IN THE COURT OF APPEALS OF IOWA

No. 6-455 / 05-1440
Filed August 9, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DOUGLAS SCOTT FUQUA,
Defendant-Appellant.

Appeal from the Iowa District Court for Union County, Paul R. Huscher, Judge.

Douglas Fuqua appeals his sentences following his convictions for driving while intoxicated, third offense, and driving while his license was revoked. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Martha Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Timothy R. Kenyon, County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Miller, JJ.

MILLER, J.

Douglas Fuqua appeals his sentences following his convictions for driving while intoxicated (OWI), third offense, and driving while his license was revoked. He contends the district court abused its discretion by considering an unproven offense in determining his sentence and that his attorney was ineffective for failing to object to the State's breach of the plea agreement. We reverse the sentences and remand for resentencing.

The record reveals the following facts. On December 27, 2004, Fuqua was stopped for speeding. The officer who stopped him believed Fuqua was intoxicated and arrested him for OWI. Fuqua agreed to a breath test which showed an alcohol concentration of .129%. On February 2, 2005, the State charged Fuqua, by trial information, with OWI, third offense in violation of Iowa Code sections 324J.2, 321J.2(2) and 321.12(4) (2003). On March 23, 2005, Fuqua was involved in a motor vehicle accident while driving. At the time of the accident his driver's license had been and remained revoked, apparently a "test result revocation," *see* Iowa Code § 321J.12, related to the then-pending OWI charge. On May 6, 2005, the State charged Fuqua with driving under revocation in violation of section 321J.21 (2005).

Fuqua pled guilty to both of these charges on June 3, 2005. The district court sentenced Fuqua on August 5, 2005 to a term of imprisonment not to exceed five years on the OWI conviction and one year on the driving while revoked conviction. It ordered the sentences to be served concurrently. Between the time of his guilty pleas on June 3, 2005, and his sentencing in August 2005, Fuqua was charged with the additional offense of harassment in

the first degree in an unrelated matter in a different county, the harassment alleged to have occurred on July 24, 2005. This additional charge was listed in the pre-sentence investigation report that was relied on by the court in sentencing. In imposing sentences the district court stated, in relevant part,

> This court concludes that this defendant is not an appropriate candidate for probation; that a structured environment is necessary to provide not only the treatment that this defendant needs and to provide some stability for him, but also to protect the public from further offenses.
>
> It appears that, Mr. Fuqua, you've had criminal offenses and criminal convictions almost every year since 1993. *The court is especially concerned when a defendant who is presently charged with a criminal offense and is awaiting sentencing on that offense commits additional offenses*. It indicates to the court an inability to control one's behavior at a time when it is apparent that one's behavior is going to be important in connection with sentencing matters.

(Emphasis added).

On appeal Fuqua contends the court abused its discretion in sentencing him by relying on an impermissible factor in imposing the sentences. More specifically, he alleges the court impermissibly considered the July 2005 harassment charge as one of the reasons for denying him probation as evidenced by the emphasized language above.

Our review of sentencing decisions is for correction of errors at law. Iowa R. App. P. 6.4. We review for an abuse of discretion or for defects in the sentencing procedure. *State v. Cason*, 532 N.W.2d 755, 756 (Iowa 1995). Sentencing decisions of the district court are cloaked with a strong presumption in their favor. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). A sentence will not be upset on appeal unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as the trial court's

consideration of an impermissible factor. *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000).

A sentencing court may not rely upon additional, unproven or unprosecuted charges in determining the appropriate sentence for a defendant. *State v. Sailer*, 587 N.W.2d 756, 762 (Iowa 1998). "'We will set aside a sentence and remand a case to the district court for resentencing if the sentencing court relied upon charges of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved.'" *Id.* (quoting *State v. Black*, 324 N.W.2d 313, 315 (Iowa 1982)). When a defendant claims 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). To overcome the presumption in favor of a sentencing decision, a defendant must affirmatively show that the district court relied on improper evidence such as unproven offenses. *State v. Jose,* 636 N.W.2d 38, 41 (Iowa 2001); *Sailer,* 587 N.W.2d at 762.

In sentencing Fuqua the district court stated it was "especially concerned when a defendant who is presently charged with a criminal offense and is awaiting sentencing on that offense commits additional offenses." The only "additional offense" Fuqua was charged with while "awaiting sentencing" following his guilty pleas to the OWI and driving while revoked charges was the July harassment charge. Thus, this is the only "additional offense" to which the district court could have been referring in sentencing Fuqua. The harassment charge was still pending at the time of Fuqua's August 5, 2005 sentencing and thus was an unproven offense which the court expressly considered in

determining the sentences. Accordingly, we conclude the court impermissibly considered an unprosecuted charge that was neither admitted to by Fuqua nor otherwise sufficiently proven in the record. Therefore, the sentences must be set aside and the case remanded for resentencing. At the resentencing the harassment charge should not be considered by the court in determining appropriate sentences.

Fuqua also claims his trial counsel was ineffective for failing to object to the State's breach of its plea agreement. More specifically, he contends the State breached the terms of the plea agreement by providing the court with information beyond the recommendation concerning sentencing it had agreed to make in the agreement and thereby implied its recommendation should not be accepted by the court. He claims his defense counsel's failure to object to this breach by the State resulted in ineffective assistance of counsel. Although there may be merit to Fuqua's argument, *see State v. Horness,* 600 N.W.2d 294, 299 (Iowa 1999), because we are for another reason vacating Fuqua's sentences and remanding the case for resentencing we need not address his ineffective assistance claim at this time.

SENTENCES VACATED AND CASE REMANDED FOR RESENTENCING.