

IN THE COURT OF APPEALS OF IOWA

No. 2-1021 and 2-1022 / 11-2047 and 11-2048
Filed January 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNETH JAMES SHADOW,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Nathan A. Callahan, District Associate Judge.

Defendant appeals his sentences for two charges of failing to comply with the sex offender registry requirements. **AFFIRMED.**

Chad R. Frese of Kaplan, Frese & Nine, L.L.P., Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brook K. Jacobsen, Assistant County Attorney, for appellee.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ. Bower, J., takes no part.

DANILSON, J.

The defendant appeals from convictions in two cases contending the district court erred in imposing sentence on his written guilty pleas without affording him his right of allocution. Because we conclude the defendant voluntarily waived his right to be present for sentencing and the right of allocution is inseparable from the sentencing procedures, we affirm.

I. Background Facts & Proceedings

Kenneth Shadlow was previously convicted of sexual exploitation of a minor, and as a result, was required to register as a sex offender under Iowa Code chapter 692A (2011). On April 6, 2011, Shadlow was charged in AGCR175322 with failing to comply with the sex offender registry requirements, in violation of section 692A.111(1), an aggravated misdemeanor, for the time period of March 15, 2011, through March 25, 2011. On July 22, 2011, he was charged in AGCR177116 with failing to comply with the sex offender registry requirements for the time period of May 30, 2011, through July 12, 2011.

On November 4, 2011, as part of a plea agreement, Shadlow filed a written Waiver of Rights and Guilty Plea to the two charges.¹ Pursuant to the agreement, the State agreed to dismiss a third charge against Shadlow for failing to comply with the sex offender registry requirements. In addition, the State agreed to recommend in each case a two-year sentence, which would be suspended, and defendant would be placed on supervised probation for one to two years. The sentences would be made concurrent to each other.

¹ Under Iowa Rule of Criminal Procedure 2.8(2), a defendant may enter a written guilty plea to a serious or aggravated misdemeanor.

The written guilty pleas were not conditioned on the court's concurrence. The written guilty forms both stated that the defendant had the right to a fifteen-day delay before being sentenced. Shadlow checked the box to show he waived that right on both forms. The written guilty plea forms went on to state, "If waived, I request the Court impose judgment and sentence me according to the terms of the plea agreement."

The written guilty plea forms also stated: "I waive my right to be present in court for plea proceedings under R. Cr. P. 22 and my right to be present for sentencing." The forms also identify Shadlow's attorney and were signed by Shadlow. The district court accepted Shadlow's written guilty pleas and sentenced him in accordance with the parties' agreement.

II. Standard of Review

Shadlow now appeals his sentences, claiming he was denied his right to allocution. We review sentencing procedures for an abuse of discretion. *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.*

III. Merits

Under Iowa Rule of Criminal Procedure 2.23(3)(d), a defendant has the right to address the court personally "to make a statement in mitigation of punishment." The court does not need to use any particular language; "as long as the court provides defendant with an opportunity to speak regarding his punishment, the court is in compliance with the law." *State v. Jordan*, 461

N.W.2d 356, 359 (Iowa Ct. App. 1990). The rule is mandatory, but substantial compliance is sufficient. *State v. Millsap*, 547 N.W.2d 8, 10 (Iowa Ct. App. 1996). “The important thing is whether defendant had his chance to point out any reason for withholding judgment.” *State v. Patterson*, 161 N.W.2d 736, 738 (Iowa 1968).

The State claims that by waiving his right to be present for sentencing the defendant waived his right of allocution. A defendant may decide to waive the right of allocution. *State v. Jones*, 817 N.W.2d 11, 19 (Iowa 2012). This waiver should be knowing and intentional. See *State v. Lumadue*, 622 N.W.2d 302, 304 (Iowa 2001) (citing *State v. Seager*, 571 N.W.2d 204, 209 (Iowa 1997) (noting that waiver is defined as an “intentional relinquishment of a known right”)).

In *Lumadue*, the defendant entered into a written agreement to waive a jury trial, which included the statement, “I waive personal conversation with the Court concerning this charge” *Id.* The Iowa Supreme Court concluded, “[t]he sheer ambiguity of the ‘right’ Lumadue is alleged to have waived prevents us from finding, on this record, that Lumadue’s supposed relinquishment of his allocution right was knowing and intentional.” *Id.* The court noted the statement was in a document relating to the waiver of a jury trial and determined it had no bearing on sentencing proceedings. *Id.*

Our supreme court also stated that after finding Lumadue guilty upon a trial on the minutes of testimony, the court “advised him of his right to file a motion in arrest of judgment, sentenced him . . . , and gave him his appeal rights.” *Id.* at 303. Thus, clearly Lumadue was personally present for the sentencing proceedings. See *id.*

