

IN THE COURT OF APPEALS OF IOWA

No. 9-717 / 09-0247
Filed October 21, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JON ROSS MOORE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal,
Judge.

Jon Ross Moore appeals the sentences imposed following his guilty pleas
to two counts of forgery. **SENTENCES VACATED; REMANDED FOR
RESENTENCING.**

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

Thomas J. Miller, Attorney General, Martha Trout, Assistant Attorney
General, John P. Sarcone, County Attorney, and George Karnas, Assistant
County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, J.

Jon Ross Moore appeals the sentences imposed following his guilty pleas to two counts of forgery, in violation of Iowa Code section 715A.2(2)(a)(3) (2007), class D felonies. Moore contends the district court erred in imposing consecutive five year terms of incarceration, alleging the court improperly relied upon unproven crimes in reaching its sentencing decision. We vacate Moore's sentences and remand for resentencing.

I. Background Facts and Proceedings.

On December 24, 2008, Jon Ross Moore was charged by trial information in FECR224530 with two counts of forgery (Counts I and II) for alleged acts that occurred on November 10, 2008. On January 28, 2009, Moore was charged by trial information in FECR225517 with forgery (Count I), robbery in the second degree (Count II), and theft in the fourth degree (Count III) for alleged acts that occurred on November 22, 2008, and December 26, 2008. Pursuant to a plea agreement, Moore agreed to plead guilty to Count I of forgery charged in FECR224530, and enter an Alford plea of guilty to Count I of forgery charged in FECR225517. As part of the agreement the State agreed to dismiss Count II of FECR224530, and Counts II and III of FECR225517, as well as a pending aggravated misdemeanor charge, AGCR222850. Moore entered guilty pleas pursuant to the agreement.

Moore waived his right to have the court review and consider a presentence investigation report and requested immediate sentencing. The State recommended that Moore receive consecutive sentences. Moore did not

resist the imposition of prison sentences, but challenged the imposition of consecutive sentences, arguing he should be allowed to go before the parole board in a timely manner. The court thereafter sentenced Moore to an indeterminate term of incarceration of no more than five years on each conviction, to be served consecutively. The court also imposed, but suspended, the mandatory minimum fines. Moore now appeals.

II. Scope and Standards of Review.

We review the district court's sentences for correction of errors at law. Iowa R. App. P. 6.907; *State v. Sailer*, 587 N.W.2d 756, 758 (Iowa 1998). Sentencing decisions of the district court are cloaked with a strong presumption in their favor. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). "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." *Id.*

III. Merits.

Moore argues the district court erred in imposing consecutive five year terms of incarceration. He contends the court considered unproven charges in imposing the sentences, and alleges the sentences should be vacated and the case remanded for resentencing. Specifically, Moore contends the court improperly considered the charges that were to be dismissed pursuant to the plea agreement.

Sentencing decisions carry a presumption of regularity. *State v. Jose*, 636 N.W.2d 38, 41 (Iowa 2001). The burden is on the defendant to affirmatively

show the sentencing court relied on improper evidence such as unproven offenses. *Id.* If a defendant asserts that the sentencing court improperly considered unproven offenses, “the issue presented is simply one of the sufficiency of the record to establish matters relied on.” *State v. Longo*, 608 N.W.2d 471, 474 (Iowa 2000). A sentencing court is prohibited from relying on additional, unproven, and unprosecuted charges when the defendant does not admit the additional charges and no facts before the court show the charges are valid. *Sailer*, 587 N.W.2d at 762. We must set aside a sentence and remand a case for resentencing if we determine the sentencing court relied upon charges of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved. *Id.*

During Moore’s plea and sentencing hearing, the court asked whether the parties had any recommendations as to sentencing. The State recommended that Moore’s sentences run consecutively, stating the following, including a listing of Moore’s criminal history, as support for its recommendation:

[The] State would recommend that the sentences run consecutively for a number of reasons. *One is the benefit he’s receiving from the cases that are before the court today.* Two is the defendant’s criminal history, which I’ll briefly outline. In 2002 he was convicted of theft in the second degree, a class D felony, and received a deferred judgment. A substance abuse evaluation was ordered. The deferred judgment was revoked in 2003.

In 2004 the defendant was charged with burglary in the third degree. He was convicted of that class D felony, and he went to prison on burglary and the theft second concurrently. He was paroled in 2007 in September. In September of 2008 he picked up a burglary of a motor vehicle. . . . That’s the aggravated misdemeanor that’s going to be dismissed today should this matter be resolved. Unfortunately for him, he got out on bond or on pretrial release on that charge, and I think in November of ’08 he

picked up the two counts of forgery in 224530, which he's pled guilty to one count today.

Somehow, and unfortunately for him, he got out again. And in December of '08 he picked up the charges set forth in FECR 225517 and that is the case in which he has entered an Alford plea of guilty to Count 1, forgery, today.

For all those reasons, Your Honor, *I think his criminal history and his course of conduct over this several-month period merit a consecutive sentence of 10 years with these two class D felonies.*

(Emphasis added).

Thereafter, the sentencing court noted the "criminal history that was just described," and gave the reasons quoted below for the sentences imposed. Moore contends that the record of the sentencing proceeding clearly demonstrates the court considered unproven offenses in determining the appropriate punishment. Moore specifically notes the court's statements in addressing Moore's inability to control his criminal behavior while out on bond, and also points to several comments made by the court in support of its sentence. As the court stated:

. . . I'm not going to rehash that criminal history that was just described. But it's a serious criminal history, and it's unfortunate you're such a young person with that kind of criminal history. But what it—you know, actions speak a lot louder than words. And all these good things you're doing, even if I accept that's true, you're out there cancelling those out and more by the crimes you're committing in the community.

The aggravated misdemeanor that's going to be dismissed as part of the plea agreement, even when you've got a criminal charge pending and—were you out on bond or were you on pretrial release?

DEFENDANT: I was out on bond.

THE COURT: Okay. Even when you're out on bond, you can't control your criminal behavior. And we're not talking about two offenses growing out of the same facts that happened at the same time. We're talking about one that happened November 10th while you're out with the aggravated pending and another one on

November 22nd. *And that says nothing about the charges that were dismissed as part of the plea agreement.*

So you ask for something, but you don't do the things that you should do that deserve that kind of mercy. *I mean, you are out there just committing crimes every opportunity you get.*

....

And I think it calls, for the reasons that I just said, your criminal history, *the number of crimes you committed, the fact you're committing them while you're out on bond, for a consecutive sentence.*

(Emphasis added).

Our task on appeal is not to second guess the decision made by the district court, but to determine if it was unreasonable or based on untenable grounds. *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999). We have closely reviewed the record in this case, and we conclude the district court improperly considered offenses which were to be dismissed pursuant to the plea agreement when sentencing him on the forgery convictions. *See, e.g., State v. Jorgensen*, 588 N.W.2d 686, 687 (Iowa 1998).

Specifically, the court noted the aggravated misdemeanor for which Moore was released on bond at the time he committed the two forgeries of which he was convicted in these cases. The court further added, “[a]nd that says nothing about the charges that were dismissed as part of the plea agreement.”

We conclude Moore has met his burden to affirmatively show that the sentencing court improperly considered charges to which he did not admit and that were not otherwise proved. *See Longo*, 608 N.W.2d at 474; *Sailer*, 587 N.W.2d at 762. We affirm Moore's convictions, but his sentences must be vacated and the case remanded for resentencing.

SENTENCES VACATED; REMANDED FOR RESENTENCING.