

IN THE COURT OF APPEALS OF IOWA

No. 5-611 / 95-240

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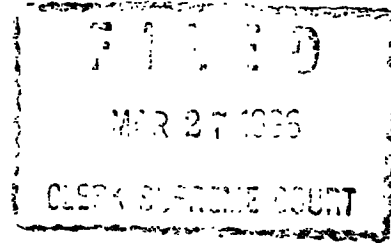
STATE OF IOWA,

Plaintiff-Appellee.

vs.

TERREL LEROY MANNING,

Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, James C. Bauch,
Judge.

Terrel Leroy Manning appeals from his conviction following his guilty pleas to unauthorized possession of an offensive weapon, accessory after the fact, eluding, fourth-degree theft, and disorderly conduct. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Angelina M. Smith, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Hall, Assistant County Attorney, for appellee.

Decided by Sackett, P.J., and Habhab, Cady, Huitink, and Streit, JJ.

HABHAB, J.

Terrel Manning was charged with the crimes of unauthorized possession of an offensive weapon in violation of Iowa Code section 724.3 (1993); accessory after the fact in violation of section 703.3; eluding in violation of section 321.279; theft in the fourth degree in violation of sections 714.1 and 714.2; and disorderly conduct in violation of section 723.4.

These criminal charges arose from several different incidents. In October 1993, police officers saw defendant exceeding the speed limit in Waterloo. The officers turned on their flashing lights and siren, but defendant did not pull over. Defendant was finally stopped when another police vehicle pulled in front of him. Due to this incident, he was charged with eluding.

In January 1994, police officers informed defendant they had an arrest warrant for his brother, Leighton Manning. Some days later, officers went to an apartment in Waterloo seeking to execute the arrest warrant for Leighton. While officers were present, defendant drove up in a van. He told officers he did not know where Leighton was. Officers then saw Leighton hiding under the rear seat of the van. Defendant was charged with accessory after the fact.

Also in January 1994, defendant was found to be in possession of a stolen cellular telephone. Defendant was charged with theft in the fourth degree based on his possession of stolen property.

In March 1994, police officers suspected defendant may be in possession of illegal drugs and asked him if he would consent to a pat down search. Defendant agreed to the search, but then became irate and threatened the officers. Defendant was arrested for disorderly conduct.

In April 1994, police officers received a report someone had a gun at a Waterloo hospital. When officers responded, they saw a sawed-off shotgun in the back seat of a vehicle in the hospital parking lot. When questioned, defendant admitted he had gotten a ride to the hospital in this vehicle and had sat in the back seat. He was charged with unauthorized possession of an offensive weapon.

Defendant was seventeen years old at the time these crimes were committed. He was waived to adult court. On September 19, 1994, he pled guilty to the crimes charged. The State agreed to recommend concurrent sentences. At the guilty plea proceedings, the parties noted there was no actual plea agreement, but negotiations were still proceeding.

At the sentencing hearing, the State recommended maximum incarceration. Defendant presented evidence to show the State had at one time agreed to make a recommendation of leniency if he had been able to assist in the purchase of fifty grams of crack cocaine in a single buy. He was unable to do this and plea negotiations failed. After formal negotiations fell through, he continued to assist police officers in making several buys, and the total of crack cocaine thus purchased

was over fifty grams. Defendant testified he continued to help police officers because he thought he would be placed on probation.

The district court sentenced defendant to a term of imprisonment not to exceed five years on the charge of unauthorized possession of an offensive weapon, a term of imprisonment not to exceed two years on the crime of accessory after the fact, one year on the eluding charge, one year on the charge of theft in the fourth degree, and thirty days in the county jail on the charge of disorderly conduct. These sentences are all to run concurrently. Defendant appeals his convictions.

I. Defendant claims his guilty pleas were not entered voluntarily or intelligently because he relied on promises of leniency. He states he believed the State would recommend probation if he continued to assist officers in undercover drug purchases. Defendant admits he failed to file a motion in arrest of judgment. Defendant further admits the trial court advised him of his right and obligation to file a motion in arrest of judgment to enable him to challenge any errors in the plea proceedings and the consequence if such motion was not timely filed. However, he states he raised his arguments of improper promises of leniency at the sentencing hearing and this constituted substantial compliance with his obligation to file a motion in arrest of judgment.

Iowa Rule of Criminal Procedure 23(3)(a) provides:

A motion in arrest of judgment is an application by the defendant that no judgment be rendered on a finding, plea, or verdict of guilty. Such motion shall be granted when upon the whole record no

legal judgment can be pronounced. A defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude his or her right to assert such challenge on appeal.

We find no authority for defendant's claim he need only substantially comply with Rule 23(3)(a). Furthermore, we find defendant did not substantially comply with the rule because he never requested withdrawal of his guilty pleas. We conclude error has not been preserved due to defendant's failure to file a motion in arrest of judgment. *State v. Oldham*, 515 N.W.2d 44, 47 (Iowa 1994).

II. In the alternative, defendant claims he received ineffective assistance of counsel because his attorney did not file a motion in arrest of judgment. He states he should not be precluded from raising this issue on appeal because the failure to preserve error was the result of ineffective representation.

