IN THE COURT OF APPEALS OF IOWA

No. 8-021 / 97-343

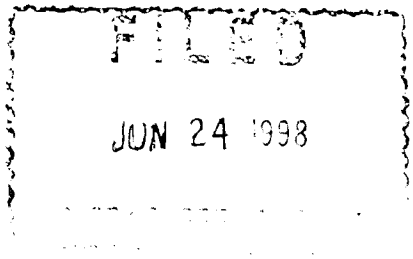
STATE OF IOWA,

Appellee,

vs.

TYRAN CEDRICK COLLINS, SR.,

Appellant.



Appeal from the Iowa District Court for Scott County, Douglas C. McDonald, District Associate Judge.

Tyran Cedrick Collins, Sr., appeals from judgment and sentence entered for third-degree theft. **AFFIRMED.**

Carol J. Walker, Davenport, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, William E. Davis, County Attorney, and Marc Gellerman, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Huitink, and Vogel, JJ.

CADY, C.J.

Tyran Collins appeals from the judgment and sentence following a guilty plea to a charge of third-degree theft. He claims the trial court denied him his right to allocution and abused its discretion in sentencing. He also maintains he received ineffective assistance of counsel. We affirm.

Collins was charged with third-degree theft following a shoplifting incident at a mall. He eventually entered a plea of guilty pursuant to a written plea agreement. Under the agreement, the State was to recommend Collins receive a two-year sentence of incarceration, together with a fine and restitution, including attorney fees and court costs. Collins had an extensive criminal history.

Collins executed a written plea of guilty. He appeared in court with his attorney to present the plea and waive time for sentencing. After accepting the plea of guilty, the district court briefly questioned Collins about his right to wait before sentencing. Collins confirmed he wanted to be sentenced and acknowledged the existence of the plea agreement. The trial court then asked, "Is there anything that either of you would like to tell me before I sentence Tyran?" Defense counsel responded to the inquiry by asking the district court "to accept" the plea agreement and to impose the sentence concurrent with a sentence in another case. The district court then asked Collins how long he had been incarcerated in jail for the other case. After Collins responded to the court's inquiry, the court sentenced Collins to serve a term of incarceration not to exceed two years on the theft offense. The trial court

then explained the reasons for the sentence and engaged in an extensive dialog with Collins concerning his past drug use, his prior theft record, and his employment.

Collins subsequently requested reconsideration of the sentence by writing letters to the district court. The district court declined to reconsider the sentence. In a formal order, the district court stated Collins should be required to serve the sentence pursuant to the plea agreement because of his prior criminal record and earn early release through parole. The district court denied reconsideration.

On appeal Collins asserts: (1) he was denied his right to allocution; (2) the district court abused its discretion in sentencing; and (3) he received ineffective assistance of counsel.

I. Allocution

We review sentencing procedures for an abuse of discretion. *See State v. Craig*, 562 N.W.2d 633, 634 (Iowa 1997). Such abuse will only be found if the district court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

Prior to the imposition of the sentence, the trial court is required to ask a defendant "whether he or she has any legal cause to show why judgment should not be pronounced against him or her." Iowa R. Crim. P. 22(3)(a). Furthermore, defense counsel and the defendant "shall be allowed to address the court where either wishes to make a statement in mitigation of punishment." Iowa R. Crim. P. 22(3)(d).

The trial court need not use the language in the Iowa Rules of Criminal Procedure verbatim. *Craig*, 562 N.W.2d at 635. Instead, our concern is whether the

defendant was given an opportunity to volunteer information helpful to the case. *Id.*; *see State v. Christensen*, 201 N.W.2d 457, 460 (Iowa 1972) ("Is there anything you would like to say to the court before I pronounce sentence?" was deemed sufficient language for allocution); *State v. Millsap*, 547 N.W.2d 8, 9-10 (Iowa App. 1996) ("Are you ready to be sentenced?" language did not comply with rule 22(3)(d)); *State v. Glenn*, 431 N.W.2d 193, 194-95 (Iowa App. 1988) (where court asked defendant if there was any reason why it should not go ahead and sentence him, the court elicited the defendant understood presentence recommendation matched the sentence, and a discussion of defendant's employment situation occurred, rule 22(3)(d) was satisfied).

