

FILED

JUN 30 1978

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

v.

KENT RICHARD BENADUM,

Appellant.

Filed June 30, 1978

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60672

Appeal from Boone District Court - Paul E. Hellwege, Judge.

Defendant appeals from judgment and sentence upon conviction for breaking and entering. Affirmed.

Stanley R. Simpson, of Boone, for appellant.

Richard C. Turner, Attorney General, and James Robbins, Boone County Attorney,
for appellee.

Submitted to Allbee, C.J., Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant, Kent Richard Benadum, appeals from judgment and sentence imposed for violation of § 708.8, The Code 1975, breaking and entering. We affirm the trial court.

Defendant was originally charged with three counts of breaking and entering and one count of criminal trespass. On January 14, 1977, after plea bargaining with the county attorney, defendant withdrew his not guilty plea and sought permission to plead guilty. The bargain was for a guilty plea to one count of breaking and entering in return for dismissal of the other charges and the county attorney's promise not to recommend a penitentiary sentence to the judge. After disclosure of the plea bargain in open court the guilty plea was accepted and sentencing was set for April 22, 1977.

At the April 22, 1977 sentencing hearing the following pertinent dialogue occurred:

[By defendant's counsel]:

Because Mr. Benadum has spent approximately 140 days in jail, because he is a first-time offender, and because of his youth, we would ask that he be released on the time served. . . .

* * * *

[By Mr. Robbins, County Attorney]:

Having not been here at the previous hearing I am unaware of what the previous recommendation is, or was, but from my examination of the file I think it would be an injustice to let Mr. Benadum go off virtually scot-free for this violation of law. The churches which were involved in this incident suffered something like \$1834.00 in damages. True, most of that has been covered by insurance, but I still think Mr. Benadum should accept some responsibility to reimburse those expenses, whether it be to the insurance companies or to the churches, and I think he needs some incentive to perhaps straighten his life out, and perhaps if he were given some kind of jail sentence and some kind of work-release program, that might give him some incentive to pay back these losses and pay back his attorney's fees the county has been required to pay and might allow him to rehabilitate himself.

The available sentencing alternatives under § 708.8, The Code, involve either (a) ten years in the penitentiary or reformatory; (b) a \$100 fine and imprisonment in the county jail for a period not to exceed one year. After hearing the statements of counsel previously mentioned the trial court sentenced defendant to imprisonment in the state reformatory at Anamosa for not more than ten years.

On appeal the defendant asserts as grounds for reversal, (1) the involuntariness of the guilty plea, (2) abuse of discretion by the sentencing court for not suggesting the defendant withdraw his guilty plea when it was apparent that a new prosecutor was present, (3) breach of the plea bargain, and (4) ineffective assistance of counsel in failing to seek withdrawal of the guilty plea when it was apparent that the plea bargain had been breached by the new prosecutor.

I. Voluntariness of plea. We find no merit in defendant's contention that his guilty plea was involuntary. A review of the guilty plea hearing reveals a strict compliance with the standards required by *State v. Sisco*, 169 N.W.2d 542 (Iowa 1969) and *Brainard v. State*, 222 N.W.2d 711, 722 (Iowa 1974).

II. Breach of plea bargain. Defendant's remaining assignments flow from his contention that prosecutor Robbins's statement at the sentencing hearing violated the plea bargain. We disagree. Robbins's recommendation was for a county jail sentence, which was not inconsistent with the plea bargain.

III. Having found that the plea bargain was fulfilled, we must conclude that defendant's other assignments are meritless. The trial court did not abuse its discretion by failing to suggest defendant withdraw his guilty plea. The State had fulfilled its part of the bargain, but even if there had been a breach, it was the duty of the defendant, not the court, to seek withdrawal. *State v. Lindsey*, 171 N.W.2d 859, 861 (Iowa 1969). Also, because we conclude the plea bargain was not breached, we find that the defendant has not established a factual basis demonstrating his counsel's inadequacy as required by *State v. Williams*, 207 N.W.2d 98 (Iowa 1973). The claimed inadequacy of counsel is based entirely upon the failure to request "withdrawal of guilty plea after change of circumstances predicated on plea bargaining."

AFFIRMED.