

IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-1244

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GEORGE R. DAVIS,
Defendant-Appellant.

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

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

DARREL MULLINS
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
darrel.mullins@ag.iowa.gov

JOHN SARCONI
Polk County Attorney

JORDAN ROLING
Assistant Polk County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

- I. At sentencing, the judge invited Davis twice to address the court. Did the court provide him an opportunity to speak in mitigation of punishment?**

Authorities

State v. Cason, 532 N.W.2d 755 (Iowa 1995)
State v. Cheatheam, 569 N.W.2d 820 (Iowa 1997)
State v. Damme, 944 N.W.2d 98 (Iowa 2020)
State v. Duckworth, 597 N.W.2d 799 (Iowa 1999)
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State v. Nosa, 738 N.W.2d 658 (Iowa Ct. App. 2007)
State v. Worby, No. 17-1832, 2018 WL 4360995
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Iowa Code § 814.6(1)(a)(3)
Iowa R. App. P. 6.903(3)
Iowa R. Crim. P. 2.23(3)(d)

ROUTING STATEMENT

The State agrees the Court should route this matter to the Court of Appeals. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

George Davis appeals his sentence for third-offense Operating While Intoxicated, contending the district associate court failed to honor his right of allocution. *See* Iowa Code § 321J.2; Iowa R. Crim. P. 2.23(3)(d).

The Honorable Mark F. Schlenker presided.

Course of Proceedings and Facts

The State accepts the defendant's statement of the facts and procedural history of the case. Iowa R. App. P. 6.903(3).

ARGUMENT

- I. The district associate court invited Davis to speak twice and imposed the sentence he said he accepted. The Court afforded him his right of allocution.**

Preservation of Error and Jurisdiction

The State agrees that Davis can argue on appeal that the district court failed to afford him a right of allocution. Iowa Code § 814.6(1)(a)(3); Iowa R. App. P. 6.903(3); *State v. Damme*, 944 N.W.2d 98, 105 (Iowa 2020).

Standard of Review

The State agrees the Court will review for abuse of discretion.

Iowa R. App. P. 6.903(3).

Merits

A court must offer the defendant a chance for allocution. Iowa R. Crim. P. 2.23(3)(d); *State v. Millsap*, 547 N.W.2d 8, 10 (Iowa Ct. App. 1996). The right to allocution is mandatory but may be met with substantial compliance. *State v. Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999). The court need not employ “any particular language to satisfy rule 2.23(3)(d).” *State v. Nosa*, 738 N.W.2d 658, 660 (Iowa Ct. App. 2007).

Inviting the defendant to address the court satisfies the rule. *See, e.g., State v. Worby*, No. 17-1832, 2018 WL 4360995, *2 (Iowa Ct. App. 2018) (“does the Defendant wish to address the Court?”); *State v. Larue*, No. 16-0544, 2017 WL 2181251, *1 (Iowa Ct. App. May 17, 2017) (“Mr. Larue, is there anything you would like to say?”); *State v. Mooney*, No. 11-1569, 2013 WL 261267, *3 (Iowa Ct. App. Jan. 24, 2013) (“the court asked Mooney if there was anything else he would like to say”); *compare State v. Millsap*, 547 N.W.2d 8, 10 (Iowa

Ct. App. 1996) (“Mr. Millsap, are you ready to be sentenced at this time?” did not substantially comply with the rule).

The right to allocution is personal to the defendant. But failure to invite him to address the court is not always prejudicial. If the defendant and counsel affirmatively state they agree to a sentence with the State, the failure to invite the defendant to address the court can be harmless. *State v. Cason*, 532 N.W.2d 755, 757 (Iowa 1995).

Generally, a sentence will not be upset on appellate review unless a defendant can demonstrate an abuse of discretion or a defect in the sentencing procedure.” *State v. Cheatheam*, 569 N.W.2d 820, 821 (Iowa 1997) (citation omitted). “A trial court’s sentencing decision is cloaked with a strong presumption in its favor, and an abuse of discretion will not be found unless a defendant shows such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.” *Id.*

Larue, 2017 WL 2181251 at *1.

Here, there is no abuse of discretion. The district associate court asked Davis if he wished “to address the court.” Sent. Tr. p. 5, l. 8–p. 6, l. 12. Davis explained he had an accident after he took pills that belonged to his son. *Id.* p. 5, ll. 21–25.

A few moments of confusion followed. The court thought Davis was denying a factual basis but then realized the plea had already

been accepted and no motion in arrest of judgment was on file. *Id.* p. 6, ll. 1–12. So, the Court suggested that defense counsel visit with Davis. *Id.*

Back on the record, the Court said to defense counsel, “Do you want to make further record?” *Id.* ll. 23–24.

Defense counsel invited Davis to speak. *Id.* p. 7, ll. 1–2.

Then the Court said, “If he wants to come up. Move the microphone over there. If [sic] you can come up if that’s something you wish.” *Id.* ll. 3–5.

Davis then said, “Yes. My lawyer and I discussed it and come to the conclusion that I can go ahead and accept the five-year sentence.” *Id.* ll. 6–8.

In accord with Rule 2.23(3)(d), the judge offered Davis an opportunity to address the court. In fact, the judge offered him two opportunities. The rule does not require a third. The court substantially complied with the rule.

The district associate court also imposed the five-year sentence Davis said he accepted. *Id.* p. 7, ll. 6–8; Pet. Plead Guilty (filed May 29, 2020); App. 7. Davis suffered no prejudice.

As such, the district associate court acted within its discretion in giving Davis a chance to address it and in imposing the agreed-upon sentence.

CONCLUSION

The Court should affirm the defendant's sentence.

REQUEST FOR NONORAL SUBMISSION

The State does not seek oral argument.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



DARREL MULLINS
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
darrel.mullins@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(f)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **824** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(f)(1).

Dated: July 2, 2021



DARREL MULLINS

Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
darrel.mullins@ag.iowa.gov