

IN THE COURT OF APPEALS OF IOWA

No. 2-487 / 11-0492
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JASON JON MEANS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick,
Judge.

A defendant appeals the denial of his second motion to correct an illegal
sentence. **AFFIRMED.**

Angela Fritz Reyes, Davenport, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, and Michael J. Walton, County Attorney, for appellee.

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

VOGEL, P.J.

Jason Means appeals from the district court's denial of his second motion to correct an illegal sentence. He asserts the district court erred by entering an order correcting his sentence without his presence on his first motion to correct an illegal sentence. He also asserts his presence was required when the district court conducted a hearing on his second motion to correct the illegal sentence. In addition, he claims the district court erred in denying his claim that the original sentencing court in 1994 failed to articulate on the record the reasons for imposing consecutive sentences and failed to provide him his right of allocution. After reviewing the record on appeal, we affirm the decision of the district court.

I. Background and Proceedings.

In 1994, Jason Means was convicted of first-degree kidnapping, second-degree murder, first-degree robbery, criminal gang participation, conspiracy to commit robbery, and possession of an offensive weapon. Means was a juvenile when he committed the crimes but was charged and tried as an adult under Iowa Code section 232.8(1)(c) (1993). He was sentenced to a life term in prison without the possibility of parole on the first-degree kidnapping conviction under Iowa Code sections 710.2 and 902.1 (1993). He was also sentenced to terms of imprisonment for the other felony convictions of fifty years, twenty-five years, five years, ten years, and five years to be run consecutively to each other. His convictions and sentences were affirmed on appeal. *State v. Means*, 547 N.W.2d 615 (Iowa Ct. App. 1996).

In 2010, the United States Supreme Court declared life imprisonment without the possibility of parole for non-homicide juvenile offenders violated the

Eighth Amendment. *Graham v. Florida*, 130 S. Ct. 2011 (2010). Later that year the Iowa Supreme Court in *Bonilla v. State*, 791 N.W.2d 697 (2010), held, in light of *Graham*, it would sever the “without parole” language from the rest of the class A sentencing statute that was applicable to Bonilla—a juvenile convicted of a non-homicide crime. Thus, on remand the district court was directed to sentence Bonilla to life with the possibility of parole. *Bonilla*, 791 N.W.2d at 702–03.

Based on *Graham*, but before *Bonilla*, Means filed a motion to correct an illegal sentence pursuant to Iowa Rule of Criminal Procedure 2.24(5) challenging the constitutionality of his sentence of life without the possibility of parole under *Graham*. A hearing was held in July of 2010, at which Means was present. There Means’s counsel reiterated the claims made in her written motion asking the court for a “reasonable opportunity for parole” under *Graham*. She also asserted the court could not simply sever the “without parole” language from the statute but was required to vacate the entire sentence. In concluding she stated, “[W]e have other issues with other parts of the sentencing, but just talking about this in the *Graham* case.” The State resisted, and the court asked the parties to address in posthearing briefs the retroactive application of *Graham*, which neither party had yet addressed. Means’s counsel asked whether Means would be brought back from prison for “whatever is going to be filed.” The court responded, “Not necessarily. That will depend on what my determination of the issues are.”

In September of 2010, the district court entered its ruling on Means’s first motion to correct an illegal sentence, without a further hearing and without bringing Means back to court. The court amended the prior sentencing order

entered in 1994 to strike the parole ineligibility and ordered Means to serve the remainder of his natural life in prison but be subject to parole considerations under chapter 906 of the Iowa Code. This ruling left intact the consecutive sentences ordered on the other convictions, which totaled ninety-five years. Means did not appeal this order.

In October of 2010, Means filed a second motion to correct an illegal sentence. Means's counsel asserted that she alerted the court at the first hearing that she had "two other sentencing issues to argue" and was led to believe a further hearing would be convened based on the court's decision on the retroactive application of *Graham*. Means made a new claim that challenged the life sentence with parole and the consecutive sentences as an illegal sentence under *Graham*, asserting his consecutive sentences along with the life with parole sentence did not give him a "meaningful opportunity at parole" under *Graham*. Means asserted the court erred by issuing its order amending his sentence, what he considers to be a resentencing, without his presence, and this error required vacating his sentence and convening a new sentencing hearing. Means also claimed that the original sentencing court in 1994 erred in imposing consecutive sentences without articulating on the record the reason for the sentences and also erred in denying him his right of allocution.

A hearing on this motion was held on March 3, 2011, without Means's presence. The court stated it had directed that Means be transported for the hearing but "apparently through some oversight" that order was not communicated to the sheriff. The court stated that it preferred to proceed with the hearing as scheduled. Means's attorney asserted the claims she raised in

this her second written motion. The State resisted asserting Means should have, but failed to appeal the prior ruling, and thus, the issues could not again be raised. It asserted the previous ruling was correct in light of the *Bonilla* decision. It also asserted the original 1994 sentencing court did give Means an opportunity for allocution and did state, at least briefly, the reasons for imposing consecutive sentences.

The district court denied the second motion both at the hearing and in a written ruling. It held that the issues of the 1994 sentencing court—failing to articulate on the record the reason for imposing consecutive sentences and failing to provide Means with the right of allocution—were not challenges to an illegal sentence but allegations of a defective sentencing procedure, which can only be raised on direct appeal from the conviction or in a postconviction relief action as an ineffective-assistance-of-counsel claim. It held Means's presence was not required when it issued its earlier order amending his life sentence to provide for the possibility of parole. It also ruled that the amended sentence was not illegal and was in compliance with *Graham* as evidenced by the *Bonilla* ruling. Finally, it held any claim Means makes that the department of corrections was incorrectly implementing the earlier ruling and denying Means a parole hearing, the appropriate recourse was to bring an administrative action or a postconviction relief action. Means appeals.

