**IN THE COURT OF APPEALS OF IOWA**

No. 0-503 / 99-1833
Filed October 13, 2000

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

**vs.**

**DANNY RAY BIRCH, SR.,**
**Defendant-Appellant.**

FILED
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CLERK SUPREME COURT

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Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Danny Birch appeals from the judgments and sentences entered upon his guilty pleas to carrying a concealed weapon in violation of Iowa Code section 724.4(3)(a) (1997) and theft in the second degree in violation of sections 714.1(4) and 714.2(2) (1997). He contends the trial court erred in failing to adequately afford him his right of allocution. **AFFIRMED; REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Fred H. McCaw, County Attorney, and Christine Corken, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

**MILLER, J.**

Danny Ray Birch appeals from his sentences, following guilty pleas, for theft in the second degree and carrying a concealed weapon. He contends the district court failed to adequately afford him his right to allocution as required by Iowa Rules of Criminal Procedure. We affirm Birch's convictions but vacate his sentence and remand for resentencing.

**Background Facts and Prior Proceedings**

Birch was charged with several criminal offenses, including carrying a concealed weapon in violation of Iowa Code section 724.4(3)(a) (1997) and theft in the first degree, by possession of stolen property, in violation of Iowa Code sections 714.1(4) and 714.2(1) (1997). Pursuant to a plea agreement under which other charges would be dismissed and the State would recommend suspended sentences, Birch entered pleas of guilty to the weapons charge and to a reduced charge of theft in the second degree. The district court sentenced Birch to a term not to exceed two years on the weapons charge and a term not to exceed five years on the theft charge, with the sentences to run concurrently. On appeal Birch claims the trial court failed to afford him his right to allocution under Iowa Rules of Criminal Procedure 22(3)(a) and 22(3)(d).

**Standard of Review and Preservation of Error**

Our review of sentencing procedures is for an abuse of discretion. *State v. Craig*, 562 N.W.2d 633, 634 (Iowa 1997). Such abuse will be found only if the district court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.* The normal rule of requiring error preservation is not ordinarily applicable to void, illegal or procedurally

defective sentences. *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa App. 1994). A defendant is not required to raise an alleged sentencing defect in the trial court in order to preserve a right of appeal on that ground. *State v. Wilson*, 294 N.W.2d 824, 825-26 (Iowa 1980); *State v. Young*, 292 N.W.2d 432, 435 (Iowa 1980).

**Merits**

A sentencing court is required under Iowa Rule of Criminal Procedure 22(3)(a) to ask the defendant "whether he or she has any legal cause to show why judgment should not be pronounced against him or her." The rule continues on in subsection (d) to further require that prior to the courts 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." Together these requirements are referred to as a defendant's right to "allocution."[1]

Sentencing courts are not required to use any particular language to satisfy Rule 22(3)(d). *State v. Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999); *Craig*, 562 N.W.2d at 635. Substantial compliance with the rule is sufficient. *Duckworth*, 597 N.W.2d at 800. "The important thing is whether the defendant is given an opportunity to volunteer any information helpful to the defendant's case." *Craig*, 562 N.W.2d at 635 (citing *State v. Christiansen*, 201 N.W.2d 457, 460 (Iowa 1972)). Therefore, as long as the district court provides the defendant

[1] "Allocution" is defined as the "formality of court's inquiry of defendant as to whether he has any legal cause to show why judgment should not be pronounced against him on verdict of conviction; or whether he would like to make a statement on his behalf and present any information in mitigation of sentence." BLACK'S LAW DICTIONARY 76 (6th ed. 1990).

with an opportunity to speak regarding his punishment, the court is in compliance with the rule. *Id.*

In the sentencing hearing the only questions that were clearly addressed to the defendant by the trial court, and the only questions that were answered by the defendant, were some six questions at the beginning of the hearing and one question at the conclusion of the hearing. The questions at the beginning dealt with what charges the defendant had pled guilty to, whether he was aware of the maximum penalties, and whether he understood he was present for sentencing. The question at the conclusion, after sentencing had occurred, was whether the defendant had any questions. After the questions at the beginning of the hearing the trial judge inquired, "Is there anything that you'd like to say to me before sentence is pronounced?". Birch's attorney, Mr. Nelson, answered the question and informed the court of the plea agreement Birch had entered into with the State wherein the State was to recommend a suspended sentence. The court then sought further argument from Mr. Nelson stating,

> . . . but I guess what I'm saying to you is Mr. Birch is on the verge of going to prison. You need to tell me more specifically why it is, what you and the State have agreed on that suggest he shouldn't go to prison.

