IN THE COURT OF APPEALS OF IOWA

No. 1-581 / 10-2002
Filed August 24, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARQUEZ JUWAN CLAYTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Thomas Bice, Judge.

Marquez Clayton appeals from the sentence imposed by the district court following his guilty plea to possession of marijuana with intent to deliver. **SENTENCE VACATED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Vidhya Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, Ricki Osborn, County Attorney, and Jennifer Bonzer, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

Marquez Clayton appeals from the sentence imposed by the district court following his guilty plea to possession of marijuana with intent to deliver, in violation of Iowa Code section 124.401(1)(d) (2009). Clayton argues the district court abused its discretion in relying on unproven offenses in determining his sentencing. Clayton further contends his counsel was ineffective for failing to object to the State's presentation of additional evidence at sentencing without the statutory advanced notice. Upon our review, we conclude the testimony pertaining to Clayton's involvement in an alleged shooting incident following the event that formed the factual basis for his guilty plea (1) was relevant to the proof of an unprosecuted offense, rather than the charge Clayton pled guilty to, (2) was not admitted by Clayton, (3) was not otherwise sufficiently proven in the sentencing record, and (4) was relied on by the sentencing court in imposing Clayton's sentence, and thus, the court's consideration of that matter was improper. We therefore vacate Clayton's sentence and remand for resentencing.

I. Background Facts and Proceedings.

At approximately 4:45 a.m. on August 22, 2010, officers were dispatched to the 1800 block of 1st Avenue North in Fort Dodge, on a report of shots fired. Officer Dennis Mernka responded and observed a red pickup truck turning a corner in the neighborhood where the shots were reportedly fired. The truck pulled into an alley behind a building and the driver, Tanner King, and the passenger, Marquez Clayton, exited the vehicle. Officer Mernka asked for identification and noticed Clayton acting suspicious regarding a large bulge in his

pocket. A pat-down of Clayton revealed a bag of marijuana in his pocket. Clayton was placed under arrest.

King consented to a search of the truck. Officer Tim Broen conducted the search and discovered a 9 mm gun beneath the passenger seat. King told Officer Broen that "they" had shot a black truck parked on 1st Avenue North and that Clayton had thrown three shell casings in front of the building King's truck was parked behind. The reports of Officers Broen and R. Gruenberg reflect King stated Clayton had the gun and shot it at the black truck. However, Officer Gruenberg's report noted "every time King went through the story, it seemed to change." Officers located a black truck that had been shot several times and also found a shell casing lying next to the black truck, but never located the shell casings King stated Clayton threw out. Officer Mernka's report noted that "[t]he gun was held for fingerprints and more charges maybe at a later date." The record did not specify the results of any such fingerprinting.

At the scene of Clayton's arrest, three males approached Officers Mernka and Broen. They stated they had been at the nearby Kum & Go making a newspaper delivery when Clayton offered to sell some marijuana to one of them, a fellow high school student from Fort Dodge. The males also stated that earlier, when they were leaving the newspaper storage facility and going to Kum & Go, they had heard three to four gunshots.

Clayton was charged with possession of marijuana with intent to deliver while in immediate possession or control of a firearm, in violation of Iowa Code

section 124.401(1)(d)-(e) (2009).[1] Clayton pleaded not guilty. He later entered a plea agreement with the State. Pursuant to the plea agreement, Clayton agreed to plead guilty to the State's amended charge to possession of marijuana with intent to deliver, without the firearm enhancement; the State agreed to follow the recommendation in the PSI; and the defense was free to request whatever sentence it felt was appropriate. Clayton agreed to pay $1487.24 in restitution for damages to the black truck that "got shot in connection with this case," but that Clayton "has not been charged and will not be charged."

At the plea hearing, Clayton did not admit to or adopt the minutes of testimony, acknowledging only that he possessed marijuana with intent to deliver. He stated that on August 22, 2010, he got a ride to Kum & Go with a friend. He admitted he possessed more than a half ounce but less than fifty kilograms of marijuana. He stated that, while at Kum & Go, he observed some friends from school and asked if they wanted to buy any marijuana. Clayton made no admissions regarding the alleged firearm or shooting incident. The court accepted Clayton's plea as knowing, voluntary, and supported by a factual basis.

