IN THE COURT OF APPEALS OF IOWA

No. 6-100 / 95-760

000397

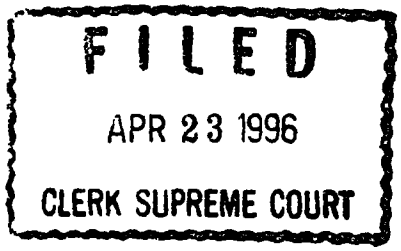
STATE OF IOWA,

Plaintiff-Appellee,

vs.

RHONDA VOSHELL,

Defendant-Appellant.



Appeal from the Iowa District Court for Tama County, Larry J. Conmey, Judge.

Rhonda Voshell appeals from her convictions and sentences, following guilty pleas, for operating while intoxicated, third offense, and driving while license revoked in violation of Iowa Code sections 321J.2(2)(c) and 321J.21 (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, and Brent D. Heeren, County Attorney, for appellee.

Considered by Sackett, P.J., and Cady and Streit, JJ.

SACKETT, P.J.

Defendant-appellant Rhonda Voshell appeals from her convictions and sentences, following guilty pleas, for operating while intoxicated, third offense, and driving while her license was revoked in violation of Iowa Code sections 321J.2(2)(c) and 321J.21 (1995). Defendant contends her attorney did not effectively represent her at the time of her guilty plea. We affirm.

Defendant pled guilty to operating a motor vehicle while intoxicated, third offense, and driving while her license was revoked. In defendant's application to withdraw her not guilty plea, the plea agreement was stated as being:

> That the county attorney will recommend sentence to the Waterloo correction facility OWI program, that the sentence herein will be concurrent with probation violation in Black Hawk case OWI CR042457 and simple misdemeanors in T5411, 5412, and 5412 (Tama). That Waterloo facility sentence is a Rule 9 agreement for plea.

The State recommended the above sentence to the court. However, defendant was sentenced to 180 days in jail for the driving while intoxicated charge and a consecutive thirty days in jail for driving while her license was revoked. After sentence was imposed, the following colloquy took place:

> THE DEFENDANT: Your Honor, I pleaded guilty on a plea 9.
> THE COURT: There is nothing in the plea that said that it was a Rule 9 agreement.
> THE DEFENDANT: Yes, it was. You told me I pled guilty on a plea 9 (indicating to [her attorney]). This is not right . . .
> THE COURT: You can have a chair in the back. You can talk to her in there.

Defendant appeals. She contends her counsel was ineffective for failing to challenge her guilty plea on the basis it was not knowingly, intelligently, and voluntarily entered due to an unfulfilled plea bargain.

Defendant raises a constitutional challenge. We review de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984).

The burden of proving trial counsel was not effective falls on the defendant. *State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987). The defendant must show by a preponderance of the evidence that his trial attorney failed to perform an essential duty and as a result he was prejudiced. *See id.* There is a strong presumption trial counsel's actions were reasonable and within the normal range of competency. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

Defendant's attorney did not file a motion in arrest of judgment. Therefore, error was not reserved on this issue as recognized by the State in its brief.

The trial court has broad discretion on whether to accept a guilty plea. *State v. Wenzel*, 306 N.W.2d 769, 771 (Iowa 1981). If the plea bargain is conditioned on the court's acceptance, the trial court has three options: (1) it may accept the plea bargain arrangement; (2) it may reject the arrangement and allow defendant to withdraw the plea; or (3) it may defer its decision until it receives the presentence report. *Id.*; Iowa R. Crim. P. 9(2); Iowa R. Crim. P. 9(4). The court may also inform defendant it will not be bound by the plea agreement and allow withdrawal of the plea. Iowa R. Crim. P. 9(4).

Iowa Rule of Criminal Procedure 9(4) states in pertinent part:

> 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.

The clear language of Iowa Rule of Criminal Procedure 9(4) mandates the court to inform defendant if it does not intend to be bound by the plea agreement. In the absence of so informing defendant, the court is bound to the plea agreement. Thereafter, if the trial court does not go along with the plea agreement, it must allow defendant to withdraw his or her guilty plea. *See Wenzel*, 306 N.W.2d at 771-72.

Defendant argues the court should have followed Iowa Rule of Criminal Procedure 9 and, had the court done so, she could have withdrawn her plea.

The State contends the rule 9 portion of the agreement was not violated and, even if it were violated, defendant has not shown prejudice. In the alternative, the State contends the issue should be reserved for postconviction relief.

The written plea of guilty was clearly conditioned upon some type of Rule 9 agreement. Consequently, a record was required to be made by the court either confirming or rejecting the agreement. Iowa R. Crim. P. 9(2); *State v. Barker*, 476 N.W.2d 624, 626 (Iowa App. 1991). This was not done. However the issue of ineffective assistance of counsel cannot be fully adjudicated without giving trial

counsel an opportunity to explain his conduct, as well as the nature of the plea agreement.

We agree plaintiff's challenge should be reserved for postconviction relief and we affirm.

AFFIRMED.

Cady, J., concurs; Streit, J., dissents.

STREIT, J. (dissenting)

I respectfully dissent.

The trial court has broad discretion on whether to accept a guilty plea. *State v. Wenzel*, 306 N.W.2d 769, 771 (Iowa 1981). If the plea bargain is conditioned on the court's acceptance, the trial court has three options: 1) it may accept the plea bargain arrangement; 2) it may reject the arrangement and allow the defendant to withdraw the plea; or 3) it may defer its decision until it received the presentence report. *Id.*; Iowa R. Crim. P. 9(2). The court may also inform the defendant it will not be bound by the plea agreement and allow withdrawal of the plea. Iowa R. Crim. P. 9(4); *State v. Barker*, 476 N.W.2d 624, 626 (Iowa App. 1991).

Iowa Rule of Criminal Procedure 9(2) provides:

> 2. Advising court of agreement. If a plea agreement has been reached by the parties the court shall require the *disclosure of the agreement* in open court at the time the plea is offered. Thereupon, if the agreement is conditioned upon concurrence of the court in the charging or sentencing concession made by the prosecuting attorney, the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until receipt of a presentence report.

(Emphasis added.)

In the instant case, the court was not adequately informed that the plea being entered was a rule 9 plea. The provision for it being subject to rule 9 was contained in a five-page guilty plea. Neither the court nor any of the parties spoke of it being a rule 9 plea. The court stated at sentencing that there was nothing in the plea that said it was subject to rule 9. The defendant herself was the first to point out to the court the

plea was subject to rule 9 after she was sentenced. Under these facts and circumstances, the court was not given an opportunity to exercise its discretion on whether to accept or reject the guilty plea or to defer this decision until the presentence investigation report was received.

Defendant's attorney failed to inform the court during the guilty plea that this was a rule 9 plea and was ineffective for this failure. Prejudice resulted. The original plea was defective, and defendant should be allowed to withdraw her guilty plea. Alternatively, I would remand for the trial court to exercise its discretion under rule 9.