FILED
DEC 29 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	Filed December 29, 1982
Plaintiff-Appellee,	)	363
vs.	)	2-346 67758
STEVEN LEON TOBIN,	)	
Defendant-Appellant.	)	

Appeal from Linn District Court, August F. Honsell, Judge.

The defendant, Steven Leon Tobin, entered a plea of guitly to a charge of theft in the second degree, a violation of Iowa Code section 714.2(2). He appeals from the resulting conviction and sentence. REVERSED AND REMANDED.

Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and John P. Messina, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

OXBERGER, C.J.

The defendant, Steven Leon Tobin, entered a plea of guilty to a charge of theft in the second degree, a violation of Iowa Code section 714.2(2). He appeals from the resulting conviction and sentence. He contends his trial attorney rendered ineffective assistance by failing to raise and preserve a constitutional challenge to section 714.4(2), even though the attorney had told both the defendant and the court that the defendant's guilty plea would be conditioned on reserving the right to present that constitutional challenge on appeal. We reverse and remand.

Tobin's attorney, the prosecutor, and the court were all made aware of the fact that Tobin's guilty plea was conditioned upon the reservation by him of the right to challenge the constitutional validity of the court's use of his prior convictions as a basis for imposing a greater sentence upon him. It was understood by all concerned that Tobin's counsel would make the constitutional challenge to Iowa Code section 714.2(2)(1981) and move to arrest judgment following his plea.

Tobin's attorney failed to file a motion in arrest of judgment, judgment was entered, and Tobin was sentenced to a term of imprisonment not to exceed five years. He appeals from this judgment and sentence.

Tobin claims that his counsel was ineffective in that he failed properly to preserve his challenge to section 714.2(2) , thus denying him the opportunity to pursue a meaningful appeal. The State agrees that Tobin's counsel was indeed ineffective. There is thus no question, so far as we are concerned, as to whether Tobin's counsel was ineffective. The only question to which we must address ourselves is whether the ineffective assistance which Tobin received from his counsel requires us to reverse his conviction and remand for further proceedings. We conclude that it does.

In State v. Weig, 285 N.W.2d 19 (Iowa 1979), the supreme court held that where the prosecution broke its promise to the defendant to recommend probation at a sentencing hearing in exchange for the defendant's guilty plea, the trial court should have granted the defendant's motion to withdraw his guilty plea. Similarly, in State v. Townsend, 238 N.W.2d 351, 356 (Iowa 1976), the supreme court held that where there is manifest injustice, as when the guilty plea is based on "unfulfilled promises or inducements," the guilty plea would be considered to have been tendered involuntarily.

In these cases and in many others, the promises and inducements were made by the prosecutors. The issue, however, does not hang upon who made the promise, but upon the extent to which the defendant relied upon such promises in entering his guilty plea. If a guilty plea is voluntarily and intelligently entered, it may not be vacated merely because the defendant was not advised of every conceivable constitutional plea that might have been entered in abatement. But in Tollett v. Henderson, 411 U.S. 258, 266-67, 93 S. Ct. 1602, 36 L. Ed. 2d 235, 243 (1973), the United States Supreme Court said:

> If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not "within the range of competence demanded of attorneys in criminal cases." [citation]. Counsel's failure to evaluate properly facts giving rise to a constitutional claim or his failure properly to inform himself of facts that would have shown the existence of a constitutional claim, might in particular fact situations meet this standard of proof.

The Court went on to say that a criminal defendant might attack the voluntariness of his guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763, 773 (1970). That test was "whether that advice was within the range of competence demanded of attorneys in criminal cases."

In Strader v. Garrison, 611 F. 2d 61 (4th cir. 1979), the court set forth the appropriate remedy where a criminal defendant was denied effective assistance of counsel:

> When the misadvice of the lawyer is so gross as to amount to a denial of the constitutional right to effective assistance of counsel, leading the defendant to enter an improvident plea, striking the sentence and permitting a withdrawal of the plea seems a necessary consequence of the deprivation of the right to counsel. Deprivation of the constitutional right cannot be left unredressed. When it has occasioned the entry of a guilty plea, the inevitable redress is an order striking the plea or release of the prisoner.
>
> . . . When the erroneous advice induces the plea, permitting him to start over again is the imperative remedy for the constitutional deprivation.

Id. at 65.

The court explained that under Supreme Court decisions, where the guilty plea would never have been tendered if the defendant had been properly advised by his lawyer, the assistance of counsel must be deemed as having been so ineffective as to amount to a denial of the constitutional right to counsel, and the judgment of conviction must be vacated. Id. at 64, citing United States ex rel. Hill v. Ternullo, 510 F. 2d 844 (2d Cir. 1975).

We are faced in the instant case with a situation in which all parties agree that the defendant was denied effective assistance of counsel. Tobin's guilty plea was conditioned upon his attorney's moving for arrest of judgment and appealing his conviction on the ground the conviction violated certain constitutional rights. His attorney's failure to perform as promised and expected amounted to a violation of the conditions upon which Tobin entered his guilty plea. It is reasonable to assume that Tobin never would have entered his guilty plea if he had not been assured that his attorney would perform as promised. This failure amounts to the degree of failure which the courts in Weig, Townsend, Tollett, McMann, and Strader, supra held was an unconstitutional deprivation of the defendant's right to effective counsel and requires a vacation of the trial court's judgment.

We conclude that Tobin was deprived of effective assistance of counsel, that this deprivation was of such a degree that it rises to a denial of his constitutional right to effective assistance of counsel, and that his conviction must be reversed. We therefore reverse and remand with instructions that Tobin be permitted to withdraw his guilty plea.

REVERSED AND REMANDED.