FILED
MAR 23 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed May 23, 1982

vs.)

557

DAVID ALLEN JOHNSON,) 2-50 / 66158

Defendant-Appellant.)

Appeal from Polk District Court - Dale Missildine, Judge.

Defendant appeals from his conviction and sentence, pursuant to his guilty plea, the crime of delivery of a controlled substance in violation of section 204.401, The Code 1979, asserting his guilty plea was not entered knowingly because he was not aware of the penal consequences of the plea, and that the plea was not entered voluntarily. AFFIRMED.

William L. Kutmus, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and M. J. Blink, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

Defendant, David Allen Johnson, appeals from his conviction and sentence, pursuant to his guilty plea, of the crime of delivery of a controlled sbustance in violation of section 204.401, The Code 1979. Defendant contends his guilty plea was not entered knowingly because he was not aware of the penal consequences of the plea, and that the plea was not entered voluntarily. We affirm.

Defendant was charged by trial information with the crime of delivery of a controlled substance in violation of section 204.401(1), The Code 1979. On January 16, 1980, defendant pled guilty to the crime as charged. There was no agreement between the State and defendant in the matter. During the colloquy between the court, defendant and the prosecution pursuant to Iowa R. Crim. P. 8(2)(b), the prosecutor stated that, while there was no agreement between the State and the defense, he knew there had been discussions between defense counsel and the court about an arrangement that it be "a conditional plea and that Mr. Johnson could withdraw," if the hearing pursuant to section 204.409, The Code, was adverse to defendant. Trial court responded:

> Mr. Johnson, the Court does not want you to plead guilty to an offense based on something that the court might or might not do in the future. The Court's going to have to make up its mind about that after it sees a presentence report. You under stand that.
>
> Answer: Yes, sir.
>
> Question: And while there has been predictions made as to what the Court might or might not do under certain contingencies, I want you to understand that is a decision this Court will have to make in the future and I might make a decision contrary to the predictions that had been made here, do you see?
>
> Answer: Yes, sir.
>
> Question: I don't want to foreclose that. I will try to do what I think is best under all the circumstances, but I wouldn't want you to plead guilty on anything the Court has said. Do you understand now?
>
> Answer: Yes.

On March 27, 1980, a hearing pursuant to section 204.409, The Code, was held to determine whether defendant was a person to benefit under that section. Trial court did not declare defendant to be an abuser and sentenced him to imprisonment for a period not to exceed ten years. Defendant's appeal followed.

I. Scope of Review. Ordinarily, our review of criminal proceedings is at law for correction of errors, only, and not de novo. Iowa R. App. P. 4. "However, when, as here, issues as to a violation of constitutional safeguards are raised, this court is obliged to make an independent valuation of the totality of the relevant circumstances shown by the entire record under which rulings on those constitutional rights were made. That is, when a constitutional issue is presented, the evidence relevant to the issue is reviewed **de novo.**" Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

II. Guilty Plea. Before accepting a guilty plea, trial court must determine by personal colloquy that the plea was made voluntarily. Iowa R. Crim. P. 8(2)(b). To be voluntary, a guilty plea must be knowing and intelligent. State v. Fluhr, 287 N.W.2d 857, 863 (Iowa 1980). The guilty plea cannot be considered to have been knowingly and intelligently made unless the defendant understands the penal consequences of his plea. Iowa R. Crim. P. 8(2)(d)(2); State v. Lemburg, 257 N.W.2d 39, 41 (Iowa 1977).

In the instant case, the record indicates that defendant was promised only a hearing pursuant to section 204.409. This he received. Thereafter, once trial court determined he was not an abuser, defendant made no attempt to withdraw the plea during the interval between the March 27th hearing and the August 18th sentencing hearing. At the sentencing hearing, defendant likewise made no attempt to withdraw his plea. When trial court inquired as to whether there was any legal cause why sentence should not be imposed, defense counsel responded negatively. Since defendant had an opportunity to withdraw his plea, the consequences of his failure to do so rest solely with him. We thus decline to disturb trial court's judgment.

AFFIRMED.