

IN THE COURT OF APPEALS OF IOWA

No. 8-722 / 08-0053
Filed October 1, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARTEZ PETER JOHN ANDERSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bruce Zager,
Judge.

Martez Anderson appeals his sentence for intimidation with a dangerous
weapon and carrying weapons. **SENTENCING ORDER VACATED AND
REMANDED.**

Mark C. Smith, State Appellate Defender, and Martha Lucey, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Andrews, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant
County Attorney, for appellee.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

Defendant Martez Anderson pled guilty to the non-forcible felony of intimidation with a dangerous weapon and to carrying weapons in violation of Iowa Code sections 708.6 and 724.4(1) respectively. The charges arose from an incident in Waterloo in which Anderson was driving a borrowed car with three passengers. While Anderson was driving, a passenger fired several shots at a car driven by Kenneth Keller, leaving Keller uninjured, but causing damage to his vehicle and to another vehicle which had been parked on the street. Anderson then sped away.

On June 28, 2007, Anderson was arrested for violations of Iowa Code sections 708.6, 724.4(1), and 902.7.¹ Pursuant to a plea agreement, Anderson pled guilty on October 12, 2007. On December 21, 2007, Anderson was sentenced to a term of incarceration not to exceed ten years for the charge of intimidation with a dangerous weapon and two years on the charge of carrying weapons, to be served concurrently. Anderson appeals following his sentencing, arguing that the district court abused its discretion in considering an unproven offense in determining his sentence.

II. Standard of Review

A sentence is in the discretion of the district court and should only be disturbed upon a showing that the district court abused its discretion. *State v. Garrow*, 480 N.W.2d 256, 259 (Iowa 1992). There is a strong presumption that

¹ The sentencing associated with the charge arising from violation of Iowa Code section 902.7 is not disputed on appeal.

the district court properly exercised its discretion. *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983). “A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as trial court consideration of impermissible factors.” *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1983).

III. Defendant’s Sentence

In determining a proper sentence, the district court can consider all pertinent matters “including the nature of the offense, the attending circumstances, the defendant’s age, character, and propensities or chances for reform.” *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995). “A court may not consider an unproven or unprosecuted offense when sentencing a defendant unless (1) the facts before the court show the accused committed the offense, or (2) the defendant admits it.” *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998). It is Anderson’s burden to affirmatively demonstrate that the district court relied on unproven charges. *State v. Ashley*, 462 N.W.2d 279, 282 (Iowa 1990). If Anderson can show that the district court relied on unproven charges, we must vacate the sentence and remand the matter for resentencing; we are not to speculate about the weight the district court assigned to an improper consideration. *State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998).

Anderson contends that the district court considered unproven crimes in stating “[i]t sounds like it may have been part of an ongoing type of behavior in this matter,” referencing the State’s contention that this was not an isolated incident, but part of an escalating pattern involving Anderson. At the sentencing hearing, the prosecutor stated:

This was an ongoing thing as well, as I think the Court, upon review of the trial information and minutes of testimony, would reflect that this was not an isolated incident and, in fact, that over the course of a couple of days this thing had been ongoing and, in fact, was escalating.

When we consider the district court's statement in conjunction with the prosecutor's statements, we find that the district court improperly considered the unproven course of conduct alleged by the prosecutor. Anderson specifically denied involvement in these offenses during the sentencing hearing. Anderson has affirmatively demonstrated that the district court relied on unproven charges, and we therefore vacate the sentence and remand for resentencing.

SENTENCING ORDER VACATED AND REMANDED.