# IN THE COURT OF APPEALS OF IOWA

No. 0-624 / 99-1961
Filed November 8, 2000

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

**vs.**

**RICHARD ALLEN MILLSAP,**
**Defendant-Appellant.**

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CLERK SUPREME COURT

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Appeal from the Iowa District Court for Polk County, Karen Romano, Judge.

On appeal from the judgments and sentences entered upon his guilty pleas to domestic abuse causing injury, driving while barred, and third-degree theft, defendant contends the court erred in failing to allow him to exercise his right of allocution and in failing to state reasons for the imposition of consecutive sentences. **SENTENCES VACATED, CASE REMANDED FOR RESENTENCING.**

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

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, John P. Sarcone, County Attorney, and Mark Sandon, Assistant County Attorney, for appellee.

Considered by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

**VAITHESWARAN, J.**

Richard Allen Millsap pled guilty to charges of: (1) driving while barred as a habitual offender, in violation of Iowa Code section 321.561 (1999); (2) domestic abuse causing injury, in violation of Iowa Code section 708.2A(2)(b), and (3) enhanced third-degree theft, in violation of Iowa Code sections 714.1(1) and 714.2(3). The district court sentenced him to terms not to exceed two years, one year, and two years respectively, with the first two sentences to run consecutively. This resulted in a total term not exceeding three years. The court further ordered this three-year term to run consecutively to prior sentences Millsap was serving. On appeal of the sentences comprising the three-year term, Millsap contends the district court did not afford him his right to speak in support of reduced punishment and did not set forth reasons for imposing consecutive sentences. We agree and accordingly vacate the sentences and remand for resentencing.

***I. Right of Allocution***

Iowa Rule of Criminal Procedure 22(3)(d) affords a defendant a right to make a statement in mitigation of punishment. This right is known as the right of allocution. *State v. Craig*, 562 N.W.2d 633, 635 (Iowa 1997). To comply with this rule, a district court must give a defendant an opportunity to volunteer information that would support his or her cause. *State v. Duckworth*, 597 N.W.2d 799, 801 (Iowa 1999). The court must do so during the sentencing proceeding and prior to sentencing, not during guilty plea or post-sentencing proceedings. *See Id. Craig*, 562 N.W.2d at 636. Our review, therefore, is limited to the sentencing record. *Id.*

We conclude the district court did not afford Millsap his right of allocution. After obtaining his guilty pleas, the court confirmed Millsap wished to proceed with sentencing that day, then immediately proceeded to pronounce sentence.

The State maintains the error was harmless because Millsap was sentenced in accordance with a plea agreement. However, while the record contains written plea agreements, the court did not state it intended to be bound by the agreements. For this reason, we cannot conclude the error was harmless.

Because Millsap was not afforded an opportunity to speak on his own behalf, we vacate his three sentences and remand for resentencing. *See State v. Millsap*, 547 N.W.2d 8, 10 (Iowa App. 1996).

***II. Consecutive Sentences***

Millsap next contends the sentences must be vacated because the district court did not set forth reasons for imposing consecutive sentences. The State counters that the written judgments state the sentences are being imposed to protect the public, a reason the State contends is sufficient to support the imposition of consecutive sentences.

We conclude this form language in a form order does not satisfy the court's obligation to "state on the record its reason for selecting the particular sentence." Iowa R. Crim. P. 22 (3)(d); *see also State v. Jacobs*, 607 N.W.2d 679, 690 (Iowa 2000) (vacating sentences where court failed to state reasons for imposition of consecutive sentences); *State v. Oliver*, 588 N.W.2d 412, 415 (Iowa 1998). We accordingly vacate the sentences and remand the case for resentencing.

**SENTENCES VACATED, CASE REMANDED FOR RESENTENCING.**