IN THE COURT OF APPEALS OF IOWA

No. 6-286 / 05-1801
Filed May 10, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MANDELL CLARK,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Frederick Breen, District Associate Judge.

Defendant appeals his guilty pleas on for two counts of eluding and one count of operating a motor vehicle without the owner's consent. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Timothy Schott, County Attorney, and Jonathan Beaty, Assistant County Attorney, for appellee.

Considered by Zimmer, P.J., Vaitheswaran, J., and Schechtman, S.J. *

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

SCHECHTMAN, S.J.

Mandell Clark appeals his sentence following pleas of guilty to two counts of eluding and one count of operating a motor vehicle without owner's consent. We affirm.

Background Facts and Proceedings.

Mandell Clark was convicted and sentenced, after pleas of guilty, for two amended charges of eluding, serious misdemeanors, and operating a motor vehicle without owner's consent, an aggravated misdemeanor. He was sentenced to one year imprisonment on each eluding charge and a two-year indeterminate term of imprisonment on the operating a motor vehicle without owner's consent charge. Consecutive sentences were imposed. Minimum fines, surcharges, and restitution were also imposed.

Clark contends the sentencing court improperly considered another unproven and unprosecuted charge which constituted an abuse of discretion and reversible error. At sentencing, the court made the following remarks:

> In the first incident, the officers had reason to stop the defendant to interrogate him about a claim that he was detaining a female in a car. When they came upon him, he drove away, a chase ensued, at which a lot of dangerous driving took place, threatening him and the pursuing officers and citizens in the community through which he was driving.
>
> The female who was alleged to have been wrongfully detained by him was found to be in the vehicle. She was everlastingly grateful that they finally brought the car to a stop. She was extremely upset at the experience of having been in this eluding vehicle.

Clark asserts that the portion of his plea to establish a factual basis for eluding recited only his failure to stop after a marked law enforcement vehicle had ignited its flashing red lights; that the sentencing court would have needed to

use the minutes of testimony to learn of the female passenger's existence which is improper, and any allegation of wrongful detention or false imprisonment is a consideration of an unproven and unprosecuted charge which warrants a vacation of the sentence and resentencing.

Status of Review.

This sentence is within the statutory limits and our review is for abuse of discretion. *State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998). Abuse of discretion occurs when the district court "exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Peters*, 525 N.W.2d 854, 859 (Iowa 1994).

A sentencing decision enjoys a strong presumption in its favor. *Id.* In order to override that presumption, the defendant is required to show a reliance on improper evidence such as an unproven offense, *State v. Jose*, 636 N.W.2d 38, 41 (Iowa 2001), or other impermissible factors. *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000).

Analysis.

Clark cites three cases as authority for a remand for resentencing. In *State v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998), the affirmative showing was premised on the court's statement that "the concession provided in the plea agreement provides for actually the dismissal of what would probably be easily provable, five additional counts, so there is a substantial concession that's already been made to the defendant."

In *State v. Black*, 324 N.W.2d 313, 315 (Iowa 1982), the court stated:

> The fact you pled guilty to one charge of Indecent Exposure cannot and does not belie the fact that the State in return for that plea dismissed a Burglary charge, from which the facts indicate that you entered the private residence of an individual who was a total stranger . . . . The Court cannot and will not ignore the factual basis which gives rise to this charge.

This sentencing was remanded with instructions not to consider the dismissed charge unless admitted or independently proven. *Black*, 324 N.W.2d at 316.

In *State v. Messer*, 306 N.W.2d 731, 732 (Iowa 1982), the affirmative showing was the sentencing court's remark that it "was taking into consideration the fact there were two other charges that were not prosecuted in this matter as part of a plea bargaining."

Another case where vacation occurred is *State v. Sinclair*, 582 N.W.2d 762, 763 (Iowa 1998), which involved a prosecution for first-offense operating while intoxicated. The affirmative showing was this statement by the sentencing court:

> I have to under the law sentence you as a first offense because that's what it was . . . . But I believe that I can take into consideration that there was a problem because you were arrested for some type of alcohol-related incident and that for some reason maybe they couldn't prove you guilty beyond a reasonable doubt and that's why these were dismissed, and the Court has to take that into consideration. That this is a first, but you've had three prior arrests.

Sinclair, 582 N.W.2d at 765.

In each of these four cases the reviewing court did not have to speculate as to whether these unproven offenses gave some weight to the respective sentences. It was clear from the comments that the respective offenses played a part in the result.

In this subject case, the sentencing court, on one of the two eluding charges, justified the intended stop on a "claim" of detention and a similar "allegation." Nowhere did the court give any weight to that fact, but instead recited cogent reasons for the maximum sentences; i.e., a wild chase which endangered the defendant, pursuing officers, and citizens in the community through which he was driving (without mention of the alleged passenger). The court also noted past convictions:

> of assault and a weapons charge, simple misdemeanor trespass and assault, escape and trespass for which he was sent to prison, assaulting police, interference with official acts, criminal mischief 4, another count of interference with official acts . . . . theft fourth, assault while participating in a felony . . . theft 1 and interference with official acts causing injury.

Additionally, the defendant had only recently been released from prison. Lastly, the court labeled Clark a recidivist, committing dangerous offenses, failing to accept responsibility notwithstanding punishment and treatment, and ignoring his responsibilities to the court by failing to appear for a pretrial hearing prompting his arrest.

Clark has failed to show an affirmative reliance by the trial court on an unproven offense. It is abundantly clear the sentencing court based its sentence upon Clark's repetitive violations of the law and his irresponsible behavior. Other than a recitation of the "allegation" of detention, the court merely found the passenger to have been "upset" and "grateful." These were comments not employed in the sentencing outcome. It is a long reach to label these comments as an uncharged offense or prosecution. But in any event, they do help to explore the nature of the eluding offense.

The minutes of testimony can be used to establish a factual basis for the plea of guilty. *Black*, 324 N.W.2d at 316. The defendant has not shown that any of the court's information was obtained from the minutes. The attacked recitation was composed of comments, not findings. Nor were they a conclusive determination that another crime had occurred that was unproven or uncharged. A defendant cannot escalate and gild a circumstantial comment into an accusation of an accompanying crime that was then inappropriately considered as a part of the sentencing judgment. The court's remarks bear little resemblance to those in *Gonzalez*, *Black*, *Messer*, and *Sinclair*. There has been little persuasion that this rises to a reason to vacate these sentences.

The sentences, and each of them, are affirmed.

AFFIRMED.