

IN THE COURT OF APPEALS OF IOWA

No. 9-456 / 08-1760
Filed July 22, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEVEN PHILLIP RICHARDSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Charles H. Pelton,
Judge.

A defendant appeals his sentence for second-degree theft, claiming the district court (1) illegally imposed a \$10 D.A.R.E. surcharge and (2) improperly considered unproven criminal conduct. **SENTENCE VACATED IN PART.**

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

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Michael L. Wolf, County Attorney, and Elizabeth Srp, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

VAITHESWARAN, P.J.

Steven Richardson appeals his sentence for second-degree theft, in violation of Iowa Code section 714.2(2) (2007). He contends the district court (1) illegally imposed a \$10 D.A.R.E. surcharge and (2) improperly considered unproven criminal conduct.

The State concedes that the surcharge should not have been imposed. See Iowa Code § 911.2 (requiring assessment of surcharge only for offenses under Iowa Code chapter 321J or chapter 124, division IV). Therefore, that portion of the sentence is vacated.

We turn to Richardson's contention that the court considered unproven charges. It is established that 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 district court imposed an indeterminate prison sentence not exceeding five years and declined to suspend the sentence as requested by Richardson, citing Richardson's age, limited education and employment background, and his "very lengthy criminal history." The judge then transitioned to a discussion of an appeal bond, stating:

I set bond on appeal a little higher than usual based on the former extradition and his residence in Illinois and his criminal history, and frankly, the likelihood of other offenses being committed in the event he were released on bail. The court's impression based on—*actually getting annoying a little bit in this case, and in another where there was a hung jury that*—and, of course, reading the presentence investigation, he's probably a chronic substance abuser that gets mixed up with alcohol or drugs and then commits some offense while impaired. And that seems to be his pattern, I'm

sorry to say. Wish we could break that pattern. We hope that this—if he'll take advantage of what's offered in the institution, will lead toward rehabilitation and deterrence and break that—that practice that he has, unfortunately.

(Emphasis added).

Citing the emphasized language, Richardson maintains that the court's sentencing decision was based in part on a case that resulted in a hung jury.

The State counters that this language was not a part of the sentencing decision.

We agree with the State. The district court directed the statements at issue to the amount of the appeal bond, not the sentence, which already had been imposed. An appeal bond “is separate and independent from the underlying judgment and sentence entered by the court.” *State v. Formaro*, 638 N.W.2d 720, 726 (Iowa 2002). Bail on appeal is neither a federal nor a state constitutional right. *State v. Kellogg*, 534 N.W.2d 431, 434 (Iowa 1995). The primary purposes of conditions on an appeal bond are to “assure the future appearance of the defendant upon completion of the appeal and to provide for the safety of others during the course of the appeal.” *Formaro*, 638 N.W.2d at 726. The district court exercised its discretion and made its comments to explain the heightened appeal bond. Nothing in this record suggests the district court's comments applied to the sentence already imposed.

We vacate the surcharge but affirm the balance of the sentence.

SENTENCE VACATED IN PART.