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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Appellee,) Filed April 26, 1979

vs.)

WILLARD OSWALD,) 91/62154

Appellant.)

Appeal from Mills District Court - Harold L. Martin and Jerry Larson, Judges.

Defendant appeals judgment imposed on his guilty plea alleging trial court's mistatement concerning the penal consequences of the plea rendered the same involuntary. - REVERSED AND REMANDED.

Timothy I. Markel, Glenwood, for Appellant.

Thomas J. Miller, Attorney General of Iowa, William R. Armstrong, Assistant Attorney General, and H. Walter Green, Mills County Attorney, for Appellee.

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

OXBERGER, C. J.

Defendant Willard Oswald appeals judgment and sentence imposed on his plea of guilty to second degree burglary, in violation of section 713.3, Code Supp. 1977. He contends trial court misinformed him of the penal consequences of his plea thereby rendering it involuntary. We reverse.

The State, citing State v. Reaves, 254 N.W.2d 488, 493 (Iowa 1977), initially argues that defendant's failure to file a motion in arrest of judgment precludes him from challenging the adequacy of his guilty plea proceeding. This contention was recently addressed in State v. Gardner, 274 N.W.2d 328, 329 (Iowa 1979). In Gardner, the court held that the Reaves procedural rule which requires a motion in arrest of judgment to preserve a claim of deficiency in guilty plea proceedings does not apply to pleas taken under the new criminal code as it now exists. Id. We will therefore review the issue raised by defendant on its merits.

When the defendant entered his plea of guilty the county attorney recommended to the trial court a deferred non-penitentiary sentence. The trial court said he wasn't bound by the agreement. The judge said "If at the time of disposition, the court enters an order for disposition other than what you understand the nature of these plea negotiations to be your only remedy at that time is to ask the court to withdraw your plea of guilty and go ahead and have a trial." A different trial judge sentenced the defendant. He did not honor the plea bargain nor did he ask the defendant if he wanted to withdraw his plea of guilty.

The record reveals that trial court informed defendant the maximum penalty for the offense was a term in the penitentiary not to exceed ten years. The court later mistakenly told defendant that an alternative sentence was a fine not exceeding $100 and imprisonment in the county jail for not more than one year. This alternative was not, in fact, available to the sentencing court. See §§ 902.9(3), 907.3, Code Supp. Since the trial court provided misinformation about sentencing alternatives by listing a possibility it could not have administered in addition to one it was authorized to impose, we cannot conclude that defendant's plea was voluntary with full knowledge of its consequences as required by Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969) and Brainard v. State, 222 N.W.2d 711, 723 (Iowa 1974). See also State v.

Geiger, 113 Ariz. 297, 298, 552 P.2d 1191, 1192 (1976).

We reverse and remand with instructions (1) the sentence be set aside; (2) defendant be allowed to withdraw his guilty plea; (3) there be further appropriate proceedings.

Reversed and remanded with instructions.

All judges concur, except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I would affirm on direct appeal recognizing that the appellant still has the possible option of some post-conviction relief under § 663A.2(4) which would permit the taking of evidence from the defendant, his counsel, and the county attorney to determine what part, if any, the erroneous sentencing alternative played in the defendant's ultimate guilty plea. The out right reversal by the majority on the non-existent record concerning the error and its part in the entire proceedings places form before substance. In my opinion, the post-conviction relief statutes are in a large measure designed specifically for this type of problem.

The record indicates a thorough and comprehensive compliance with State v. Sisco, 169 N.W.2d 542 (Iowa 1969) and Brainard v. State, 222 N. W.2d 711 (Iowa 1974). This entire plea was the result of a plea bargain fully discussed with the defendant and with the parties in the courtroom. Neither the defendant nor his counsel at any time raised any questions about the erroneous sentencing alternative stated by the trial court. Brainard requies that the maximum penalty be set forth. This was properly done by the trial court at the time of taking the plea. I consider the alternative sentence that the trial court erroneously suggested as insignificant and harmless error. I would not reverse the case when there is no record whatsoever to support an allegation that it played any part in the defendant's decision. This can be fully explored in post-conviction proceedings where a record can be developed to support any needed appellate judicial action.