IN THE COURT OF APPEALS OF IOWA

No. 9-308 / 97-2280
Filed July 23, 1999

STATE OF IOWA,

Appellee,

vs.

WILEY GARY FRANKLIN,

Appellant.

FILED
JUL 23 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, James D. Coil, Judge.

Wiley Franklin appeals from his convictions for operating while intoxicated and driving while license suspended. **AFFIRMED.**

Timothy J. Kramer, Rock Valley, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel A. Dalrymple, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Streit and Vogel, JJ.

600289

VOGEL, J.

Wiley Franklin was arrested three times in approximately five months on various charges including operating while intoxicated and driving while license suspended. He claims his conviction in the second case must be overturned because his written plea agreement cannot be found, and without it there is no evidence that he waived the requirements of I. R. Crim. P. 8(2)(b). We affirm on this issue as we find there is evidence in the record to demonstrate that he waived the requirements of I. R. Crim. P. 8(2)(b). Franklin also contends it was error for the prosecutor to revoke his first plea agreement after his plea was accepted by the court. Because we find that Franklin has waived his right to challenge this revocation, we affirm.

Background facts. No. 70110. On August 29, 1997, Franklin filed a written guilty plea and waiver of rights to a charge of operating while intoxicated. The prosecutor agreed to recommend the dismissal of a second charge, driving while license suspended. The district court accepted the plea on September 19, 1997, and ultimately set sentencing for December 2, 1997. Before Franklin was sentenced he was arrested twice more on driving violations.

No. 73225. Charges in this case included operating while intoxicated (Count I), driving while license is revoked (Count II), and driving while license is under suspension (Count III). On November 17, Franklin filed a written guilty plea to Counts I and III, in exchange for the dismissal of Court II. The pleas were accepted by the court with sentencing set for December 2, 1997.

000290

No. 73853. Charges in this case were operating while intoxicated (Count I) and driving while license suspended (Count II). On November 17, 1997, Franklin entered pleas of guilty to both charges, which were accepted by the court. As with the other charges, sentencing was set for December 2, 1997.

Following the recommendation of a plea agreement pertaining to all three cases, the district court sentenced Franklin to a one-year term of incarceration for each of the five convictions, all to be served consecutively. Franklin now appeals.

Scope of review. As both issues raised by Franklin involve constitutional safeguards, we make an independent evaluation of the circumstances as shown by the entire record and review de novo. *See State v. Sayre*, 566 N.W.2d 193, 195 (Iowa 1997); *State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1994).

I. Conviction in case No. 73853. Based upon references made on the record by the prosecutor, defense counsel, and the court, it is clear that Franklin entered a written guilty plea in case No. 73853. However, sometime after the court accepted the plea, the written plea document disappeared and has never been found.[1] Franklin now contends that his conviction in case No. 73853 cannot stand because the court did not advise him of the procedures under I. R. Crim. P. 8(2)(b), and there is no evidence that he waived that right in a written plea.

---

[1] After filing his appeal, Franklin filed an application for certification pursuant to I. R. App. P. 10(b) regarding the missing written guilty plea. The court responded that both written pleas in case Nos. 73225 and 73853 were before it at the November 17, 1997 hearing, and were placed in the appropriate files along with its order accepting the pleas. The court verified that the clerk's office had no electronic docketing or other record of the plea in case No. 73853 and had no explanation for its disappearance.

Rule 8(2)(b) provides:

> The court may refuse to accept a plea of guilty, and shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis. Before accepting a plea of guilty, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) The nature of the charge to which the plea is offered.
>
> (2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.
>
> (3) That the defendant has the right to be tried by a jury, and at trial has the right to assistance of counsel, the right to confront and cross-examine witnesses against the defendant, the right not to be compelled to incriminate oneself, and the right to present witnesses in the defendant's own behalf and to have compulsory process in securing their attendance.
>
> (4) That if the defendant pleads guilty there will not be a further trial of any kind, so that by pleading guilty the defendant waives the right to a trial.
>
> *The court may, in its discretion and with the approval of the defendant, waive the above procedures in a plea of guilty to a serious or aggravated misdemeanor.*

(Emphasis added).

Although we do not have the written plea before us for case No. 73853, the record supports that such a plea existed. There is also evidence that the written plea contained a waiver of Franklin's right to be informed of the rule 8(2)(b) procedures. The written pleas in the other two cases were executed on identical forms and contain language providing for the defendant's waiver of rule 8(2)(b) procedures. We note

that Franklin does not contend he did not waive his rule 8(2)(b) rights; he merely contends no documentation could be produced to demonstrate that he did so. Given that Franklin waived his right to be informed of the rule 8(2)(b) procedures in the other two cases on identical forms, we find sufficient evidence to support that he also waived this right in case No. 78353. For this reason, his conviction should be affirmed.

II. Conviction in case No. 70110. Before Franklin was charged in case Nos. 73225 and 73853, he entered into a plea agreement with the State in case No. 70110. Upon Franklin's plea of guilty on August 29, 1997, the State agreed to recommend dismissal of the driving while suspended charge, and a 180-day sentence with all but four days suspended. However, on November 14, 1997, the prosecutor informed Franklin's counsel that the plea agreement in No. 70110 would be withdrawn due to Franklin's recent arrests. After discussing Franklin's new arrests and criminal history with his counsel, the prosecutor faxed Franklin's counsel a document withdrawing the original recommendation and essentially proposing to recommend a five-year sentence. Negotiations ensued and Franklin ultimately agreed to the new plea agreement.

Franklin now asserts that he should be allowed to withdraw his guilty plea in case No. 70110 because the State's revocation of the initial plea agreement was in clear violation of Iowa law. We agree that the prosecutor was completely without authority to revoke the plea agreement after the plea had been accepted by the court.

See State v. Edwards, 279 N.W.2d 9, 11 (Iowa 1979) ("The State may withdraw from a plea bargain at any time prior to, but not after, actual entry of the guilty plea by defendant or other action by defendant constituting detrimental reliance upon the arrangement.") (citations omitted). However, we find that Franklin has waived any argument on this issue based not only on his consent to the new plea agreement disposing of all charges, but also on his failure to file a motion in arrest of judgment.

Iowa R. Crim. P. 23(3)(a) provides, in relevant part:

> 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.*

(Emphasis added). A motion in arrest of judgment "must be made not 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." I. R. Crim. P. 23(3)(b).

When Franklin received notice that the State intended to revoke the initial plea agreement, his remedy was to move for an arrest of judgment. Franklin acknowledged his right to do so in the initial plea agreement. However, Franklin consented to a new, and favorable, plea agreement. For both of these reasons, we conclude that Franklin waived his right to challenge the prosecutor's actions on appeal.

Having considered all issues properly before us on appeal, we hereby affirm Wiley Franklin's convictions and sentences.

AFFIRMED.