FILED
DEC 30 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

421

STATE OF IOWA,

Plaintiff-Appellee,

vs.

ELMER JOHN LAPPE, JR.,

Defendant-Appellant.

Filed December 30, 1981

I-411
66310

Appeal from Linn District Court - Ansel J. Chapman, Judge.

Defendant appeals from judgment and sentence for burglary in the second degree upon his plea of guilty asserting that (1) the trial court erred in not holding an evidentiary hearing on his motion to withdraw his plea of guilty; and (2) that he received ineffective assistance of counsel with respect to his attempt to withdraw his plea of guilty. AFFIRMED.

Lowell H. Forte, Cedar Rapids, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, for plaintiff-appellee.

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

PER CURIAM

Defendant appeals from judgment and sentence for burglary in the second degree upon his plea of guilty. On appeal he asserts that (1) the trial court erred in not holding an evidentiary hearing on his motion to withdraw his plea of guilty; and (2) that he received ineffective assistance of counsel with respect to his attempt to withdraw his plea of guilty. We reject both contentions and affirm the judgment and sentence.

The sequence of material events prior to entry of judgment includes the following. A trial information was filed on October 9, 1980, charging defendant with the present offense. The defendant was arraigned on October 10, 1980, and entered a plea of not guilty to the charge. Later, the defendant was arrested on another charge of burglary in the second degree. At this time he was also charged with being an habitual offender. A round of plea bargaining ensued, and an agreement was reached wherein the State would dismiss the second charge of burglary in the second degree and the habitual offender allegation if the defendant pled guilty to the initial charge of burglary in the second degree. The court was advised that a guilty plea would be entered as a result of this plea negotiation.

When defendant appeared in court for this purpose, however, he advised the court that he would "like to proceed to trial." This occurred on Thursday, December 11, 1981, when the case was scheduled for trial the following Monday, December 15th. The court then advised defendant that the trial would proceed at the scheduled time. The following day, Friday, December 12th, the defendant again appeared before the court and this time withdrew his plea of not guilty to the present charge and tendered a plea of guilty pursuant to the plea bargain previously described. Before the plea of guilty was accepted by the trial court, the following colloquy transpired:

> THE COURT: The plea bargain then is that the State is in effect recommending that there be incarceration here and commitment to the custody of the Director of Adult Corrections and that in return the State will dismiss another charge of burglary in which the defendant was also charged with being an habitual offender and that no action will be taken in this particular case 6095 as far as charging the defendant with being an habitual offender.
>
> MR. EELLS: That's right.
>
> THE COURT: Is that your understanding, Mr. Robinson?
>
> MR. ROBINSON: Yes, it is, your Honor.
>
> THE COURT: Now, is this your understanding?
>
> MR. LAPPE: Yes, it is. That's stated well.

THE COURT: Pardon?

MR. LAPPE: Yes.

THE COURT: Now, I want the record to show that you were here in this Courtroom yesterday and that the Court had been informed by the County Attorney's office by and through your counsel that you wished to enter a plea of guilty to this charge and when you were brought before the Court you said that you did not want to enter a plea of guilty, do you recall that?

MR. LAPPE: Yes. Well, I had time. My reasoning for that was I wanted a separate for the first charge and go to trial on the second one. Well, that wasn't available I wanted, you know, to look into that.

THE COURT: You have had an opportunity to reconsider?

MR. LAPPE: Yes, yes.

THE COURT: You have gone over it very carefully?

MR. LAPPE: Oh, yes.

THE COURT: All right.

MR. LAPPE: That's why I am back to my original decision.

* * *

THE COURT: Do you have any difficulty hearing or understanding or communicating with me at this time?

MR. LAPPE: None whatsoever, your Honor.

THE COURT: You fully appreciate what's going on and you are tendering to the Court a plea of guilty?

MR. LAPPE: Yes.

THE COURT: Before I can accept a plea I must be assured that it's freely and voluntarily entered by you on your part, do you understand that?

MR. LAPPE: Yes.

