

IN THE COURT OF APPEALS OF IOWA

No. 7-098 / 06-0730
Filed March 28, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DOMINICK RONALD MARCOTT,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick,
Judge.

Defendant appeals his sentences for third-degree theft and operating a
motor vehicle without the owner's consent. **JUDGMENT OF CONVICTION
AFFIRMED, SENTENCE VACATED, AND CASE REMANDED FOR
RESENTENCING.**

Patricia Reynolds, Acting Appellate Defender, and Theresa R. Wilson,
Assistant Appellate Defender, for appellant.

Dominick Marcott, Clarinda, pro se.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney
General, William E. Davis, County Attorney, and Rob Cusack, Assistant County
Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BEEGHLY, S.J.**I. Background Facts & Proceedings**

On January 13, 2006, Dominick Marcott was charged with forgery for attempting to cash a forged check from the account of Maryann Parr at a Kwik Shop in Davenport. On January 19, 2006, Marcott was charged with second-degree theft for taking the vehicle of Randy Raymond. Marcott entered into a plea agreement with the State and pled guilty to third-degree theft and operating a vehicle without the owner's consent. Marcott was sentenced to a term of imprisonment not to exceed two years on each charge, to be served consecutively. He appeals his sentences.

II. Sentence

Marcott contends the district court failed to give sufficient reasons for imposing consecutive sentences in this case. Our review of a sentencing decision is for an abuse of discretion. *State v. Evans*, 672 N.W.2d 328, 332 (Iowa 2003). Under Iowa Rule of Criminal Procedure 2.23(3)(d), "[t]he court shall state on the record its reason for selecting the particular sentence." A court must also give its reasons for imposing consecutive sentences. *State v. Jacobs*, 607 N.W.2d 679, 690 (Iowa 2000). Although the reasons given need not be detailed, they must be sufficient to permit appellate review. *State v. Keopasa euth*, 645 N.W.2d 637, 641 (Iowa 2002).

At the sentencing hearing the State recommended consecutive sentences. Defendant asked to remain in jail until he could enter a half-way house for substance abuse treatment. The district court noted that Marcott was attempting

to address his substance abuse problems, and that there might be programming available through the department of corrections. The court then stated its reasons for imposing incarceration.

Our review of the record does not show any reasons were given for imposing consecutive sentences. We also do not find the reasons for consecutive sentences were given as part of the overall sentencing plan. See *State v. Delaney*, 526 N.W.2d 170, 178 (Iowa Ct. App. 1994). We determine the sentencing order should be reversed and the case remanded for a new sentencing hearing.

III. Victim Impact Statements

Marcott claims he received ineffective assistance because his defense counsel did not object to portions of a victim impact statement submitted by Parr which included allegations of unproven offenses. Because this issue may arise on resentencing, we will address it.

Our review of claims regarding ineffective assistance of counsel is de novo. *Berryhill v. State*, 603 N.W.2d 243, 244-45 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006).

Generally, the sentencing court may not rely “upon charges of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved.” *State v. Sailer*, 587 N.W.2d 756, 762 (Iowa 1998). A

defendant must make an affirmative showing the court relied upon improper evidence. *Id.*

In the present case, at the beginning of the sentencing hearing the district court stated, “I would note at the outset that the Court will not give any consideration to any entries in the presentence investigation report criminal history section for which there’s been no admission or adjudication of guilt.” The statements in the presentence investigation report were the same ones which were in the victim impact statement.

Furthermore, the incidents in the victim impact statement were part of the same course of conduct from which the third-degree theft charge arose. We conclude “the impact of those acts was properly addressed by the victim and the sentencing court did not err in allowing the statement to be admitted in its entirety.” *See id.* at 761. We determine Marcott has failed to show he received ineffective assistance due to counsel’s failure to object to portions of Parr’s victim impact statement.

IV. Pro Se Issues

Marcott has raised issues on appeal in a pro se brief. He claims he did not receive the presentence investigation report in a timely manner under Iowa Code section 901.4 (2005), and Parr should not be considered a “victim” who could submit a victim impact statement. Neither of these issues were raised before the district court, and we determine the issues have not been preserved for our review. *State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa 1997) (noting

issues must be presented to and passed upon by the district court before they can be raised and decided on appeal).

We affirm the judgment, reverse Marcott's sentences and remand for resentencing.

**JUDGMENT OF CONVICTION AFFIRMED, SENTENCE VACATED,
AND CASE REMANDED FOR RESENTENCING.**