IN THE COURT OF APPEALS OF IOWA

No. 8-192 / 97-0436

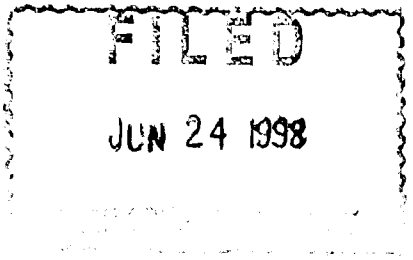
STATE OF IOWA,

Plaintiff-Appellee,

vs.

MICHAEL JAMES McNAMEE,

Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart, Judge.

Defendant appeals the judgment and sentence entered upon his conviction, following a guilty plea, of operating while intoxicated in violation of Iowa Code section 321J.2 (1995). **AFFIRMED.**

Kellie Rae Taylor, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kasey Wadding, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Streit, JJ.

PER CURIAM.

Defendant Michael McNamee appeals the judgment and sentence entered upon his conviction, following a guilty plea, of operating while intoxicated on November 23, 1996, in violation of Iowa Code section 321J.2 (1995). He argues: (1) his plea was not knowing and voluntary; (2) the district court violated Iowa Rule of Criminal Procedure 9 in accepting his guilty plea; and (3) his sentence constituted cruel and unusual punishment in violation of the Eighth Amendment. We affirm the court's judgment and sentence.

After defendant was charged on January 27, 1997, he appeared at his arraignment without an attorney and entered a guilty plea, affirmatively waiving his right to counsel. The district court asked a series of questions to ascertain whether he understood the elements of the offense, the possible penalties for the offense, and the rights he was giving up by pleading guilty.

Defendant agreed he was driving on November 23, 1996, and his blood alcohol content at that time was .148. Though the trial court advised defendant of his right to delay sentencing, defendant requested immediate sentencing and the trial court pronounced sentence.

The trial court sentenced defendant to pay a fine of $500, plus a thirty percent surcharge and court costs, to serve ten days in jail, and to complete a drinking driver's course. The trial court then suspended the jail time and placed defendant on one

year's probation. To comply with probation, defendant was ordered to refrain from illegal activity and pay his fine and costs in timely installments of $100 a month.

On January 29, 1997, defendant appealed, advancing his plea was not knowingly and voluntarily entered because he simply mimicked the answers another defendant gave the court. Defendant further asserts the court violated Iowa Rule of Criminal Procedure 9 by failing to inquire as to whether there was a plea agreement. Finally, defendant contends his punishment for violation of Iowa Code section 321J.2 was cruel and unusual in violation of the Eighth Amendment.

The State argues, among other things, defendant has failed to preserve error. Defendant's brief does not state his issues raised on appeal were preserved for review. *See* Iowa R. App. P. 14(a)(5).

In order to challenge a guilty plea, a defendant must file a motion in arrest of judgment. Iowa R. Crim. P. 23(3)(a). Failure to file a motion in arrest of judgment precludes a defendant from challenging the guilty plea proceeding. *Id.*

Even if defendant had filed a motion in arrest of judgment, he would have failed. The trial court was in substantial compliance with Iowa Rule of Criminal Procedure 8(2)(b). Consequently, defendant's due process rights were satisfied. *See State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1994). The trial court did not violate Iowa Rule of Criminal Procedure 9(2) because the guilty plea was not conditioned on the court's acceptance of the State's sentencing recommendation. The sentence

imposed is not cruel and unusual punishment. *See Shedlock v. Iowa Dist. Court*, 534 N.W.2d 656, 660 (Iowa 1995).

AFFIRMED.