

IN THE COURT OF APPEALS OF IOWA

No. 8-791 / 08-0402
Filed October 15, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DOMINICK RONALD MARCOTT,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick,
Judge.

Dominick Marcott appeals his sentences for third-degree theft and
operating a motor vehicle without the owner's consent. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney
General, and Michael J. Walton, County Attorney, for appellee.

Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

DOYLE, J.

I. Background Facts and Proceedings.

This court affirmed Dominick Marcott's 2006 convictions of third-degree theft and operating without the owner's consent, but remanded the case for resentencing. See *State v. Marcott*, No. 06-0730 (Iowa Ct. App. Mar. 28, 2007). Marcott, free on appeal bond, failed to appear at a June 2007 sentencing hearing. He was later arrested on a bench warrant on February 22, 2008. That same day the district court set a resentencing hearing for February 29, 2008; however, later that day, the hearing was changed to February 25, 2008.

At the February 25, 2008 resentencing hearing, defense counsel informed the court that he had several witnesses who would testify to Marcott's rehabilitation in the year and a half since he had been released on appeal bond. He stated the witnesses would testify that Marcott had been working full-time jobs since September 2007. He also said that the witnesses believed the sentencing hearing was going to be held on February 29, 2008. He said Marcott "would like those witnesses present." Marcott's attorney also requested a new presentence investigation be prepared. Finding the delay in sentencing was due to Marcott's absence, the court denied the request for a new report. The district court proceeded with the hearing and sentenced Marcott to an indeterminate term of imprisonment not to exceed two years on each count, and suspended a fine of \$500 on each count.

Marcott appeals. He claims the district court erred in prohibiting him from presenting witness testimony in mitigation of his sentence.

II. Standard of Review.

We review sentencing decisions for correction of errors at law. Iowa R. App. P. 6.4. Because sentencing decisions “are cloaked with a strong presumption in their favor,” they will be disturbed only upon a showing of an abuse of discretion. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). “An abuse of discretion is found only when the sentencing court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable.” *Id.*

III. Merits.

Marcott claims the district court erred and abused its discretion in prohibiting him from presenting witness testimony in mitigation of his sentence. He cites Iowa Rule of Criminal Procedure 2.23(3)(d). The court complied with this rule in allowing both Marcott and his attorney to address the court. Marcott also raises a due process argument. He failed to preserve error on this claim because he did not raise it in the district court. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Marcott also cites Iowa Code section 901.5, which provides that “after receiving and examining all pertinent information, including the presentence investigation report, and the victim impact statements, if any, the court shall consider the following sentence options.” We find no violation of this statute.

Both Marcott and his attorney addressed the court and informed the court that Marcott had been employed and had not run afoul of the law prior to the sentencing hearing. Although Marcott’s counsel indicated he had two witnesses who would testify as to Marcott’s rehabilitation in the last year and a half, that he

would like those witnesses to be present, and that those witnesses believed the sentencing was going to be the February 29, 2008, counsel failed to ask for a continuance of the hearing. During the sentencing hearing, the court stated:

The court can accept the fact that [Marcott] most likely has been employed and clearly has not run afoul of law enforcement since his release by virtue of the fact that we aren't coming to the court today for resentencing until now, him having just been rearrested as a consequence of his absconding from parole supervision and failure to appear at sentencing in June. So it's clear that [Marcott] has made progress in terms of staying out of trouble.

At best, the information to be provided by the proposed witnesses would have been cumulative. After a full review of the record, we do not believe that the district court erred or abused its discretion in precluding the presentation of mitigation witnesses who were not present at the hearing. Nor do we find error with the district court's denial of a new presentence report. We therefore affirm the sentences imposed by the district court.

AFFIRMED.