FILED
MAR 31 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

MICHAEL RAY COHRT,)

Defendant-Appellant.)

Filed March 31, 1986
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6-52
85-1419

Appeal from the Iowa District Court for Benton County (CR 2263) - Larry J. Conmey, Judge.

Defendant appeals his guilty pleas to operating while intoxicated, third offense, in violation of Iowa Code section 321.281 and possession of a controlled substance, marijuana, in violation of Iowa Code section 204.401(3). **AFFIRMED.**

Brian L. Gruhn, Cedar Rapids, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; David L. Dorff, Assistant Attorney General; and Thomas Noonan, Benton County Attorney; for plaintiff-appellee.

Considered by Oxberger, C.J., Schlegel, and Hayden, JJ.

HAYDEN, J.

Defendant negotiated a plea agreement with the Benton County attorney. The terms of the agreement were that in exchange for the guilty plea to the OWI, third offense charge, the State would recommend a five-year suspended sentence and a fine of $1,000 plus surcharge and costs. The State would also recommend, in exchange for the guilty plea to the possession of the controlled substance charge, a sentence of six months in the Benton County jail with no resistance to a work release arrangement.

Defendant claims the sentencing court erred in not affording him the opportunity to withdraw his guilty plea after it rejected the nonbinding plea agreement offered by the county attorney. We affirm.

On June 6, 1985, before District Judge Paul J. Kilburg, the following transpired during the tender of defendant's guilty plea:

> BY THE COURT: I want you to also understand, Mr. Cohrt, that despite the fact that you and Mr. Gruhn and Mr. Noonan have entered into a plea bargain, the sentencing judge is not necessarily bound by that plea bargain. Do you understand that?
>
> BY THE DEFENDANT: Yes.
>
> BY THE COURT: There are penalties under I and II which I'll explain to you and when it comes time for sentencing the judge can impose any sentence that he feels is appropriate under the law. Do you understand that?
>
> BY THE DEFENDANT: Yes.
>
> BY THE COURT: He will listen to what you have to say, and what Mr. Gruhn and Mr. Noonan have to say, and he'll examine the presentence investigation and any other evidence, and he'll make a decision. Do you understand that?
>
> BY THE DEFENDANT: Yes.
>
> BY THE COURT: Knowing that, do you still want to go ahead here today?
>
> BY THE DEFENDANT: Yes. [Emphasis added.]

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After accepting defendant's guilty plea, the trial court informed defendant as follows:

> BY THE COURT: Mr. Cohrt, now that I have accepted your plea, it's my duty to inform you if at any time before five days from the date set for sentencing, which is August 2nd, you decide to attack the plea of guilty that you have just entered, you must file what's known as a motion in arrest of judgment. In order to do that you must set forth why the plea is not correct, and unless you do that, you'll be prevented from attacking the plea at a later date. Do you understand that?
>
> BY THE DEFENDANT: Yes.

No motion in arrest of judgment was filed, and on August 2, 1985, defendant was sentenced by District Judge Larry J. Conmey to an indeterminate term not to exceed five years on the OWI, Third Offense charge, and to six months in the Benton County jail on the possession of a controlled substance charge. In addition, defendant's driver's license was revoked for a period of six years and he was ordered to pay a fine of $750. The sentencing court gave the following reasons for imposing its sentence:

> The term of incarceration is necessary in the opinion of this Court to protect the community from further offenses by this Defendant. Two, the Defendant has been on probation at least three prior times and while on probation has committed other offenses. Three, the extensive and lengthy criminal record of the Defendant, including five OWI charges indicates to this Court a total disregard on behalf of the Defendant for the laws of the State of Iowa. The record has indicated to this Court that the Defendant has been arrested forty-one times from 1973 and 1985 and has been convicted approximately 27 times. The Court is of the opinion that a structured environment is necessary in order that the Defendant might have the opportunity to rehabilitate himself and return to society. The sentence imposed will hopefully deter the Defendant and others from committing additional crimes in the State of Iowa.

Iowa Rule of Criminal Procedure 9.4, Rejection of Plea Agreement, provides as follows:

> If, at the time the plea of guilty is tendered, the court refuses to be bound by or rejects the plea agreement, the court shall inform the parties of this fact, afford the defendant the opportunity to then withdraw his or her plea, and advise the defendant that if he or she persists in his or her guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement. If the defendant persists in his or her guilty plea and it is accepted by the court, the defendant shall not have the right subsequently to withdraw the plea except upon a showing that withdrawal is necessary to correct a manifest injustice.

In State v. Parrish, 232 N.W.2d 511, 515 (Iowa 1975), the Iowa Supreme Court held that a trial court is not bound to allow withdrawal of a plea where each of the following conditions are met:

> (1) the court renounces participation in the bargain;
>
> (2) denies any inclination to be bound thereby;
>
> (3) such renunciation and denial are made known to the defendant; and
>
> (4) the defendant thereafter enters or affirms his plea of guilty.

All four conditions are established in the record before us. A defendant should not be permitted to enter a guilty plea, gamble on the sentence, and then move to withdraw the plea if he is disappointed with the severity of the sentence imposed. Id.

Here the record shows that defendant was informed by the court at the plea hearing that he was not bound by the plea agreement and could impose any sentence that he feels is appropriate under the law. We find the import of this to be that the sentence could be more or it could be less favorable than the party's agreement. Knowing this, the defendant elected to proceed with the pleas of guilty. The right to withdraw a guilty plea tendered and accepted must necessarily be grounded on manifest injustice. State v. Townsend, 238 N.W.2d 351, 356 (Iowa 1976). Such is not the case here.

Finally, the defendant failed to file a motion in arrest of judgment per Iowa Rule of Criminal Procedure 23(3)(a) and (b), which is as follows:

> a. Motion in arrest of judgment; definition and grounds. A motion in arrest of judgment is an application by the defendant that no judgment be rendered on a finding, plea, or verdict of guilty. Such motion shall be granted when upon the whole record no legal judgment can be pronounced. A defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude his or her right to assert such challenge on appeal.
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> b. Time of making motion by party. The motion must be made no later than forty-five days after plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction may be rendered, but in any case not later than five days before the date set for pronouncing judgment.

Defendant was on notice that the only way he could attack his guilty plea prior to sentencing was by filing a motion in arrest of judgment. His failure to do so further forecloses consideration of this challenge to his guilty plea. State v. Spence, 282 N.W.2d 131, 132 (Iowa 1979).

AFFIRMED.