FILED
OCT 27 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed October 27, 1981

vs.)

ALLEN WAYNE JOHNSON,) 1-283
65494

Defendant-Appellant.)

Appeal from Polk District Court - Luther T. Glanton, Jr., Judge.

Defendant appeals the denial of his request to withdraw his plea of guilty to burglary in the second degree in violation of sections 713.1 and 713.3, The Code. AFFIRMED.

Francis C. Hoyt, Jr., State Appellant Defender's Office, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

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

CARTER, J.

Defendant appeals the denial of his request to withdraw his plea of guilty to burglary in the second degree in violation of sections 713.1 and 713.3, The Code. He alleges that the guilty plea was made as the result of an agreement not kept by the trial court and thus was involuntary. We affirm the trial court.

Defendant Allen Wayne Johnson was charged with burglary in the second degree April 20, 1978. On June 9, 1978, after discussion in chambers between defendant and his attorney, the county attorney, and the trial judge, defendant entered a plea of guilty to the charge in open court. The court properly informed defendant of all the constitutional protections he was waiving by entering a guilty plea, and established as well that there was a factual basis for the plea. Also on the record was the following conversation relating to the agreement reached in chambers and relied upon by defendant in pleading guilty:

> Defendant's Attorney: In chambers, we discussed the present living situation of my client and also the fact that his past record, for all practical purposes, is clean; and at that point, you said that you would give him probation if the pre-sentence [sic] investigation showed what my representations were to the Court to be true.
>
> The Court: Now do you understand that, Mr. Johnson? If your record is not clear, that you can be sentenced to the maximum of ten years in prison or five thousand dollar fine or both; do you understand?
>
> Defendant: Yes.
>
> The Court: If your record is not clear, the Court will allow you to withdraw your plea and stand trial; do you understand that?
>
> Defendant: Yes, sir.

Thereafter, a presentence investigation report was ordered and sentencing was set for July 21, 1978.

The record indicates that at or about the time fixed for imposition of sentence, defendant appeared at the courthouse and was informed that the trial court intended to impose a sentence of incarceration. At this time he was given an opportunity to withdraw his plea of guilty and asked to confer with his brother prior to making that decision. When the case was called for the sentencing hearing defendant was no longer present in the courthouse and a warrant was issued for his arrest.

It was nearly two years before defendant was apprehended. On July 9, 1980, he appeared for sentencing on the 1978 burglary charge before the same judge who had taken his guilty plea. At this time defendant requested leave to withdraw his guilty

plea and proceed to trial. He stated that he now believed he could prove it was his brother who had committed the burglary, not himself. The following exchange then took place:

> The Court: Now, Mr. Allen Wayne Johnson, I think I did advise you on the 9th of June, 1978, when you entered your plea of guilty, that at that time the Court would let you withdraw it and stand trial. But do you think that same promise would hold, you know, two years later after you escaped and been gone for two years? Do you think the Court would be bound by that promise?
>
> The Defendant: No, sir, I don't.
>
> The Court: I would not be naive enough, Mr. Johnson, to give you that same promise now after you escaped--not escaped; after you didn't show up, you know, claiming you wanted to talk to your brother, and we haven't seen you since June the 9th, 1978, you know.

The trial court then proceeded to go through the defendant's past record in detail, telling him he had had second chances in the past, and then sentenced him to a term not to exceed ten years.

The defendant contends that the guilty plea upon which his conviction and sentence is based should be declared to be involuntary because it was prompted by a false inducement. We agree that defendant could reasonably have perceived the statement of the judge at the guilty plea proceeding as an assurance by the court that if circumstances convinced the court that probation was not a proper sentence, then defendant would be given an opportunity to withdraw his plea of guilty. We further agree that if this opportunity had not been afforded defendant, the plea would have been based on false inducement and therefore involuntary. See, e.g., State v. Runge, 228 N.W.2d 35, 37 (Iowa 1975). But our review of the record convinces us that defendant was afforded an opportunity to withdraw his plea of guilty after being informed that the court would not grant his probation. Rather than accepting this opportunity, defendant fled and evaded apprehension for nearly two years. We find that defendant's acts in this regard constituted a waiver of his right to exact continuing compliance by the court with the offer of plea withdrawal. As so viewed, the record does not support defendant's claim of false inducement. We have considered all issues urged and find no ground for reversal.

AFFIRMED.