

IN THE COURT OF APPEALS OF IOWA

No. 3-116 / 12-1113
Filed February 27, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DERIK W. ODELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve,
Judge.

Derik Odell appeals a district court order finding violations of probation, revoking his deferred judgment, and imposing a prison sentence on a charge of burglary in the third degree. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Michael J. Walton, County Attorney, and Kimberly K. Sheperd, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Derik Odell appeals a district court order finding violations of probation, revoking his deferred judgment, and imposing a prison sentence on a charge of burglary in the third degree. He contends the court (1) violated his constitutional right to procedural due process by failing to provide sufficient findings of fact showing the basis for revocation of his deferred judgment and (2) failed to conduct a sufficient sentencing hearing in violation of Iowa Rule of Criminal Procedure 2.23(3).

I. Background Facts and Proceedings.

In July 2010, Odell pled guilty to a charge of burglary in the third degree, in violation of Iowa Code sections 713.1 and 713.6A (2009). He was granted a deferred judgment and was placed on probation for two years. The fine was suspended, but he was ordered to pay restitution and complete CADS (Center for Alcohol and Drug Services) treatment.

In August 2011, the State filed a report of probation violation, later amended. Odell stipulated to the probation violations and was found in contempt of court. He was ordered to serve 180 days in county jail. As additional terms of his probation, Odell was ordered to complete the CADS in-jail treatment program. Upon successful completion of the CADS program, he was ordered to enter a residential facility, receive a mental health evaluation, and obtain a G.E.D.

In May 2012, the State filed a second addendum to the report of probation violation. The report alleged Odell had violated the terms of his probation by violating jail rules, which caused him to be placed on special management status

and terminated his opportunity to participate in treatment. It was recommended that Odell's probation be revoked and sentence imposed.

A probation revocation hearing was held in June 2012. At the conclusion of the evidence, the district court determined "that the State [had] proved the violations alleged in the report of violation previously filed in this matter and the addendum to that report." The court revoked the deferred judgment and proceeded immediately to sentencing. The court sentenced Odell to five years in prison. Odell now appeals.

II. Finding of Violations of Deferred Judgment Probation.

Odell contends the district court's cursory revocation ruling violated his procedural due process rights. The State counters that Odell did not preserve error on his due process challenge because he failed to raise the issue in the district court. Recognizing this state of affairs, Odell makes an alternative claim of ineffective assistance of counsel. See *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006) ("Ineffective-assistance-of-counsel claims are not bound by traditional error-preservation rules."). We agree with the State that we must review the issue under an ineffective-assistance-of-counsel rubric.

As a preliminary matter, we note that the record is adequate to decide rather than preserve Odell's claim that trial counsel was ineffective in failing to object to the brevity of the district court's findings that he violated the terms of his deferred judgment probation. See *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008) ("Although claims of ineffective assistance of counsel are generally preserved for postconviction relief proceedings, we will consider such claims on direct appeal where the record is adequate."). To prevail, Odell must show his

attorney breached an essential duty and prejudice resulted. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The claim may be resolved on either ground. *Id.* at 196. We elect to address the prejudice ground. The test for prejudice under an ineffective-assistance-of-counsel claim is whether “it is reasonably probable that the result of the proceeding would have been different.” *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009) (quoting *State v. Schaer*, 757 N.W.2d 630, 638 (Iowa 2008)).

Odell maintains that he was prejudiced as follows: “The district court’s actions cannot be reviewed because the record does not contain the district court’s factual basis for finding Odell had violated the terms of his deferred judgment.” This argument would be more appealing if Odell were also challenging the sufficiency of the evidence supporting the findings that he violated the terms of his probation. See *State v. Kirby*, 622 N.W.2d 506, 510-11 (Iowa 2001) (addressing both the adequacy of the court’s findings in revoking probation and whether sufficient evidence supported that decision). He is not. It follows that he cannot show he was prejudiced by the claimed inadequacy of the court’s findings.

