IN THE COURT OF APPEALS OF IOWA

No. 6-197 / 95-1072

STATE OF IOWA,

Plaintiff-Appellee,

vs.

WILLIAM JOSEPH McCARDLE,

Defendant-Appellant.

FILED
MAY 31 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Pottawattamie County, Glen M. McGee, Judge.

Defendant appeals from the sentencing order entered following his pleas of guilty to possession with intent to deliver methamphetamine, possession with intent to deliver cocaine, and being a felon in possession of a firearm. **REVERSED AND REMANDED WITH INSTRUCTIONS.**

Frank E. Robak, Sr., Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Richard Crowl, County Attorney, and Christopher Wilson, Assistant County Attorney, for appellee.

Heard by Habhab, P.J., and Cady and Streit, JJ. Vogel, J., takes no part.

HABHAB, P.J.

William McCardle was charged by trial information with possession of methamphetamine (count I), tax stamp violations (count II), possession of cocaine with intent to deliver (count III), being a felon in possession of a firearm (count IV), and possession of marijuana (count V).

On October 11, 1994, McCardle entered *Alford* pleas to counts I, III, and IV. The plea agreement called for the State to drop the other counts, return some property, and recommend concurrent sentences. On January 12, 1995, McCardle filed a motion to either compel the plea agreement, dismiss on speedy trial grounds, or arrest judgment. At a subsequent hearing, McCardle indicated the State breached the first plea agreement by failing to return much of the cash seized. The assistant county attorney informed the court he did not have control of the property and thus could not return it. The parties agreed neither knew at the time of the plea negotiations the county attorney was not in a position to bargain for the return of the property due to forfeiture proceedings.

The district court found the plea agreement did not exist. The court noted McCardle's attorney and the assistant county attorney bargained in good faith for the return of property neither party had any control over. The court set aside McCardle's pleas and set the matter for trial.

On April 11, 1995, McCardle entered an *Alford* plea to counts I, III, and IV. McCardle's attorney explained, "We are going to do basically everything that

occurred in that [first] plea agreement, with the exception of the property, and also that sentencing will be open." The State agreed with this statement of the plea agreement. The court then explained the applicable penalties and McCardle stated he understood them.

On June 13, 1995, the sentencing hearing was held. McCardle argued the sentences imposed should be concurrent. McCardle's attorney stated:

> As to sentencing, I would ask that any sentence imposed on any of these counts be concurrent by the court, especially in view of the fact that the original plea agreement entered into by the state especially agreed to concurrent sentencing . . . .
>
> For those reasons, Your Honor, I don't think that because we are here now, without Mr. McCardle getting that property, that the fact that Mr. McCardle has stepped forward and said, okay, despite the fact the state isn't able to give that property back, I'm still willing to go ahead and plead and go through with the plea bargain, that he should be in any way penalized by anything other than, at the maximum, of concurrent sentence and especially no fine, since he -- originally the state had originally agreed to give him that property back, which he now no longer has.

The assistant county attorney who participated in the plea negotiations, Chris Wilson, was not present at the sentencing hearing. Instead, Tim O'Grady appeared for the State. O'Grady acknowledged he could not speak regarding previous plea negotiations since he was not involved in the case. O'Grady then argued McCardle's sentences should be served consecutively. The court imposed a five-year term on count I, a ten-year term on count III, and a five-year term on count IV, to be served consecutively.

McCardle filed a notice of appeal on June 21, 1995. After the notice of appeal was filed, the State filed an application for resentencing. McCardle then filed a

motion in arrest of judgment and a resistance to the application for resentencing based on a claim of lack of jurisdiction. On August 22, 1995, the district court overruled McCardle's motions and entered a resentencing order, amending the judgment on count I to read "for a term of not more than 10 years." McCardle filed an amended notice of appeal to include the resentencing order.

On appeal, McCardle raises four issues. McCardle contends the district court erred: (1) by failing to allow McCardle to withdraw his guilty plea a second time; (2) in filing an order to re-sentence McCardle after a notice of appeal had been filed;[1] (3) in consolidating the forfeiture proceedings with the criminal case; and (4) in violating the Double Jeopardy Clause by subjecting McCardle first to a criminal action and then a civil forfeiture action for the same crime.

In raising the issue of consolidating the forfeiture proceeding and the criminal case, McCardle fails to cite any authority in his argument. The failure to argue or cite authority results in a waiver of the issue. Iowa R. App. 14(a)(3); *Genetzky v. Iowa State Univ.*, 480 N.W.2d 858, 861 (Iowa 1992); *Johnson v. State Farm Auto. Ins. Co.*, 504 N.W.2d 135, 139 (Iowa App. 1993). This issue is deemed to be waived.

