IN THE COURT OF APPEALS OF IOWA

No. 9-183 / 98-0826

STATE OF IOWA,

Appellee,

vs.

RAYMOND MARTIN LLOYD,

Appellant.

FILED
APR 30 1999

Appeal from the Iowa District Court for Warren County, John P. Crouch, Judge.

Defendant appeals from his conviction, following a guilty plea, for driving while barred, possession of methamphetamine, and driving while revoked. **SENTENCE VACATED; REMANDED FOR RESENTENCING.**

D. William Thomas, Des Moines, until withdrawal, and then Donna M. Shauer, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Kevin A. Parker, County Attorney, and Gary W. Kendall, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Zimmer, JJ.

ZIMMER, J.

Raymond Lloyd appeals his judgment and sentences for driving while his license was barred in violation of Iowa Code section 321.561 (1997); possession of methanphetamine in violation of Iowa Code section 124.401(5) (1997); and driving while his license was revoked in violation of Iowa Code section 321J.21 (1997). He contends the sentencing court (1) effectively sentenced him to more counts than were contained in the guilty plea; (2) denied him his right of allocution; and (3) failed to state reasons for the sentences imposed. He also contends he was denied effective assistance of trial counsel. We agree he was denied his right of allocution and vacate his sentence and remand for resentencing.

On February 19, 1998, a six count trial information was filed charging Lloyd with five serious misdemeanor offenses and one aggravated misdemeanor offense. Following plea negotiations, the State agreed to dismiss counts IV, V, and VI if Lloyd would plead guilty to the remaining aggravated misdemeanor charge of driving while barred and serious misdemeanor charges of possession of methanphetamine and driving while revoked.

The district court accepted Lloyd's guilty pleas and sentenced him to an indeterminate two-year prison term and a $500 fine for driving while barred. The court imposed a $250 fine and a one year prison term for the drug offense and imposed a $1,000 fine for driving while revoked. The one and two year prison terms were ordered to be served concurrently. The court finally stated: "Counts IV, V, and VI will be dismissed upon your performing what you're supposed to do in Counts I,

II, II — that is pay your fines, surcharge and court costs." The court subsequently noted in its entry of judgment that "Count IV, V, and VI are to be dismissed upon defendant's completion of the terms of the sentence herein imposed, as well as his payment of the court costs in this matter." Lloyd appeals.

I. Sentencing Defects

A. Scope of Review. Where, as here, appellant does not allege a failure on the part of the trial court to exercise discretion, we review a district court's sentencing procedures for abuse of discretion. *See State v. Craig*, 562 N.W.2d 633, 634 (Iowa 1997); *State v. Stanley*, 344 N.W.2d 564, 567 (Iowa App. 1983). We will find abuse only where discretion has been "exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Neary*, 470 N.W.2d 27, 29 (Iowa 1991).

B. Merits. Defendant alleges three separate sentencing defects require this case be remanded for re-sentencing. We first consider Lloyd's argument the sentencing court abused its discretion in denying him the opportunity to present a statement to the court in mitigation of punishment, in violation of Iowa Rule of Criminal Procedure 22(3)(d). Because Lloyd challenges the sentencing procedure itself, our review is limited to the sentencing record. *See State v. Craig*, 562 N.W.2d at 636.

The right to allocution is embodied in Iowa Rule of Criminal Procedure 22(3)(d). *See State v. Craig*, 562 N.W.2d at 634. That rule requires that prior to rendition of judgment "counsel for defendant, and the defendant personally, shall be allowed to address the court where either wishes to make a statement in mitigation of

punishment." *See* Iowa R. Crim. P. 22(3)(d). The sentencing court is not required to use any specific language to satisfy the rule; substantial compliance is sufficient. *See State v. Craig*, 562 N.W.2d at 635 (quoting *State v. Glenn*, 431 N.W.2d 193, 194 (Iowa App. 1988). So long as the district court provides the defendant with an opportunity to speak regarding his punishment or to volunteer any information helpful to his cause, the court is in compliance with the rule. *Id.* (citing *State v. Glenn*, 431 N.W.2d at 194–95); *State v. Christensen*, 201 N.W.2d 457, 460 (Iowa 1972).

This opportunity has been deemed satisfied in several cases. In *State v. Christensen*, the Iowa Supreme Court held defendant was not denied the opportunity to exercise his right to allocution where the sentencing court inquired of defendant: "Is there anything you would like to say to the court before I pronounce sentence?" *See State v. Christensen*, 201 N.W.2d 457, 459 (Iowa 1972). The same is true where the court and the defendant engage in an extended question-and-answer colloquy aimed at eliciting statements about punishment. *See State v. Patterson*, 161 N.W.2d 736, 738 (Iowa 1968). The Iowa Court of Appeals affirmed sentencing in *State v. Glenn*, where it was found (1) the court had asked the defendant if there was any reason why it should not go ahead and sentence him; (2) the court elicited from the defendant that he understood the presentence recommendation which matched the sentence; and (3) the court and the defendant discussed his employment situation. *See State v. Glenn*, 431 N.W.2d at 194–95. Finally, asked before sentencing, the question "Did you want to say something?" sufficiently affords defendant an opportunity to address the court concerning his punishment. *See State v. Craig*, 562

N.W.2d at 635 (citing approvingly *Green v. United States*, 365 U.S. 301, 304, 81 S.Ct. 653, 655, 5 L.Ed.2d 670, 673 (1961).

