STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1532

State of Minnesota,
Respondent,

vs.

Chad Michael Ryan,
Appellant.

Filed August 6, 2018
Reversed and remanded
Halbrooks, Judge

Blue Earth County District Court
File No. 07-CR-16-1502

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Patrick R. McDermott, Blue Earth County Attorney, Scott A. Hersey, Special Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Cleary, Chief Judge; and Halbrooks, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant challenges his sentence for second-degree controlled-substance sale on the grounds that the district court erred by denying him the right to counsel at his sentencing

hearing and by denying him the right to allocution. Appellant also argues that he is entitled to be resentenced under the Minnesota Drug Sentencing Reform Act (DSRA) sentencing guidelines. In a pro se supplemental brief, appellant raises additional issues. Respondent agrees with all of appellant's arguments on appeal with the exception of those raised in appellant's pro se supplemental brief. We reverse and remand for resentencing.

FACTS

Following a controlled buy, the state charged appellant Chad Ryan in April 2016 with second-degree controlled-substance sale under Minn. Stat. § 152.022, subd. 1(1) (2014). Ryan applied for and was appointed a public defender by the district court. The public defender represented Ryan at the omnibus hearing. After that hearing, Ryan discharged his public defender because he was unhappy with her performance. At two subsequent hearings, Ryan appeared without counsel.

During a hearing in January 2017, the district court asked Ryan if he wanted to proceed pro se. Ryan told the district court that he believed that he did not have a choice, stating that his first public defender was "no attorney" but that he could not find private counsel. The district court advised Ryan that he could proceed pro se; but in order to do so, Ryan needed to sign a waiver of counsel. Ryan stated that he did not want to sign a waiver of his right to counsel. The district court interpreted Ryan's statement as his unwillingness to sign the waiver. Ryan never signed a petition to proceed pro se.

Following the January 2017 hearing, the district court issued two orders—one appointing advisory counsel and one accepting Ryan's waiver of counsel. The case proceeded to a jury trial at which Ryan represented himself. The jury convicted Ryan.

The district court scheduled Ryan's sentencing hearing for July 21, 2017. On July 3, 2017, Ryan reapplied for a public defender. On the first page of the public-defender application, Ryan handwrote the word "appeal." The district court granted Ryan's public-defender application that same day and, without explanation, rescheduled the sentencing hearing for July 5, 2017.

On July 5, 2017, a new public defender appeared to represent Ryan. The district court was uncertain why the public defender appeared for the sentencing hearing, stating that it was under the impression that Ryan had requested an attorney to represent him on appeal, because Ryan had handwritten the word "appeal" on his public-defender application. Ryan advised the district court that he wanted counsel present at his sentencing hearing. The district court responded, "If [the new public defender] has something to say, he can say it, I guess."

Ryan's public defender requested a continuance, reasoning that he did not have enough time to prepare for the July 5 sentencing hearing because he had just been appointed on July 3. The district court asked the prosecutor for input. The prosecutor told the district court that there is a county policy under which defendants do not get to pick and choose their public defender. The prosecutor asserted that, because Ryan had already discharged his first public defender before trial, he was not entitled to a new public defender for sentencing. The public defender responded that the public defender's office is responsible for choosing which public defenders represent defendants, not the county attorney's office.

The district court agreed with the prosecutor. It denied the requested continuance, barred the public defender from representing Ryan, and imposed a sentence without

allowing Ryan the right to allocution. The public defender made a record that he "[did not] think that Mr. Ryan . . . had the opportunity to have effective assistance of counsel at this sentencing hearing and that if Mr. Ryan had been provided more opportunity, it would have been the intent of [the public defender's] office to be able to ask for a departure." This appeal follows.

D E C I S I O N

I.

When the facts are undisputed, we review de novo whether a waiver of counsel was knowing and intelligent. *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). Criminal defendants have a federal and state constitutional right to counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *see State v. Worthy*, 583 N.W.2d 270, 279 (Minn. 1998). The right to counsel applies to the "critical stages" of criminal proceedings. *State v. Krause*, 817 N.W.2d 136, 144 n.6 (Minn. 2012) (citing *United States v. Wade*, 388 U.S. 218, 224, 87 S. Ct. 1926, 1931 (1967)). Sentencing is a critical stage of a criminal proceeding. *See State v. Maddox*, 825 N.W.2d 140, 144 (Minn. App. 2013) (citing *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 1205 (1977)). Therefore, a defendant has a constitutional right to counsel during a sentencing hearing. *Id.*

A defendant may waive his right to counsel if his waiver is knowing, voluntary, and intelligent. *Krause*, 817 N.W.2d at 148 n.10. To ensure a proper waiver, a district court "should comprehensively examine the defendant regarding the defendant's comprehension of the charges, the possible punishments, mitigating circumstances, and any other facts

relevant to the defendant's understanding of the consequences of the waiver." *Rhoads*, 813 N.W.2d at 885-86 (quotations omitted).

In *Maddox*, we determined that a defendant's right to counsel under the Minnesota Constitution applies to restitution hearings and reversed a district court's restitution order because the district court proceeded with the restitution hearing without obtaining the defendant's waiver of his right to counsel. 825 N.W.2d at 147. In doing so, we acknowledged that the Supreme Court has determined that sentencing is a critical stage of a criminal proceeding to which the Sixth Amendment right to counsel applies. *Id.* at 144 (citing *Gardner*, 430 U.S. at 358, 97 S. Ct. at 1205). Even though the Supreme Court had not yet expanded the Sixth Amendment right to counsel to restitution hearings, because the Minnesota Supreme Court had "demonstrated a willingness to interpret the right to counsel under the Minnesota Constitution independently of the United States Constitution," we held that a restitution hearing is also a critical stage of a criminal proceeding to which the right to counsel under article I, section six of the Minnesota Constitution applies. *Id.* at 145 (quotation omitted). Because the district court did not obtain Maddox's waiver of his right to counsel before proceeding with the restitution hearing, we concluded that the district court violated Maddox's right to counsel, reversed the restitution order, and remanded for another proceeding. *Id.* at 147.

