IN THE COURT OF APPEALS OF IOWA

No. 3-1018 / 13-0526
Filed December 5, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RYAN MICHAEL PORATH,
Defendant-Appellant.

Appeal from the Iowa District Court for Bremer County, Christopher C. Foy, Judge.

Defendant appeals the sentences imposed for his convictions for six counts of sexual abuse in the third degree. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, and Kasey E. Wadding, County Attorney, for appellee.

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

DANILSON, J.

Ryan Porath appeals the sentences imposed for his convictions for six counts of sexual abuse in the third degree, three in violation of Iowa Code sections 709.1 and 709.4(2)(b), and three in violation of sections 709.1 and 709.4(2)(c)(4) (1997).[1] On appeal, he maintains the district court abused its discretion by relying on improper factors in imposing his sentence, namely unproven claims and unavailable sentencing options. He asks that we remand for resentencing. Because we find the district court did consider impermissible factors, we vacate the sentence and remand for resentencing.

I. Background Facts and Proceedings.

On June 15, 2012, the State filed a trial information against Porath, charging him with six counts of sexual abuse in the third degree. On January 18, 2013, Porath entered a plea of not guilty. However, seven days later, pursuant to a plea agreement, Porath tendered a written guilty plea to each of the six counts alleged in the trial information. As part of the plea agreement, the State agreed to recommend concurrent ten-year sentences for each of the charges.

On February 8, 2013, the plea was accepted by the court. At that time, a pre-sentence investigation (PSI) was ordered and sentencing was set for April 1, 2013.

At sentencing, the court stated:

> Mr. Porath, I've taken time to review your file. I've looked at the presentence investigation report. And I'm presented with two very different sides of one person.

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[1] The code in force varies for the six charges, but no substantive changes affecting this opinion exist.

Obviously you are a person capable of good. There are many letters of support written on your behalf describing the positive things that you've done, the positive parts of your life. The cr— On the other side are the crimes that you've committed against [P.E.]. And I would say that as good as, um some of the things you've done in your life, what you did to [P.E.] was equally as horrible.

And if I understand the recommendation being made by the probation officer who prepared the PSI, he is proposing that you would receive consecutive sentences on the first three counts. It's not clear whether he's saying then the other three counts should be just concurrent to each other but are also concurrent to the other sentence. In any event, it's being proposed that the court give you 30 to 40 years in prison. I don't believe that's necessary.

But what I am wrestling with right now is the recommendation that's being made by the parties. I appreciate the reasons for the recommendation. I'm not saying the recommendation is unreasonable. And yet ultimately it is the court's job to try to accomplish the goals of sentencing. Sometimes those goals are a bit conflicting.

What the court is struggling with right now is whether a concurrent sentence would be sufficient to accomplish your rehabilitation and also adequately protect the community.

In reviewing the presentence investigation report, the description of the—the crimes, the admiss—and considering the admissions you made back at the time of sentencing, um, you know, the—what happened in this situation was not a momentary lapse in judgment or where you dabbled in something and ultimately saw the error of your ways and went in a different direction.

There was a pattern and practice of inappropriate sexual acts with somebody who was too young to say no. Too young to really appreciate what was happening. And as a result, that person has issues and challenges in his life that no one should have.

The other aspect here that, um, I guess the court has considered, if these offenses— And I guess this is a factor that cuts both way. The offense— The most recent ones took place over 12, 13 years ago.