At the sentencing hearing, Clayton requested a deferred judgment and probation. The State sought to present testimony of Officers Dennis Mernka, Tim Broen, and Dennis Quinn to establish the presence of a firearm and Clayton's alleged involvement in the shooting incident. The State explained, "there's aggravating circumstances to this charge," and asked the court "to consider any evidence concerning a gun." Defense counsel objected on grounds that the

[1] King was charged with carrying weapons.

State's presentation of such evidence was in violation of the plea agreement, that it was not proper for the court to consider evidence of an uncharged offense, and that the State's evidence did not establish Clayton "had anything to do with the gun." Counsel did not, however, object that the State failed to provide notice of its intent to present evidence of the uncharged offense at sentencing.

The court allowed the testimony in regard to the firearm and shooting "for sentencing purposes" to "make an informed decision relative to the appropriate sentence." The court sentenced Clayton to a five-year suspended sentence and imposed two years of probation. Clayton now appeals.

II. Scope and Standard of Review.

The scope of appellate review for defects in sentencing procedure is for correction of errors at law. *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001). "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. Liddell*, 672 N.W.2d 805, 815 (Iowa 2003).

III. Consideration of Unproven and Uncharged Offenses.

Clayton argues the district court abused its discretion in relying on unproven and uncharged offenses in determining his sentence. He states he pleaded guilty to possession of marijuana with intent to deliver, without the firearm enhancement, and the State agreed to rely on the PSI at sentencing. Clayton further states that in setting forth the factual basis for the plea, he "made no reference to the firearm or the alleged shooting incident, and did not admit or adopt the minutes of testimony." Clayton contends the State should not have

been allowed to introduce the officers' testimony relating to the presence of the firearm and the alleged shooting incident, and the record of the sentencing proceeding clearly demonstrates the court relied on the testimony in determining the appropriate punishment.

When exercising its sentencing discretion, a sentencing court must "weigh and consider all pertinent matters in determining a proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances [for] reform." *State v. Leckington*, 713 N.W.2d 208, 216 (Iowa 2006). A sentencing court may not consider unprosecuted or unproven criminal activity absent sufficient proof or the defendant's admission to such conduct. *State v. Sailer*, 587 N.W.2d 756, 762 (Iowa 1998). A guilty plea to a reduced charge does not constitute an admission to a greater offense. *State v. Black*, 324 N.W.2d 313, 315-16 (Iowa 1982). The court may only consider the facts contained in the minutes that are necessary "to establish a factual basis for the charge to which the defendant pleads guilty." *Id*. at 316.

A. Attending circumstances. The State contends the officers' testimony pertaining to the gun and shooting incident should be characterized as "part of the circumstances surrounding the drug offense." In support of its argument, the State points out that "officers would not have stopped King's vehicle that morning but for reports of shots fired in the area."

Sentencing courts are cautioned that "[w]here portions of the minutes [of testimony] are not necessary to establish a factual basis for a plea, they are deemed denied by the defendant and are otherwise unproved and a sentencing

court cannot consider or rely on them." *State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998). In *State v. Black,* 324 N.W.2d 313, 316 (Iowa 1982), our supreme court explained that this prohibition stems from a concern that "[n]o evidence is before the court that shows the alleged facts contained in these portions of the minutes [of testimony] are valid."

Here, Clayton did not adopt or admit the minutes of testimony, and defense counsel objected to the officers' testimony regarding the gun and the shooting incident. The court allowed the testimony, and Officer Mernka testified about the stop of the vehicle after responding to a report of shots being fired. He testified about finding the 9 mm gun under Clayton's seat and Tanner King's statement that "they" had shot up a black truck. Officer Timothy Breon also testified about finding the gun, and Officer Quinn added it felt warm to the touch and smelled as if recently fired.