To establish a claim on ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *Caldwell v. State*, 494 N.W.2d 213, 214 (Iowa 1992). Representation by counsel is presumed competent, and a defendant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991).

Concerning deficiency of performance, the ultimate test is whether counsel's performance was within the range of normal competency. *Brewer v. State*, 444 N.W.2d 77, 93 (Iowa 1989). Improvident trial strategy, miscalculated tactics, and

mistakes in judgment do not necessarily amount to ineffective assistance of counsel.

Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989).

Concerning proof of prejudice, a defendant must show counsel's failure worked to his substantial and actual disadvantage, to the end that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Brewer*, 444 N.W.2d at 83.

In the present case, we consider whether a challenge to the guilty plea proceeding would have been successful. An involuntary or coerced plea will not support a judgment and sentence. *State v. Dee*, 218 N.W.2d 561, 563 (Iowa 1974). A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. *State v. Whitehead*, 163 N.W.2d 899, 902 (Iowa 1969). Thus, a plea induced by an empty promise of leniency is involuntary and any judgment based thereon is void. *State v. Lindsey*, 171 N.W.2d 859, 863 (Iowa 1969).

However, a disappointed expectation of leniency is not enough to require withdrawal of a guilty plea. *State v. Ramirez*, 400 N.W.2d 586, 589 (Iowa 1987).

The supreme court has stated:

We cannot agree that every statement the county attorney or his assistants make in response to a defense counsel's inquiry as to what recommendation the State would make if his client entered a plea of guilty can be labeled "empty promises of leniency" so as to void the plea. To be so classified it must also appear to the court the statement, when made, was likely to induce the accused to enter the plea, that the accused relied upon it and was deceived by it. No other rule would be feasible or practicable. Any other rule would tend to restrict all

communication between counsel relative to criminal charges pending and would not be in the public interest.

Lindsey, 171 N.W.2d at 863.

We find no evidence in the present case to show defendant relied upon an empty promise of leniency. The prosecutor had originally agreed to recommend leniency if defendant assisted officers in purchasing over fifty grams of crack cocaine in a single buy. Defendant admitted he was unable to comply with this condition. Therefore, he cannot claim he relied upon this promise of leniency. The only agreement reached was that the State would recommend concurrent sentences. In this regard, the State did make this recommendation and the court did impose concurrent sentences.¹

Furthermore, there is no evidence any other offers of leniency were made. Defendant does not claim he was promised any certain sentence in return for his guilty plea. Defendant's testimony showed he hoped the State would recommend probation if he continued to assist officers with drug buys even after plea negotiations fell through. As noted above, a mere disappointed expectation of leniency is not enough to require withdrawal of a guilty plea. *Ramirez*, 400 N.W.2d at 589.

¹ The record further establishes the court advised defendant it was not bound by any agreement he may have entered into with the State and defendant unequivocally replied he understood that admonishment. Further, during the course of the plea proceedings, defendant admitted he understood the only plea agreement entered into was that the State would recommend concurrent sentencing.

We conclude defendant has failed to show he received ineffective assistance of counsel due to counsel's failure to file a motion in arrest of judgment. We find such a motion would be unsuccessful because there is no evidence to show defendant's guilty plea was the result of empty promises of leniency. We affirm defendant's convictions. Costs of this appeal are assessed to defendant.

AFFIRMED.

All judges concur, except Sackett, J., who concurs in part and dissents in part.

SACKETT, P.J. (concurring in part; dissenting in part)

I concur in part and dissent in part.

I concur with the majority decision to affirm because defendant's challenge that his plea was not voluntarily or intelligently given was not preserved for review when his attorney failed to file a motion in arrest of judgment. I would reserve his claim of ineffective assistance for postconviction proceedings.

I do not find the record sufficient to answer defendant's claim his counsel was ineffective in failing to file the motion. There are too many unanswered questions.

Defendant was born on September 11, 1976. He pled guilty eight days after his eighteenth birthday. He was still a juvenile when the crimes he was accused of committing and pled guilty to happened. From the record, I could not say there may not have been valid challenges to some of these charges. In fact, defendant claimed innocence on one offense and entered an Alford plea on another.

Clearly, and the State admits, there was some agreement made with defendant to give him concessions for his cooperation in helping uncover drug sales. Defendant was not eighteen when he, with some involvement by his attorney, entered into agreements with the county attorney's office to assist in a controlled purchase of cocaine for a promise of some concessions. The agreement was not reduced to writing. Yet defendant, still not eighteen, assisted in the controlled purchase of over five grams of cocaine from two persons and gave information resulting in the arrest

of a person charged with intent to deliver and gave information on persons from Chicago intending to sell drugs in the area.

Clearly defendant made an effort to assist in uncovering drug sales and put himself at considerable risk in doing so. It concerns me that law enforcement would place defendant, when he was still under the age of eighteen, in this dangerous situation.

Defendant has had a troubled childhood. He dropped out of school in the ninth grade. He was on juvenile probation. Yet he put himself at great risk in these drug transactions for what appears to have been of no benefit to him. There are too many unanswered questions in this record that need to be explored before I would be ready to address defendant's claim of ineffective assistance of counsel.

For these reasons, I would reserve his claim of ineffective counsel for postconviction relief.