

IN THE COURT OF APPEALS OF IOWA

No. 7-436 / 06-1934
Filed August 22, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT JOSE FOWLER-ORTIZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager, Judge.

Robert Jose Fowler-Ortiz appeals from a supplemental order amending a sentence previously entered. **SUPPLEMENTAL ORDER VACATED; SENTENCE VACATED; AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Fangman, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

EISENHAUER, J.

Robert Jose Fowler-Ortiz appeals from a supplemental order amending a sentence previously entered. He contends the court improperly modified the sentence in a supplemental order. He also contends he was denied due process when the new sentence was entered without a hearing. We review his claims for correction of errors at law. Iowa R. App. P. 6.4.

Fowler-Ortiz pled guilty to third-degree sexual abuse in violation of Iowa Code section 709.4 (2005) on February 17, 2006 and was immediately sentenced to a term of imprisonment not to exceed ten years. The sentence was suspended and Fowler-Ortiz was placed on supervised probation for five years. Approximately nine months later, the district court determined Fowler-Ortiz's sentence did not comply with Iowa Code section 903B.1¹. It entered a supplemental order amending the judgment and sentence to provide that after Fowler-Ortiz had completed his sentence, "Pursuant to Iowa Code Section 903B.1 the Defendant is sentenced to a special sentence which commits him into the custody of the Iowa Department of Corrections for the rest of his life, with eligibility for parole as provided in chapter 906."

Fowler-Ortiz argues any error in his sentencing could not be corrected by a supplemental order because the order was in the nature of a nunc pro tunc order. Such orders are available only to correct clerical errors, not an error in judicial thinking, a judicial conclusion, or a mistake of law. See *State v. Naujoks*, 637 N.W.2d 101, 113 (Iowa 2001). Fowler-Ortiz also argues the district court

¹ Iowa Code section 903B.1 became effective on July 1, 2005

denied him the right to procedural due process by entering a new sentencing order without providing him the opportunity to be heard.

We address Fowler-Otiz's second argument first. Our supreme court requires a record establishing that the court has afforded an opportunity for the defendant to speak regarding punishment. See *State v. Craig*, 562 N.W.2d 633, 637 (Iowa 1997). However, this requirement is not applied to all sentencing proceedings. In *State v. Cooley*, 691 N.W.2d 737, 741 (Iowa Ct. App. 2004), we held that under the Iowa Rules of Criminal Procedure, a defendant's presence is not required when three conditions were met. First, the district court is correcting an existing sentence rather than imposing a new sentence. *Id.* Second, the disposition would not be aided by the defendant's presence. *Id.* Third, the modification does not make the sentence more onerous. *Id.* In the present case, the third condition was obviously not met. By entering the supplemental order, Folwer-Ortiz was sentenced to a lifetime parole in addition to the suspended sentence he was subject to under the original sentence. The modification therefore makes the sentence more onerous. We conclude Fowler-Ortiz should have been before the court when it considered imposition of the lifetime parole. The supplemental order is vacated. We do not need to discuss the issue whether the supplemental order is a proper way to correct the error in the original sentence.

**SUPPLEMENTAL ORDER VACATED; SENTENCE VACATED; AND
REMANDED FOR RESENTENCING.**