The State contends the minutes of testimony and officer testimony suggesting Clayton's proximity to a gun and involvement the shooting incident should be characterized as a circumstance attendant to his attempt to sell marijuana that was appropriately considered by the sentencing court. We disagree, and refuse to give such a broad definition to the concept of "attending circumstances." In *Black*, the defendant pled guilty to a charge of indecent exposure. 324 N.W.2d at 314. Portions of the minutes of testimony suggested that the defendant had gained entry into the victim's home by breaking and entering. *Id.* In that case, the State similarly urged the court to characterize Black's alleged illegal entry as an attending circumstance of the indecent exposure. *Id.* at 316. Our supreme court, however, refused to view as attending

circumstances facts going exclusively to a charge that was not proven or admitted to. *Id.* Despite the fact that the alleged illegal entry could be viewed as directly connected to the admitted indecent exposure, the court in *Black* vacated the sentence:

> We find that the sentencing court considered the alleged illegal entry into the victim's home although the entry had not been proved nor, since illegal entry is not an element of the crime of indecent exposure, had it been admitted to in Black's guilty plea.

Id. at 316.[2]

We believe a comparison of our case to the facts in *Black* lends ample support for our conclusion that by considering Clayton's alleged involvement in the shooting incident and his near proximity to a gun in selecting the appropriate sentence, the district court considered an unproven, uncharged offense rather than mere attending circumstances of the possession with intent to deliver charge. The offense to which Clayton pleaded guilty did not require a showing he wielded a gun. Rather, the factual basis required for a charge of possession of marijuana with intent to deliver was met upon a showing or an admission Clayton possessed fifty kilograms or less of marijuana that he intended to sell. *See* Iowa Code § 124.401(1)(d). We conclude any evidence involving the shooting incident or Clayton's possession of a gun would have been relevant to the enhancement charge of possession of marijuana with intent to deliver, which

[2] To accept the State's conception of "attending circumstances" forwarded both here and in *Black* would, in our view, effectively eviscerate the prohibition against the sentencing court's consideration of unproven, unadmitted, uncharged conduct not necessary to establish a factual basis for a guilty plea. If we were to adopt the State's position, any criminal conduct supporting an uncharged crime would be appropriately considered by the sentencing court because the conduct occurred contemporaneously with the conduct admitted in the guilty plea. We conclude our supreme court's holding in *Black* requires us to reject the State's argument.

is met by "[a] person in the immediate possession or control of a firearm while participating in a violation of this subsection." *See* Iowa Code § 124.401(1)(e).

B. Reliance on unproven and uncharged offenses. Even if the court considered unproven offenses, "in order to overcome the presumption the district court properly exercised its discretion, there must be an affirmative showing the court relied on . . . improper evidence." *Sailer*, 587 N.W.2d at 762; *State v. Ashley*, 462 N.W.2d 279, 282 (Iowa 1990) (acknowledging the defendant must show the sentencing court was not "merely aware" of the improper evidence, but also "relied" on it in rendering sentence). Therefore, we must ascertain whether the court did indeed rely on unproven or uncharged offenses in determining Clayton's sentence.

At the sentencing hearing, in overruling defense counsel objections to the officer testimony, the court stated, "I want to know the factual background that's involved here so that I can make an informed decision relative to the appropriate sentence . . . that will be imposed and that's why I want to hear from Officer Mernka." After the State presented testimony from three officers, the State urged against a deferred judgment, arguing that "the evidence . . . heard from the officers . . . in the very least, links the defendant to committing this crime while he has in his possession a firearm and also link him to a shooting . . . ." In imposing Clayton's sentence, the court began by admonishing Clayton for "driving around Fort Dodge with marijuana and a weapon." The following colloquy ensued:

> COURT: . . . I hear this testimony about you driving around Fort Dodge at quarter to five in the morning with a 9 mm semi-automatic loaded and somebody—somebody is discharging that weapon.