Um, there are certain things in the minutes of testimony, certain things in— And I guess I should focus more on what's in the presentence investigation report because these references are in there as well. But there are, um, just things in there that cause the court to question whether [P.E.] is your only victim. . . . What I would consider grooming behavior with [P.E.]. The way that and the circumstances which you perpetrated against [P.E.] all carry signs and indications that the court has seen in other situations

> where somebody, um, is a sexual deviant and has perpetrated against many victims.
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> Whether that's you or not, I guess just the—the pattern and practice of your acts with [P.E.] are sufficient to convince the court that concurrent sentences are not appropriate. Or not that running them all concurrent is appropriate.
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> I think one other factor here is if your crimes had been committed more recently you would be subject to a special sentence under 903B.1 which would provide some additional protection for the community. Um. In that once you served your prison sentence that the court has gone—would go along with the recommendation of all concurrent, that, um, there would be ad additional period of time. I guess with a C felony, it would be your lifetime, where you'd be subject to the supervision by the Director of Department Corrections and be subject to additional prison time if you didn't comply with all the terms of your parole.
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> I don't have that here. That's not an option for the court to use. And so for that reason, I believe that it's appropriate to run at least two of the sentences consecutive to each other.

The court then sentenced Porath to an indeterminate term not to exceed ten years incarceration for each count. The sentences on counts I, II, and III were ordered to run concurrent with each other. The sentences on counts IV, V, and VI were also ordered to run concurrently with each other, but consecutive to the sentences on counts I, II, and III. Porath appeals.

II. Standard of Review.

Our review is for correction of errors at law. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). The decision to impose a sentence within statutory limits is "cloaked with a strong presumption in its favor." *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). The sentence will not be upset on appeal "unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure." *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). The consideration by the trial court of impermissible factors constitutes a defect

in the sentencing procedure. *Id*. If a court considers unprosecuted and unproven charges, we remand for resentencing. *Formaro*, 638 N.W.2d at 725.

III. Discussion.

Porath claims the sentencing court erred by considering unproven claims when determining the appropriate sentence. In making his assertion, Porath relies specifically on the court's statement:

> Um, there are certain things in the minutes of testimony, certain things in— And I guess I should focus more on what's in the presentence investigation report because these references are in there as well. But there are, um, just things in there that cause the court to question whether [P.E.] is your only victim. . . . What I would consider grooming behavior with [P.E.]. The way that and the circumstances which you perpetrated against [P.E.] all carry signs and indications that the court has seen in other situations where somebody, um, is a sexual deviant and has perpetrated against many victims.

Sentencing courts may not consider an unproven or unprosecuted offense when sentencing a defendant unless (1) the facts before the court show the defendant committed the offense, or (2) the defendant admits it. *State v. Jose*, 636 N.W.2d 38, 41 (Iowa 2001). In somewhat different phraseology, our supreme court has stated, "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." *Formaro*, 638 N.W.2d at 725 (emphasis added).

We conclude the court's explanation reveals it improperly considered both facts outside Porath's case record and that Porath had committed other unproven crimes. Essentially, the district court extrapolated that because of the similarities of Porath's crime to crimes committed by sexual predators against

multiple victims, Porath may have had multiple victims. The court did so without any admission from Porath that he had committed any other crimes. We acknowledge the additional minutes of testimony allege Porath admitted to other crimes with other victims. However, Porath never admitted the additional minutes of testimony were true or substantially true. Rather, the record reflects Porath agreed the additional minutes of testimony could be used to support the factual basis for the pleas he was attempting to enter at the time of the plea-taking proceedings—pleas to crimes involving only one victim.

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. There is no general prohibition against considering other criminal activities by a defendant as factors that bear on the sentence to be imposed." *State v. Longo*, 608 N.W.2d 471, 474 (Iowa 2000). However, if a court uses any improper consideration in determining a sentence, resentencing is required. *Grandberry*, 619 N.W.2d at 401. This is true even if the improper factors are a "secondary consideration." *Id.* We are not free to "speculate about the weight the trial court mentally assigned to [the improper factors]." *State v. Messer*, 306 N.W.2d 731, 733 (Iowa 1981). Moreover, consideration of information obtained from outside the record is a defect in the sentencing procedures that requires a remand for resentencing. *Id.* Accordingly, Porath's sentence is vacated, and we remand for resentencing.

In light of our conclusion on this issue, we find it unnecessary to address Porath's second claim that the district court improperly considered unavailable sentencing options.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.