

IN THE COURT OF APPEALS OF IOWA

No. 3-946 / 13-0223
Filed January 9, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES LEE MOORE,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark J. Smith,
Judge.

The defendant appeals the court's sentencing order and finding of
contempt. **CONVICTION AFFIRMED, SENTENCE VACATED AND
REMANDED FOR RESENTENCING, AND WRIT ANNULLED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant
Attorney General, Michael J. Walton, County Attorney, and Will Ripley, Assistant
County Attorney, for appellee.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

BOWER, J.

James Lee Moore asks us to vacate the sentence imposed following his guilty plea, arguing the district court denied him his right of allocution. Moore also challenges the court finding him in contempt. Alternatively, he argues even if sufficient evidence supports the contempt finding, the court abused its discretion in imposing punishment. We affirm and remand for the limited purpose of resentencing.

I. Background Facts and Proceedings

After an altercation injured a grocery store cashier and her co-worker, the State charged James Lee Moore with two counts of assault causing bodily injury. See Iowa Code § 708.1 (2011). Moore's trial was initially set for January 21, 2013, but was later changed to January 28, 2013, at 9:00 a.m., with a final pretrial conference on January 24. On January 25, 2013, the State and Moore entered into a written memorandum of plea agreement. In exchange for Moore's plea, the State agreed to dismiss count two at sentencing and to recommend 360 days in jail with all but thirty days suspended, plus payment of a fine, court costs, attorney fees, and victim restitution. The matter remained set for trial.

On January 28, Moore was fifteen to twenty minutes late for his 9:00 jury trial. When the parties appeared, the court stated: "Today is the day set for jury trial; however, the court has been given a memorandum of plea agreement." The parties acknowledged the terms, which were reviewed by the court, and defense counsel noted the court's concurrence was a requirement. Counsel gave the

court Moore's written plea of guilty to one count of assault causing bodily injury,¹ and Moore verified his signature. Also in writing, Moore waived his right to a delay in sentencing and his right to file a motion in arrest of judgment. The court asked, "And again Mr. Moore, you understand you have a right to a fifteen-day delay in sentencing, and . . . you also waive your right to file a motion in arrest of judgment?" Moore replied: "Yes." The State then requested the court dismiss count two.

The court ruled: "The court would dismiss count two. The court accepts the plea agreement and would order [Moore] to pay a fine . . . and he [is] ordered to serve 360 days in jail with all but [thirty] days suspended." The court denied defense counsel's subsequent request to delay mittimus until March and ordered victim restitution. Next, the court stated: "Mr. Moore, this matter was set for jury trial at nine o'clock today. The jury has been here since eight o'clock, and the court wished to begin jury trial at nine o'clock [The prosecutor] indicated you did not come here until about twenty minutes after nine"

Moore replied he arrived at 9:15 a.m. and asserted the clerk of court told him the trial started at 9:30. Defense counsel stated he discussed the trial with Moore at the pretrial conference. Counsel also sent Moore a letter with the information but argued Moore made "an honest mistake today." The court, noting "the jury is waiting to hear this case at this time," ruled Moore's failure to appear at nine o'clock was contemptuous. The court sentenced Moore to five

¹ The written plea stated the court could sentence Moore to jail for up to one year and could impose a fine between \$315 and \$1875 plus surcharge and court costs. Moore's plea acknowledged: "I also understand that any plea agreement is not binding on the court."

days in jail “consecutive to the already issued thirty days in jail, for failure to appear as required.” Moore now appeals.

II. Scope and Standards of Review

We review sentencing challenges for errors at law. *State v. Liddell*, 672 N.W.2d 805, 815 (Iowa 2003). We will not upset a sentence on appellate review unless the defendant shows “an abuse of trial court discretion or a defect in the sentencing procedure.” *Id.* 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).

Moore attempts to appeal directly from the district court ruling finding him in contempt of court, but he has no “statutory right to appeal from an order to punish for contempt.” See *In re Inspection of Titan Tire*, 637 N.W.2d 115, 131 (Iowa 2001). Contempt proceedings may be “reviewed by certiorari.” *Id.* Under Iowa Rule of Appellate Procedure 6.108, we elect not to dismiss Moore’s case but “proceed as though the proper form of review had been requested.” See *id.*

We review a certiorari action for correction of errors at law. *Id.* A district court’s finding of contempt must be established by proof beyond a reasonable doubt, and we consider whether substantial evidence supports the judgment. *Id.* Substantial evidence is “such evidence as could convince a rational trier of fact that [Moore] is guilty of contempt beyond a reasonable doubt.” See *Ervin v. Iowa Dist. Ct.*, 495 N.W.2d 742, 744-45 (Iowa 1993).

