

IN THE COURT OF APPEALS OF IOWA

No. 7-640 / 06-1775
Filed October 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KIRBY JOE TRUESDELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Kristin L. Hibbs,
Judge.

Kirby Truesdell appeals from the judgment and sentences entered on his
conviction of second-degree theft and forgery. **AFFIRMED.**

Mark C. Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney
General, Harold Denton, County Attorney, and Jerry Vander Sanden, Assistant
County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

VAITHESWARAN, J.

Kirby Truesdell pled guilty to forgery and second-degree theft. At the sentencing hearing, the State requested five-year prison terms on each charge and asked that the sentences run consecutively. Defense counsel agreed to the recommendation of a prison sentence but argued the sentences should run concurrently rather than consecutively.

The district court sentenced Truesdell to indeterminate prison terms not exceeding five years. The court ordered the sentences to run consecutively, for the following reasons:

You have a long history of criminal actions. You show a disregard for the law and you were just discharged from your prison sentence roughly a month before you committed the first of these two offenses. They are separate offenses.

The Court considers that as well as the argument presented, the contents of the presentence investigation.

The court's written judgment cited the following additional reasons for the sentences:

1. The Defendant's age.
2. The nature and circumstances of this offense.
3. The Defendant's need for rehabilitation and the Defendant's potentiality therefore.
4. This sentence will hold the Defendant accountable for his actions and should act as a deterrent against future offenses by this Defendant and others.
5. This sentence will provide for the protection of the community.

On appeal, Truesdell maintains that the district court based the sentence in part on allegations of unproven or unadmitted crimes. His argument rests on the prosecutor's reference to a pending third offense operating-while-intoxicated charge. With respect to this charge, the prosecutor stated, "I believe actually that

is a matter to which the Defendant entered a guilty plea and failed to appear for sentencing. I could be wrong on that.”

“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.” *State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002). The district court did not violate this rule. First, defense counsel admitted much of what the prosecutor represented. He stated, “[t]here was a failure to appear, as [the prosecutor] cited, in this case, but Mr. Truesdell did ultimately turn himself in on that failure to appear.” Second, the district court made no reference to this charge in sentencing Truesdell. *State v. Jose*, 636 N.W.2d 38, 41 (Iowa 2001) (stating defendant must affirmatively show that court relied on unproven offenses); *State v. Ashley*, 462 N.W.2d 279, 282 (Iowa 1990) (stating the fact court was merely aware of unproven charges not sufficient to overcome presumption sentencing discretion properly exercised).

While the court did consider “the arguments presented,” there is no indication that the court was persuaded to impose consecutive sentences based on the prosecutor’s qualified and equivocal reference to a “pending” charge. *Cf. State v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998) (vacating sentence where court stated, “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”). The court cited valid reasons for the sentences, including the fact

that Truesdell committed the first of the two crimes roughly one month after discharging a prior prison sentence.

Finding no reliance on unproven or unadmitted charges, we affirm Truesdell's judgment and sentences.

AFFIRMED.