III. Adjudication of Guilt and Sentencing.

Odell also argues the district court did not comply with the rules of criminal procedure governing sentencing. Those rules apply because the entry of a sentence after a probation revocation is “the final judgment in the criminal case and not part of the civil revocation proceeding.” *State v. Lillibridge*, 519 N.W.2d 82, 83 (Iowa 1994). Accordingly, a district court must comply with the rules of criminal procedure when imposing a sentence, whether the defendant’s

conviction and sentencing have been deferred, as was the case with Odell, or whether the defendant was previously sentenced and is before the court for revocation of probation. *Id.*; see also *State v. Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999) (“[A] district court must comply with the rules of criminal procedure when imposing a sentence after revoking probation.”). We look to Iowa Code section 901.6 and Iowa Rule of Criminal Procedure 2.23(3) to determine whether the district court afforded Odell the mandatory procedural requirements of sentencing. Our review of this issue is for an abuse of discretion. *Duckworth*, 597 N.W.2d at 800.

Odell first maintains that the district court did not ask him whether there was any legal cause why judgment should not be pronounced. See Iowa R. Crim. P. 2.23(3)(a) (“When the defendant appears for judgment, the defendant must be . . . asked whether the defendant has any legal cause to show why judgment should not be pronounced against the defendant.”); see also Iowa Code § 901.6 (“If judgment is not deferred, and no sufficient cause is shown why judgment should not be pronounced and none appears to the court upon the record, judgment shall be pronounced and entered.”).

The district court was not required to ask this precise question. See *State v. Craig*, 562 N.W.2d 633, 634-35 (Iowa 1997) (“Insofar as Craig’s claim is based on the court’s failure to specifically ask this question, his argument lacks merit. This court has previously emphasized that the words used by a sentencing court to offer the defendant a right to allocution need not duplicate the language of section [901.6] (now rule [2.23](3)(a)).”). However, rule 2.23(3)(a) and section 901.6 require the court to engage in a colloquy with the defendant about

sentencing. This inquiry reflects a historical concern with the mental status of a criminal defendant at the time of imposition of sentencing. See *State v. Stallings*, 658 N.W.2d 106, 111 (Iowa 2003) (finding an in-court colloquy may bring to light further issues regarding defendant's mental status and capabilities), *overruled on other grounds by State v. Feregrino*, 756 N.W.2d 700 (Iowa 2008). The inquiry is part of a two-step process: "First, the court orally enters a pronouncement of the sentence on the record in the presence of the defendant, giving the court's reasons for the sentence. Second, the court files a written judgment entry." *State v. Hess*, 533 N.W.2d 525, 527 (Iowa 1995) (citations omitted). It is undisputed that the district court did not engage Odell in such a colloquy about sentencing.

Odell next contends the court did not afford him an opportunity to speak in mitigation of his punishment. Rule 2.23(3)(d) provides that, before pronouncement of judgment, "counsel for the defendant, and the defendant personally, shall be allowed to address the court where either wishes to make a statement in mitigation of punishment." It is undisputed that the district court did not engage either Odell or his counsel in such a colloquy about mitigation of punishment.

Odell finally argues that the district court did not "state on the record the reasons for the imposition of sentence," "[n]or did the court include adequate reasons for the sentence imposed" as required by rule 2.23(3)(d). After imposing the five-year-prison sentence, the district court stated:

The court finds on balance that Mr. Odell has been given every reasonable opportunity to comply with the terms of his probation in the community and that those efforts—there is simply nothing

further to be done along that line and that the only reasonable and appropriate sentence at this point is one of incarceration, and therefore that will be the sentence of the court.

The district court explained its reasons for imposing a sentence of incarceration. However, the other omissions in the sentencing proceedings are fatal, and the State agrees with Odell that the proper remedy is to vacate the sentence imposed and remand for resentencing. See *Lillibridge*, 519 N.W.2d at 83.

IV. Conclusion.

We affirm the findings of probation violations and the revocation of Odell's deferred judgment, but we remand for sentencing consistent with Iowa Code section 901.6 and Iowa Rule of Criminal Procedure 2.23(3).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.