

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN MICHAEL BOOZER,

Defendant-Appellant.

UNPUBLISHED

October 28, 2021

No. 355408

St. Clair Circuit Court

LC No. 20-000796-FH

Before: STEPHENS, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ his guilty-plea convictions for breaking and entering a motor vehicle to steal property worth \$1,000 or more but less than \$20,000, MCL 750.356a(2)(c)(i), and stealing another’s financial transaction device, MCL 750.157n(1). Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to 5 to 30 years’ imprisonment for breaking and entering a motor vehicle to steal property worth \$1,000 or more but less than \$20,000 and 5 to 15 years’ imprisonment for stealing another’s financial transaction device. On appeal, defendant argues that remand for resentencing is necessary because defendant was sentenced for a felony by videoconference in violation of MCR 6.006. We affirm in part, reverse in part, and remand.

I. BACKGROUND

The facts underlying this appeal are not contested. Defendant entered a plea of guilty to breaking and entering a motor vehicle to steal property worth \$1,000 or more but less than \$20,000, and stealing another’s financial transaction device. Pursuant to the terms of defendant’s guilty plea, the following charges were dismissed: one count of receiving and concealing stolen property worth less than \$200, MCL 750.535(5), two counts of receiving and concealing stolen property worth \$200 or more but less than \$1,000, MCL 750.535(4)(a), one count of receiving and concealing stolen property worth \$1,000 or more but less than \$20,000, MCL 750.535(3)(a), and three counts of second-degree home invasion, MCL 750.110a(3). The plea was accepted during

¹ *People v Boozer*, unpublished order of the Court of Appeals, entered December 29, 2020 (Docket No. 355408).

the height of the Covid-19 pandemic and during the then-effective Covid-19 court rules and Executive Orders. At no time was defendant apprised in writing or on the record of any right to be physically present for his allocution. He did in fact allocate, and the court noted that defendant had a lengthy criminal history and was able to obtain “a very favorable plea agreement[.]” Ultimately, the trial court sentenced defendant, as a fourth-offense habitual offender, to 5 to 30 years’ imprisonment for breaking and entering a motor vehicle to steal property worth \$1,000 or more but less than \$20,000 and 5 to 15 years’ imprisonment for stealing another’s financial transaction device. This appeal followed.

On appeal, defendant argues that remand for resentencing is necessary because defendant was sentenced for a felony by videoconference in violation of MCR 6.006. We agree that the trial court violated MCR 6.006 and remand for resentencing.

II. STANDARD OF REVIEW

“To preserve a sentencing issue for appeal, a defendant must raise the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.” *People v Anderson*, 322 Mich App 622, 634; 912 NW2d 607 (2018) (quotation marks and citation omitted). On appeal, defendant argues that remand for resentencing is necessary because defendant was sentenced for a felony by videoconference in violation of MCR 6.006. Defendant failed to raise this issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court. Thus, this issue is unpreserved.

Generally, “[t]he proper interpretation and application of a court rule is a question of law that is reviewed de novo.” *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012) (citation omitted). However, this issue is unpreserved. The error in this case is not just a failure to adhere to a court rule, it also implicates constitutional rights. We acknowledge that there is no precedent regarding whether the failure to inform a defendant of the right to allocute in person is a structural error. However, this Court’s precedents apply the same standard to unpreserved constitutional errors as it does to other unpreserved claims of error. This Court reviews unpreserved claims of error, whether constitutional or nonconstitutional, for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Under a plain error analysis, “defendant must establish (1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected defendant’s substantial rights.” *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011). An error affects a defendant’s substantial rights if it affects the outcome of the lower court proceedings. *Carines*, 460 Mich at 763. Reversal is warranted only when the plain error resulted in the conviction of an actually innocent defendant or when an error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” *Kowalski*, 489 Mich at 506 (citation and quotation marks omitted).

III. ANALYSIS

MCR 6.006(A) identifies the criminal proceedings in which two-way interactive video technology may be used without first obtaining a waiver of a defendant’s physical presence at the proceeding. Because felony sentencing is not included in the list of criminal proceedings in which two-way interactive video technology may be used, felony sentencing by video conference without

a waiver of a defendant's physical presence at the proceeding plainly contravenes MCR 6.006(A). *People v Heller*, 316 Mich App 314, 315; 891 NW2d 541 (2016).

While this Court has held that a defendant may waive the right to be present during felony sentencing, there is no record evidence that either the defendant or his counsel waived in this case. *People v Palmerton*, 200 Mich App 302, 304; 503 NW2d 663 (1993); see also MCR 6.006(C). "A valid waiver arises when the defendant specifically knows of the right to be present and intentionally abandons the protection of that right." *Palmerton*, 200 Mich App at 303 (citations omitted). "A valid waiver cannot be established from a silent record." *Id.* (citations omitted). In the instant matter, there is no indication on the record by defendant, defense counsel, or the trial court that defendant specifically knew of his right to be physically present during the sentencing hearing and expressly waived that right. Indeed, the fact that defendant appeared at sentencing by way of videoconference was simply never addressed. Considering that a valid waiver cannot be established from a silent record, no waiver occurred. Therefore, defendant was sentenced for a felony by videoconference without a waiver of his right to be physically present, and the trial court plainly violated MCR 6.006.

The trial court plainly violated MCR 6.006 and the prosecution failed to offer any response to this appeal. In *Heller*, 316 Mich App at 320, this Court recognized that some studies have suggested that "individuals who appear in court via video conferencing are at risk of receiving harsher treatment from judges or other adjudicators." However, sentencing is a critical stage in a criminal proceeding. Our trial courts are imbued with the responsibility and the discretion to fashion an individualized sentence while considering sentencing guidelines, the traditional purposes of sentencing, the allocation of victims, if any, and the allocation of the defendant. *People v Chapa*, 407 Mich 309; 284 NW2d 340 (1979); *People v Peters*, 191 Mich App 159; 477 NW2d 479 (1991); *People v Sabin (On Second Remand)*, 242 Mich App 656; 620 NW2d 19 (2000).

We acknowledge that counsel for the defendant failed to either offer an affidavit or even directly argue the impact on the sentence. That failure by appellate counsel is of grave concern. However, no affidavit by the defendant or argument by counsel would have been able to ascertain the difference between an allocution on a small screen and an in person articulation to the judicial officer. Allocution is the only opportunity a defendant has to directly address the court. The right to allocute in person is a substantial right, and failure to honor that right is not susceptible to objective measurement. Failure to afford the defendant this right impacts the actual integrity of the judicial system's obligation to protect the rights of the accused.

Accordingly, we affirm defendant's convictions, but remand for resentencing consistent with this opinion. We retain jurisdiction.

/s/ Cynthia Diane Stephens

/s/ David H. Sawyer

/s/ Deborah A. Servitto

Court of Appeals, State of Michigan

ORDER

People of MI v Kevin Michael Boozer

Docket No. 355408

LC No. 20-000796-FH

Cynthia Diane Stephens
Presiding Judge

David H. Sawyer

Deborah A. Servitto
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for resentencing consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 63 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 42 days after completion of the proceedings.

/s/ Cynthia Diane Stephens
Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

October 28, 2021
Date

Chief Clerk