IN THE COURT OF APPEALS OF IOWA

No. 3-024 / 12-0716
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LA LOVAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

A defendant contends that the district court considered improper factors in imposing sentence against him. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and Joseph Crisp, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

VAITHESWARAN, P.J.

La Lovan entered an *Alford*[1] plea to conspiracy to manufacture a controlled substance (methamphetamine) and second-degree arson. The district court sentenced him to a prison term not exceeding ten years on each count, with the terms to be served consecutively.

On appeal, Lovan contends that, in imposing sentence, the district court improperly considered his purchase of pseudoephedrine, a precursor used in the manufacture of methamphetamine. He specifically asserts, "The whole topic of improper use of pseudoephedrine was not a proper sentencing factor because it was not alleged in the trial information, not included in the charges pled to, and not admitted to by the defendant."

"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). When a sentence is challenged on the basis of improperly-considered, unproven criminal activity, "the issue presented is simply one of the sufficiency of the record to establish the matters relied on." *State v. Longo*, 608 N.W.2d 471, 474 (Iowa 2000).

The record in this case included the minutes of testimony attached to the trial information. Not all minutes "may be relied upon and considered by a sentencing court." *State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998). The

[1] An *Alford* plea allows a defendant to consent to the imposition of prison sentence without admitting participation in the acts constituting the crime. *North Carolina v. Alford,* 400 U.S. 25, 37 (1970).

court may only consider "those facts contained in the minutes that are admitted to or otherwise established as true." *Id.* (citation and internal quotation marks omitted). Those "portions of minutes . . . [that] are not necessary to establish a factual basis for a plea . . . are deemed denied by the defendant and are otherwise unproved and a sentencing court cannot consider or rely on them." *Id.*

Contrary to Lovan's assertion, the purchase of pseudoephedrine was not an uncharged crime but an integral component of the charge of conspiracy to manufacture methamphetamine to which Lovan entered an *Alford* plea. That crime required proof that "at least one conspirator committed an overt act evidencing a design to accomplish the purpose of the conspiracy by criminal means." Iowa Code § 706.1(3) (2011); *accord State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999) (noting that "the State must show an overt act toward the accomplishment of the conspiracy"). The overt acts tying Lovan to the conspiracy were his repeated purchases of pseudoephedrine.

These purchases were documented in the minutes of testimony as follows:

> [Police officers] retrieved the pseudoephedrine purchases, blocks, inquiries information from various pharmacies in the Polk County, Iowa, area, and that these records are attached hereto and incorporated by this reference. These records show that a number of purchases or attempts to purchase pseudoephedrine were made by the defendants herein and that at certain times, their attempts to purchase pseudoephedrine were blocked based on non-compliance with the pseudoephedrine purchasing requirements.

The minutes further connected these purchases to the manufacture of methamphetamine by citing anticipated testimony from officers "regarding the chemicals and equipment used to manufacture methamphetamine and . . . that

the chemicals and equipment found in the possession of the defendant(s) are consistent with the manufacturing and conspiracy to manufacture methamphetamine." During the *Alford* plea colloquy, Lovan specifically admitted that the witnesses would testify as to the matters contained in the trial information and that he would likely be convicted based on that testimony. Through counsel, he also agreed that the minutes of testimony would be included as a part of the court's acceptance of his plea.

At the sentencing hearing, the prosecutor made reference to the pseudoephedrine purchases reflected in the minutes and a handwritten letter from Lovan explaining those purchases. The prosecutor stated in pertinent part:

> Furthermore, Mr. Lovan to this day has failed to take responsibility for his actions involving this conspiracy. . . . Mr. Lovan has been observed in our community since August of 2010, ending in May of 2011 of his arrest of frequenting pharmacies here in our community to purchase pseudoephedrine for the use to manufacture a controlled substance.
>
> Mr. Lovan states in a letter to the Court that he was verbally manipulated by Mr. Quang, his codefendant, into purchasing pseudoephedrine. However, that excuse would be justified if it happened once, but Mr. Lovan purchased pseudoephedrine again, again, and again from August 2010 to May of 2011. This was not a coincidence.

Lovan's attorney responded to this assertion by eliciting the following statement from Lovan: "I bought them for my own use, and when these people saw me bought these pills, they said we also use this medication too, so I gave some to them." Lovan also stated: "At that time I was not—I was not well. I was weak, but when I took this medication, it helped me to wake up a little bit. I had to use this medication because this medication helps me to relax and easier to breathe. That's it."

In sentencing Lovan, the district court addressed the pseudoephedrine references as follows:

> The Court has had an opportunity to review the presentence investigation report. While that report does recommend probation and that there are aspects of this case that would support that recommendation, most notably the defendant's lack of meaningful prior criminal history, the Court is more persuaded by the circumstances under which this offense—these offenses were committed . . . .
>
> [T]he fact that the defendant has, as the State has pointed out, failed to show any remorse for the actions that he has previously been found guilty of and, in fact, today to some extent provided some inconsistent information as to why these substances were being used. I heard him say that it was to wake up, to relax and to help some undiagnosed or unspecified condition. I find those excuses inadequate to relieve the defendant of the consequences of his actions resulting in the Court's acceptance of his plea of guilty earlier today.
>
> For those reasons, the Court will be adopting the State's recommendation that the defendant be incarcerated for these offenses. The Court will also be adopting the State's recommendation that these sentences run consecutive to each other because of the separate and serious nature of these offenses and for the reasons previously stated by the Court on the record.

The court's oblique discussion of Lovan's pseudoephedrine purchases did nothing more than confirm facts underlying Lovan's *Alford* plea.

We turn to the court's discussion of Lovan's explanatory statement. Lovan contends that the court acted improperly in implying he "was lying when he stated that he purchased pseudoephedrine for his own use." We disagree.

The court began its statement of reasons by finding that Lovan "failed to show any remorse for the actions that he has previously been found guilty of." The court also cited the prosecutor's statement, which mentioned Lovan's failure to take responsibility for his actions involving the conspiracy. Both were appropriate considerations in the sentencing decision. *See State v. Knight*, 701

N.W.2d 83, 88–89 (Iowa 2005) (concluding a defendant's lack of remorse was an appropriate consideration at sentencing as long as it was not based on the defendant's decision to stand trial, even when the defendant professed innocence by entering an *Alford* plea); *State v. Knutson*, 234 N.W.2d 105, 108 (Iowa 1975) (stating trial court could find the defendant "showed no indication of motivation to accept responsibility for his conduct"). Because the court appropriately considered whether Lovan was remorseful and whether he took responsibility for his involvement in the crimes, the court could also consider Lovan's voluntary statement as it bore on these sentencing factors. *See State v. Bragg*, 388 N.W.2d 187, 192 (Iowa Ct. App. 1986) (concluding the defendant's "failure to acknowledge his guilt even after conviction by the jury" did not amount to an abuse of discretion because it was considered in the court's "determination of the needs of the defendant to accomplish his rehabilitation"). For that reason, the court's discussion of Lovan's statement did not inject an improper factor into the sentencing decision.

We affirm Lovan's sentence for conspiracy to manufacture methamphetamine and second-degree arson.

AFFIRMED.