IN THE COURT OF APPEALS OF IOWA

No. 3-719 / 12-2175
Filed August 7, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DERRICK LEE BERRY,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Thomas L. Koehler (plea) and Ian K. Thornhill (sentencing), Judges.

Derrick Berry appeals from the sentence imposed following his guilty plea to first-degree theft and assault causing bodily injury. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Chandra Peterson, Student Legal Intern, Jerry Vander Sanden, County Attorney, and Jason Burns, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Vaitheswaran and Doyle, JJ.

VAITHESWARAN, J.

Derrick Berry was charged with first-degree robbery and other crimes. He pled guilty to first-degree theft and assault causing bodily injury. At the sentencing hearing, the prosecutor recommended a ten-year prison sentence on the theft count, without suspension, and a one-year sentence on the misdemeanor assault count to be served concurrently with the theft sentence.

In imposing sentence the district court stated:

> The problem that I can't get over here is just how violent this offense was. I am reading in the presentence report and, again, this is undisputed . . . the police were at the scene dealing with an allegation that the defendant violated the no-contact order against [his girlfriend] and before they even left, Mr. Berry came back and punched [his girlfriend] multiple times. *And then apparently they found some items on hand that belonged to the victim*, *which apparently is where the Robbery First charge came from*. Obviously, that is not what he pled to. I am not considering that at all.
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> But the circumstances here are that the Defendant has been very violent toward [his girlfriend] . . . . [I]n the presentence report, [it says] that a no-contact order was in place and the criminal history shows that the Defendant received a contempt sentence for violating the no-contact order in place at that same time.
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> *It appears to me that the Defendant got a huge break in the plea deal* that he received and, of course, he even characterizes it himself to the probation officer who is preparing the report as he thinks it is fair because it is the best his lawyer could get him. I do not know that that is accepting full responsibility.
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> So based upon the circumstances of this offense, the violent nature, and then looking at the . . . there is . . . at least some assaultive history and his criminal history, not including the violation of the no-contact order that is related to this case. I . . . do not see probation as being an option.
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> . . .
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> In determining the sentence I considered the entirety of the presentence investigation report. I considered the nature and

> circumstances of the offenses, and the history and characteristics of the Defendant, including his age and his prior confirmed criminal history. I am not including any other unadjudicated or dismissed allegations. I have considered the recommendations of both counsel and consider the recommendations of the presentence report prepared, which also recommends jail time without probation. Specifically . . . one of the factors that weighs heavily in my decision is the violent nature of the offense, the fact that there was an underlying protective order in place that the defendant had no regard for at all, which I believe aggravates the offense.

(Emphasis added.)

On appeal, Berry contends that the district court impermissibly considered the unproven first-degree robbery charge in sentencing him. *State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002) ("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."). If a defendant asserts that the sentencing court 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).

We conclude the district court impermissibly considered the unproven offense of first-degree robbery. The court mentioned the unadmitted facts pertaining to the charge and characterized the plea agreement as affording Berry a "huge break." These statements belie the court's repeated assertions that the unproven offense was not being considered. *See State v. Black*, 324 N.W.2d 313, 314 (Iowa 1982) (stating the court "may have improperly based Black's sentence on allegations arising from the unprosecuted burglary charged that were neither admitted by the defendant nor proved independently").

For that reason, we vacated the sentence and remand for resentencing.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.