FILED
MAY 31 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,)
vs.)
DENNIS DELLACA,)
Appellant.)

Filed May 31, 1978

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Appeal from Polk District Court - Luther T. Glanton, Judge.

Defendant appeals challenging the voluntariness of his plea of guilty alleging it was in response to threats and coercion by the trial court. - Affirmed.

John C. Wellman, Des Moines, for Appellant.

Richard C. Turner, Attorney General of Iowa, and Dan Johnston, Polk County Attorney, for Appellee.

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

PER CURIAM

Defendant Dennis Dellaca appeals his guilty plea to the crime of conspiracy to deliver heroin in violation of § 204.401(1), The Code. On appeal, defendant alleges the trial court erred in accepting his plea because the plea was not voluntary in that the trial court coerced the plea by threatening to make the sentence consecutive with the sentence already imposed on a related charge if defendant exercised his constitutional rights and went to trial.

The requirements for the acceptance of a plea of guilty are found in State v. Sisco, 169 N.W.2d 542 (Iowa 1969) and Brainard v. State, 222 N.W.2d 711 (Iowa 1974). State v. Reaves, 254 N.W.2d 488 (Iowa 1977). One of those requirements is that the plea of guilty must be voluntary. Where the plea was procured by undue influence, coercion or fraud, the plea is not voluntary and no valid judgment or sentence can be pronounced. State v. Bastedo, 253 Iowa 103, 107, 111 N.W.2d 255 (1961).

It is improper for a trial judge to impose a heavier sentence as a penalty for the exercise of one's constitutional right to a jury trial. United States v. Derrick, 519 F.2d 1, 4 (6th Cir. 1975). If the trial judge threatens to impose the maximum sentence upon a conviction after trial, the plea is involuntary and any judgment based thereon is void. State v. Rife, 260 Iowa 598, 602, 149 N.W.2d 846 (1967) citing Machibroda v. United States, 368 U.S. 487, 82 S.Ct. 510, 7 L. Ed. 2d 473 (1962).

After a jury trial on a delivery charge involving the same transaction out of which the conspiracy charge arose, defendant indicated to the trial court he wished to withdraw his former plea of not guilty and enter a plea of guilty to the conspiracy charge. After briefly going through some of the foundation for the plea, the court decided not to accept the plea at that time deciding instead to wait until the date of sentencing on the delivery charge to go through the formal prerequisites. The trial court indicated it would read the presentence report and then allow defendant a chance to withdraw his plea.

After a hearing, defendant was sentenced to ten years in the men's penitentiary on the delivery charge. Dellaca then requested to withdraw his plea of guilty to the charge of conspiracy. In chambers, the trial court told defendant that he was inclined to let him withdraw his plea of guilty and stand trial that morning,

but that he would not get a concurrent sentence if he was convicted. After an off-the-record discussion with his attorney, defendant pled guilty to the charge of conspiracy to deliver a controlled substance.

Before accepting the plea, the trial court told defendant and his attorney that it would not try the conspiracy charge if defendant changed his mind and that a different judge would have to try it if he stood trial because the present judge might be prejudiced against him due to his familiarity with the facts. Dellaca's rights were then explained.

Defendant was asked if there were any promises or threats made or if he were coerced in any way into making a plea, to which he responded "no". His attorney asked him if he was aware that the judge could sentence him consecutively even though he pled guilty; Dellaca responded in the affirmative. He reiterated that Dellaca would have another judge should he elect to stand trial and inquired if defendant was entering his plea because he was afraid of a jury trial. Dellaca replied that he was not. Finally, the trial court asked once more if defendant understood the judge would disqualify himself and Dellaca replied that he understood. The trial court then sentenced Dellaca to a ten year term on the conspiracy charge to run concurrently with the sentence already imposed.

On appeal, defendant alleges his plea was involuntary because the trial court exerted improper leverage in obtaining defendant's plea by threatening him with a greater sentence should he elect to exercise his right to trial by jury. His responses to the trial court's and his own attorney's questions indicate the contrary. Our focus is not on what the trial court said but on what the defendant understood and his awareness thereof. State v. Lemburg, 257 N.W.2d 39, 45 (Iowa 1977); State v. Reaves, supra. An independent review of the record convinces us defendant's plea was voluntary and not in response to any coercion on the part of the trial court.

AFFIRMED.

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

OXBERGER, J. (dissenting)

I agree that our focus is not on what the trial court said but rather on what the defendant understood and his awareness thereof. I think what Dellaca understood, indeed feared, was that whichever judge served at trial and sentencing that judge would share the trial court's predisposition to withhold concurrent sentencing upon Dellaca's insistence that he be allowed to go to trial on the delivery charge. I cannot agree that this judicial conduct did not act in Dellaca's grasp of his situation to coerce his plea. I think it directly explains Dellaca's retreat from his earlier desire to "see what the jury says."