> Now, that's not what you're charged with here, but you know, it's part of the scenario, part of the factual basis that we have here. And that—that troubles this Court to no end because that kind of conduct in this community is an act of terror and this Court will not have it.
>
> Whether it be you or any other person, whether you be 17 or whatever, it makes no difference. Because the effect of that type of act is one that will terrorize this community and it will cause people to withdraw and it will cause people to have grave concern about being members of this community. I'm not going to have it. It's that simple.
>
> So from this day forward, I'm going to put you on probation. I'm going to talk to you here momentarily about what those terms of probation are. Frankly, you're getting a break. You're not going to prison. Had you been 30 years old with your record, come in here with this testimony that we have about shooting up the town about—with a 9 mm semi-automatic weapon—
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> DEFENSE COUNSEL: Your Honor, it's my understanding the Court wasn't going to consider—At this point I will object and ask the objection precede. The Court is saying over and over you're sentencing my client for something he hasn't been charged for.
>
> COURT: [I]t's part of the record and a part of the factual basis of this crime and I am going to consider it. If you think I'm wrong, we can take it up in Des Moines. It's part of the factual basis of the arrest. It was testified to here by no less than three officers.

These statements by the court clearly show the sentencing court not only considered but also relied on Clayton's alleged involvement in "shooting up the town" and his possession of a "semi-automatic loaded weapon" in imposing his sentence. Because the court relied on unproven or uncharged criminal activity absent sufficient proof or Clayton's admission, the sentence must be vacated and the case remanded for resentencing. *Sailer*, 587 N.W.2d at 762; *see Black*, 324 N.W.2d at 315.

C. Restitution. The State also argues Clayton's agreement to pay restitution for damages to the truck that was shot "is sufficient to serve as an admission to a part in that criminal activity." We disagree.

It is clear from the sentencing proceedings Clayton's agreement to pay restitution pursuant to the plea agreement was not an admission of his criminal responsibility to the cause of such damages. Rather, Clayton agreed to pay restitution, a condition of the State's plea, in order to take advantage of the agreement. When the State pointed out during the sentencing hearing that Clayton had agreed to pay restitution, defense counsel emphasized Clayton's agreement to pay restitution was not an admission of his guilt regarding the firearm or shooting incident:

> DEFENSE COUNSEL: The fact that my client has agreed to pay restitution is not an indication of any guilt. That is a requirement by the State that if wants the benefit of this plea agreement, he has to agree to that restitution. And I made it very clear to the State my client isn't happy about that. In order to take advantage of the plea agreement, he clearly did have marijuana, he clearly tried to sell it. He's not trying to back away from that for a minute.
>
> Mr. Tanner King was arrested for possession of a firearm, not my client. So that is not an admission of guilt in any way . . . .

Here, Clayton did not stipulate to the amount of damages to the truck, nor did he take responsibility for any part in causing the damages. The damages were not necessary to establish a factual basis for the offense to which Clayton pled, and were not listed in the PSI. Rather, Clayton agreed to pay restitution per the plea agreement, but specifically acknowledged he was not admitting any wrongdoing or responsibility for the damages underlying the restitution amount. Therefore, we agree with Clayton that his agreement to pay restitution should not be deemed "an admission to a part in that criminal activity."

IV. Ineffective Assistance of Counsel.

Clayton further contends his counsel was ineffective for failing to object to the State's presentation of additional evidence (officer testimony) at sentencing without advance notice pursuant to Iowa Code sections 901.2 and 901.4.[3] As a result of our analysis of the aforementioned issues raised by Clayton, we find it unnecessary to address his remaining claim of ineffective assistance of counsel.

V. Conclusion.

Upon our review, because we conclude the testimony pertaining to Clayton's involvement in an alleged shooting incident following the event that formed the factual basis for his guilty plea (1) was relevant to the proof of an unprosecuted offense, rather than the charge Clayton pled guilty to, (2) was not admitted by Clayton, (3) was not otherwise sufficiently proved in the sentencing record, and (4) was relied on by the sentencing court in imposing Clayton's sentence, we must conclude the court's consideration of that matter was improper. We therefore vacate Clayton's sentence and remand for resentencing before another judicial officer.

SENTENCE VACATED AND REMANDED.

[3] Clayton also relies on *State v. Ashley*, 462 N.W.2d 279, 282 (Iowa 1990), wherein our supreme court concluded Iowa Code sections 901.2 and 901.4 require the State to give advance notice, prior to sentencing, of evidence to be presented not otherwise noted in the presentence investigation report.