

IN THE COURT OF APPEALS OF IOWA

No. 9-723 / 09-0469
Filed October 7, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD LYNN WISECUP,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Cynthia Moisan,
District Associate Judge.

Defendant appeals the sentences imposed by the district court following
his pleas to theft in the third degree and operating a motor vehicle without
owner's consent. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis Hendrickson,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney
General, John P. Sarcone, County Attorney, and Linda Zanders, Assistant
County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Mansfield, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

ZIMMER, S.J.

Richard Wisecup appeals from the sentences imposed after he pled guilty to two aggravated misdemeanor offenses. He contends the district court failed to state adequate reasons for the concurrent jail terms it imposed. We affirm.

I. Background Facts and Proceedings.

Wisecup was charged with theft in the third degree (enhanced), in violation of Iowa Code section 714.2(3) (2009), and operating a motor vehicle without owner's consent, in violation of section 714.7. On March 2, 2009, he appeared before the court with his attorney and filed a written plea of guilty to both crimes.¹ In his written plea, Wisecup waived his right to transcription of the proceedings.² He also waived his right to have a presentence investigation prepared and waived his right to allocution at sentencing. The guilty plea proceedings were not reported.

The district court accepted the defendant's pleas of guilty and scheduled a sentencing date in July. The court's written order contains the following handwritten language: "It is anticipated, upon successful completion of TX, LUS will be dismissed and paraphernalia." On March 11, 2009, the court rescheduled Wisecup's sentencing hearing for March 17. According to the written order, the sentencing hearing was reset because Wisecup "elected not to do the In Jail TX Program as originally provided for at his guilty plea." There is no record of any

¹ Wisecup's plea included admissions that he operated a motor vehicle without the owner's consent, took merchandise from a Wal-Mart store with the intent to deprive, and that he had two prior theft convictions.

² The plea contained a paragraph stating, "I waive my right to have a court reporter make a verbatim copy of these proceedings."

proceedings related to the circumstances surrounding the entry of the order resetting hearing.

On March 17, Wisecup appeared before the district court with his attorney for sentencing. No record was made of the sentencing hearing. It is unclear whether Wisecup orally waived his right to transcription of the sentencing hearing, or whether waiver was inferred from the previous waiver in Wisecup's written plea of guilty. In any event, Wisecup does not contend his trial counsel was ineffective for failing to request that the sentencing hearing be reported.

Following the sentencing hearing, the district court filed a written jail order which sentenced Wisecup to 365 days in jail for each offense, to be served concurrently.³ The court granted Wisecup credit for jail time he had already served. The sentencing order included the following language: "The Court has determined that this sentence will provide reasonable protection for the public. Probation is denied because it is unwarranted." No additional reasons for the sentence imposed were stated in the written sentencing order. Following sentencing, Wisecup made no attempt to create an additional record with a supplemental statement of the proceedings or a bill of exceptions.

Wisecup now appeals. He argues the district court erred in failing to state adequate reasons for imposing concurrent 365-day jail sentences. In response, the State contends that Wisecup has waived any alleged sentencing error by waiving the reporting of the plea and sentencing hearings and failing to provide a record to permit appellate review of the district court's exercise of discretion.

³ The maximum sentence for each charge is imprisonment for not more than two years plus a fine of not more than \$6250.

II. Scope and Standard of Review.

We review the district court's sentencing decision that is within statutory limits for abuse of discretion. *State v. Alloway*, 707 N.W.2d 582, 584 (Iowa 2006). No abuse of discretion will be found unless the defendant shows that such discretion was exercised for reasons clearly untenable or to an extent clearly unreasonable. *State v. Mai*, 572 N.W.2d 168, 170 (Iowa Ct. App. 1997).

III. Merits.

Iowa Rule of Criminal Procedure 2.23(3)(d) (2009) requires a trial court to state on the record its reasons for selecting a particular sentence. The court's statement of reasons may be either written or oral. *Alloway*, 707 N.W.2d at 584-585. The purpose of this requirement is to give appellate courts the opportunity to review the discretionary nature of the sentencing. *Id.* at 584.

