IN THE COURT OF APPEALS OF IOWA

No. 1-938 / 11-0500
Filed December 21, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOE NAPEH YANKOON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

Defendant appeals his conviction for possession of a controlled substance with intent to deliver. **SENTENCE VACATED; REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, John P. Sarcone, County Attorney, and Joseph Crisp, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Eisenhauer, JJ.

EISENHAUER, J.

Joe N. Yankoon appeals from his sentence, following a guilty plea, for possession of a controlled substance with intent to deliver. He contends the district court failed to adequately afford him his right to allocution as required by the Iowa Rules of Criminal Procedure. We affirm Yankoon's conviction but vacate his sentence and remand for resentencing.

At sentencing—after pleading guilty to the charge noted above and after the attorneys had made recommendations to the court—the court addressed this question to Yankoon's attorney: "Ms. Summers, now would be appropriate time for him to address the Court if he wishes to." The attorney responded: "No, Your Honor, he does not." The court then pronounced judgment and sentence.

Yankoon asks for vacation of the sentence and remand for resentencing because trial court failed to afford him his right to allocution under Iowa Rules of Criminal Procedure 2.23(3)(*a*) and 2.23(3)(*d*). We review his claim for an abuse of discretion. *State v. Craig,* 562 N.W.2d 633, 634 (Iowa 1997).

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. *Id.* The United States Supreme Court in *Green v. United States,* 365 U.S. 301, 305, 81 S. Ct. 653, 655, 5 L. Ed. 2d 670, 674 (1961), explained the importance of sentencing judges avoiding litigation by ensuring the record shows 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.

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.

Yankoon was not directly addressed by the court, nor did he speak in mitigation of punishment. The trial court's question was directed to defense counsel rather than to Yankoon. We conclude Yankoon has shown he was not afforded his right to allocution under rule 2.23(3).

We affirm Yankoon's conviction but vacate his sentence and remand for resentencing.

SENTENCE VACATED; REMANDED FOR RESENTENCING.