In his brief, McCardle fails to state how he preserved the Double Jeopardy Clause issue for appeal. Statements regarding error preservation are required for all

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[1] Both parties agree the filing of a notice of appeal precluded the district court from resentencing McCardle without some kind of limited remand. However, due to our findings on the first issue regarding the State's alleged breach of the second plea agreement, we need not reach this issue.

issues raised on appeal. Iowa R. App. 14(a)(5). The absence of such a statement constitutes a waiver of the issue. *State v. Akers*, 435 N.W.2d 332, 336-37 (Iowa 1989). This error preservation requirement is closely tied to the idea we will not consider issues, even of a constitutional nature, which are not first raised at the district court level. *Waterbury v. State*, 387 N.W.2d 309, 310 (Iowa 1986). Accordingly, we refuse to address this issue on appeal.

The primary issue on appeal is whether the State breached the second plea agreement and whether, in turn, the district court abused its discretion in failing to allow McCardle to withdraw his guilty plea a second time. Our review of the district court's denial of a request to withdraw a guilty plea is for abuse of discretion. *State v. Tillman*, 228 N.W.2d 38, 39 (Iowa 1975). No abuse will be found unless defendant shows the "discretion was exercised on grounds clearly untenable or to an extent clearly unreasonable." *State v. Ramirez*, 400 N.W.2d 586, 588 (Iowa 1987).

Plea bargaining has been recognized and accepted as an effective and desirable method of prompt and efficient disposition of many criminal cases. *Santobello v. New York*, 404 U.S. 257, 260-61, 92 S. Ct. 495, 497-98, 30 L. Ed. 2d 427, 432 (1971). Our supreme court has stated:

> The important thing is not that there shall be no "deal" or "bargain" but that the plea shall be a genuine one, by a defendant who is guilty; one who understands his situation, his rights, and the consequences of the plea, and is neither deceived nor coerced.

State v. Whitehead, 163 N.W.2d 899, 902 (Iowa 1969) (quoting *Cortez v. United*

States, 337 F.2d 699, 701 (9th Cir. 1964)). The plea agreement binds both the defendant and the State. *State v. Hinners*, 471 N.W.2d 841, 843 (Iowa 1991). The performance of a plea agreement is mutual. *State v. Aschan*, 366 N.W.2d 912, 917 (Iowa 1985).

Sentencing recommendations are commonly included in plea agreements. Our supreme court has noted, "It is difficult to perceive of a more effective influence on a decision whether or not to plead guilty to a criminal offense than an agreement with a prosecuting officer relative to his recommendation as to a sentence." *State v. Fisher*, 223 N.W.2d 243, 245 (Iowa 1974) (quoting *White v. Gaffney*, 435 F.2d 1241, 1244 (10th Cir. 1970)). When a defendant, in pleading guilty, relies on a promise made by the State, that promise made by the State must be fulfilled. *State v. Weig*, 285 N.W.2d 19, 21 (Iowa 1979); *State v. Runge*, 228 N.W.2d 35, 37 (Iowa 1975).

In making the first plea agreement, the State promised to recommend concurrent sentences be imposed. The second plea agreement was explained to the trial court as, "We are going to do basically everything that occurred in [the first plea agreement], with the exception of property and that sentencing will be open." We find the words "sentencing will be open" to be ambiguous. If the State had intended to remove the sentencing recommendation of concurrent sentences from the plea agreement, then the State could have easily done so. As the State did not make such a statement, we conclude a recommendation of concurrent sentences was still

reasonably understood to be part of the plea agreement. *See Runge*, 228 N.W.2d at 37.

Since the State did not fully perform the plea agreement, we find the district court abused its discretion and accordingly set aside the sentences, and we remand to the district court with directions that (a) at the resentencing, there be specific performance of the plea agreement which shall include a recommendation by the State that there be a concurrence of the sentences;[2] or (b) defendant be given the option[3] to withdraw his guilty plea on each count and go to trial on the original charges. In the event defendant is resentenced, the sentencing shall be before a different judge. We emphasize this is in no sense to question the fairness of the present sentencing judge, for he cannot be faulted where the prosecutor failed to reveal the entire plea agreement.

REVERSED AND REMANDED WITH INSTRUCTIONS.

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[2] We note the following quotation from *State v. Edwards*, 279 N.W.2d 9, 11 (Iowa 1979): "[T]he State may withdraw from a plea bargain at any time prior to, but not after, actual entry of the guilty plea by defendant or other action by defendant constituting detrimental reliance upon the arrangement."

[3] *See Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). With reference to this case, we note the concurring opinion of Justice Douglas where, while joining the Court's opinion, apparently because he thinks the remedy should be chosen by the state court, he concludes that the state court ought to accord a defendant's preference considerable, if not controlling, weight. Thus, a majority of the Court appears to believe that in cases like these, when the defendant seeks to vacate the plea, that relief should generally be granted. *Santobello*, 404 U.S. at 263-69, 92 S. Ct. at ___, 30 L. Ed. 2d at 434-37.