When the reasons for a particular sentence are not established by the record, we are normally required to remand the case for resentencing. *Id.* at 585. However, "[i]t is a defendant's obligation to provide this court with a record affirmatively disclosing the error relied upon." *State v. Mudra*, 532 N.W.2d 765, 767 (Iowa 1995). We will not permit a defendant to raise an issue without attempting to give the court a record upon which to decide the issue. See *Alloway*, 707 N.W.2d at 586.

When the absence of a record of the reasons for a sentence includes the absence of a transcript of the sentencing proceeding, a defendant has several additional methods to create a record. Our rules of criminal procedure allow a defendant to create a record by means of a bill of exceptions under rule 2.25 after sentencing, or by filing a supplemental statement of the record under Iowa

Rule of Appellate Procedure 6.10(3) after an appeal has been filed. *Id.*; see *Mudra*, 532 N.W.2d at 767. A defendant's failure to utilize any of these methods to produce a record serves as a waiver of the defendant's challenge to the district court's failure to state the reasons for the sentence it imposed. *Alloway*, 707 N.W.2d at 585-86 (stating a defendant will not be permitted to raise an issue on appeal concerning an abuse of discretion in sentencing without attempting to give the court a record upon which to decide the issue); *Mudra*, 532 N.W.2d at 766-67. Thus, in *Mudra*, our supreme court determined the defendant had waived error on his claim of the district court's abuse of discretion in failing to give reasons for the sentences, because the defendant waived transcription of the proceedings and failed to use other methods to produce a record. *Id.*

In this case, the record consists merely of Wisecup's written guilty plea and waiver of rights, the district court's sentencing order, and various trial court papers. Although it is unclear exactly how Wisecup waived his right to transcription of the sentencing hearing, the fact remains that Wisecup failed to produce a record by other means—either through a bill of exceptions after sentencing, or by filing a supplemental statement of the record with this appeal. See Iowa R. Crim. P. 2.25; Iowa R. App. P. 6.10(3). With these principles and facts in mind, we first address the State's claim that the defendant has waived any sentencing error.

The State's argument that Wisecup waived his claim of sentencing error is premised on the contention that the sentencing court "provided no written reasons for the sentence imposed in its jail sentencing order." The problem with this argument is that the State's assertion is not correct. Unlike *Mudra*, the

district court in this case *did* provide two reasons for the sentence imposed on Wisecup, which he claims are insufficient. Under the circumstances presented here, we reject the State's argument that the defendant has waived any sentencing error. We now turn to the merits of Wisecup's claim.

Wisecup argues that the court did not give sufficient reasons for the concurrent one year county jail sentences imposed. He describes the sentence imposed as the "worst result possible" and notes that if he had "received one more day he would have been incarcerated within the Department of Corrections and become eligible for parole." His brief also suggests that a jail sentence was imposed simply because Wisecup eschewed treatment.

Here, the district court imposed a sentence that was within the statutory limits. The court gave two reasons for the sentence it selected. The court determined the jail sentence would protect the public and concluded probation was not warranted. The court chose to impose concurrent rather than consecutive sentences for Wisecup's two offenses. The court could have imposed a lengthier sentence and added a fine. Though sparse, the record demonstrates that the district court exercised discretion and further reveals the concerns that motivated the court to select the sentence imposed.

Sentencing decisions carry a presumption of regularity. *State v. Jose*, 636 N.W.2d 38, 41 (Iowa 2001). In addition, the defendant bears the burden to affirmatively show the sentencing court relied on improper evidence or otherwise abused or failed to exercise its discretion. *Id.* We conclude Wisecup has failed to demonstrate that the district court abused its discretion by failing to give adequate reasons for the sentence it imposed.

Although not fatal to his claim of error, it is worth mentioning that Wisecup's arguments on appeal are not aided by the fact that he made no attempt to supplement the record after an unreported sentencing hearing. The lack of pertinent information about Wisecup in the appellate record is his own doing and detracts from his claim of sentencing error.

IV. Conclusion.

Because Wisecup had failed to demonstrate that the district court abused its discretion in imposing sentence, we affirm.

AFFIRMED.