

IN THE COURT OF APPEALS OF IOWA

No. 9-212 / 07-2077
Filed April 8, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICO OSBY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Defendant Rico Osby appeals his sentence on two convictions of attempt to commit murder and two convictions of willful injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, John P. Sarcone, County Attorney, and Jim Ward, Assistant County Attorney, for appellee.

Sackett, C.J., and Potterfield and Mansfield, JJ.

SACKETT, C.J.

Defendant, Rico Osby, appeals his sentence on two convictions of attempt to commit murder and two convictions of willful injury in violation of Iowa Code sections 707.11 and 708.4 (2007). He contends the district court abused its discretion in denying his counsel an opportunity to make a statement in mitigation of his sentence. We affirm.

SCOPE OF REVIEW.

We review for an abuse of discretion. *State v. Adams*, 554 N.W.2d 686, 692 (Iowa 1996).

BACKGROUND.

At defendant's sentencing the prosecutor spoke and recommended that the court impose consecutive sentences on all four counts. The district court asked if defendant wanted to say anything before sentence was pronounced. Defendant made a statement expressing regret for his actions, explained that he hears voices telling him to kill, and asked that he be placed in a psychiatric facility. The prosecutor spoke again, noting to the court the defendant had been evaluated by a psychiatrist prior to trial and was not determined to be incompetent. The victim then spoke to the court. At the conclusion of the victim's statement the court addressed the defendant's attorney asking, "Mr. Jellineck? Anything?" Jellineck replied, "No, your Honor." Sentence was then imposed.

ATTORNEY'S OPPORTUNITY TO MAKE A STATEMENT.

Defendant contends his attorney was denied the opportunity to make a statement in mitigation of sentence, which defendant contends is mandatory under Iowa Rule of Criminal Procedure 2.23(3)(d). The rule provides in applicable part:

If no sufficient cause is shown why judgment should not be pronounced, and none appears to the court upon the record, judgment shall be rendered. Prior to such rendition, counsel for the defendant, and the defendant personally, shall be allowed to address the court where either wishes to make a statement in mitigation of punishment.

We do not agree with defendant that the district court denied his attorney the opportunity to make a statement in mitigation of the sentence. There is no evidence that defendant's counsel sought to speak in mitigation and was denied the right to do so. Additionally, the district court addressed the attorney during the sentencing procedure and opened the door in such a way as to provide the opportunity for the attorney to speak in mitigation.

The court's comment to defense counsel, "Anything?," would not be sufficient to meet the court's obligation to the defendant, for the burden rests with the court to make sure the defendant understands he or she has the right to say anything he or she wants to before sentence is imposed. The sentencing court must substantially comply with the rules that require the court to ask the defendant if he or she wants to make a statement in mitigation of punishment under Iowa Rule of Criminal Procedure 2.23(3)(d), or whether there is any legal cause why the sentence should not be pronounced under rule 2.23(3)(a). *State v. Craig*, 562 N.W.2d 633, 637 (Iowa 1997). There is no need for this rationale to

be applied to counsel's right to speak, since attorneys already know they have the right to speak on behalf of their clients. All the court needs to do is allow the attorney to address the court which the district court clearly did here. See *United States v. Vasquez*, 216 F.3d 456, 459 (5th Cir. 2000), *cert. denied*, 531 U.S. 972 (2000).

AFFIRMED.