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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed January 31, 1978
vs.)
RUSSELL WAYNE REAGAN,) 385/60650
Appellant.)

Appeal from Greene District Court - M. D. Seiser, Judge.

Defendant appeals guilty plea conviction claiming the failure of the prosecutor to recommend the bargained for sentencing rendered his plea involuntary. - Reversed and remanded to allow defendant to withdraw guilty plea and plead anew.

Richard N. Winders, of Cudahy, Wilcox, Handley, Magee & Polking, Jefferson, for Appellant.

Richard C. Turner, Attorney General of Iowa, and Nicola Martino, Greene County Attorney, for Appellee.

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

PER CURIAM

Defendant Russell Wayne Reagan appeals his guilty plea conviction and penitentiary sentence for violation of § 321.281, The Code 1975. He claims his plea was involuntary and the sentence should be set aside. We reverse and remand.

At Reagan's guilty plea hearing, his attorney reported the plea bargaining was essentially that the prosecutor would recommend a suspended sentence and treatment for alcoholism at a medical facility. The court then inquired of Reagan regarding the offense charged. Reagan indicated he had had three drinks but did not know whether he was intoxicated or whether, if his case was submitted to a jury, he would be found guilty. After an extended exchange with the judge, Reagan did finally enter a plea of guilty. The judge inquired immediately of the prosecutor if any other promises than those related by defense counsel had been made. The prosecutor concurred with defense counsel's report of plea negotiations. Then the judge inquired of Reagan his understanding of the plea negotiations: "He is going to keep me out of the penitentiary, that's what I'm concerned with." The judge informed Reagan he was not required by law to follow this recommendation; that a determination as to sentencing must await a presentence investigation. Reagan acknowledged his understanding of this and replied in the affirmative that he still desired to plead guilty.

At the sentencing hearing the prosecutor stated to the judge:

> . . . That the presentence investigation does tend to put the situation entirely in new light. I don't remember what promises, if any, I have made to the defense counsel in our prior meetings. But at this time I would just say that I have--I find no objections to the presentence investigation.

The presentence investigation report recommended incarceration. The court then inquired of defense counsel whether there was any presentence bargaining: "That we would recommend--he would not be sentenced to the penitentiary. . . ." The court then asked Reagan if he had anything further to say before pronouncement of sentencing. Reagan replied in the negative. He was sentenced to the penitentiary for one year.

At the outset we must disagree with the State's view that the prosecutor did live up to his bargain and that his colloquy with the judge at the sentencing hearing

was merely an answer to a question concerning corrections or additions to the presentence investigation report. The prosecutor's words indicate that 1) the presentence report cast an entirely new light in his mind upon the appropriate sentencing for Reagan, 2) he could not recall his prior promises made to defense counsel, but 3) whatever they were, he had no objection to the imprisonment recommendation of the presentence investigation report.

State v. Townsend, 238 N.W.2d 351, 356 (Iowa 1976) stated the right to withdraw a guilty plea tendered and accepted must be grounded upon "the concept it was involuntarily tendered, having been based on unfulfilled promises or inducements." **Townsend** characterized State v. Runge, 228 N.W.2d (Iowa 1975) and Santobello v. New York, 404 U.S. 257 (1971) as cases in which sentence recommendations promised by the State were never made on the record. In **Runge**, prior to the tender in informal consultation, the judge advised by the county attorney of the plea negotiations regarding sentencing concessions indicated his policy was not to honor such concessions. The court found the record devoid of any showing the defendant was informed of this expressed view before his guilty plea was tendered or accepted:

> Briefly stated, defendant's guilty plea was not shown of record to have been free from inducement flowing from the county attorney's pre-plea concessions. Thus the controverted plea was not knowingly and voluntarily entered (citations omitted) . . . . Moreover, the above noted county attorney's promised recommendation, on which defendant relied, was never made. In other words the bargain was not kept. See Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L.Ed.2d 427 (1971).

Runge, 228 N.W.2d at 37. The judge, fully apprised of the plea bargaining, and aware of the failure of the prosecutor to fulfill his bargain, proceeded to sentencing without affirmatively offering Reagan an opportunity to withdraw his guilty plea or an opportunity to stand upon his plea in the altered circumstance. We believe **Townsend** indicates **Runge** and **Santobello** require such opportunity be accorded to a defendant faced as Reagan was with having entered a guilty plea significantly influenced by a prosecutor's sentencing bargain which was ultimately unfulfilled. **Townsend**, 238 N.W.2d at 356.

The case is reversed and remanded with instructions that the sentence be set aside, and that Reagan be allowed to withdraw his guilty plea and plead anew.