

**IN THE COURT OF APPEALS OF IOWA**

No. 8-364 / 07-1372  
Filed June 25, 2008

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

**vs.**

**JAMES CLARK YEAGER,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Jackson County, Charles H. Pelton, Judge.

James Clark Yeager appeals his sentence, following his guilty plea and conviction, for reckless use of a firearm. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Kent Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Phil Tabor, County Attorney, and James Kivi, Assistant County Attorney, for appellee.

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

**MILLER, P.J.**

James Clark Yeager appeals his sentence, following his guilty plea and conviction, for reckless use of a firearm. He claims the district court considered impermissible factors in sentencing him. We vacate his sentence and remand the case for resentencing.

The State charged Yeager, by trial information, with kidnapping in the first degree, in violation of Iowa Code sections 710.1(3) and 710.2 (2007), and willful injury, in violation of section 708.4(1). The minutes of evidence attached to the information stated that Karen Franzen, the alleged victim, would testify that Yeager assaulted her, abducted and threatened her at gunpoint, and intentionally shot her on March 8, 2007.<sup>1</sup>

The State later filed an amended trial information replacing the original charges against Yeager with a charge of reckless use of a firearm, in violation of section 724.30(1). On the date of the amended filing pursuant to a plea agreement, Yeager entered a guilty plea to the reckless use charge and the State agreed to concur in any recommendation made in the presentence investigation report (PSI). A PSI was prepared and presented to the court for consideration at sentencing. The PSI's "Official Version" of what occurred was basically Franzen's statements from the minutes of testimony. It was noted in the PSI that Franzen did not provide a statement to the PSI preparer nor did she fill out a victim impact statement. The PSI also provided Yeager's version of events. Yeager stated that on the day in question he and Franzen drove in

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<sup>1</sup> Franzen's statements were set out in great detail in the minutes of evidence. This is simply a much abbreviated summary of her statements.

his truck in pursuit of a stray dog. He had been consuming alcohol most of the day and had a .45 caliber handgun in his possession at the time in order to shoot the stray dog. He stated that during the "chase" he exited the passenger door of his truck at a neighbor's hog lot with the gun to look for the dog, upon trying to get back in the truck the door would not open so he fired two shots into the door in an attempt to get it open, and in this "reckless confusion" a third shot was fired and went through the window of the door and into Franzen's leg. The PSI recommended a sentence of incarceration.

At the sentencing hearing Franzen appeared and told the court that most of her statements set forth in the minutes, which were transferred to the "Official Version" in the PSI, were untrue. She stated that not only had she been using methamphetamine at the time of the incident in question, but that she also had been medicated and sedated with morphine at the hospital when she later gave the version of events to law enforcement as found in the minutes of evidence. She claimed that she did not remember what she had said at the hospital and had no memory of talking to the agents from the department of criminal investigation (DCI) while there. She asserted that her mother had told her that in the emergency room she said the dog shot her. Approximately a week later Franzen went to the Jackson County Sheriff's Office to meet with one of the DCI agents and the prosecutor. According to Franzen, they told her what she had said at the hospital and then she told them those statements were not true.

At sentencing Franzen admitted she must have said what the State claimed she had said at the hospital, but she again adamantly denied that her

original statements were true. Instead, she reaffirmed Yeager's version of events as set forth in the PSI, telling the district court essentially the same story regarding what had occurred on the day in question. In short, Franzen claimed she and Yeager were in his truck chasing a stray dog off their property. She was driving and Yeager got out of the truck with the gun to chase the dog and the door slammed shut. He could not get the door open to get back in the truck. Franzen tried to open it for him but it slammed shut again so Yeager then attempted to shoot through the door and in this process Yeager somehow shot Franzen in the leg. However, she stated it was an accident and she was not fearful of Yeager. She admitted she was under the influence of methamphetamine at the time and that Yeager was drunk. Yeager also spoke to the court at the sentencing hearing. He stated that because of his intoxicated condition on the day in question he should never have had possession of a weapon.

In accordance with the terms of the plea agreement the State concurred with the PSI recommendation of incarceration. The district court sentenced Yeager to a term of imprisonment of no more than ten years. In giving the reasons for the sentence imposed the district court stated, in part,

I heard what Mr. Yeager says and what Ms. Franzen says and find it to be unusual that he would be – that Mr. Yeager would be carrying a .45 caliber handgun, which I think is generally accepted as an unusually large handgun, to be shooting a dog. It sounds rather unusual, and the circumstances might likely be more what is [in] the official report.