III. Merits

A. Right of Allocution. Moore argues the district court erred in failing to allow him to exercise his right of allocution before imposing sentence. The State does not contest the fact the district court failed to afford Moore his right of allocution. Citing *State v. Cason*, 532 N.W.2d 755, 757 (Iowa 1995), the State argues the court's error was harmless.

Iowa Rule of Criminal Procedure 2.23(d) provides that before a sentence is rendered, "the defendant personally, shall be allowed to address the court . . . to make a statement in mitigation of punishment." Although the rule is mandatory, substantial compliance is sufficient. *State v. Glenn*, 431 N.W.2d 193, 195 (Iowa Ct. App. 1988). "Trial judges before sentencing should . . . unambiguously address themselves to the defendant [and] should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing." *Green v. United States*, 365 U.S. 301, 305 (1961); see *State v. Craig*, 562 N.W.2d 633, 637 (Iowa 1997) (citing *Green* and ruling the right to allocution is personal to the defendant).

We turn to *Cason*, where the trial court asked the defendant on several occasions whether he had any questions regarding his plea agreement or the sentencing recommendations and at that time, the defendant "had several opportunities to state any objections to the proposed sentence." *Cason*, 532 N.W.2d at 757. Under those circumstances, the *Cason* court ruled the trial court's failure to formally afford the defendant his right of allocution was harmless error. *Id.*

Our review of the record shows this case is distinguishable from *Cason*. See *id.* At the hearing, the district court's three questions to Moore were limited in asking him (1) to acknowledge his understanding of the plea agreement's terms, (2) to verify his signature on the plea agreement, and (3) to acknowledge his waivers of a delay in sentencing and his right to file a motion in arrest of judgment. The trial court did not inquire whether Moore was in agreement with the sentencing recommendation, whether he wished to speak in mitigation of his punishment, or whether he had any questions regarding his plea agreement. Accordingly, the trial court's failure to afford Moore his right of allocution is reversible error. We affirm Moore's conviction for assault causing bodily injury and remand for the limited purpose of resentencing.²

B. Substantial Evidence of Contempt. Moore challenges the district court's finding he was in contempt of court for delaying the start of trial by his late arrival. Moore argues the evidence was not sufficient to show he *willfully* violated the order.

Our statutory scheme lists acts constituting contempt of court, including "illegal resistance to any order or process made or issued by" the court. Iowa Code § 665.2(3). Contempt is "willful disobedience."³ *Ervin*, 495 N.W.2d at 744. Willful disobedience supporting the court's contempt finding requires evidence Moore's conduct was "intentional and deliberate with a bad or evil purpose, or

² We continue to encourage counsel to avoid the unnecessary time and expense of an appeal by bringing to the attention of the sentencing judge any claimed errors easily remedied in the trial process, such as the failure to afford the defendant a right of allocution. See *State v. Millsap*, 547 N.W.2d 8, 10 n.1 (Iowa Ct. App. 1996).

³ Moore does not argue the court's order setting the time and date for trial was uncertain. See *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998).

wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not.” See *Christensen*, 578 N.W.2d at 678.

Disobedience is not at issue here because it is undisputed Moore did not comply with the court’s order setting trial. We turn to the willfulness requirement. Moore must show he “was unable to perform the act ordered.” *Id.* at 678.

The answers of Moore’s defense counsel during the court’s questioning provide ample evidence supporting the court’s contempt finding. Counsel stated he orally discussed the trial with Moore and again informed him in a letter. Moore did not deny his attorney had communicated this information to him. The trial court found Moore’s excuse that he was misinformed by the clerk of court unconvincing. We give “great deference to the trial court on issues of witness credibility.” *McKinley v. Iowa Dist. Ct.*, 542 N.W.2d 822, 825 (Iowa 1996); see *Titan*, 637 N.W.2d at 131 (rejecting the contemner’s “mistake” argument “because it is evident from the district court’s ruling that the court did not believe it”). Substantial evidence in the record supports the court’s conclusion Moore willfully disobeyed the court’s order.

C. Punishment for Contempt. Alternatively, Moore argues even if sufficient evidence supports the court’s contempt finding, the court abused its discretion in imposing a punishment of five days in jail.

Moore’s contempt punishment is not a “criminal sentence.” See *State v. Mott*, 731 N.W.2d 392, 394 (Iowa 2007). Historically, we grant trial courts wide discretion in sentencing for contempt, and we interfere only where the court’s

discretion has been clearly abused. *Newby v. Dist. Ct.*, 147 N.W.2d 886, 894 (Iowa 1967). Based on the circumstances detailed above, we find no abuse of discretion.

CONVICTION AFFIRMED, SENTENCE VACATED AND REMANDED FOR RESENTENCING, AND WRIT ANNULLED.