Mr. Nelson then continued to argue at some length why Mr. Birch should not go to prison, discussing the facts of the case, the other people possibly involved, the plea negotiations, and Birch's prior criminal record. The State responded at the court's invitation and essentially agreed with Mr. Nelson's statements.

The court then directed Mr. Birch to stand up, whereupon judgment and sentence were pronounced. The court concluded the hearing by asking, "Do you have any questions?". Birch responded with a negative nod.

Birch argues the district court failed to properly afford him his right to allocution by not addressing a question directly to him allowing him to make a statement in mitigation of punishment, pursuant to Iowa Rule of Criminal Procedure 22(3)(d), or a statement as to whether he had any legal cause to show why judgment should not be pronounced pursuant to Iowa Rule of Criminal Procedure 22(3)(a). Based on this omission Mr. Birch asserts a new sentencing hearing should be ordered. We agree.

The State contends that although the trial court arguably did not address its inquiries to Birch himself, defense counsel offered all matters of concern for the record and offered substantial information in mitigation of punishment. Additionally, the State argues that the district court offered an opportunity for Birch to speak in mitigation of punishment, and the fact he declined to provide argument personally should not require a new sentencing hearing.

The determination we must make is two-fold. First, we must determine whether the trial court's inquiry was itself sufficient to substantially comply with rules 22(3)(d) and 22(3)(a). Second, if it was we must then determine to whom the record shows the question was addressed.

Iowa's appellate courts have on several relatively recent occasions addressed the question of substantial compliance with rule 22 and whether a defendant has been accorded his right to allocution. Most deal with rule 22(3)(d). Very few deal directly or indirectly with rule 22(3)(a).

In *State v. Glenn,* 431 N.W.2d 193 (Iowa App. 1988), the trial court asked the State and then the defendant if there was any reason the court should not

proceed to sentence the defendant, questioned the defendant to assure that he knew and understood what the State's sentencing recommendation was, and then asked what the defendant had to say about that recommendation. We held that the exchange between the court and defendant provided defendant adequate opportunity to address the court. *Glenn*, 431 N.W.2d at 194. We went on to discuss the statutory predecessor of present rule 22(3)(a) and note that *State v. Christensen*, 201 N.W.2d 457, 460 (Iowa 1972) had held that being asked, "Is there anything you would like to say to the court before I pronounce sentence?", was sufficient to comply with its requirement. We cited *State v. Patterson*, 161 N.W.2d 736, 738 (Iowa 1968) for its statement that, "The important thing is whether defendant had his chance to point out any reason for withholding judgment."

In *State v. Jorden*, 461 N.W.2d 356, 359 (Iowa App. 1990) we found the defendant was given ample opportunity to volunteer any information helpful to his case and rule 22(3)(d) was not violated when the defendant and the court engaged in a question and answer colloquy concerning the presentence investigation report and the court asked the defendant if there was any reason why sentence could not be pronounced. We also found there was no denial of a right of allocution in a case in which the defendant addressed the court without interruption in response to the court's question, "Any comments you want to make at all regarding this offense." *See State v. Ludley*, 465 N.W.2d 912, 915 (Iowa App. 1990). In doing so we quoted with approval the following statement

concerning rule 22(3)(d): "[A]s long as the court provides defendant an opportunity to speak regarding his punishment, the court is in compliance with the law." *Id.* (quoting *Glenn*, 431 N.W.2d at 195).

