

IN THE COURT OF APPEALS OF IOWA

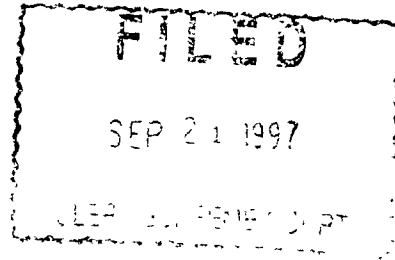
No. 7-248 / 96-1655
Filed September 24, 1997

000381

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICKY RAYMOND CLARK,
Defendant-Appellant.



Appeal from the Iowa District Court for Des Moines County, Gary J. Snyder,
District Associate Judge.

Defendant appeals from the judgment and sentence entered following a guilty plea to assault with intent to commit sexual abuse, carrying weapons, and indecent contact with a child in violation of Iowa Code sections 709.11, 724.4(3)(b), and 709.12 (1995). **JUDGMENT AND SENTENCE VACATED; REMANDED WITH DIRECTIONS.**

Jean Doyle Winnike of Anderson, Roberts & Porth, P.L.C., Burlington, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Jennifer Verhein, Michael Clark, and Ronald E. Robertson, Assistant County Attorneys, for appellee.

Considered by Sackett, P.J., and Huitink and Vogel, JJ.

HUITINK, J.

Defendant Ricky Raymond Clark appeals from the judgement and sentence entered following his guilty plea to assault with intent to commit sexual abuse, carrying weapons, and indecent contact with a child in violation of Iowa Code sections 709.11, 724.4(3)(b), and 709.12 (1995).

I. Background Facts and Proceedings.

Clark was arrested after he allegedly offered an alcoholic beverage to three children, touched one of them, threatened them, and made sexually oriented remarks to them. During a search of his person after arrest, police found Clark was carrying a knife with a blade larger than five inches. Clark was charged with assault with intent to commit sexual abuse, indecent contact with a child, and carrying a weapon.

Clark agreed to plead guilty to these offenses in exchange for the State's recommended sentencing concessions. The county attorney agreed to recommend any sentence of confinement be suspended and terms of probation including alcohol and drug treatment.

Clark plead guilty as agreed. The terms of the plea agreement were recited for the record at the plea hearing. The court accepted Clark's plea after engaging in a brief colloquy with Clark regarding the nature of the charges, the constitutional implications of his plea, its factual basis, and the maximum penalty the court could impose as a result of Clark's guilty pleas. After accepting Clark's guilty plea, there was this exchange between the court and Clark's attorney:

THE COURT: All right. What do you want to do about sentence date, for sentence to be scheduled?

MS. WINNIKE: Your honor, our agreement was that we would request a suspended sentence.

THE COURT: With Mr. Clark I think a presentence investigation would be well called for.

Your record card that I have before me, which obviously is not terribly complete, shows that he has a sexual abuse allegation charge against him, accessory to robbery conviction, indecent exposure, many intoxications and other miscellaneous charges, too numerous to mention. I'm going to order a presentence investigation and reschedule sentence after the completion of that information. We'll do the sentence August 28, August 28 at nine in the morning.

DEFENDANT: That's lame.

THE COURT: I'm sorry?

DEFENDANT: I said that's lame.

THE COURT: That may well be, but that's when it is. August 28, nine o'clock in the morning.

There is no further plea record and our review of the appendix and the case file does not disclose any written documentation of the plea or plea agreement. Additionally, there is no indication Clark moved to withdraw his plea.

The presentence report confirmed Clark's substantial criminal history, including numerous convictions for public intoxication, interference with official acts, indecent contact with a child, assault with intent to commit serious injury, and accessory after the fact to a robbery. The report recommended consecutive terms of incarceration on each count based on the seriousness of the present offenses, Clark's criminal history, and substance abuse.

At Clark's sentencing hearing on August 28, 1996, the State appeared by an assistant county attorney who did not participate in the earlier described plea

discussions. His recommendation was for a sentence conforming to that provided in the presentence report. He did, however, acknowledge the State's agreement to recommend a suspended sentence when Clark's attorney reminded the court of the terms of the plea agreement.

The court rejected Clark's arguments for suspended sentences and probation. Clark was sentenced to a two-year term and \$1000 fine for assault with intent to commit sexual abuse, a one-year term and \$1000 fine for carrying weapons, and a two-year term and \$1000 fine for indecent contact with a child. The court ordered all of the sentenced to be served consecutively.

