

IN THE SUPREME COURT OF THE STATE OF NEVADA

APRIL EVE JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46235

FILED

JUN 29 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, entered pursuant to a guilty plea, of one felony count of using a controlled substance. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. The district court sentenced appellant April Eve Johnson to serve a prison term of 12 to 30 months.

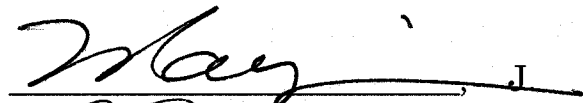
Johnson's sole contention on appeal is that the district court erred by failing to address her and ask whether she wished to make a statement in her own behalf at sentencing. The State concedes the error, and we agree.

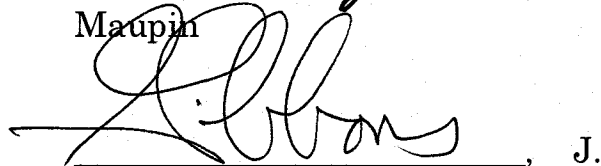
NRS 176.015(2) codifies the defendant's right of allocution. It requires the district court to "[a]ddress the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment" before passing sentence. A district court's failure to afford a defendant his right of allocution is not harmless error "when the district court has the discretion to sentence the defendant to a shorter sentence than given."¹

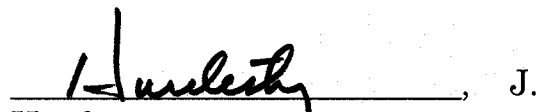
¹United States v. Mack, 200 F.3d 653, 657 (9th Cir. 2000).

Johnson was convicted of a category E felony,² and absent the district court's exercise of discretion she would have received a suspended sentence and probation.³ Therefore, we conclude that the error was not harmless and that this case must be remanded for resentencing. As the district court judge did not rely on prejudicial material during sentencing, it is unnecessary for a different district court judge to preside over the resentencing hearing.⁴

Accordingly, we AFFIRM Johnson's judgment of conviction, but we VACATE her sentence. We REMAND this matter to the district court for resentencing consistent with this order.


Maupin J.


Gibbons J.


Hardesty J.

cc: Hon. Steven R. Kosach, District Judge
Washoe County Public Defender
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

²NRS 453.411(3)(a).

³NRS 176A.100(1)(b); NRS 193.130(2)(e).

⁴Goodson v. State, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982).