In this case, the inquiry by the district court would normally satisfy the rules governing a defendant's right of allocution if it was directed at Collins and he was given an opportunity to respond. Collins argues, however, the inquiry was directed at persons other than himself, considering the district court used his given name in propounding the question.

We recognize the transcript does not capture the entire communication process. Most nonverbal communication can be lost on appeal. Thus, our inclination in issues of this nature is often to give deference to the trial court. Yet, in dealing with the right of allocution, trial courts must make a clear record which leaves no doubt the defendant has been given the opportunity to speak prior to sentencing. *Craig*, 562 N.W.2d at 636-37.

Although the record in this case clearly shows Collins' attorney was given an opportunity to speak prior to the imposition, this is not enough. *Id.* The right of allocution is personal to the defendant. *Id.* Even if the inquiry was addressed to Collins, there was no indication he was actually given an opportunity to speak after his attorney addressed the district court. *See Millsap*, 547 N.W.2d at 10. Instead, the district court pronounced the sentence following the remarks by Collins' attorney.

Resentencing is generally required if a sentencing court does not comply with a defendant's right of allocution. *See Craig*, 562 N.W.2d at 637; *see also United States v. Margiotti*, 85 F.3d 100, 103 (2nd Cir. 1996). Error, however, can be harmless where the failure to invite allocution did not result in prejudice. *See State v. Cason*, 532 N.W.2d 755, 757 (Iowa 1995).

In this case, the record reveals the defendant and his attorney were in agreement with the sentence recommended by the State. *See id.* Moreover, although the district court announced the sentence before Collins had an opportunity to exercise his right of allocution, a long dialog promptly took place between the court and Collins which allowed Collins to provide ample evidence to the court in mitigation of sentence. This colloquy concluded with Collins acknowledging the reasons for the sentence and indicating he had no questions. Thus, Collins did exercise his right of allocution before the sentencing hearing concluded, and while the court could have changed or modified its initial pronouncement. *See United States v. Laverne*, 963 F.2d 235, 237-38 (9th Cir. 1992) (no violation of right of allocution where court gave defendant opportunity to speak before court made its final judgment

but after it had made a preliminary determination of sentence). Finally, the district court fully considered Collins' request to reconsider the sentence. Under all these circumstances, we conclude no prejudice occurred and the error was harmless.

II. Abuse of Discretion

Collins claims the district court abused its discretion in imposing the sentence because some of the reasons articulated by the court were not supported by the evidence. We have reviewed the sentencing transcript and fail to find any evidence to show the district court actually based the sentencing on an erroneous belief. Furthermore, the record confirms the district court was, essentially, giving effect to the agreement of the parties. *See Cason*, 532 N.W.2d at 757. Under these circumstances, we conclude the district court did not abuse its discretion.

III. Ineffective Assistance of Counsel

The claim of ineffective assistance of counsel asserted by Collins involves a constitutional challenge. Therefore, our scope of review is de novo. *State v. Cook*, 565 N.W.2d 611, 613 (Iowa 1997). Ordinarily, ineffective assistance of counsel proceedings are preserved for postconviction proceedings. *See State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). These claims may be resolved on direct appeal only when the record adequately addresses the issues. *See State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Moreover, a claim of ineffectiveness of counsel is an exception to the general rule that an issue must be raised timely and adequately in order to preserve error for appeal. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993).

Collins claims he received ineffective assistance of trial counsel because his attorney: (1) allowed him to sign a plea agreement calling for the maximum term of incarceration; (2) failed to make a statement in mitigation of the sentence; (3) failed to request immediate reconsideration of the sentence after Collins informed the court about his employment and lack of drug use; and (4) mislead him about the actual amount of time he would spend in prison if he agreed to the plea agreement.

The record is insufficient for us to address these issues on direct appeal. Collins must therefore present these claims in an application for postconviction relief to permit a full development of the record and give his counsel an opportunity to explain the decisions. We preserve the claim for postconviction proceedings.

AFFIRMED.