II. Analysis.

Means's claims on appeal can be broken down into two categories: claims of error at his initial sentencing in 1994 and claims regarding the failure to have him present when the court issued its order on the first motion to correct an

illegal sentence and at the hearing on the second motion. We review challenges to the illegality of a sentence for correction of errors at law. *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001).

A. 1994 Sentencing Errors.

Means contends even his amended sentence is illegal because the district court in 1994 failed to articulate on the record the reason for imposing consecutive sentences¹ and failed to provide him with his right of allocution.² Means asserts he is able to raise these complaints at any time under Iowa Rule of Criminal Procedure 2.24(5)(a), which states, “The court may correct an illegal sentence at any time.” We disagree. There is a difference between an illegal sentence and a sentence that is imposed in an illegal manner. See *Tindell*, 629 N.W.2d at 359. An illegal sentence is one that is not authorized by statute or is beyond the power of the court to impose. *Id.* To the contrary, a challenge that a sentence was illegally imposed is a procedural error which must be raised at the earliest opportunity after the grounds for the objection become apparent—in this case, on direct appeal from the 1994 sentencing. *Id.* As the court in *Tindell* stated,

The Iowa rule . . . provides that the correction may be made “at any time,” strongly suggesting it is directed to excision of sentences insofar as they were beyond the jurisdiction of the court and

¹ At the sentencing hearing in 1994, the district court stated, “The court has reviewed the presentence investigation as well as the fact and circumstances which arose during trial of this case and makes a determination that those sentences which will be imposed shall be consecutive.”

² We assume without deciding that Means was not provided his right of allocution in 1994. From the limited record we have on appeal, it appears the district court did ask Means whether he had anything to say. Means replied, “No, Your Honor.” For the purposes of this appeal, we do not need to determine whether this was an adequate opportunity for Means to make a statement in mitigation of punishment under Iowa Rule of Criminal Procedure 2.23(3)(d).

therefore void. If we were to expand that concept to encompass redress for underlying procedural defects, as well, it would open up a virtual Pandora's box of complaints with no statutorily prescribed procedures for their disposition nor any time limits for their implementation. We do not believe the legislature intended such a result.

Id. at 359–60.

Both of Means's claims—failure to articulate reasons for consecutive sentences and failure to provide opportunity for allocution—are claims that challenge *how* the sentence was imposed, not challenges to the actual sentence. Thus, they are claims of procedural errors and not claims of an illegal sentence. We therefore affirm the district court's decision denying Means's second motion to correct an illegal sentence on these grounds.

B. Defendant's Presence at Motion Hearings.

Next, Means claims the district court erred in not permitting him to be present when it issued its decision on the first motion to correct an illegal sentence and also at the hearing for the second motion to correct an illegal sentence.

(1) First Motion. Means relies on Iowa Rule of Criminal Procedure 2.23(3)(d) to support his claim that his presence was required when the district court entered its decision on his first motion to correct an illegal sentence. This rule requires the court to permit the defendant and his attorney to address the court if either wishes to make a statement in mitigation of the punishment. Iowa R. Crim. P. 2.23(3)(d). Means refers to this right as “fundamental” and states that the court's resentencing of him without his presence violated Iowa law and the “Constitutions.”

Contrary to Means's argument, we find this issue controlled by Iowa Rule of Criminal Procedure 2.27(3)(b), which states, "The defendant's presence is not required at a reduction of sentence under rule 2.24." This is precisely what occurred in this case. The district court reduced Means's sentence from life without parole to life with parole pursuant to Means's motion under rule 2.24(5). In addition, our courts have expanded the rule 2.27 exception to situations where the correction of the sentence "will not be significantly aided by the defendant's presence." See *State v. Cooley*, 691 N.W.2d 737, 740 (Iowa 2004). The district court stated in its ruling on the second motion, "This court's correction of his sentence pursuant to *Graham* could not and would not have been altered by the defendant's presence. The defendant has suffered no prejudice and the court's determination would not have changed by the defendant's presence."

We also note that once again Means is attempting to attack a procedural sentencing issue collaterally by filing a second motion to correct an illegal sentence. As stated above, procedural sentencing challenges must be raised on direct appeal. No appeal was taken from the first motion, and therefore, we find this issue waived.

(2) Second Motion. Finally, Means claims the district court erred in conducting the hearing on the second motion without his presence. Means asserts this error can only be corrected by vacating the court's order and remanding with instructions to convene a sentencing hearing where both he and his counsel are present and have an opportunity to be heard. The State asserts Means's counsel failed to preserve error on this claim by failing to object to the court conducting the hearing without Means's presence.

We agree. Because there was no objection, the district court was not given an opportunity to rule on this issue, and thus, it is not preserved for our review. See *State v. Halliburton*, 539 N.W.2d 339, 342 (Iowa 1995) (“When a party fails to alert the district court to its contentions, that party cannot thereafter rely on those contentions to seek a reversal on appeal.”). Furthermore, the claims made in the second hearing all challenged the procedural nature of his previous sentencing hearings, and therefore, as stated above, they are not properly raised in a collateral motion and should have been raised on direct appeal.

III. Conclusion.

In conclusion, we find the district court properly rejected Means’s claims in his second motion that the 1994 sentencing court failed to articulate on the record the reason for imposing consecutive sentences and failed to provide him his right of allocution. These claims were based on an improper procedure, not to an illegal sentence. We also find Means’s claims that he should have been present when the district court issued its order amending his sentence and at the second motion’s hearing were not properly preserved for our review. We therefore affirm the district court.

AFFIRMED.