

**IN THE COURT OF APPEALS OF IOWA**

No. 7-557 / 07-0304  
Filed September 6, 2007

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**THOMAS MORGAN DONELSON,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Harrison County, James M. Richardson, Judge.

Thomas Morgan Donelson appeals from the judgment and sentence entered upon his conviction of operating while intoxicated. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, Jennifer Mumm, County Attorney, and Marcus Gross, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

**EISENHAUER, J.**

Thomas Morgan Donelson appeals from the judgment and sentence entered upon his conviction of operating while intoxicated, contending the district court erred in denying his right of allocution. We remand for resentencing.

Donelson was convicted of operating while intoxicated as an habitual offender and sentenced to a term of imprisonment not to exceed five years. The State filed a petition for writ of certiorari on September 12, 2005, arguing the sentence was illegal as Iowa Code section 902.9(5) mandated an indeterminate term of fifteen years for an habitual offender. We granted the State's petition for writ of certiorari, and the case was remanded for resentencing. Donelson appeared before the district court at the resentencing hearing and was sentenced to serve a term not to exceed fifteen years. Donelson appeals, claiming the district court erred in denying his right of allocution.

Our review of sentencing procedure is for an abuse of discretion. *State v. Craig*, 562 N.W.2d 633, 634 (Iowa 1997). "Such abuse will only be found if the district court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.*

Iowa Rule of Criminal Procedure 2.23(3)(d) provides that prior to pronouncing judgment, the sentencing court must allow the defendant to make a statement in mitigation of punishment. Sentencing courts are not required to use any particular language to satisfy rule 2.23(3)(d). *State v. Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999). Substantial compliance with the rule is sufficient. *Id.* The important thing is whether the defendant is given any opportunity to

volunteer any information helpful to the defendant's case. *State v. Patterson*, 161 N.W.2d 736, 738 (Iowa 1968).

In the present case, the State concedes that the district court did not allow Donelson a right to allocution as required by rule 2.23(3)(d). However, it argues that Donelson's presence at the resentencing was not required; he therefore did not have a right to allocution. We disagree. In *State v. Cooley*, 691 N.W.2d 737, 741 (Iowa Ct. App. 2004), we engaged in an in-depth discussion on when a defendant must appear at a sentencing proceeding. We concluded that a defendant's presence was required unless three conditions were met: (1) the district court was correcting an existing sentence rather than imposing a new sentence, (2) the disposition would not be aided by the defendant's presence, and (3) the modification does not make the sentence more onerous. *Id.* In the present case, the original five-year sentence was vacated on appeal. The district court was imposing a new sentence, rather than correcting an existing sentence, at the January 22, 2007 hearing. In addition, the fifteen-year term obviously makes Donelson's sentence more onerous. Therefore, Donelson's presence was required at the resentencing hearing. When the defendant appears for judgment, he must be afforded the right to allocution. Iowa R. Crim. P. 2.23(3)(d). This right to allocution cannot be denied simply because the sentence imposed on the defendant is mandatory. The district court erred in denying Donelson's right to allocution, and the error is not harmless. *Craig*, 562 N.W.2d at 636-37.

**SENTENCE VACATED AND REMANDED FOR RESENTENCING.**