IN THE COURT OF APPEALS OF IOWA

No. 9-566 / 89-840

FILED
DEC 21 1989
CLERK SUPREME COURT

**STATE OF IOWA,**

Appellee,

vs.

502

**CHARLES PHILLIP WIENEKE II,**

Appellant.

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Appeal from the Iowa District Court for Linn County, Paul J. Kilburg, Judge.

The defendant entered a guilty plea to a charge of third offense OWI. He has now appealed from the resulting conviction and sentence. He contends the sentence was erroneous because it was based on a recommendation in a presentence report which was contrary to an agreement between the prosecutor and the defense attorney. He also contends he should be given credit for one day served in jail before sentencing. The State concedes the merits of defendant's latter argument. **AFFIRMED AS MODIFIED.**

Jon M. Kinnamon, Cedar Rapids, for the appellant.

Thomas J. Miller, Attorney General; Thomas S. Tauber, Assistant Attorney General; and Todd Tripp, Assistant County Attorney, for the appellee.

Considered by Oxberger, C.J., and Donielson and Habhab, JJ.

**DONIELSON, J.**

Charles Wieneke was arrested on December 23, 1988, for driving a motor vehicle while under the influence of alcohol. Later that day he was released with a condition of his bail being that he consume no alcohol and he obtain alcohol evaluation and counseling. Wieneke completed a substance abuse evaluation at the Area Substance Abuse Council on January 9, 1989. He was referred to the Mental Health Institute in Independence, Iowa, for inpatient treatment and was to report there on January 24, 1989.

In a plea arrangement with Wieneke, the State agreed to make no specific sentencing recommendation and to accept the recommendation of the presentence investigation as long as it required Wieneke to undergo substance abuse evaluation and treatment. Pursuant to his understanding of this agreement, Wieneke's attorney advised him not to report for the recommended inpatient treatment on January 24, 1989.

On April 7, 1989, following entry of Wieneke's guilty plea, the court directed the preparation of a presentence investigation (PSI) report. The report was completed and submitted to the court and to counsel prior to sentencing. The report referred to the fact that Wieneke had not reported to the Mental Health Institute for treatment and that this decision was based on his attorney's advice. The PSI report stated Wieneke's statements and actions

indicated he had not accepted his alcohol abuse problem nor had he made a commitment to treatment. In making its sentencing recommendation, the presentence investigator specified it was made after considering Wieneke's decision not to adhere to the Area Substance Abuse Council's recommendation to follow through with inpatient substance abuse treatment.

Wieneke was sentenced to serve 360 days in jail of which all but 45 days were suspended. Following his incarceration Wieneke is to serve three years of probation the terms of which include inpatient substance abuse treatment. Wieneke has appealed from his conviction and sentence.

Wieneke contends his sentence was erroneous because it was based on a PSI report which drew adverse inferences from Wieneke's failure to seek substance abuse treatment before sentencing. He argues it is unfair to make evaluation and treatment part of the condition for a plea bargain and then to penalize him and draw adverse inferences in a PSI report because of his failure to undergo treatment prior to sentencing.

Wieneke also contends the sentencing court should have credited him with one day of jail-time served before sentencing. The State agrees Wieneke should be credited with the one day he served before his sentencing.

The only issue before this court is Wieneke's contention that no adverse inferences should have been permitted in the PSI report regarding his election to forego treatment prior to sentencing. He argues the plea arrangement agreed to make treatment a matter for the trial court to address in the sentencing disposition. He argues the presentence investigator, as an agent of the State, was allowed to subvert the plea agreement and he requests a new sentencing hearing based on the authority of Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971).

We need not reach the question of what effect the terms of a plea bargain have on the preparation of a presentence investigation report. See generally U.S. v. Nelson, 837 F.2d 1519, 1522 (11th Cir. 1988), cert. denied, 109 S. Ct. 82 (1988) (PSI report may not contain statement of facts which are in direct contravention of stipulated facts in plea agreement); Lee v. State, 501 So. 2d 591, 593 (Fla. 1987) (PSI report cannot contain statements contrary to plea arrangement); State v. White, 535 So. 2d 544, 545 (La. Ct. App. 1988) (prosecutor bound by plea bargain not to make sentence recommendation cannot offer her recommendation for inclusion in presentence investigation report); State v. McQuay, 148 Wis. 2d 823, 826, 436 N.W.2d 905, 906 (Wis. Ct. App. 1989), pet. for rev. granted 443 N.W.2d 310 (Wis. 1989) (despite terms of plea arrangement,

presentence report may contain all information relevant to sentencing).

The plea arrangement in this case specified only that the prosecution would make no sentencing recommendation and would adhere to the recommendation in the PSI report as long as it included a provision for substance abuse and treatment. As a condition of his bail, Wieneke was to seek alcohol evaluation and counseling. At no point did the prosecution agree to alleviate the consequences Wieneke would endure if he failed to follow through with recommended substance abuse treatment. Nothing in the plea arrangement either directly, or by implication, addressed the issue of Wieneke's participation in presentencing substance abuse treatment.

A sentencing judge should be in possession of the fullest information possible concerning a defendant's life and characteristics. State v. Stanley, 344 N.W.2d 564, 570 (Iowa App. 1983). A court is entitled to give weight to the recommendations of a presentence investigator. State v. Inger, 292 N.W.2d 119, 126 (Iowa 1980).

The contents of the PSI report utilized by the trial court in this case did not subvert the plea agreement reached by Wieneke and the State. A resentencing hearing is not warranted in this case and Wieneke's request is hereby denied. His request for credit for one day served in jail is granted. Iowa Code § 321J.2(2)(c) (1989).

**AFFIRMED AS MODIFIED.**