

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

v.

GEORGE DAVIS,

Defendant-Appellant.

SUPREME COURT
NO. 20-1244

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE MARK SCHLENKER, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 2nd day of July, 2021, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to George Davis, 3205 Kingman Blvd., Apt. 206, Des Moines, IA 50311.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the district court failed to provide Davis an opportunity to speak in mitigation of sentence as required by Iowa Rule of Criminal Procedure 2.33(3)(d)?

Authorities

State v. Damme, 944 N.W.2d 98, 105 (Iowa 2020)

Iowa Code § 814.6(1)(a)(3) (2019)

State v. Wilson, 294 N.W.2d 824, 826 (Iowa 1980)

State v. Craig, 562 N.W.2d 633, 634 (Iowa 1997)

Iowa R. Crim. P. 2.23(3)(d)

State v. Millsap, 547 N.W.2d 8, 10 (Iowa Ct. App. 1996)

State v. Lumadue, 622 N.W.2d 302, 304 (Iowa 2001)

State v. Nosa, 738 N.W.2d 658, 660 (Iowa Ct. App. 2007)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issue raised involves the application of existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

George Davis appeals from his conviction, judgment and sentence for operating while intoxicated, third offense, following his guilty plea in the Polk County District Court.

Course of Proceedings. The State charged George Davis with operating while intoxicated, third offense, a class D felony in violation of Iowa Code § 321J.2 (2019), and possession of a controlled substance (Zolpidem), first offense, a serious misdemeanor in violation of Iowa Code § 124.401(5) (2019). (Trial Information) (App. pp. 4-6). The State additionally alleged Davis was subject to enhancement as a habitual offender. (Trial Information) (App. pp. 4-6).

Davis and the State reached a plea agreement by which Davis would plead guilty to OWI third offense and the State

would dismiss the possession charge and the habitual offender enhancement. (Petition to Plead Guilty) (App. p. 7). The parties agreed to recommend a five-year indeterminate term of incarceration and the minimum fine. (Petition to Plead Guilty) (App. p. 7). Due to the ongoing Covid-19 pandemic, Davis's plea was entered on paper and no in-person plea hearing was held. (Waiver of Presence) (App. p. 8). The court accepted Davis's plea. (Order Accepting Plea) (App. pp. 9-11).

Davis's counsel withdrew two weeks later. (Motion to Withdraw) (App. p. 12). New counsel was appointed to handle Davis's sentencing. (Order 6/30/2020) (App. pp. 13-14). After several continuances, Davis's sentencing hearing was held on August 24, 2020. (Sentencing Tr. p. 1).

The court sentenced Davis as jointly recommended—imposing a five-year indeterminate prison sentence and a \$3,125 fine. (Sentencing Order) (App. pp. 15-19). The court further found Davis did not have the reasonable ability to pay category B restitution. (Sentencing Order) (App. pp. 15-19).

Davis filed a timely notice of appeal. (Notice of Appeal) (App. pp. 20-25).

Facts: According to Davis’s guilty plea, he admitted that on December 30, 2019, he “operated a motor vehicle on a public roadway while under the influence of methamphetamine, amphetamine, and zolpidem.” (Petition to Plead Guilty) (App. p. 7). He had two prior convictions for OWI. (Petition to Plead Guilty) (App. p. 7).

ARGUMENT

The district court failed to provide Davis an opportunity to speak in mitigation of sentence as required by Iowa Rule of Criminal Procedure 2.33(3)(d).

Jurisdictional Statement. “[G]ood cause exists to appeal from a conviction following a guilty plea when the defendant challenges his or her sentence rather than the guilty plea.” State v. Damme, 944 N.W.2d 98, 105 (Iowa 2020). Because Davis is challenging his sentence and not his underlying guilty plea, he has “good cause” to appeal as required by Iowa Code § 814.6(1)(a)(3) (2019).

Preservation of Error. Generally, 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, 826 (Iowa 1980).

Standard of Review. Appellate review of sentencing procedures is for an abuse of discretion. State v. Craig, 562 N.W.2d 633, 634 (Iowa 1997). Such abuse is found when the district court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Id.

Discussion: Before the district court may enter judgment, “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.” Iowa R. Crim. P. 2.23(3)(d). The rule is mandatory. State v. Millsap, 547 N.W.2d 8, 10 (Iowa Ct. App. 1996). Substantial compliance is required: the record must show “that the court has ‘invited, or afforded an opportunity for’ the defendant to

“speak regarding punishment.” State v. Lumadue, 622 N.W.2d 302, 304 (Iowa 2001) (quoting Craig, 562 N.W. at 637). Any waiver of the allocution right must be unambiguous, knowing, and intentional. Lumadue, 622 N.W.2d at 304. Where the allocution requirement is not substantially complied with, a remand for resentencing is required. Id.

In this case, the court initially asked if Davis wished “to address the court.” However, when Davis told the court he didn’t believe he was guilty, the court halted the proceedings to allow counsel to discuss with Davis whether he was attempting to rescind his plea. (Sentencing Tr. p. 5 L. 8 – p. 6 L. 12).

After the recess, the court clarified that Davis’s plea had already been entered and accepted by the court and asked Davis’s attorney if she wanted to make a further record. She had Davis clarify that he was not trying to rescind his plea and that he voluntarily entered the guilty plea. (Sentencing Tr. p. 6 L. 15 – p. 7 L. 19). Thereafter, the court proceeded to sentencing.

This is the time and place set for sentencing. No motion in arrest of judgment has been filed. In view of the defendant's statements both before and after the recess and in view of what I've read in the written plea agreement the Court will proceed with proceed with sentencing on Count I under the terms of the plea agreement. Is there anything else the defendant further wishes to advise the Court, Miss Young?

(Sentencing Tr. p. 8 L. 15-23).

Davis's attorney addressed Davis's reasonable ability to pay and the court gave the State an opportunity to cross-examine on that issue. (Sentencing Tr. p. 8 L. 24 – p. 9 L. 18). The court then sentenced Davis, relying on his criminal history, education, work history, substance abuse history and the plea agreement, without Davis being asked to give a statement regarding sentencing. (Sentencing Tr. p. 9 L. 19 – p. 11 L. 19).

Thus, Davis was not given the opportunity to speak in mitigation of sentence. His only discourse in court went to the voluntariness of his plea and whether he was, in fact, trying to rescind it. In this situation, the court “did not unambiguously provide [Davis] with the opportunity to exercise his right to allocution.” State v. Nosa, 738 N.W.2d 658, 660 (Iowa Ct. App.

2007). See State v. Millsap, 547 N.W.2d 8, 10 (Iowa Ct. App. 1996) (Allocution requirement not substantially complied with where court's "question did not invite Millsap to address the court in mitigation of the sentence, nor did the surrounding circumstances reveal Millsap should have understood the court was giving him the opportunity.").

Conclusion. Because Davis was denied his right of allocution as required by Iowa Rule of Criminal Procedure 2.23(3)(d), his sentence should be vacated and remanded for resentencing.

NONORAL SUBMISSION

Counsel does not request to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$1.32, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 1,102 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



Dated: 7/2/21

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