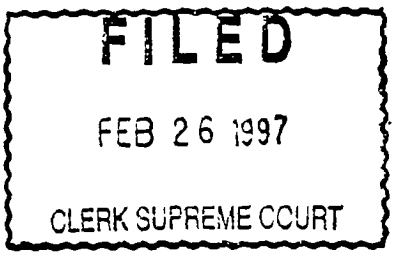
IN THE COURT OF APPEALS OF IOWA

No. 7-012 / 95-2055

000252



MICHAEL RAY LOVE,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Henry County, John C. Miller, Judge.

Applicant appeals from the district court's denial of his postconviction relief application. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Michael A. Riepe, County Attorney, and Michael C. Vance, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., and Cady and Streit, JJ.

SACKETT, P.J.

Petitioner-appellant Michael Ray Love appeals from the trial court's denial of his application for postconviction relief. He contends the trial court erred in finding he failed to show his trial counsel was not effective in allowing him to plead guilty to first-degree murder. We affirm.

Michael, then twenty-one, and his brother Bradley Love, then seventeen, were at a party the evening of December 25, 1993, and Michael drank beer. Michael and Bradley shouted at and had a physical confrontation with other guests at the party, including Donnal McKenzie at whose home the party was held. Michael and Bradley were subsequently asked to leave. They did, but they returned in the early morning hours. Michael was armed with a shotgun and Bradley with a knife that had a seventeen and three-fourths inch blade. Michael shot and killed McKenzie. Bradley and Michael injured other guests. They were apprehended shortly thereafter.

The State on January 4, 1993, charged both Michael and Bradley with first-degree murder and other crimes. They employed separate attorneys. The county attorney sent a letter to Bradley's attorney, dated April 13, 1996, that said if Michael pled guilty to first-degree murder, the county attorney would reduce Bradley's first-degree murder charge to second-degree murder.[1] The county attorney sent a letter to

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[1] The State agreed to recommend Bradley receive a total indeterminate term of 125 years, with a mandatory twenty-year term without parole on various reduced charges.

Michael's attorney, also dated April 13, 1993, which was directed to the resolution of Michael's companion charges and probation revocation matters. Nowhere in the letter to Michael's attorney was there any mention of the concessions offered Bradley.

On April 16, 1993, the district court accepted Michael's guilty plea to first-degree murder. At the hearing, the court read the plea agreement contained in the April 13 letter to Michael's attorney. There was no mention of the plea proposal made to Bradley. On May 17, 1993, Michael was sentenced to life in prison.

On June 29, 1993, Michael wrote a letter to the clerk of court stating he was unable to contact his attorney to file an appeal. On August 30, 1993, he wrote another letter explaining he did not file an appeal within the prescribed time because he was not able to contact his attorney. On September 7, 1993, the court appointed an attorney to represent Michael. On October 24, 1994, Michael filed an application for postconviction relief.

At the postconviction hearing, Michael testified that when he entered his guilty plea, he knew nothing in his plea agreement mentioned leniency for Bradley. He further testified he believed if he did not plead guilty, Bradley would not get a reduced charge. However, Michael also testified he did not know about his brother's plea agreement until after they were both sentenced.

Michael's trial counsel testified he told Michael if he pleaded guilty to first-degree murder it "might" get Bradley a better deal, but there were no promises made

by the county attorney. The attorney also testified he told Michael he did not have to plead guilty. Michael's trial counsel testified he was aware of the county attorney's plea offer to Bradley.

On November 16, 1995, the court denied Michael's petition for postconviction relief finding Michael's guilty plea was not induced by threats from the county attorney. The court, although finding Michael waived this issue because he did not file a motion in arrest of judgment or a direct appeal, considered the merits of the claim. The district court found the county attorney did not attempt to "link" Michael's plea agreement with Bradley's agreement. The district court further found it was Bradley's attorney who proposed Bradley's ultimate plea agreement. The court concluded the fact both defense attorneys discussed the prospective agreements did not support a finding the county attorney used concessions for Bradley and induced Michael to plead guilty. The trial court found inconsistencies in Michael's testimony.

Michael contends his trial attorney was not effective in allowing him to plead guilty to first-degree murder because his guilty plea was not voluntary. He contends the trial court was never advised the favorable agreement for Bradley was conditioned upon Michael's guilty plea and was part of his plea agreement. He requests the postconviction court be reversed and his case be remanded to allow him to withdraw the guilty plea, or in the alternative, a remand to the postconviction court for a hearing on the question of whether his plea was voluntary.

The State contends error is not preserved because Michael failed to file a motion in arrest of judgment or to raise the issues on direct appeal. They further contend he has not shown the required prejudice.

Michael challenges his guilty plea by seeking to show he did not have adequate representation. Therefore, he bears the burden of proving by a preponderance of the evidence his attorney failed to perform an essential duty and prejudice resulted. *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986).

Michael contends his plea was not voluntary. A plea must be voluntary, free from compulsion, and knowing and intelligent. *See Henderson v. Morgan*, 426 U.S. 637, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976); *see also McCarthy v. United States*, 394 U.S. 459, ___, 89 S. Ct. 1166, 1171, 22 L. Ed. 2d 418, 425 (1969).

Our supreme court has adopted the Minimum Standards for Criminal Justice, Pleas of Guilty, of the American Bar Association, including Standard 1.5, as follows:

> The court should not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. By inquiry of the prosecuting attorney and defense counsel, the court should determine whether the tendered plea is the result of prior plea discussions and a plea agreement, and if it is, what agreement has been reached. If the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court. The court should then address the defendant personally and determine whether any other promises or any force or threats were used to obtain the plea.

Wallace v. State, 245 N.W.2d 325, 326 (Iowa 1976) (citing *State v. Sisco*, 169 N.W.2d 542, 548 (Iowa 1969)).

A guilty plea is not voluntary if the trial court fails to inquire about the plea agreement. *See Wallace*, 245 N.W.2d at 326. The court must be advised of all parts of the plea agreement. *See Sisco*, 169 N.W.2d at 548. Plea bargaining bears upon voluntariness because it involves promises or concessions made in return for the plea. *Wallace*, 245 N.W.2d at 325; *Sisco*, 169 N.W.2d at 548.

Michael contends the trial court should have been advised before accepting his plea of the concessions offered Bradley. We agree. The county attorney's letter made it clear concessions were offered Bradley based on Michael's plea. Michael's attorney was aware of the offer of these concessions and should have made that known to his client. The decision to plead guilty is the defendant's alone. *Wallace*, 245 N.W.2d at 327. While we find, as did the postconviction court, contradictions in the statements made by Michael as to his belief of how Bradley's concessions related to his plea, the only conclusion that can be drawn from the record is a concession was offered Bradley based on Michael's plea and the trial court should have known what this was to properly assess the voluntariness of the plea. *See State v. Danh*, 516 N.W.2d 539, 541 (Minn. 1994); *see also Wallace*, 245 N.W.2d at 326. We disagree with any of the trial court's conclusions that are contrary. However, our determination the district court accepting this plea should have had this information does not end our inquiry.

Michael, because he brings this as a claim his trial counsel was not effective, must show prejudice. *Meier v. State*, 337 N.W.2d 204, 206 (Iowa 1983). Michael

contends he has shown prejudice because he showed he had a diminished capacity defense based on his intoxication. This defense was investigated before his plea was entered and no support for the defense was found. Nothing in the record convinces us Michael would have been successful using a diminished capacity defense. There is overwhelming evidence supporting Michael's conviction of first-degree murder. Michael has failed to show the required prejudice.

We find it unnecessary to address the State's contention error was not preserved.

AFFIRMED.