

**IN THE COURT OF APPEALS OF IOWA**

No. 3-483 / 12-2116  
Filed June 12, 2013

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

**vs.**

**JOSHUA ANTHONY HOLLAND,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Winnebago County, Rustin T. Davenport, Judge.

Joshua Holland appeals his convictions for third-degree burglary and fifth-degree theft, asserting the sentencing court considered an impermissible factor in sentencing him. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Christopher Scott, Student Legal Intern, Adam D. Sauer, County Attorney, for appellee.

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

**DOYLE, P.J.**

In May 2012, the State filed a trial information against Joshua Holland, asserting eight counts of third-degree burglary in Winnebago County. On August 21, 2012, a plea hearing was held. There, Holland submitted written guilty pleas to one count of third-degree burglary and one count of fifth-degree theft in the Winnebago County case. Additionally, Holland submitted a written guilty plea to one count of third-degree burglary in a pending Hancock County case against him. In exchange for his guilty pleas, the State recommended suspended sentences in each case with probation.

In a colloquy with Holland, the district court inquired as to the factual bases for the three guilty pleas. Holland admitted that on or about August 10, 2011, he entered an occupied structure in Winnebago County without the right to do so, with the intent to commit a theft within that structure. Holland also admitted that on or about July 27, 2011, he entered an occupied structure in Hancock County without the right to do so, with the intent to commit a theft. Holland agreed the court could rely on the minutes of evidence in each case to provide further support for his guilty pleas as stated in his written guilty pleas. The court ultimately accepted Holland's pleas and set a sentencing hearing.

The sentencing hearing was held in November 2012. The court noted it had reviewed the presentence investigation report (PSI). Among other things, the PSI referenced Holland's three guilty pleas at issue, and it noted Holland's written version of his offenses was that he "stole junk from [abandoned] farm houses." The PSI recommended Holland be granted deferred judgments as to all three guilty pleas. Holland's counsel stated she and Holland had reviewed the

report and had no corrections except to add his current employer. Holland's counsel requested the court adopt the parties' plea agreements.

The district court declined to grant Holland deferred judgments. In delivering its sentences, the court explained:

The law of Iowa requires that the court impose a sentence that will best provide for [Holland's] rehabilitation, protect the community, and deter others from committing this crime. The court would note that there was a recommendation in the presentence investigation—make sure I got the right one—that [Holland] be granted a deferred judgment. The difficulty with that recommendation from the [Iowa] Department of Corrections is that the factual basis surrounding . . . the crime that [Holland] has pled guilty to indicates this was not an isolated matter. There were other instances connected with this. The court's mindful of the fact that there's . . . a joint recommendation regarding sentencing in light of a plea agreement. The court finds that that sentencing recommendation should be accepted by the court, that it's appropriate under the circumstances. . . . The court finds that the proposed plea agreement is appropriate. Turning to . . . the Hancock County file, [Holland] is sentenced to five years in prison with that time suspended, probation for two years . . . .

. . . .  
 . . . Turning to the Winnebago County file, regarding [the third-degree burglary conviction], the court will impose a five-year sentence with that sentence suspended with two years probation. . . .

. . . .  
 . . . The two sentences in Hancock County and in Winnebago County will . . . run concurrently.

Regarding [the fifth-degree theft conviction], . . . given the recommendations as well as the circumstances, the court finds that that jail time is appropriate and sentences [Holland] to [thirty] days in jail as to [that conviction] . . . .

Holland now appeals. He takes issue with the court's statement in its sentencing colloquy that "the crime [Holland] . . . pled guilty to indicates this was not an isolated matter. There were other instances connected with this." He contends the "other instances" referred to by the court were crimes that were dismissed pursuant to the plea agreement, specifically the other counts of third-

degree burglary charged in the Winnebago County trial information. Holland contends the court's statement means the court considered "unproven charges" in sentencing Holland, though he notes the court honored the requests of the parties.

We review a sentence in a criminal case for the correction of errors at law. *State v. Kramer*, 773 N.W.2d 897, 898 (Iowa Ct. App. 2009). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as trial court consideration of impermissible factors." *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995). One impermissible factor is the consideration of another criminal offense where the facts before the court do not show the defendant committed the offense. See *State v. Longo*, 608 N.W.2d 471, 474 (Iowa 2000). It is a well-established rule that a sentencing court may not rely upon additional, unproven and unprosecuted charges where the defendant has not admitted to the charges or facts are not presented to show the defendant committed the offenses. See *State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002); *State v. Black*, 324 N.W.2d 313, 315-16 (Iowa 1982). "We will not draw an inference of improper sentencing considerations which are not apparent from the record." *Formaro*, 638 N.W.2d at 725.

However, "[t]here is no general prohibition against considering other criminal activities by a defendant as factors that bear on the sentence to be imposed." *Longo*, 608 N.W.2d at 474. A court may consider an unproven or unprosecuted offense when sentencing a defendant if the facts before the court show the accused committed the offense, or the defendant admits it. *State v.*

*Witham*, 583 N.W.2d 677, 678 (Iowa 1998). Our supreme court has specifically permitted sentencing courts to consider the contents of a PSI in its sentencing decision where the defendant did not object to the portion of the PSI being considered. *Id.*

Upon our review, we conclude the sentencing court did not consider an impermissible factor in sentencing Holland in the Winnebago County case. Although Holland only appeals his sentences in that specific case, he cannot look at the court's comments at the hearing in a vacuum. Here, the court was sentencing Holland on two convictions of third-degree burglary arising from two separate incidents in two separate counties. Holland himself admitted at the plea hearing he committed two separate incidents of third-degree burglary. Additionally, as the State points out, Holland acknowledged in his interview for the PSI he had stolen items from abandoned farm houses, indicating at least two or more incidents. In the proper context, it is apparent from the record the court was referring to those multiple incidents, which is not prohibited. We therefore find the sentencing court did not abuse its discretion in declining to grant Holland deferred judgments and impose instead suspended sentences. Accordingly, we affirm.

**AFFIRMED.**