IN THE COURT OF APPEALS OF IOWA

No. 6-711 / 05-1712
Filed October 11, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES PAUL SMITH,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Kirk A. Daily, Judge.

James Paul Smith appeals from the sentence entered upon his conviction of operating while intoxicated, first offense. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Mark Tremmel, County Attorney, and Ron Kelly, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

SACKETT, C.J.

Defendant-appellant, James Paul Smith, appeals the sentence imposed upon him for the offenses of stalking, in violation of Iowa Code section 708.11(3)(b)(4) (2005); operating while intoxicated, first offense, in violation of section 321J.2; and third-degree burglary, in violation of section 113.6A. He contends the district court considered improper factors in sentencing him. We affirm.

Smith was initially charged with stalking; operating while intoxicated, third offense; third-degree burglary; harassment; driving while barred; and driving while operating privileges have been suspended, denied, or revoked. He filed a written guilty plea to the charges of operating while intoxicated, first offense, and third-degree burglary. The district court also accepted a guilty plea to the charge of stalking. The district court sentenced Smith to a term of imprisonment not to exceed five years and a fine of $750 for stalking; one year in prison and a fine of $1,000 for operating while intoxicated, first offense; and a term of imprisonment not to exceed two years and a fine of $500 for third-degree burglary.

Smith contends the district court considered the original charge of operating while intoxicated, third offense, in sentencing him. He points to the statement made by the district court in announcing its reason for the sentence that "[t]his was a third offense . . . OWI that was knocked down to a first" and that defendant had "at least one prior third that was knocked down to a second."

The State contends the court's consideration of the crime of operating a motor vehicle while intoxicated, third offense, was not an abuse of discretion because it is not an unproven charge in that defendant was twice convicted of

operating while intoxicated. In making this argument the State makes reference to two pages of the pre-sentence investigation (PSI) report, but leaves it to us to determine whether it shows that a third offense was reduced to a first and at least one prior third was knocked down to a second.

A sentence imposed by the district court is reviewed for errors at law. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). The decision of the district court to impose a particular sentence within the statutory limits is cloaked with a strong presumption in its favor, and will only be overturned for an abuse of discretion or the consideration of inappropriate matters. *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983) (citing *State v. Gartin*, 271 N.W.2d 902, 910 (Iowa 1978)). A district court may "impose a severe sentence for a lower crime on the ground that the accused actually committed a higher crime on the occasion involved *if* the facts before the court show the accused committed the higher crime." *State v. Longo*, 608 N.W.2d 471, 474 (Iowa 2000) (quoting *State v. Thompson*, 275 N.W.2d 370, 372 (Iowa 1979)). We look to the "sufficiency of the record to establish the matter relied on." *Longo*, 608 N.W.2d at 474. If the district court relied on improper factors, we will remand the case for resentencing. *State v. Black*, 324 N.W.2d 313, 315 (Iowa 1982).

The district court may consider any portion of the PSI report, including criminal history, not challenged by the defendant when determining an appropriate sentence. *State v. Grandberry,* 619 N.W.2d 399, 402 (Iowa Ct. App. 2000). Smith did not challenge the accuracy of this portion of the report. This constitutes "sufficient facts" from which the district court could consider Smith's prior OWI offenses. *See State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998)

(finding the unchallenged PSI mental history portion "constituted sufficient facts from which the sentencing court could consider the defendant's prior sexual abuse"). We conclude the district court did not rely upon inappropriate factors when sentencing the defendant. The judgment of the district court is affirmed.

AFFIRMED.