

**IN THE COURT OF APPEALS OF IOWA**

No. 8-511 / 06-1789  
Filed July 16, 2008

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

**vs.**

**KEMEN SOLOMAN DEWITT,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Karen Romano,  
Judge.

Kemen Dewitt appeals from the sentence imposed by the district court  
following his plea of guilty to possession of crack cocaine with intent to deliver.

**AFFIRMED.**

Shane C. Michael of Michael Law Firm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Robert T. Diblasi, Assistant  
County Attorney, for appellee.

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

**EISENHAUER, J.**

Kemen Dewitt appeals from the sentence imposed by the district court following his plea of guilty to possession of crack cocaine with intent to deliver in violation of Iowa Code section 124.401(1)(c)(3) (2005). He contends the court abused its discretion in requiring he serve the mandatory minimum and denying his request for probation. He claims the court erroneously considered unproven charges.

Sentencing decisions of the district court are reviewed for errors at law. Iowa R. App. P. 6.4; *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of district court discretion or a defect in the sentencing procedure. *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1983).

“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 fact the court was merely aware of unproven charges is not sufficient to overcome the presumption that it properly exercised its sentencing discretion. *State v. Ashley*, 462 N.W.2d 279, 282 (Iowa 1990). The defendant must affirmatively show that the court relied upon the unproven offense. *State v. Jose*, 636 N.W.2d 38, 41 (Iowa 2001).

Dewitt’s criminal record extends back more than a decade to a trespass conviction in March of 1997. He was convicted of possession with intent to distribute cocaine base back in May of 1999. He was arrested for the current

drug offense despite having previously completed a drug education program in federal prison following that conviction. Dewitt failed to complete an inpatient treatment program while in jail awaiting sentencing on this offense, although he admits he needs treatment. Testing reveals Dewitt has a high risk of reoffending.

Although the presentence investigative report lists charges for which Dewitt was not found guilty, he has fallen short of showing the court relied on these charges in sentencing him. The court simply stated it considered Dewitt's "prior criminal record" in sentencing him. The report revealed several prior convictions. Dewitt having offered no other evidence to show the court relied on unproven offenses, we find no impropriety.

Nor do we find the court abused its discretion in requiring Dewitt to serve the mandatory minimum sentence for his offense. At sentencing Dewitt's attorney asked the court to find "mitigating circumstances exist and not impose the mandatory one-third." She was referring to Iowa Code section 901.10(1) (2005), which permits the court to reduce a mandatory sentence under certain circumstances. It reads:

A court sentencing a person for the person's first conviction under section 124.406, 124.413, or 902.7 may, at its discretion, sentence the person to a term less than provided by the statute if mitigating circumstances exist and those circumstances are stated specifically in the record.

Iowa Code § 901.10(1).<sup>1</sup> Dewitt claims the court failed to address its discretion to reduce the sentence. As authority Dewitt cites *State v. Young*, 695 N.W.2d 504

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<sup>1</sup> Dewitt in his brief refers to Iowa Code section 901.10(2). However, that section is not applicable here as it refers to amphetamine and methamphetamine offenses.

(Iowa Ct. App. 2005).<sup>2</sup> However, in sentencing Dewitt, the court referred to section 901.10 and stated mitigating circumstances do not exist. Clearly the court was aware of its discretion and exercised it to deny any reduction in Dewitt's sentence. Because the court did not abuse its discretion in sentencing Dewitt, we affirm.

**AFFIRMED.**

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<sup>2</sup> This citation is to a list of unpublished opinions of this court. Iowa Rule of Appellate Procedure 6.14(5) states in pertinent part:

An unpublished opinion of the Iowa appellate courts or of any other appellate court may be cited in a brief; however, unpublished opinions shall not constitute controlling legal authority. A copy of the unpublished opinion shall be attached to the brief and shall be accompanied by a certification that counsel has conducted a diligent search for, and fully disclosed, any subsequent disposition of the unpublished opinion. . . . When citing an unpublished appellate opinion, a party shall include, when available, an electronic citation indicating where the opinion may be readily accessed on line.

Dewitt failed to attach a copy of *State v. Young*, the required certification, or the electronic citation.