However, the court's simple question to the defendant at the commencement of the sentencing hearing, "Mr. Millsap, are you ready to be sentenced at this time?", was insufficient to comply with rule 22(3)(d) where the defendant made no verbal response and the record did not show any process of engagement between the defendant and the sentencing judge. *State v. Millsap*, 547 N.W.2d 8, 10 (Iowa App. 1996). In so holding we noted that the question did not invite the defendant to address the court in mitigation of sentence, nor did the surrounding circumstances reveal the defendant should have understood that the court was giving that opportunity. *Id.*

In another case our supreme court has held that rule 22(3)(d) was not complied with where, although the trial judge engaged in a colloquy with the defendant at sentencing, that colloquy was relatively short and no question by the court would suggest to the defendant that he could voice arguments in mitigation of his sentence. *State v. Craig*, 562 N.W.2d 633, 635-36 (Iowa 1997). The supreme court further held that the fact Craig's counsel spoke in mitigation of punishment did not constitute substantive compliance with rules 22(3)(d) and 22(3)(a) because the right to allocution is personal to the defendant and the discourse that had occurred had not invited, or afforded an opportunity for, the defendant to volunteer information in mitigation of his sentence. *Id.* at 637.

More recently our supreme court has again noted that a sentencing court is not required to use any particular language to comply with rule 22(3)(d), that substantial compliance is sufficient, and that substantial compliance occurs where the trial court provides the defendant with an opportunity to volunteer any information helpful to the defendant's cause. *Duckworth*, 597 N.W.2d at 800. However, in that probation violation proceeding there was not substantial compliance with rule 22(3)(d) because the trial court made no effort during the sentencing phase to provide the defendant with an opportunity to volunteer any information in mitigation of his sentence. *Id.* at 801. The supreme court affirmed the defendant's conviction but vacated his sentence and remanded for resentencing, as it had done in Craig. *Id.*

We conclude that the trial court's question in this case, "Is there anything that you'd like to say to me before sentence is pronounced?", would constitute substantial compliance with rule 22 by giving the defendant an opportunity to volunteer any helpful information in his cause in mitigation of punishment, or to state a legal cause as to why judgment should not be entered, if addressed to the defendant personally. We must therefore determine if the record demonstrates that the question was directed to the defendant because, as discussed below, the right to allocution is a personal right and cannot be satisfied by addressing such questions to defense counsel and not affording the defendant himself an independent and personal opportunity to make such statements as well.

It is clear that Birch's attorney, Mr. Nelson, answered the trial court's question quoted above and, in doing so, provided the court with a very thorough

argument in mitigation of punishment and reasons why Birch should receive a suspended sentence. In itself, however, such an argument by defense counsel is not sufficient to substantially comply with the requirements of Iowa Rule of Criminal Procedure 22(3)(d), despite the State's argument to the contrary. *Craig*, 562 N.W.2d at 636-37.

The right to allocution is one which is personal to the defendant and the fact counsel may speak in mitigation of punishment does not constitute substantial compliance with the rules and does not render the court's error harmless. *Id.* The court's holding in *Craig* relied heavily on the Supreme Court's decision in *Green v. United States*, 365 U.S. 301, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961). The Supreme Court in *Green* stated:

> None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself. We are buttressed in this conclusion by the fact that the Rule explicitly affords the defendant two rights: "to make a statement in his own behalf," and "to present any information in mitigation of punishment." We therefore reject the Government's contention that merely affording defendant's counsel the opportunity to speak fulfills the dual role of Rule 32(a).

*Green*, 365 U.S. at 304, 81 S. Ct. at 655, 5 L. Ed. 2d at 673. Similarly Iowa's rule 22(3)(d) states that both "counsel for the defendant *and the defendant personally* shall be allowed to address the court where *either* wishes to make a statement in mitigation of punishment." (Emphasis added.) *See also Craig*, 562 N.W.2d at 637. Thus, Mr. Nelson's statements in mitigation of sentence do not in and of themselves substantially comply with the rule because the right to allocution was personal to Mr. Birch.

The State's reliance on *State v. Patterson*, 161 N.W.2d 736, 738 (Iowa 1968), *State v. Cason*, 532 N.W.2d 755, 757 (Iowa 1995), and *State v. Jorden*, 461 N.W.2d 356 (Iowa App. 1990), for the proposition that defense counsel's statements in mitigation alone are sufficient to comply with rule 22, is misplaced. In all three of these cases the court clearly found the defendant himself had been allowed an opportunity to address the court, had done so in some manner in two of the cases, and in the third case any failure to formally afford the right to allocution was harmless. *See Patterson*, 161 N.W.2d at 738 (holding defendant was not denied right of allocution where the trial court carried on an extended question and answer colloquy with defendant himself, during which the defendant had ample opportunity to volunteer any information helpful to his cause or which would constitute reason for withholding sentence); *Cason*, 532 N.W.2d at 757 (holding any failure to formally afford defendant his right to allocution was harmless where defendant affirmatively stated he agreed with the recommendation of sentence proposed by the State, the trial court on several occasions asked defendant whether he had any questions regarding his plea agreement or the sentencing recommendations, and defendant had several opportunities to state any objections to the proposed sentence); *and Jorden*, 461 N.W.2d at 359 (holding defendant was not denied his right to allocution where the judge and defendant engaged in a question and answer colloquy concerning defendant's opportunity to review and ability to understand the presentence report, and the judge asked both the defendant and the State if there was any reason why sentence should not be imposed).

