

**IN THE COURT OF APPEALS OF IOWA**

No. 9-396 / 08-1865  
Filed June 17, 2009

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**BECKY LYNN WOMACK,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Wright County, Steven J. Oeth,  
District Associate Judge.

A defendant appeals from her sentence following her guilty plea to forgery.

**AFFIRMED.**

James Fitzgerald, Fort Dodge, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney  
General, Thad Roche, Student Legal Intern, Eric Simonson, County Attorney, for  
appellee.

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

**VOGEL, J.**

Becky Womack appeals the sentence imposed upon her conviction for forgery. She asserts that in imposing her sentence, the district court abused its discretion by relying on improper sentencing factors. We affirm.

**I. Background Facts and Proceedings.**

The minutes of testimony and police reports reveal the following facts. From October 2004 to June 2006, Womack was the caretaker for an elderly woman, Francis Larson. In June 2006, Larson's attorney and nephew became suspicious that Womack had been stealing from Larson and fired Womack. Two days later, Larson died at the age of 103. Subsequently, Larson's attorney and nephew reported their suspicions to the Clarion Police Department.

Officers interviewed Womack on September 22, 2006, and April 7, 2007. During the first interview, Womack was questioned about numerous financial transactions, including cash withdrawals from Larson's credit card accounts, checks drawn on Larson's checking account that were written to Larson and Womack, and certificates of deposit, life insurance, and stock owned by Larson that had been liquidated. Womack admitted to using Larson's credit cards, but claimed it was with Larson's permission or that the cash was for Larson. She confirmed that numerous cash withdrawals from the credit card accounts occurred at Prairie Meadows and some of the money was spent there. Additionally, Womack was questioned about Larson's missing jewelry that had been recovered from a pawn shop in Ames. Womack claimed that the jewelry was a gift from Larson and admitted she had pawned it. During the second

interview, officers presented ten cancelled checks from Larson's checking account, to which Womack admitted that she had signed Larson's name.

On October 2, 2007, the State charged Womack with seven counts of forgery in violation of Iowa Code sections 715A.2(1)(b) and 715A.2(2)(a)(3) (2007) and one count of dependent adult abuse in violation of Iowa Code section 235B.20(5). The forgery charges arose from the checks drawn on Larson's checking account that Womack had admitted to signing. On October 10, 2008, pursuant to a plea agreement, Womack entered an *Alford* plea to one count of forgery and the State moved to dismiss the remaining charges. See *North Carolina v. Alford*, 400 U.S. 25, 32-38, 91 S. Ct. 160, 164-68, 27 L. Ed. 2d 162, 168-72 (1970) (holding that an accused may consent to the imposition of a sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime). Womack agreed to pay restitution for the underlying acts supporting the seven counts of forgery.

On November 13, 2008, a sentencing hearing was held. In addition to a presentence investigation report and a victim impact statement being made part of the record, Larson's nephew testified on behalf of Larson's estate. The State and Womack "stipulated to an amount of damages in the amount of \$4775, which includes seven forged checks and some jewelry that was made reference to in the Victim Impact Statement." The district court then stated: "[S]o you are clear, and the record is clear, in terms of what the Court then is going to consider the Defendant having done is essentially obtaining either cash or items valuing or totaling \$4775 for purposes of sentencing?" Both the State and Womack, through her counsel, indicated their agreement. The district court further stated:

The Court is faced with a situation where you have pled guilty to one count of a class D felony as set forth in Count I. You also acknowledge responsibility for restitution for Counts II through VII, in addition to Count I that you have pled guilty to.

The Court notes that the allegations are that each of those acts occurred on days distinct from each other . . . . [T]his was not a situation where you engaged in criminal conduct on one specific day, but rather a situation where the Court can conclude that you engaged in criminal conduct on more than one specific day.

The Court wants the record to reflect that it is not considering the allegation that your criminal conduct resulted in damage to the victim or the victim's estate to the extent that the damage is set forth on the third page of the Crime Victim Statement of Pecuniary Damages. I am only considering your conduct as it relates to the Count that you pled guilty to and the other six counts that you have acknowledged being responsible for restitution.