Here, Ryan reapplied for a public defender after trial, and the district court granted his request. At his sentencing hearing, the new public defender appeared, and Ryan again requested that he be present. Despite Ryan's repeated requests, the district court did not allow the public defender to represent Ryan and did not obtain a proper waiver of his right

to counsel. Similar to the restitution hearing in *Maddox*, the district court here proceeded with the sentencing hearing without obtaining a knowing, voluntary, and intelligent waiver of Ryan's right to counsel. *Id.* Therefore, the district court violated Ryan's right to counsel.

The denial of the right to counsel "is a structural error." *Bonga v. State*, 765 N.W.2d 639, 643 (Minn. 2009). Therefore, to obtain reversal, it "does not require a showing of prejudice." *State v. Camacho*, 561 N.W.2d 160, 171 (Minn. 1997). Because the district court denied Ryan the right to counsel at his sentencing hearing, we reverse Ryan's sentence and remand for resentencing.

Ryan also argues that the district court denied him the right to allocution. Before pronouncing a sentence, a district court must allow personal statements from the defendant. Minn. R. Crim. P. 27.03, subd. 3. This right, otherwise known as allocution, is not discretionary with the district court. *State v. Hanson*, 304 Minn. 415, 415-16, 231 N.W.2d 104, 105 (1975). Nor is it waived if the defendant fails to request it. *Id.* at 416-17, 231 N.W.2d at 105. A defendant is entitled to allocute "except where the court has had the benefit of a presentence investigation or defendant by his testimony has presented his background and his version of the facts." *Id.* at 416, 231 N.W.2d at 105. If a district court denies a defendant allocution without having a presentence investigation or having a defendant "take the stand in his own defense," an appellate court must remand "to permit allocution" and resentencing. *Id.* at 417, 231 N.W.2d at 105.

Ryan did not testify at trial, and he did not make a statement during the sentencing hearing. In addition, the district court did not have the benefit of a presentence investigation. Therefore, Ryan was denied his right to allocution. *See id.* (reversing

sentence and remanding where the defendant did not take the stand in his defense and the district court did not have a presentence investigation).

Because the district court denied Ryan the right to counsel during his sentencing hearing and denied him the right to allocution, we reverse Ryan's sentence and remand to the district court for resentencing. On remand, the district court shall permit a public defender to represent Ryan at his sentencing hearing, provide enough time for the public defender to prepare for the hearing, and allow Ryan to make a statement before imposing sentence.

II.

Ryan argues that he is entitled to be resentenced under the new sentencing guidelines. The state agrees. The Minnesota Sentencing Guidelines provide presumptive sentences for criminal offenders. Minn. Sent. Guidelines (2016). The guidelines were amended by the DSRA and signed into law on May 22, 2016. 2016 Minn. Laws ch. 160, § 22, at 592. Section 18 of the act—which amended the sentencing grids—took effect on May 23, 2016. 2016 Minn. Laws ch. 160, §§ 1-18, at 591; 22 at 592.

Ryan was convicted of a second-degree controlled-substance crime, and he has a criminal-history score of one. Section 18 of the DSRA reduces the severity level of second-degree controlled-substance crimes from 8 to D7 on the new Drug Offender Grid. *Compare* Minn. Sent. Guidelines 4.A (Supp. 2015), *with* Minn. Sent. Guidelines 4.C (2016). Under the revised guidelines, the presumptive sentence for a second-degree controlled-substance crime when the offender has a criminal-history score of one is 58 months, and that sentence is presumptively stayed. Minn. Sent. Guidelines 4.C (2016).

The amended DSRA sentencing grid applies to cases in which judgment was not final as of May 23, 2016. *State v. Kirby*, 899 N.W.2d 485, 490 (Minn. 2017). A district court enters final judgment in a criminal case when it "enters a judgment of conviction and imposes or stays a sentence." Minn. R. Crim. P. 28.02, subd. 2(1). In a felony or gross misdemeanor case, a defendant may appeal from a final judgment "within 90 days after final judgment." Minn. R. Crim. P. 28.02, subd. 4(3)(a).

Here, the district court applied the pre-DSRA guidelines and imposed a sentence of 58 months on July 5, 2017. Ryan had 90 days from that date to appeal before his judgment became final. Minn. R. Crim. P. 28.02, subd. 2(1). The DSRA went into effect on May 23, 2016, more than one year before Ryan was sentenced. Therefore, Ryan's sentence was not yet final when section 18 took effect. We reverse Ryan's sentence and remand for resentencing under the DSRA.

III.

Ryan raises additional claims in a pro se supplemental brief, but he does not cite to any legal authority. Appellate courts do not consider issues raised on appeal that are not supported by argument or citation to legal authority. *State v. Tomassoni*, 778 N.W.2d 327, 335 (Minn. 2010); *see State v. Sontoya*, 788 N.W.2d 868, 876 (Minn. 2010) (declining to address claim on merits where pro se appellant "d[id] not cite either the record or legal authority to support this claim"). Therefore, Ryan's pro se claims are not properly before us.

Reversed and remanded.