Unlike *Lumadue*, here the entire sentencing hearing was waived. Shadlow's written Waiver of Rights and Guilty Pleas stated, "I waive my right to be personally present in court for plea proceedings under R. Cr. P. 22 and my right to be present at sentencing." There is no ambiguity in Shadlow's waiver of right to be present for sentencing. Furthermore, we note Iowa Rule of Criminal Procedure 22 was renumbered Iowa Rule of Criminal Procedure 2.23 effective November 15, 2002, and the current rule includes the right of allocution in paragraph (d). There can be little doubt that the reference to "R. Cr. P. 22" in the written guilty plea forms refers to the rights now found in rule 2.23 because our current criminal procedural rules no longer include a rule identified as criminal procedural rule "22." Even if we disregard the reference to "R. Cr. P. 22," we think Shadlow's waiver of his right to be present for sentencing serves as a waiver of his right to allocution.

As observed by our supreme court in *State v. Webb*, 516 N.W.2d 824, 830 (Iowa 1994):

"One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 1058, 25 L. Ed. 2d 353, 356 (1970); see also U.S. Const. amend. VI; *State v. Meyers*, 426 N.W.2d 614, 616 (Iowa 1988); Iowa R. Crim. P. 25(1). However, this right is not absolute; it "may be lost by consent or at times even by misconduct." *Allen*, 397 U.S. at 342-43, 90 S. Ct. at 1060, 25 L. Ed. 2d at 358, see also *State v. Moore*, 276 N.W.2d 437, 440-41 (Iowa 1979); *State v. Blackwell*, 238 N.W.2d 131, 135 (Iowa 1976); Iowa R. Crim. P. 25(2).

Our supreme court has also recognized that although the defendant has a right to be present for all critical stages of the proceedings, the right to be present may be waived. *State v. Taylor*, 223 N.W.2d 217, 222 (Iowa 1974).

Here, clearly Shadlow consented to his absence for the sentencing hearing by his written waivers. The written guilty plea forms do not preserve Shadlow's right of allocution. Our rules of criminal procedure only require the defendant to be personally present for sentencing in felony cases, Iowa R. Crim. P. 2.27(1), and as we have observed, although a defendant has a right to be present for sentencing, the defendant's personal presence may be waived.

One court has observed, "The right of allocution is nowhere specifically granted in either the state or the federal constitution. It is an inseparable part of the right to be present, which defendant waived by his voluntary absence. The law cannot force a right upon a defendant who turns his back upon it." *State v. Anderson*, 929 P.2d 1107, 1111 (Utah 1996). Our supreme court has also noted that a voluntary absence from trial permits the court to proceed with the trial as if the defendant was present, and in such circumstances, the defendant forfeits his right to confrontation. *State v. Johnson*, 243 N.W.2d 598, 603 (Iowa 1976) (citing *Taylor v. United States*, 414 U.S. 17, 19 (1973) (concluding that a waiver of the right to be present for trial "leaves the court free to proceed with the trial in like manner and like effect as if he were present"))).

Our state constitution also does not reference a defendant's right of allocution. Rather, Iowa Rule of Criminal Procedure 2.23(d) provides that prior to rendition of judgment the defendant shall be permitted to make a statement in

mitigation of punishment. Here, Shadlow's written pleas waived his right to be present for sentencing and requested that "the court impose judgment and sentence" upon him "according to the terms of the plea agreement in paragraph 11" of the written pleas. The court fully granted his requests.

In sum, Shadlow clearly waived and consented to his absence at a critical stage of the proceedings, his sentencing hearings. On this record, we have no evidence upon which to find that the waiver was not knowing and voluntary.² Shadlow's right of allocution was an inseparable part of his right to be present for his sentencing hearings, and he voluntarily chose to absent himself from those proceedings by his written waiver. The court was entitled to proceed with sentencing as if the defendant was present, and his right of allocution was forfeited.

We affirm Shadlow's convictions and sentences.

AFFIRMED.

² We note that Shadlow contends that the written guilty plea forms are silent in regard to whether he had knowledge of his right of allocution. However, because Shadlow has not claimed his trial counsel was ineffective for failing to inform him of this right, we do not address this contention. Moreover, Shadlow cites no authority in support of this issue, and without authority, we may deem the issue waived. See Iowa R. App. P. 6.14(1)(c) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue."); *Hollingsworth v. Schminkey*, 553 N.W.2d 591, 596 (Iowa 1996) ("When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived."); *Soo Line R.R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994) ("[R]andom mention of [an] issue, without elaboration or supportive authority, is insufficient to raise the issue for our consideration."); *Id.* at 689 (stating court will not consider issues concerning which an appellant cites no authority nor offers any substantive argument); *Osborne v. Iowa Natural Res. Council*, 336 N.W.2d 745, 747 (Iowa 1983) (stating court need not address an issue because the appellant failed to state, argue, or cite authority in its brief).