. . . .  
Again, I am only relying on what you have admitted to here today . . . .

Finally, the court discussed the other factors it considered, including Womack's prior theft conviction and that Womack abused her position of trust, and sentenced Womack to five years in prison, as well as ordering restitution. The district court dismissed the remaining charges. Womack appeals her sentence, asserting that the district court abused its discretion in relying on improper sentencing considerations.

## **II. Standard of Review.**

We review sentencing decisions for correction of errors at law. Iowa R. App. P. 6.4; *State v. Sailer*, 587 N.W.2d 756, 758 (Iowa 1998). A district court's sentencing decision is cloaked with a strong presumption in its favor. *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). "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." *Id.*; *Sailer*, 587 N.W.2d at 758-59.

### III. Consideration of Unprosecuted Charges.

Womack asserts that the sentence imposed by the district court should be vacated and the case remanded for resentencing because the district court considered unprosecuted charges in imposing the sentence, specifically the six counts of forgery that were dismissed pursuant to the plea agreement. 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. “There is no general prohibition against considering other criminal activities by a defendant as factors that bear on the sentence to be imposed.” *State v. Longo*, 608 N.W.2d 471, 474 (Iowa 2000). A sentencing court may rely on unprosecuted charges in determining the appropriate sentence for a defendant if either (1) the facts before the court show the charges are valid or (2) the defendant admits to the charges. *Sailer*, 587 N.W.2d at 762; *State v. Messer*, 306 N.W.2d 731, 732-33 (Iowa 1981). 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.” *Longo*, 608 N.W.2d at 474. If the sentencing court did rely on an impermissible factor, we must set aside the sentence and remand for resentencing. *Grandbery*, 619 N.W.2d at 401; *Sailer*, 587 N.W.2d at 762.

The district court specifically stated that it was considering Womack’s conduct as it related to the one count of forgery that she pled guilty to and the other six counts that she “acknowledged being responsible for restitution.” Womack contends that this was an abuse of discretion because the district court

considered the dismissed charges. The State responds that even if the district court did consider the dismissed forgery charges, it was appropriate because the facts before the court demonstrated that Womack actually committed the underlying acts supporting the dismissed charges and Womack took responsibility for those acts by agreeing to make the appropriate restitution. The State points to Womack's admission that she signed the checks and Womack's acceptance of "responsibility for all the actions which the court considered when sentencing her."

According to the police report following the interviews with Womack, she admitted to signing the checks from which the six counts of forgery stem.<sup>1</sup> She again admitted this fact in the presentence investigation report, in which she stated that she "wrote out [Larson's] checks" and "signed the checks with the consent of Frances." See *State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998) (holding that the sentencing court did not abuse its discretion in considering two dismissed charges where in the presentence investigation report, the defendant had implicated himself). Furthermore, during the sentencing hearing, Womack

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<sup>1</sup> The police report was attached to the minutes of testimony. Our supreme court has discussed minutes of testimony in context of sentencing:

[M]inutes of testimony attached to a trial information do not necessarily provide facts that may be relied upon and considered by a sentencing court. Minutes can be used to establish a factual basis for a charge to which a defendant pleads guilty. "The sentencing court should only consider those facts contained in the minutes that are admitted to or otherwise established as true." Where portions of the minutes are not necessary to establish a factual basis for a plea, they are deemed denied by the defendant and are otherwise unproved and a sentencing court cannot consider or rely on them.

*State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998) (quoting *State v. Black*, 324 N.W.2d 313, 316 (Iowa 1982)). In the present case, Womack's admission that she signed Larson's name to the checks was necessary to establish a factual basis for her plea and later admitted in the presentence investigation report.

took responsibility for the amounts of these checks. She specifically “stipulated to an amount of damages in the amount of \$4775, which includes *seven* forged checks and some jewelry that was made reference to in the Victim Impact Statement.” (emphasis added). Under these circumstances, we find the district court did not rely on impermissible factors in sentencing Womack. *See also Longo*, 608 N.W.2d at 474 (recognizing a lower standard of proof during the sentencing stage). Therefore, we conclude the district court did not abuse its discretion and affirm the district court.

**AFFIRMED.**