Yeager appeals his sentence, contending the district court considered impermissible factors in determining the sentence. More specifically, he claims

the court based its sentencing determination on facts that supported the unprosecuted, greater charges, facts that Yeager did not admit and that the victim specifically stated were untrue. He further contends the court impermissibly considered the fact he “continued to be largely supported by his family.”

Our review of sentencing decisions is for correction of errors at law. Iowa R. App. P. 6.4. We review for an abuse of discretion or for defects in the sentencing procedure. *State v. Cason*, 532 N.W.2d 755, 756 (Iowa 1995). A sentence will not be upset on appeal unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as the trial court's consideration of an impermissible factor. *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000).

A sentencing court may not rely upon additional, unproven or unprosecuted charges in determining the appropriate sentence for a defendant. *State v. Sailer*, 587 N.W.2d 756, 762 (Iowa 1998). “We will set aside a sentence and remand a case to the district court for resentencing if the sentencing court relied upon charges of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved.” *State v. Black*, 324 N.W.2d 313, 315 (Iowa 1982).

A sentencing court *may not* . . . impose a severe sentence for a lower crime on the ground that the accused actually committed a higher crime *unless* the facts before the court show the accused committed the higher crime or the defendant admits it – even if the prosecutor originally charged the higher crime and reduced the charge. . . . [T]he accused does not admit the higher charge by pleading guilty to the lower charge.

*Id.* (quoting *State v. Thompson*, 275 N.W.2d 370, 372 (Iowa 1979)).

Minutes of testimony attached to the information do not necessarily provide facts that may be relied upon and considered by a sentencing court. . . . [W]here portions of the minutes are not necessary to establish a factual basis for the guilty plea, they are denied by the defendant, and they are otherwise unproved, we find no basis to allow the sentencing court to consider and rely on these portions. . . . The sentencing court should only consider those facts contained in the minutes that are admitted to or otherwise established as true.

*Id.* at 316 (internal citations omitted).

The district court stated that part of its reason for imposing the sentence it imposed was because it did not believe Franzen's and Yeager's version of events, and that more likely what happened was what was found in the "official report." We believe it is clear that by "official report" the court was referring to the "Official Version" found in the PSI report, which comes directly from Franzen's statements in the minutes of evidence in support of the original kidnapping and willful injury charges. As set forth above, Franzen told the court at sentencing that those statements were untrue and gave the court a version of events consistent with Yeager's version as set forth in the PSI. Because the majority of this portion of the minutes was not necessary to establish a factual basis for Yeager's guilty plea to the reckless use charge, was not admitted by Yeager, was denied by Yeager, and was otherwise unproven, the sentencing court should not have considered or relied on it.

Accordingly, we conclude from the record made at the sentencing hearing that the district court based Yeager's sentence, at least in part, on facts supporting the unprosecuted kidnapping and willful injury charges that were

neither admitted to by Yeager nor otherwise proved. The court's reliance on these facts was misplaced.

The State contends it is clear the district court ignored the original, higher charges because it specifically stated it was "not sentencing for what could have happened," and was "going to not take into consideration, to a large extent the recommendations of the [PSI] preparer," which intimated a higher offense. Those recommendations stated

Had the defendant been a better shot, he might now be standing trial for murder. Fortunately for Karen Franzen, he was not. As in all cases of violence, with the potential for death, there can be but one recommendation – incarceration.

We believe the court's statement that it was not going to take into consideration the PSI preparer's "Recommendations" regarding what "could have happened" does not change what the court stated it believed did happen, which is what was set forth in the "Official Version" section of the PSI. This section included assertions that Yeager had assaulted Franzen, kidnapped and threatened her at gunpoint, and intentionally shot her. We have noted above that consideration of such facts, and therefore the basis for the related unprosecuted and unproven charges, was improper. At a minimum it is unclear what the court in fact believed and relied on in determining the sentence it imposed. We cannot speculate about the weight a sentencing court assigned to an improper consideration and thus must strike down the sentence. *Black*, 324 N.W.2d at 316. If a court in determining a sentence uses any improper consideration, resentencing of the defendant is required. *State v. Gonzalez*,

582 N.W.2d 515, 517 (Iowa 1998). This is true even if it was merely a “secondary consideration.” *State v. Messer*, 306 N.W.2d 731, 733 (Iowa 1981).

Accordingly, Yeager’s sentence is vacated and the case remanded for resentencing. On resentencing, the district court shall not consider the unprosecuted charges or the facts involved in them unless they are admitted by Yeager or independently proved. We make no suggestion as to what the appropriate sentence should be. See *Black*, 324 N.W.2d at 316. In view of our disposition of this issue, we need not consider any other allegedly improper factors that Yeager argues were considered by the district court.

**SENTENCE VACATED AND REMANDED FOR RESENTENCING.**