IN THE COURT OF APPEALS OF IOWA

No. 3-061 / 12-0870
Filed April 10, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CODY D. SUTTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil, District Associate Judge.

A defendant contends the district court (1) considered unproven charges in sentencing him and (2) violated his Fifth Amendment right against self-incrimination by considering admissions that he made to his substance abuse evaluator. **JUDGMENT AFFIRMED, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.**

Thomas P. Frerichs of Frerichs Law Office, P.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Peter Blink, Assistant County Attorney, for appellee.

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

VAITHESWARAN, P.J.

We must decide (1) whether the district court considered unproven charges in sentencing the defendant and (2) whether the court violated the defendant's Fifth Amendment right against self-incrimination "by considering admissions [he] made . . . to his substance abuse evaluator."

I. Background Facts and Proceedings

Cody Sutton was arrested and charged with possession of cocaine. Following his arrest, Sutton voluntarily obtained a substance abuse evaluation.

Sutton later pled guilty to possession of cocaine. The district court ordered him to "obtain a substance abuse evaluation at his . . . own expense before the date and time set for sentencing" and to "file a copy of said evaluation with the court." In response to the court directive, Sutton filed the evaluation he obtained following his arrest.

At the sentencing hearing, Sutton asked for a deferred judgment. The district court denied the request and imposed a 365-day jail term, with all but two days suspended. The court also placed him on probation for twelve to twenty-four months. In articulating reasons for the sentence, the district court made reference to other acts, as follows:

> Well, the fact that [Sutton] admitted that he was—had used cocaine and that he was operating a motor vehicle I don't—he's not charged with operating while intoxicated so I haven't considered that he is charged or convicted of that offense, but the simple fact that he was operating a motor vehicle after having consumed cocaine, I have taken that into consideration as those are aggravating circumstances in this case.

The court also made reference to the substance abuse evaluation as follows:

> I believe the sentence is appropriate based upon the nature and circumstances of this offense as well as you as an offender and the information offered in the substance abuse evaluation. It would certainly indicate from the information in the substance abuse evaluation that this is not something out of character for you. It says in there that you've been experimenting with cocaine use off and on for close to eight years. So I don't believe a deferred judgment is warranted on the basis of the circumstances of this offense or for those reasons as well.

This appeal followed.

II. Analysis

A. Unproven or Unprosecuted Charge

"A district court 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). The State concedes the district court's reference to Sutton's operation of a motor vehicle after consuming cocaine violated this proscription. The State further concedes resentencing is required.

B. Fifth Amendment

Even though the first issue requires resentencing, Sutton asks us to address the question of whether the court's reference to his admissions during the substance abuse evaluation violated his Fifth Amendment right against self-incrimination. He asserts that resolution of the issue is necessary "so that when he is resentenced it can be done fairly and without the potential prejudice that [he] alleges occurred when he was initially sentenced." We agree the issue should be addressed.

The Fifth Amendment to the United States Constitution states that "[n]o person . . . shall be compelled in any criminal case to be a witness against

himself." U.S. Const. amend. V. The Fourteenth Amendment of the Federal Constitution extends the privilege to state prosecutions. *State v*. *Harris*, 741 N.W.2d 1, 5 (Iowa 2007).

The parameters of the Fifth Amendment right are as follows: "The [Fifth] Amendment . . . does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *Minnesota v*. *Murphy*, 465 U.S. 420, 427–28 (1984) (quotation marks and citation omitted).

Sutton frames his Fifth Amendment concern as follows: "[W]hether a Defendant who is 'compelled' to produce a substance abuse evaluation, may be punished using the findings of the evaluation as negative criteria in the sentencing of the Defendant." As Sutton's formulation recognizes, the key word in the Fifth Amendment is "compelled." *See id*. Sutton presumes he was "compelled" to produce a substance abuse evaluation. We begin by parsing that presumption.