We conclude none of the cases cited by the State stand for the proposition that counsel's statements in mitigation of sentence in themselves are sufficient to substantially comply with rule 22. Further, the more recent decision in *Craig* explicitly holds that the right to allocution is personal to the defendant, and counsel's statements in mitigation of punishment do not constitute substantial compliance with rule 22. *Craig*, 562 N.W.2d at 637. Any prior decisions whose holdings may be seen as arguably inconsistent with the holding in *Craig* should no longer be considered controlling law in Iowa.

We cannot determine from the record, with any reasonable certainty, whether the trial court's question that invited comment before sentencing was directed to the defendant, to his attorney, Mr. Nelson, or to both. This is because the question does not make clear to whom it was addressed. The fact that the question came at the end of a brief colloquy with the defendant might suggest it was directed to the defendant. However, the defendant's attorney, Mr. Nelson, answered the question. The question did not ask, "Is there anything *the defendant* would like to say . . . ?". It did not ask, "Is there anything *Mr. Birch* would like to say . . . ?". The question did not address Mr. Birch by name. Further, after defense counsel had responded at length the trial court's following comment and solicitation of further argument was directed to defense counsel, not the defendant, and evoked further comment by defense counsel only. Finally, Birch at no time spoke regarding sentence or punishment. These facts, taken together, rather strongly suggest that the trial court's question was directed to defense counsel rather than the defendant.

As long ago as 1961, in a case involving a question similar to the one at issue in this case, the Supreme Court noted the difficulty of determining to whom the question had been addressed. It stated, "A record, certainly this record, unlike a play, is unaccompanied with stage directions which may tell the significant cast of the eye or the nod of the head." *Green*, 365 U.S. at 304-05, 81 S. Ct. at 655, 5 L. Ed. 2d at 673. The Supreme Court then explained the importance of sentencing judges avoiding litigation by ensuring that the record shows that the defendant has personally been given the opportunity to speak in mitigation of punishment. It stated

> However, to avoid litigation arising out of ambiguous records in order to determine whether the trial judge did address himself to the defendant personally, we think that the problem should be, as it readily can be, taken out of the realm of controversy. This is easily accomplished. Trial judges before sentencing should, as a matter of good judicial administration, unambiguously address themselves to the defendant. Hereafter trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing.

*Green*, 365 U.S. at 305, 81 S. Ct. at 655, 5 L. Ed. 2d at 674.

Much more recently, in vacating a sentence and remanding for resentencing because the defendant was not afforded his right to allocution under rule 22(3)(d), the Iowa Supreme Court cited *Green* in stating

> We echo the words of the Supreme Court in *Green* in recommending that trial judges leave no room for doubt that a defendant has been given the opportunity to speak regarding punishment.

*Craig*, 562 N.W.2d at 637. We re-emphasize these comments from *Green* and *Craig*.

Birch did not speak in mitigation of punishment. The facts strongly suggest that the trial court's question was directed to defense counsel rather than

to Birch. We conclude Birch has shown that he was not afforded his right to allocution under rule 22.

We affirm Birch's convictions but vacate his sentences and remand for resentencing.[2]

**AFFIRMED; REMANDED FOR RESENTENCING.**

[2] We continue to urge defense counsel to avoid unnecessary time and expense of appeal by bringing to the attention of the trial court any claimed errors that can readily be remedied in the trial court, such as the failure to afford the defendant a right of allocution involved in this case. *See, e.g., State v. Millsap*, 547 N W.2d 8, 10 n.1 (Iowa App. 1996).