IN THE COURT OF APPEALS OF IOWA

No. 2-299 / 11-1264
Filed June 13, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CORY RAY SPURGEON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, O'Dell McGhee (trial) and Cynthia Moisan (sentencing), District Associate Judges.

Cory Spurgeon appeals from the judgment and sentence entered on his conviction for theft in the third degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John Sarcone, County Attorney, and Olu Salami, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

BOWER, J.

Cory Spurgeon appeals from the judgment and sentence imposed following his conviction for theft in the third degree. He contends the district court failed to state adequate reasons for the sentence it imposed. Because Spurgeon failed to provide this court with a record affirmatively disclosing the error relied upon, we find he has waived error on his claim. We affirm.

I. Background Facts and Proceedings.

On March 18, 2011, Spurgeon was charged with theft in the third degree (enhanced), in violation of Iowa Code section 714.2(3) (2011). In a supplemental trial information filed that same day, Spurgeon was charged with theft in the fifth degree, in violation of section 714.2(5). He pled not guilty to both crimes. The case proceeded to trial on the charge of theft in the fifth degree; the jury returned a verdict finding Spurgeon guilty. On June 24, 2011, Spurgeon appeared before the court with his attorney in regard to the charge for theft in the third degree. He entered a written stipulation to two prior theft convictions. The court accepted Spurgeon's stipulation, and he was adjudged guilty of theft in the third degree. On August 5, 2011, Spurgeon appeared before the court with his attorney for sentencing. No record was made of the sentencing hearing.[1]

Following the sentencing hearing, the district court filed a written prison order which sentenced Spurgeon to two years confinement, participation in the Victim Offender Reconciliation Program, and victim restitution to be determined

[1] Spurgeon does not contend his trial counsel was ineffective for failing to request the sentencing hearing be reported.

later.[2] The sentencing order included the following language: "The Court has determined that this sentence will provide reasonable protection of the public. Probation is denied because it is unwarranted." No additional reasons for the sentence imposed were stated in the written sentencing order. Following sentencing, Spurgeon made no attempt to create an additional record with a supplemental statement of the proceedings or a bill of exceptions. Spurgeon now appeals, arguing the district court failed to state adequate reasons for the sentence it imposed.

II. Scope and Standard of Review.

A district court's decision to impose a sentence within the statutory limits is cloaked with a strong presumption in its favor and will only be overturned for an abuse of discretion or defect in the sentencing procedure, such as considering impermissible factors. *State v. Alloway*, 707 N.W.2d 582, 584 (Iowa 2006), *overruled on other grounds by State v. Johnson*, 784 N.W.2d 192 (Iowa 2010); *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). No abuse of discretion will be found unless the defendant shows that such discretion was exercised for reasons clearly untenable or to an extent clearly unreasonable. *State v. Mai*, 572 N.W.2d 168, 170 (Iowa Ct. App. 1997).

III. Discussion.

Spurgeon contends the district court erred in failing to state adequate reasons for the sentence it imposed. The State concedes our supreme court has found the exact boilerplate language used here by the court in the prison order to

[2] The maximum sentence for Spurgeon's charge is imprisonment for not more than two years plus a fine of not more than $6250.

be insufficient. *See State v. Lumadue*, 622 N.W.2d 302, 304 (Iowa 2001). The State persists, however, that Spurgeon has waived any alleged sentencing error by waiving the reporting of the sentencing hearing and failing to provide a record to permit appellate review of the district court's exercise of discretion.

Iowa Rule of Criminal Procedure 2.23(3)(d) requires a trial court to state on the record its reasons for selecting a particular sentence. The court's statement of reasons may be either written or oral. *Alloway*, 707 N.W.2d at 584-85. The purpose of this requirement is to give appellate courts the opportunity to review the discretionary nature of the sentencing. *Id.* at 584.

When the reasons for a particular sentence are not established by the record, we are normally required to remand the case for resentencing. *Id.* at 585. However, "[i]t is a defendant's obligation to provide [the reviewing] court with a record affirmatively disclosing the error relied upon." *State v. Mudra*, 532 N.W.2d 765, 767 (Iowa 1995). We will not permit a defendant to raise an issue without attempting to give the court a record upon which to decide the issue. *See Alloway*, 707 N.W.2d at 586.

When a sentencing hearing is not transcribed, our rules of procedure provide several additional methods for a defendant to create a record to permit our review. *See* Iowa R. Crim. P. 2.25 (bill of exceptions); Iowa R. App. P. 6.806(1) (supplemental statement of the record). Because these methods were not utilized, Spurgeon has waived error on his claim. *See Alloway*, 707 N.W.2d at 586; *Mudra*, 532 N.W.2d at 766-67. Accordingly, we affirm the judgment and sentence entered by the district court.

AFFIRMED.

Tabor, J., concurs specially.

TABOR, J. (specially concurring)

I agree with the majority that the outcome in this case is controlled by *State v. Mudra*, 532 N.W.2d 765 (Iowa 1995). I write separately only to express the sentiment that in these times of crowded criminal dockets, scarce court reporters, and overstretched trial court judges, we still need to be careful not to subject defendants to assembly-line justice. *See generally State v. Hager*, 630 N.W.2d 828, 835 (Iowa 2001) ("[E]fficiency must always be compatible with fairness, and fairness must consider the fundamental principles which drive our system of justice and the rights and liberties of each individual."). Our supreme court decided more than a decade ago that the exact boilerplate language included in this prison order did not satisfy the requirement that the court give a reason for its chosen sentence. *Lumadue*, 622 N.W.2d at 304. I would suggest that where defendants convicted of indictable offenses waive an on-the-record, transcribed sentencing hearing, it would be better practice for the form orders to be revised to include blank lines where the court can memorialize its particularized rationale for sentencing an individual to time in prison.