probation status of the disputed crime listed in the report.

Graham contends the court could not "rely on the Iowa Courts online docket entries to find that he, in fact, has this criminal history." The opinion he cites for this proposition, *State v. Sandborn*, 564 N.W.2d 813, 815 (Iowa 1997), simply stands for the principle that identity of names standing alone is insufficient to establish the identity of persons. *Sandborn* does not proscribe the confirmation actions taken by the court.

We conclude the district court did not consider an unproven charge in sentencing Graham, and we affirm his judgment and sentence.

AFFIRMED.