

IN THE COURT OF APPEALS OF IOWA

No. 3-180 / 12-0970
Filed May 15, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GREGORY DESHON WOODS,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Marsha A. Bergan (guilty pleas) and Douglas S. Russell (sentencing), Judges.

Appeal from the convictions, judgments, and sentences following guilty pleas. **SENTENCES VACATED; REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Vidhya Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard Bennett, Assistant Attorney General, Janet M. Lyness, County Attorney, and Dana Christiansen, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

EISENHAUER, C.J.

Gregory Woods appeals from the convictions, judgments, and sentences entered following his guilty pleas to second-degree burglary and assault causing bodily injury. He contends the court denied him his right of allocution and entered an illegal sentence. We vacate his sentences and remand for resentencing.

The State charged Woods with first-degree burglary. Pursuant to a plea agreement, Woods pleaded guilty to second-degree burglary and assault causing bodily injury. The agreement provided for a joint recommendation of a ten-year sentence on the burglary to be served concurrently with a one-year sentence on the assault. The court accepted the pleas but denied Woods's request for immediate sentencing to give Woods the opportunity to challenge his pleas, and so a presentence investigation report could be prepared.

At sentencing, the court heard from both attorneys, but did not address Woods until reciting his right of appeal after imposing the sentences. The court did not question Woods and did not give him any opportunity to address the court. The court imposed the sentences agreed to in the plea agreement, but also checked the box before item five on the "sentencing no contact order" form, which provided:

The defendant has been convicted of domestic abuse assault under Iowa Code section 708.2A. Therefore, the defendant shall not possess, ship, transport, or receive firearms, offensive weapons, or ammunition until such rights have been restored in accordance with Iowa Code section 724.27. Defendant shall deliver all firearms, ammunition, and offensive weapons to the Johnson County Sheriff or Iowa City P.D. (law enforcement agency) on or before April 24, 2012 (24 hours).

We review sentencing procedures for an abuse of discretion. *State v. Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999). We will not find an abuse of discretion unless the trial court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Craig*, 562 N.W.2d 633, 634 (Iowa 1997). Normal error preservation rules do not apply to void, illegal, or procedurally defective sentences. *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994).

A. Allocution. Woods contends the court abused its discretion in failing to afford him his personal right of allocution at sentencing. Iowa Rule of Criminal Procedure 2.23(d) provides before sentence is rendered “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.” (Emphasis added.) Although the rule is mandatory, substantial compliance is sufficient. *State v. Glenn*, 431 N.W.2d 193, 195 (Iowa Ct. App. 1988). The court need not use any particular language to comply with rule 2.23(3)(d), but the court must “leave no room for doubt that a defendant has been given the opportunity to speak regarding punishment.” *State v. Craig*, 562 N.W.2d 633, 637 (Iowa 1997).

In the sentencing proceeding, Woods's attorney began her statement in mitigation of sentence with, “Mr. Woods was hoping to point out a few things to the court because, obviously, the court has discretion here.” A defense attorney's statement on behalf of a defendant does not constitute substantial compliance with rule 2.23(3)(d) and does not render the court's error harmless. *Id.* The trial court did not address Woods at any time prior to imposing sentence. We conclude Woods was not afforded his personal right of allocution at

sentencing. “The court’s departure from the rule requires a remand for resentencing.” *State v. Lumadue*, 622 N.W.2d 302, 304 (Iowa 2001).

Accordingly, we vacate the sentences imposed and remand for resentencing.

B. Illegal Sentence. Woods contends the court imposed an illegal sentence when it checked the box in front of item five on the “sentencing no contact order” form. Item five relates to restrictions based on conviction of domestic abuse assault under Iowa Code section 708.2A. Woods was not convicted of domestic abuse assault, and the evidence does not support conviction of any crime of domestic violence. As there was no factual basis for a conviction of domestic abuse assault, the sentence imposed on the basis of such a conviction is illegal. We therefore vacate the sentence and remand for resentencing.

SENTENCES VACATED; REMANDED FOR RESENTENCING.