

FILED

MAR 23 1982

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

BLAKE WESLEY ALLEN,

)

Petitioner-Appellee,

)

vs.

)

STATE OF IOWA,

)

Respondent-Appellant.

)

Filed March 23, 1982

2-61
2-66692

Appeal from Polk District Court, C. Edwin Moore, Senior Judge.

The State appeals from the trial court's award of postconviction relief.

AFFIRMED.

Thomas J. Miller, Attorney General, and Shirley Steffe, Assistant Attorney General, for petitioner-appellant.

Nicholas S. Krpan of Krpan Law Office, Des Moines, for petitioner-appellee.

Considered by Oxberger, C.J., and Snell, Carter, and Johnson, JJ. Donielson, J., takes no part.

PER CURIAM

The State appeals from the trial court's award of postconviction relief. We affirm.

Defendant Allen was charged with murder in the second degree. After negotiations, he entered a plea of guilty to the lesser included offense of voluntary manslaughter. His plea was accepted, and then he was convicted and sentenced to an indeterminate sentence of up to ten years.

Within ninety days of sentencing, defendant applied for reconsideration of his sentence pursuant to section 902.4, The Code. The trial court refused to reconsider his sentence on the ground he was ineligible for probation or suspension of sentence because he had been convicted of a forcible felony. The court's refusal was in line with a case decided one month before the plea proceeding, but of which neither the court nor the attorneys was aware. The case was State v. Hellwege, 294 N.W.2d 689 (Iowa 1980).

Allen subsequently filed the present petition for postconviction relief. The postconviction court granted him relief, concluding that the trial court had given defendant "the flickering hope" of a disposition on sentencing that was not possible. The State has appealed.

Review is on error assigned. Iowa R. App. P. 4.

I. Guilty Plea Validity.

Defendant challenged the constitutional validity of his guilty plea conviction for voluntary manslaughter, and the postconviction court granted relief by setting aside the plea and ordering a new trial on the original charge of murder in the second degree. The court's rationale was that defendant's plea had not been voluntarily and knowingly entered because the plea bargain, in which the trial court participated, had instilled in defendant's mind "more than a 'flickering hope' of shock probation."

The defendant must fully understand the penal consequences of his crime before his plea can be accepted. Brainard v. State, 222 N.W.2d 542, 550 (Iowa 1969). In the instant case, the plea negotiations were conducted and the plea decision was made on the faulty assumption that defendant could be considered for shock probation. The court and the two attorneys were not aware of the case decided one month before their plea negotiations which made reconsideration under 902.4 of a voluntary manslaughter conviction impossible.

On the court's assurance during the plea negotiations that a petition for reconsideration would be given strong or due consideration, defendant entered his plea. The hope that his sentence could and would be reconsidered was placed in defendant's mind by the court's statements and by his acquiescence and participation in the plea negotiations. The defendant was led to believe the court was going to do something for him which in fact it legally could not do. Under these circumstances, defendant did not fully know the penal consequences of his plea, and his plea was therefore not knowingly and intelligently made.

We, therefore, affirm the postconviction court and order that the plea be set aside and appropriate proceedings be conducted against the defendant.

AFFIRMED.

All judges concur, except Carter, J., who dissents.

CARTER, J. (dissenting)

I dissent. The postconviction court set aside defendant's guilty plea in reliance on State v. Boone, 298 N.W.2d 335, 338 (Iowa 1980). I do not believe that the holding in Boone renders the present plea invalid.

Unlike the court in Boone, the court in the present case did not affirmatively inform the defendant that the sentencing possibilities included a disposition which was not available under the statutes. The most that the record reflects in this regard is that the trial court, out of the defendant's presence, and prior to the entry of a plea of guilty, told defendant's lawyer that if the latter filed a motion for reconsideration of sentence it would receive due consideration. No assurances were given as to the probable success of such a motion based on either the law or the facts. The trial court was not required to advise the defendant as to the law on this matter and did not misinform him.

Another feature in the present case militates against setting aside defendant's plea of guilty based upon a claimed misunderstanding of potential sentencing options. Defendant's claim that he is entitled to postconviction relief is based upon the allegation that he was not properly informed or was misinformed as to the character of the present conviction as a forcible felony under State v. Hellwege, 294 N.W.2d 689 (Iowa 1980). The record reveals, however, that defendant had previously been convicted of a forcible felony and was ineligible for sentence reconsideration as a result of that felony conviction regardless of the character of the present charge. No claim was lodged in the postconviction proceedings that defendant was misinformed as to the consequences of the prior conviction. I would reinstate the judgment and sentence.