IN THE COURT OF APPEALS OF IOWA

No. 3-1104 / 13-0454
Filed December 18, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY EARL HOPKINS,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Rustin T. Davenport, Judge.

A defendant appeals his sentence contending the district court considered an improper sentencing factor. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

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

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, and Carlyle D. Dalen, County Attorney, for appellee.

Considered by Vogel, P.J., and Mullins and McDonald, JJ.

MULLINS, J.

Anthony Hopkins appeals the sentence imposed following his *Alford*[1] plea to attempted burglary in the third degree, in violation of Iowa Code sections 713.2 and 713.6B(1) (2011). He was originally charged with first-degree burglary and first-degree harassment. In rendering its sentencing decision, the district court stated:

> The law of Iowa requires the court impose a sentence that will best provide for your rehabilitation, protect the community, and deter others from committing this crime. The court thinks that both sides have made points regarding the recommendations regarding sentencing. *The court is mindful of the matter that the defendant's guilty verdict has been entered or—or judgment of guilt has been entered is a reduced charge*. The court is also mindful of the co-defendant although, as the State says, that the co-defendant does not have the same type of criminal history as—as Mr. Hopkins has.
>
> After considering all those factors, the court finds that you should be sentenced to 180 days in the Cerro Gordo County Jail. The minimum fine of $625 will be imposed plus law enforcement surcharge for $125 plus surcharges.

(Emphasis added.) Hopkins asserts it was improper for the court to consider the fact he entered a plea to a reduced charge. He asks that his sentence be vacated and his case remanded for resentencing.

"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. Sailer*, 587 N.W.2d 756, 758–59 (Iowa 1998). There is a strong presumption the district court properly exercised its discretion, and to overcome that presumption,

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[1] An *Alford* plea permits a defendant to consent to the imposition of a sentence without admitting to participation in the crime. *North Carolina v. Alford*, 400 N.W.2d 25, 37 (1970).

"'there must be an affirmative showing the court relied on . . . improper evidence.'" *Id*. at 762 (citation omitted).

> A sentencing court may not . . . impose a severe sentence for a lower crime on the ground that the accused actually committed a higher crime unless the facts before the court show the accused committed the higher crime or the defendant admits it even if the prosecutor originally charged the higher crime and reduced the charge.

State v. Thompson, 275 N.W.2d 370, 372 (Iowa 1979).

In *Thompson*, the defendant had been originally charged with second-degree burglary but pled guilty to third-degree theft. *Id*. at 371. In sentencing the defendant, the court stated, in part: "It is the opinion of the Court that a reduction of the charge from a class C felony to an aggravated misdemeanor does not justify the Court's allowance of probation or a deferred sentence." *Id*. The supreme court interpreted this statement to mean the sentencing judge thought he was not justified in granting probation or a deferred sentence because of the higher original charge and the subsequent reduction. *Id*. at 372. The case was remanded so the court could sentence the defendant not on the basis of the original charge and subsequent reduction but on the facts relating to the crime and the accused. *Id*.

The State in this case asserts the district court did not actually rely on the fact the charge had been reduced when it imposed the sentence, even though it mentioned it. Had the court relied on the fact that the charge had been reduced, the State asserts it would have imposed the maximum sentence of two years. Given the sentence of 180 days in jail, the State claims the district court could not have improperly believed he actually committed first-degree burglary. The court

did not indicate it was imposing a more severe punishment because of the reduction in the charge; instead, the State asserts the court was merely aware of the reduced charge, which the State claims is not enough to justify vacating and remanding this case.

The sentencing court stated it was "mindful" of the fact the defendant pled guilty to a reduced charge. The court entered its sentencing order after saying it "consider[ed] all those factors," which included the reduced charge. This language indicates the court was not merely aware but actually considered the reduced charge in imposing the sentence. *But see Sailer*, 587 N.W.2d at 763 (holding the sentencing court's statement did not prove it relied on unproven offenses in determining the sentence to impose). Just because the district court did not impose the maximum possible sentence does not mean it did not impose a more severe sentence than it otherwise would have imposed had it not considered the reduced charge.[2] *See State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998) ("We cannot speculate about the weight a sentencing court assigned to an improper consideration . . . .").

Because we conclude the district court considered an improper sentencing factor when it stated it was mindful of the reduced charge to which Hopkins pled guilty, we vacate the sentence and remand the case for resentencing.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.

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[2] We note the district court rejected Hopkins's request for a suspended sentence—which was the sentence imposed on Hopkins's co-defendant after her guilty plea to burglary.