IN THE COURT OF APPEALS OF IOWA

No. 2-927 / 11-1530
Filed November 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

FLOYD FRANK EZELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Gregory D. Brandt, District Associate Judge.

Defendant appeals his conviction and sentence for the offense of operating while intoxicated. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, John P. Sarcone, County Attorney, and David M. Porter, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., Vogel, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

HUITINK, S.J.

Following a bench trial, Floyd Ezell was convicted of operating while intoxicated, in violation of Iowa Code section 321J.2 (2011), a serious misdemeanor. A sentencing hearing was held, but was not reported. Ezell was present for this hearing. He was sentenced to one year in prison, with all but seventeen days suspended, and placed on probation for one year. Ezell appealed his conviction and sentence.

Ezell's appellate counsel filed a motion in the district court seeking a statement of the sentencing proceedings, pursuant to Iowa Rule of Appellate Procedure 6.806. In consultation with Ezell and trial counsel, appellate counsel prepared a statement and submitted it to the State and the district court. *See* Iowa R. App. P. 6.806(1). This statement included Ezell's recollections of the sentencing hearing.

On April 24, 2012, the assistant county attorney and trial counsel appeared for a hearing before the district court. On the record the district court reviewed the issues and its reasons for the sentence imposed. Trial counsel then made a statement, confirming the court's recollection. The assistant county attorney also made a statement. A transcript of the hearing was created and made part of the present record.

On appeal, Ezell now makes the argument the district court improperly held a hearing on his request for a statement of the proceedings under rule 6.806 without his presence.[1] He asserts that under Iowa Rule of Criminal

[1] As the State points out, it is not entirely clear Ezell was not present at this proceeding. The district court noted, "Mr. Ezell is present represented by his attorney."

Procedure 2.27(1) he should have been personally present for the hearing. He asks to have his sentence vacated and the case remanded for resentencing. Our review is for the correction of errors at law. *State v. Liddell*, 672 N.W.2d 805, 815 (2003).

Rule 2.27(1) provides, "In *felony* cases the defendant . . . shall be personally present at every stage of the trial including . . . the imposition of sentence. In other cases the defendant may appear by counsel." (Emphasis added.) In this case, Ezell was charged with a serious misdemeanor, and therefore rule 2.27(1) did not require him to be personally present at the sentencing proceedings. *See Patten v. State*, 553 N.W.2d 336, 337 (Iowa Ct. App. 1996) (noting a defendant in a misdemeanor case may appear by counsel).

Ezell also argues, and the State agrees, there is a separate constitutional right, based on the right to due process and confrontation, for a defendant to be present for all critical stages of a trial. *See State v. Webb*, 516 N.W.2d 824, 830 (Iowa 1994). The right to be present may be waived.[2] *State v. Snyder*, 223 N.W.2d 217, 222 (Iowa 1974). If not waived, prejudice may be presumed from the defendant's absence. *State v. Atwood*, 602 N.W.2d 775, 781 (Iowa 1999). This presumption may be rebutted, however, under a harmless-error analysis. *Id.* Thus, a defendant's absence will not always necessitate a reversal. *State v. Wise*, 472 N.W.2d 278, 279 (Iowa 1991).

In order to consider his arguments, we will assume he was absent. Based on our conclusions, however, we would affirm whether or not Ezell was present.

[2] In his written "Waiver of Jury Trial and Stipulation to Trial on the Minutes of Testimony," Ezell waived his right to allocution at sentencing. The document, however, does not specifically waive Ezell's right to be present at the sentencing hearing. We therefore reject the State's claim on appeal that Ezell waived his right to be present at sentencing, and concomitantly, his right to be present at the proceedings to recreate the sentencing proceedings.

We bypass arguments as to whether the hearing held in the district court to recreate the sentencing proceeding under rule 6.806 was a critical stage of the trial, *State v. Folkerts*, 703 N.W.2d 761, 766-67 (Iowa 2005), whether the hearing involved issues of fact and the disposition would be significantly aided by the defendant's presence, *State v. Foster*, 318 N.W.2d 176, 179 (Iowa 1982), or whether the hearing involved the correction of an existing sentence, *State v. Austin*, 585 N.W.2d 241, 245 (Iowa 1998); *State v. Cooley*, 691 N.W.2d 737, 741 (Iowa Ct. App. 2004).

We conclude even if Ezell had a right to be present for a hearing on his motion to recreate the record of sentencing, the State has shown he was not prejudiced by his absence. In order to establish harmless error, the State must prove beyond a reasonable doubt the error complained of did not contribute to the verdict. *State v. Walls*, 761 N.W.2d 683, 686 (Iowa 2009). Ezell's recollection of what occurred was included in the statement of record submitted to the court and opposing counsel. There are no allegations the result of the hearing to recreate the sentencing proceedings would have been different in any respect if Ezell had been present. We conclude any error in this case was harmless. *See Atwood*, 602 N.W.2d at 781.

Due to our decision on this issue, we do not address Ezell's claim that if this issue had not been sufficiently preserved, it was the result of ineffective assistance of counsel.

We affirm Ezell's conviction and sentence for operating while intoxicated.

AFFIRMED.