

IN THE COURT OF APPEALS OF IOWA

No. 5-290 / 94-1559

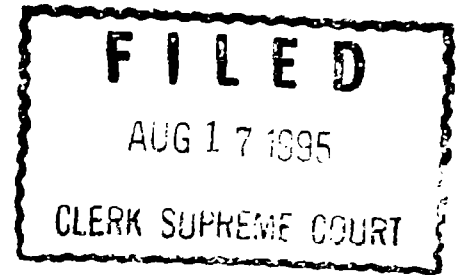
STATE OF IOWA,

Plaintiff-Appellee,

vs.

ORLANDO CLARENCE MOEN,

Defendant-Appellant.



Appeal from the Iowa District Court for Winneshiek County. Thomas N. Bower, Walter W. Rothchild, Jon Fister, and Margaret L. Lingreen, Judges.

Orlando Moen appeals the judgment and sentence entered upon his conviction, pursuant to a guilty plea, of two counts of operating while intoxicated, third offense, in violation of Iowa Code sections 321J.2 (1993). **AFFIRMED.**

Andrew P. Nelson of Meyer, Lorentzen & Nelson, Decorah, for appellant.

Thomas J. Miller, Attorney General. Mary Tabor, Assistant Attorney General, and Andrew Vandermaaten, County Attorney, for appellee.

Considered by Hayden, P.J., and Habhab, and Cady, JJ.

CADY, J.,

Orlando Moen appeals from his convictions for two offenses of operating while intoxicated (O.W.I.), third offense. He claims the district court erred by failing to allow him to withdraw his pleas of guilty prior to sentencing. We affirm.

Moen was charged with two separate offenses of O.W.I., third offense and driving while his license was revoked. He entered into a plea bargain with the State requiring him to plead guilty to the two O.W.I. offenses in return for a favorable sentencing recommendation from the State.

Moen appeared before the district court on April 29, 1994, to enter his pleas of guilty. Prior to the commencement of the hearing, the presiding judge informally suggested to counsel that he would be willing to impose sentence following acceptance of the pleas in accordance with the States' sentencing recommendation if Moen agreed to waive time for sentencing. Moen indicated he would waive time for sentencing. The county attorney, however, refused and requested the completion of a presentence investigation report prior to sentencing. The plea hearing was then held and the judge accepted Moen's pleas of guilty. The judge personally addressed Moen at the hearing and specifically inquired into the existence of the plea agreement. The following exchange occurred:

THE COURT: . . . Mr. Moen, do you understand that that plea agreement is between the parties and the Court is not bound by that plea agreement?

THE DEFENDANT: Yes. My lawyer stated that, Mr. Glee.

THE COURT: And you understand that in all likelihood I will not be the sentencing judge, and the judge could sentence you up to the maximum possible penalty provided for by law?

THE DEFENDANT: Yes.

THE COURT: Okay. And knowing that do you still wish to plead guilty today?

THE DEFENDANT: Yes, sir.

Moen subsequently appeared for sentencing on June 17, 1994, and learned that the recommendation contained in the presentence report differed from the recommendation to be made by the State pursuant to the plea agreement. The district court, with a different judge presiding than at the plea hearing, refused his request to withdraw his pleas but continued the sentencing.

Moen then filed a motion in arrest of judgment. The district court denied Moen's motion and imposed sentence. On appeal, Moen asserts he should have been permitted to withdraw his pleas of guilty because, despite the plea colloquy, he still believed he would be sentenced pursuant to the plea bargain. He also asserts the state violated the plea agreement by requesting a presentence investigation.

I. Withdrawal of Guilty Pleas

We review the denial of a request to withdraw a plea of guilty for abuse of discretion. *State v. Mattly*, 513 N.W.2d 739, 741 (Iowa 1994). An abuse exists only when it is shown that the discretion was exercised on grounds that were clearly untenable or to an extent clearly unreasonable. *Id.*

Iowa Rule of Criminal Procedure 9 (4) mandates the trial court to inform a defendant who tenders a plea of guilty under a plea agreement if the court does not intend to "be bound by or rejects the plea agreement." *See State v. Barker*, 476 N.W.2d 624, 628 (Iowa App. 1991). If the mandate is not followed, the court must allow the defendant to withdraw the guilty plea if it later refuses to follow the plea agreement. *Id.*

We believe the record plainly refutes Moen's claim that the court failed to inform him at the time of the plea colloquy that it would not be bound by the plea agreement. As set forth above, the transcript reveals the trial court specifically advised Moen that the court was not bound by the agreement and that he could receive the maximum sentence. The mandate of rule 9 (4) was clearly met.

We also specifically reject Moen's argument that the judge who accepted his pleas helped foster his misguided impression that the plea agreement would be followed, when the judge explained that he most likely would not be the sentencing judge. Moen claims the statement created an inference that the judge was still willing to accept the plea agreement. We believe Moen's claim is misplaced. While Moen may have held out hope that the plea agreement would be followed, the trial court clearly and unequivocally told Moen it was not bound by the agreement. The expectation of leniency is insufficient to support the withdrawal of a guilty plea. *Mattly*, 513 N.W.2d at 741. The trial court properly refused to allow Moen to withdraw or set aside his pleas.

II. Plea Agreement

Moen also claims the prosecutor violated the plea agreement by requesting the presentence report, or at least violated the standards of fair play. We disagree.

The plea agreement between Moen and the State did not include a waiver of the presentence report. Moreover, the preparation of the report was required by statute. *See* Iowa Code § 901.2 (1993); *State v. Thompson*, 494 N.W.2d 239, 241 (Iowa 1992) (recognizing the prohibition against waiver of the presentence investigation, as distinguished from a waiver of trial courts' use of the report). Accordingly, the State never breached the plea agreement, or violated any standard of fair play.

AFFIRMED.