Conversely, simply asking defendant if he is "ready to be sentenced" will not satisfy rule 22(3)(d). *See State v. Milsap*, 547 N.W.2d 8, 10 (Iowa App. 1996). Additionally, affording defense counsel rather than defendant an opportunity to address the court "does not constitute substantial compliance with the rules." *See State v. Craig*, 562 N.W.2d at 637. "The right of allocution is one which is personal to the defendant." *Id.*

The following occurred during sentencing of defendant:

> THE COURT: All right. Any motions in arrest of judgment been filed?
> MR. MAINS [DEFENSE COUNSEL]: No, your honor.
> THE COURT: State's recommendation to Counts I, II, and III.
> MR. KENDELL [PROSECUTOR]: [The State gave its recommendation.] State's basing its recommendation on the Defendant's criminal history which read into the record — just present it to the Judge.
> THE COURT: Show it to Mr. Mains.
> MR. MAINS: I have got a copy of that, Judge.
> THE COURT: Any disagreement with what that's showing?
> MR. MAINS: No, your honor.
> THE COURT: Has your client seen it? We've gone over that agreement.
> THE COURT: What's the county seat of Hampton County?
> MR. MAINS: Its Franklin City.
> THE COURT: I know where Hampton is —
> MR. MAINS: Should probably read the city of Hampton.
> THE COURT: It's the county seat — Okay. On behalf of Defendant, do you agree?
> MR. MAINS: Your Honor, we'd concur with that recommendation.[1]

[1] The parties dispute on appeal to what recommendation defense counsel was concurring. We find counsel was referring to the State's sentencing recommendation.

THE COURT: [The court then immediately proceeded to sentence defendant.] Counts IV, V, VI will be dismissed upon your performing what you're supposed to do in Counts I, II, and II — that is pay your fines, surcharge and court costs.[2] Are you paying all of that today? What are you paying today?
MR. LLOYD: Ain't got no money today.
THE COURT: You don't have any money today? Why not?
MR. LLOYD: I didn't think I had to pay today.
THE COURT: Well, you're not working?
MR. LLOYD: Yes, I'm working.
THE COURT: Where are you working?
MR. LLOYD: R. Dale Construction — I haven't worked the last week.
THE COURT: Do you understand the fine and surcharge and court costs are due on the date sentencing is imposed?
MR. LLOYD: I didn't know that.
THE COURT: When will they be paid?
MR. LLOYD: I don't know. I'll have to be when I get out of jail — I can pay it on payments.
THE COURT: Well, I'll set a show cause date on September 11th at 1:30. I expect that if you're out of jail that you're working. You're to pay your fine in no less than $250 a month toward your fine and surcharge and court costs. Does that make sense to you?
MR. LLOYD: Yes. Yes, sir.
THE COURT: All right. And you are sentenced, of course, to two years in Count I with an indeterminate sentence. Did you say that one year was to run concurrent with the two years?
MR. KENDALL: That's what the State is requesting, yes.
THE COURT: All right. To run concurrent with the second sentence.
MR. MAINS: Correct, Your Honor.
THE COURT: All right. He's preparing a judgment entry accordingly.
MR. KENDALL: I just prepared a mitimus. I'll do a judgment entry.

Having carefully reviewed the sentencing transcript, we determine defendant was not afforded adequate opportunity to exercise his right to allocution. The court did not ask defendant if he had anything to say on his behalf before sentence was

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[2] The trial transcript reported "I, II, and II." The transcript is likely reported in error, and should probably read "I, II, and III." We note this error is of no consequence to our decision today.

imposed. Nor did the court ask if there was any legal cause or other reason why sentence should not be imposed. Furthermore, the court did not ask defendant if he understood the State's sentencing recommendation. The court's inquiries of defense counsel as to whether Lloyd agreed with the sentencing recommendation was, without more, insufficient to satisfy the personal nature of the right to allocution under rule 22(3)(d).

Additionally, the surrounding circumstances do not indicate defendant understood he had an opportunity to address the court with regard to sentencing. For example, there was no conversation between the court and defendant before sentencing about the charges against him or his current economic situation. In fact, the court did not directly address the defendant until after sentence had already been imposed. The court's question to defense counsel as to whether any motions in arrest of judgment had been filed does not help in this regard: it did not sufficiently demonstrate to defendant that he had an opportunity to personally address the court in mitigation of punishment.

We recognize the court did ultimately ask defendant about his employment situation. However, this did not protect defendant's opportunity to address the court because the question and answer colloquy came *after* the court had already sentenced defendant, arising in response to the court's inquiries of Lloyd as to whether he would be able to pay the fines, surcharges, and court costs *already imposed.*

We determine Lloyd was denied the opportunity to address the court regarding his punishment. We vacate defendant's sentence and remand for resentencing. We

do not retain jurisdiction. Because of our disposition of this case, we do not consider Lloyd's remaining arguments.

SENTENCE VACATED; REMANDED FOR RESENTENCING.

No. 98-0826. [9-183] STATE v. LLOYD

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(8 pages $3.20)

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