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DEC 23 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed December 23, 1980

vs.)

DAVID J. MESSER,) 0-351
64183

Defendant-Appellant.)

Appeal from Henry District Court - Harlan W. Bainter, Judge.

Defendant appeals from judgment entered on his plea of guilty to the charge of burglary in the second degree in violation of section 713.3, The Code. AFFIRMED.

Mary Lou Borst of McAllister Law Office, Mt. Pleasant, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Jeanine Freeman, Assistant Attorney General, for plaintiff-appellee.

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

Defendant appeals from judgment entered on his plea of guilty to the charge of burglary in the second degree in violation of section 713.3, The Code. He claims that his guilty plea was entered without full knowledge of the consequences and that the court improperly considered other unprosecuted charges in imposing sentence. We affirm.

On April 12, 1979, an information was filed charging defendant with second-degree burglary. He entered a guilty plea on August 16, 1979, in exchange for the State's promise not to prosecute him on two other pending burglary charges. On September 17, trial court sentenced defendant to imprisonment for a term not exceeding ten years. The trial court addressed defendant as follows:

> I'm imposing this sentence, Mr. Messer, and I'm going to require that you be committed. It's difficult for me to make these decisions sometimes, but your prior record in this matter and giving you a suspended sentence at this time would depreciate the seriousness of the offense, and I'm taking into consideration the fact that there were two other charges that were not prosecuted in this matter as part of a plea bargaining.

This appeal followed.

I. We initially consider defendant's claim that he was denied due process and equal protection of the law by the operation of Iowa R. Crim. P. 23(3)(a) which states in part: "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." Defendant claims that the grounds upon which he attacks the validity of his guilty plea were not available to him until sentence had been pronounced and that the time limit under Iowa R. Crim. P. 22(3)(b) for making a motion in arrest of judgment had expired by that time. Because we elect to consider the challenges which defendant lodges against the validity of his guilty plea, notwithstanding the absence of a motion in arrest of judgment, no deprivation of defendant's rights will result from Iowa R. Crim. P. 23(3)(a).

II. Defendant claims that the trial court erred in considering two unprosecuted burglaries in imposing sentence. The State claims that defendant failed to preserve error on his claim that the trial court should not have considered the two unprosecuted offenses. It is true that defendant made no objections at the sentencing proceeding. This does not, however, preclude him from attacking his sentence and the factors used by the trial court in imposing that sentence. In State v. Marti, 290 N.W.2d 570 (Iowa 1980), defendant attacked his sentence on the ground that the trial court failed to state its reasons for imposing the sentence chosen. The State argued that defendant waived

error by not alerting the trial court to his objection. The supreme court disagreed, stating that "[d]efendant had no way of knowing before the court entered the judgment whether or not reasons would be stated in the record .... At that point, the litigation had terminated. As defendant had no opportunity to preserve error, we could not, in fairness, hold that he waived it." 290 N.W.2d at 589. See also State v. Wilson, 294 N.W.2d 824, 825-26 (Iowa 1980). Similarly, in this case, defendant had no way of knowing that the trial court would rely on the unprosecuted offenses in imposing sentence until the judgment was actually handed down. We conclude that defendant's allegation of error in this regard was not waived by his failure to object during the sentencing proceeding.

In considering defendant's claim, it is well established that reliance by a sentencing judge upon an impermissible factor provides a basis for vacation of sentence. State v. Remmers, 259 N.W.2d 779, 785 (Iowa 1977). We do not find, however, that this occurred in the present case. That portion of the sentencing hearing quoted above indicates that the trial court was most concerned about defendant's prior record of convictions, which included convictions for larceny (misdemeanor), criminal trespass (misdemeanor), and carrying a concealed weapon (felony, upon which defendant served prior sentence), in a period of less than five years. In light of this extensive prior record, it was decided that a suspended sentence was not indicated. We believe that this case is distinguishable from State v. Thompson, 275 N.W.2d 370 (Iowa 1979), where the sentencing court alluded to charge reduction as the primary reason for denying probation. In the present case, the record indicates that the unprosecuted offenses were, at most, a secondary consideration in sentencing defendant. To the extent these were also considered, this circumstance does not require that we disturb defendant's sentence.

III. Finally, defendant attacks the guilty plea itself and claims that it is invalid because it was entered without full knowledge of the consequences. This contention is premised upon the circumstance that the prosecutor did not inform defendant that the unprosecuted offenses would be used as a basis on which to recommend the maximum sentence. We note, however, that the plea-bargaining agreement says nothing about what factors the State may or may not use in recommending sentence. The only prohibition contained in the agreement was that the State could not prosecute defendant on the other two burglary charges.

Defendant claims that he was induced to plead guilty by the State's necessarily implied promise that it would not rely on the unprosecuted charges in recommending

sentence. We do not think the record supports a finding of any such promise, express or implied. In order to invalidate a plea bargain, it is not enough that defendant's subjective expectations regarding the sentence to be received or his understanding as to his legal position were erroneous. United States v. Flores, 616 F.2d 840, 842 (5th Cir. 1980); see also State v. Lindsey, 171 N.W.2d 859, 865 (Iowa 1969). We therefore reject defendant's contention that his guilty plea was invalid.

AFFIRMED.

All judges concur except Oxberger, C.J., and Snell, J., dissent.

OXBERGER, J. (dissenting).

I dissent. I cannot distinguish the holding in State v. Thompson, 275 N.W.2d 370 (Iowa 1979), from the instant case.

In Thompson the sentencing court did not have the facts or an admission of guilt before it to justify a finding the defendant had committed a more serious charge than that to which he ultimately pleaded guilty. Without such proof, the more serious charge could not be considered when imposing sentence. Id. at 372.

In this case, the sentencing court did not have before it facts or admissions of guilt concerning two charges which were dismissed pursuant to a plea bargain agreement. Prosecutor's references during sentencing hearing were insufficient to justify the sentencing court's consideration of these two unsubstantiated charges.

Although in Thompson and in the present case, there may be other factors to justify the sentence imposed, I view the holding in Thompson to require paying more than lip service to the constitutional right of a presumption of innocence.

I would remand for resentencing pursuant to Thompson.

Snell, J., joins in this dissent.