THE COURT: Now, you heard the plea bargain that has been agreed upon between the County Attorney Office, you and your client, Mr. Eells stated it and which I received?

MR. LAPPE: Yes.

THE COURT: And that is satisfactory and agreeable with you?

MR. LAPPE: It is, your Honor. . . .

* * *

THE COURT: Now, the reason I want to make sure you carefully understand this is because of the proceeding that we had yesterday when you first indicated you wanted to tender a plea of guilty and then withdrew that tender and did not want to proceed in that manner and the plea

bargain that had been negotiated as I understand it was the same as the one that had been stated this morning, you realize that?

MR. LAPPE: Yes.

THE COURT: You say that you had [a] further opportunity to consider this and have made up your mind now that you want to accept this, is that correct?

MR. LAPPE: Yes, your Honor.

THE COURT: I do not want you to come back in here at some subsequent date and tell this Court that you didn't understand what was going on.

MR. LAPPE: Okay.

THE COURT: Or that I didn't explain fully your rights to you or that you didn't know that this was the same thing that happened yesterday or that you had been unduly and improperly influenced by this Court, your attorney or Mr. Eells, do you understand that?

MR. LAPPE: Yes.

THE COURT: Because if you want to continue your plea of not guilty you can certainly do that and this case will be tried Monday morning.

MR. LAPPE: No, I am -- It's satisfactory with the plea bargain.

THE COURT: You want to go ahead with the plea bargain?

MR. LAPPE: Yes, as long as I have a guarantee that both ends or the County Attorney's end will be upheld.

In addition to the foregoing colloquy, the trial court established by inquiry of the defendant that he understood the rights which he was waiving by pleading guilty, that he understood the nature and elements of the charge, and that he admitted those acts which constitute the material elements of the offense charged.

On January 23, 1981, the defendant appeared before a different judge for sentencing. At this time defendant asked to withdraw his guilty plea, indicating that he wanted to proceed to trial. The case was transferred to the judge who had accepted defendant's plea of guilty. The matter was presented to this judge later on January 23 and after a discussion with defendant regarding his reasons for requesting the withdrawal of plea, the court refused to allow the plea to be withdrawn. The defendant was then sentenced to a prison term not to exceed ten years.

I. Defendant's first contention on appeal is that the trial court was required to hold an evidentiary hearing on his request to withdraw his plea of guilty. The record reflects that in response to his request to withdraw his plea, both of the judges to whom

it was directed inquired as to the reasons for the proposed change of position. The reasons given by the defendant were that he had been threatened with the habitual offender allegation in the event that he did not plead guilty. He stated to the court, in part, that this circumstance gave rise to a claim of coercion, a conclusion he arrived at following consultation with "people that were experienced in the area, you know, individuals such as myself in the jail." He stated that he was not "authentically" an habitual offender. Defendant's counsel advised the court that the plea bargain was negotiated based upon a potential situation in which defendant might be adjudged to be an habitual offender and punished accordingly.

It is well established that a valid guilty plea, once entered, may be withdrawn only with the permission of the trial court. The trial court has considerable discretion in deciding whether to permit or reject such a request. State v. Reed, 252 N.W.2d 455, 456-57 (Iowa 1977). We believe that in the present case defendant had an adequate opportunity to explain his position and reasons to the trial court so as to afford it sufficient information to permit a sound exercise of its judicial discretion. A further evidentiary hearing was not mandated under the circumstances.

II. Defendant also asserts that he was denied effective assistance of counsel in the trial court because his court-appointed lawyer who had negotiated his guilty plea did not openly endorse his request to withdraw that plea. Notably, no claim is made by defendant as to ineffectiveness of counsel in advising him to enter the plea of guilty in the first place or in the negotiation of the plea bargain upon which said plea was based. Defendant's claim appears to be that new counsel should have been appointed under the circumstances because the change of position placed his existing counsel in a poor posture to object. We find no merit in this claim. We have considered all issues presented and find no grounds for reversal.

AFFIRMED.