First, it is worth reiterating that Sutton was not compelled to undergo a substance abuse evaluation. He voluntarily obtained the evaluation after he was arrested. Second, Sutton voluntarily disclosed his long-term drug use rather than asserting his Fifth Amendment right against self-incrimination. Because the evaluation was obtained at Sutton's behest and the admissions were volunteered, Sutton lost the benefit of the Fifth Amendment privilege. *See id*. at 428; *see also Buchanan v*. *Kentucky*, 483 U.S. 402, 422–23 (1987) (stating if defendant requests a psychiatric evaluation "then, at the very least, the

prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested").

If that were the sum and substance of the record, we could easily conclude there was no Fifth Amendment violation. The question is complicated by the district court's issuance of an order requiring an evaluation and the court's use of his admissions to impose a harsher sentence than Sutton requested.

Sutton essentially concedes the court had authority to require a substance abuse evaluation. *See* Iowa Code § 901.4A (2011) ("[T]he court may order the defendant to submit to and complete a substance abuse evaluation, if the court determines that there is reason to believe that the defendant regularly abuses alcohol or other controlled substances and may be in need of treatment."). He focuses on the consequence of non-compliance with the court directive. In his view, he would have been sanctioned had he not followed the order. The sanctions, he asserts, rendered his admissions in the evaluation report the equivalent of compelled testimony at the sentencing hearing. *See Murphy*, 465 U.S. at 434 (stating a person may not be compelled to appear and testify and induced to forgo the Fifth Amendment privilege by a threat to impose sanctions "capable of forcing the self-incrimination which the Amendment forbids" (quotation marks and citation omitted)); *see also Estelle v*. *Smith*, 451 U.S. 454, 462 (1981) ("Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment.").

The problem with Sutton's argument is that the court order contained no sanction; the court neither expressly nor impliedly stated that if Sutton declined to speak to an evaluator and file the evaluation with the court, he would receive a

harsher sentence. *See Murphy*, 465 U.S. at 435 ("There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution."). Without a sanction, there was no Fifth Amendment violation.

Even if a sanction could be read into the court's order, a Fifth Amendment violation is not a foregone conclusion. In the postjudgment context, the court must first ask certain "critical questions," namely whether the sanction was "'accomplished through a fair criminal process' and whether the state was engaged in a 'stark' attempt to compel testimony." *State v. Iowa Dist. Ct.*, 801 N.W.2d 513, 522–23 (Iowa 2011) (quoting Justice O'Connor's concurring opinion in *McKune v. Lile*, 536 U.S. 24 (2002), which the court found to be the controlling opinion). Assuming without deciding that these are also "critical questions" in the prejudgment context, Sutton does not argue that the criminal process to which he submitted was unfair or that the State "starkly" attempted to compel testimony.

Instead, Sutton suggests "[h]e clearly faced contempt sanctions if he did not produce his evaluation." We are not convinced this is the type of sanction contemplated by the "penalty" jurisprudence. *See Murphy*, 465 U.S. at 434 (distinguishing "penalty" cases); *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977) (concluding a statute authorizing the removal from a position as officer of a political party and the imposition of a five-year ban from holding public office for the refusal to answer questions before grand jury amounted to Fifth Amendment

compulsion). But even if it is, there is no evidentiary support for Sutton's assertion that he would have faced contempt sanctions if he refused to file the evaluation.

Sutton also suggests the purpose of the evaluation is to encourage treatment and "[i]f the person obtaining the evaluation is aware that any admission made during the evaluation could be used against him/her at the time of criminal sentencing, the whole purpose of evaluation and treatment is negated." The fact remains, however, that Sutton's admission did not come on the heels of the district court order requiring an evaluation. *See Murphy*, 465 U.S. at 435 ("The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution."). At the time of his admission, there was no court order compelling an evaluation, compelling admissions, or imposing sanctions for failure to admit.

This brings us full circle to where we began: Sutton's volunteered admissions did not implicate the Fifth Amendment. *See Estelle*, 451 U.S. at 469 ("Volunteered statements . . . are not barred by the Fifth Amendment." (quotation marks and citation omitted)).

We conclude the district court did not violate Sutton's Fifth Amendment right against self-incrimination when the court cited Sutton's admission that he was a long-term drug user.

III. Disposition

We affirm Sutton's judgment but vacate his sentence and remand for resentencing.

JUDGMENT AFFIRMED, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.