IN THE COURT OF APPEALS OF IOWA

No. 9-747 / 08-1953
Filed October 21, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JACAREE HESUS BRYANT,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Jacaree Bryant appeals from the sentence imposed by the district court following his plea of guilty to possession of marijuana with intent to deliver and interference with official acts. **AFFIRMED.**

Harold J. DeLange II, Davenport, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Michael J. Walton, County Attorney, and Kimberley Griffith, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

EISENHAUER, J.

Jacaree Bryant appeals from the sentence imposed by the district court following his plea of guilty to possession of marijuana with intent to deliver and interference with official acts. Bryant contends the court erroneously considered unprosecuted charges and seeks resentencing. Specifically, Bryant notes the search warrant suppression hearing was conducted by the sentencing judge four months earlier. He argues evidence from the suppression hearing of Bryant dealing cocaine was improperly considered at his sentencing. Assuming error was preserved, we conclude Bryant has not met his burden of proof and affirm.

Sentencing decisions of the district court are reviewed for errors at law. *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). "[T]he 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. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002). "It is a well-established rule that a sentencing court may not rely upon additional, unproven, and unprosecuted charges unless the defendant admits to the charges or there are facts presented to show the defendant committed the offenses." *Id*. "If a district court improperly considers unprosecuted and unproven additional charges, we will remand the case for resentencing." *Id*.

During sentencing the court specifically identified four charges listed in Bryant's presentence investigation report that did not result in convictions (juvenile charge, alcohol under age, burglary first, and attempted burglary) and

clarified it would not consider the charges, stating: "For the record, the court disregards any criminal history of a charge which did not result in a conviction." Therefore, the sentencing record reveals the court specifically disavowed consideration of any prior conduct attributed to Bryant that did not result in a conviction. The court also explained Bryant had now committed a marijuana delivery offense for the second time: "He had his chance and he got through probation and then he turns around and does the same thing, i.e., possession of marijuana with the intent to deliver."

Bryant argues because the court knew of the unproven cocaine allegations and the prosecutor stated the police and county attorney's office considered Bryant a high risk to the community regarding drug distribution, we should *infer* the court utilized unproven charges during sentencing. We cannot draw such an inference. We will not draw an inference of improper sentencing considerations which are not apparent from the sentencing record. *See id.,* 638 N.W.2d at 725. Further, the fact the court was merely aware of unproven charges is not sufficient to overcome the presumption that it properly exercised its sentencing discretion. *State v. Ashley*, 462 N.W.2d 279, 282 (Iowa 1990). Rather, we require defendants to affirmatively show that the court relied upon the unproven offense. *State v. Jose*, 636 N.W.2d 38, 41 (Iowa 2001). We conclude Bryant has not affirmatively shown the court considered improper factors in imposing sentence. Thus, we will not disturb Bryant's sentence on appeal.

AFFIRMED.