On appeal Clark requests that we vacate the district court's judgment and sentence on all counts. He cites the court's failure to declare its intentions regarding the plea agreement and failure to inform him of his right to withdraw his guilty plea if the court rejected or refused to be bound by the plea agreement. Clark also contends that as a result of these failures his plea was not knowingly and voluntarily made. Lastly, Clark contends the district court abused its sentencing discretion by failing to consider sentencing criteria other than his criminal record and imposing a sentence of incarceration.

The State claims Clark failed to preserve any plea taking errors for our review. The State also contends the district court was not obligated to declare its intentions regarding the plea agreement and inform Clark of his right to withdraw his plea

because the agreement was not conditioned on the court's acceptance. Clark's challenge to the court's sentencing discretion is also disputed by the State.

II. Standard of Review.

Our scope of review on the plea agreement issues is limited to errors at law. Iowa R. App. P. 4. To the extent Clark's challenge to his guilty plea implicates his constitutional rights, our review is de novo. *State v. Swaim*, 412 N.W.2d 568, 570 (Iowa 1987). We review the district court's sentencing decision for an abuse of discretion. *State v. Lummus*, 449 N.W.2d 95, 96 (Iowa App. 1989).

III. Error Preservation.

As noted earlier, the State contends Clark failed to preserve error on the issues he raises concerning his guilty pleas and the plea agreement. We disagree.

A defendant may not challenge the integrity of a plea proceeding on appeal unless the challenge is first presented to the trial court by motion in arrest of judgment. Iowa R. Crim. P. 23(3)(a). The district court has a duty to inform the defendant that any challenges arising from alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to file the motion precludes the right to assert them on appeal. Iowa R. Crim. P. 8(2)(d).

Our review of the record reveals the trial court failed to discharge this duty. The record of Clark's plea does not include any reference to his obligation to challenge plea errors by filing a motion in arrest of judgment. Accordingly, Clark may challenge his plea on appeal despite his failure to file a motion in arrest of

judgment. *See State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1994); *State v. Malone*, 511 N.W.2d 423, 424 (Iowa App. 1993).

IV. Guilty Plea and Plea Agreement.

Iowa Rules of Criminal Procedure 9(3) states:

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.

Iowa Rule of Criminal Procedure 9(4) states:

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 showing that withdrawal is necessary to correct a manifest injustice.

Our review of the record does not disclose any express term of the plea agreement making it conditional on the court's acceptance of the plea agreement. The court nevertheless proceeded as if Rule 9 applied by indicating the decision regarding the plea agreement would be deferred pending receipt of a presentence investigation report. Under these circumstances, we hold that the provisions of Iowa Rule of Criminal Procedure 9(4) were implicated and the court was obligated to afford Clark the opportunity to withdraw his plea. *See State v. Barker*, 476 N.W.2d 624, 626

(Iowa App. 1991). Because Clark was not afforded the opportunity to withdraw his plea after the court rejected the plea agreement, we are compelled to set aside the judgment and sentence entered in this case.

Even if we were to find the provisions of Iowa Rule of Criminal Procedure 9(4) were not implicated in this case, Clark's conviction must be set aside because Clark's plea was not knowingly and voluntarily made. A guilty plea is not knowingly and voluntarily made unless the defendant is informed that the court is not bound by the terms of a plea agreement.¹ *State v. Runge*, 228 N.W.2d 35, 37 (Iowa 1975); *State v. Fisher*, 223 N.W.2d 243, 246 (Iowa 1974). As we have already determined, Clark was not informed prior to acceptance of his plea and imposition of sentence that the court was not bound by the terms of the plea agreement or the court retained the right to impose any sentence permitted by law for these offenses.

For these reasons, we vacate Clark's conviction and sentence and remand to the district court with instructions to afford Clark an opportunity to withdraw his guilty plea.

JUDGMENT AND SENTENCE VACATED; REMANDED WITH DIRECTIONS.

¹ We do not imply the holdings in *Fisher* and *Runge* render all guilty pleas under these circumstances per se invalid. See *State v. Parrish*, 232 N.W.2d 511, 515, (Iowa 1975). However, the absence of any declaration of the court regarding the plea agreement renders Clark's guilty plea suspect.