IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 1999-492 (9-749) / 99-0198
Filed February 23, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRENTON RAY HARMISON,
Defendant-Appellant.

Appeal from the Iowa District Court for Warren County, Dale E. Hagen and Darrell Goodhue, Judges.

Brenton Ray Harmison appeals from the judgment and sentence entered upon his convictions, after guilty pleas, of possession of a controlled substance with intent to manufacture, and possession of a precursor to a controlled substance in violation of Iowa Code sections 124.401(1)(c)(6) and 124.401(4)(1997). He contends that the district court erred in denying his motion to withdraw his guilty pleas. He also claims he was denied effective assistance of counsel because his counsel permitted him to plead guilty to the charge of possession of a controlled substance with the intent to manufacture methamphetamine without a factual basis. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Kevin Parker, County Attorney, and Gary Kendell, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Miller, J.J.

MILLER, J.

Defendant Brenton Harmison appeals his convictions, after entering pleas of guilty, of possession of methamphetamine with intent to manufacture and possession of a precursor to a controlled substance. He contends the State breached the plea agreement and therefore the court abused its discretion by not allowing him to withdraw his guilty pleas, and trial counsel was ineffective by allowing him to plead guilty without a factual basis established in court. Without reaching Harmison's ineffective assistance of counsel claim, we reverse and remand.

At pre-trial conference, the State, as part of a plea agreement, amended Count I, possession with intent to manufacture, from a class "B" felony to a class "C" felony. Then, pursuant to the plea agreement, Harmison entered a plea of guilty to count I as amended and count II, possession of ephedrine with the intent to use it as a precursor to methamphetamine. The State dismissed two remaining counts. There was no written plea agreement; rather, defense counsel stated the plea agreement on the record, with no objection from the State:

> The county attorney has agreed to recommend that my client receive a minimum fine of $1000 on Count I as amended, a minimum fine of $500 on Count II, that the prison time, ten years on Count I and five years on Count II be suspended. That my client be granted probation. Said probation on Count I and Count II run concurrently to each other, 180 day driver's license revocation, the five dollar drug education surcharge on both counts, and my client I believe at the time of sentencing would ask the Court to grant him a deferred judgment on these charges.
>
> The county attorney will object to that. That notwithstanding my client is in agreement with the recommendation of the county attorney and if the Court at the time of sentencing will not grant my client a deferred judgment, which I have explained to him is highly

unlikely, that we will join in the recommendation of the county attorney.

At the time scheduled for sentencing the prosecuting attorney informed defense counsel that he would instead be recommending imprisonment. Sentencing was continued to allow the defendant to file a motion in arrest of judgment, which he did. At the rescheduled sentencing hearing defense counsel explained that the motion in arrest of judgment was filed because the State indicated it would recommend prison time. Harmison requested that his motion in arrest of judgment also be considered a motion to withdraw his guilty pleas. The court sustained that request.

The State resisted the motions. It alleged Harmison had submitted a diluted urine sample for one drug test and on another drug test had tested positive for methamphetamine, subsequent to the entry of the guilty pleas. The State argued because Harmison had breached the plea agreement the State was no longer bound by it. The court denied Harmison's motion to withdraw his pleas of guilty, and sentenced him to a term of ten years on count I and five years on count II, to run concurrently.

We ordinarily review a denial of a motion to withdraw a plea of guilty for an abuse of discretion. *State v. Speed*, 573 N.W.2d 594, 596 (Iowa 1998). Abuse of discretion exists only where a defendant shows the trial court's sound discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.* The parties agree our review is for an abuse of discretion.

Harmison contends he complied with the terms of the plea agreement by entering pleas of guilty, thereby waiving numerous constitutional rights, and therefore is entitled to either specific performance by the State of the agreement or withdrawal of his guilty pleas. *See State v. Hinners*, 471 N.W.2d 841, 845 (Iowa 1991). The State contends that because Harmison tested positive for methamphetamine after entering his plea of guilty but before sentencing, Harmison "did not comply with a condition implicit in all plea agreements—that the defendant will not commit further criminal acts." The State further argues that it should not have to state in every plea agreement that a defendant shall not engage in criminal acts, or list every possible criminal act the defendant must not commit.

Our decision is controlled by *State v. Weig*, 285 N.W.2d 19 (Iowa 1979). In *Weig*, the prosecutor attempted to back out of a plea agreement after the defendant had entered a guilty plea, when it was discovered the defendant had been charged with additional crimes, some of which were alleged to have occurred subsequent to the defendant's plea of guilty. *Id.* at 20. The plea agreement bound the State to recommend probation "[u]nless there is a [prior] felony [conviction] which the State is not aware of." *Id.* at 19. The trial court denied the defendant's motion to withdraw his guilty plea. The Iowa Supreme Court reversed, concluding a condition that the defendant conduct himself as though he were already on probation "was a condition the State might have imposed upon its obligation to make the bargained-for recommendation, but it did not do so." *Id.* at 22.

The significant facts in this case are indistinguishable from those in *Weig*. In both cases, the defendant entered a plea or pleas of guilty with an agreement the State would make certain recommendations as to sentencing. In neither case did the State expressly condition its promise upon the defendant's acts or omissions after the plea was entered. As dictated by *Weig*, we must find the district court abused its discretion in denying Harmison's motion to withdraw his guilty pleas. Harmison was prejudiced by the denial of his motion, as he, to his detriment, had entered two pleas of guilty and waived several constitutional rights in reliance on the State's promise.

Contrary to the State's assertions, if it wishes to make it a part of the plea bargain that the agreement is contingent on the defendant obeying the law after entry of the guilty plea, that condition must appear expressly in the record as a part of the plea agreement. This imposes no heavy burden. Such a statement in written plea agreements or on the record in open court would require little time or effort.

We therefore reverse the defendant's convictions and remand to the district court for further proceedings consistent with this opinion. Because we cannot assume that Harmison's claim of ineffective assistance of counsel will survive proceedings on remand, we do not address it in this appeal.

REVERSED AND REMANDED.