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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed January 29, 1986
vs.	)	
MICHAEL TODD HEDGES,	)	5-556 85-465
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Jefferson County - James P. Rielly, Judge.

Defendant appeals the trial court's denial of his motion to withdraw his guilty plea. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Christie J. Scase, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., Schlegel, and Sackett, JJ.

Defendant appeals the trial court's denial of his motion to withdraw his guilty plea. We affirm.

Defendant Michael Hodges was a 17-year-old juvenile when he was charged with second degree burglary on December 4, 1984. Later, on December 17, 1984, defendant was charged as an adult, by trial information, with second degree burglary in violation of Iowa Code sections 713.1 and 713.5. On February 26, 1985, defendant appeared in court, with his counsel, Mr. Pieper, and entered a guilty plea to the pending charge. At the plea proceedings, the following colloquy took place:

> THE COURT: Now, Mr. Pieper, you have indicated this plea is the result of a plea discussion, plea agreement or plea bargain. Would you for the record indicate what the plea bargain is.
>
> MR. PIEPER: Yes, Your Honor. For the record, there are outstanding charges in Illinois in addition to possible charges here in the State of Iowa. We have decided to plead guilty to the charge that has been mentioned herein on the condition that any time for the charges in Illinois be served concurrently with the time that would be deemed appropriate for the charge accused here in Iowa and that any further charges would not be brought by the State of Iowa against the Defendant. I think that reflects it fairly well.
>
> MR. MORRISSEY: To be more specific about other matters pending here, there is also a matter of theft of approximately $500 from the Spurgeons Department Store here in Fairfield that there has not been a charge filed on, and the agreement is there will not be a charge filed on at this point. In Illinois there are two counts of residential burglary, one count of adult burglary and two counts of theft pending against this individual. My understanding is that any time that is served in the Iowa prison system would be served concurrent with whatever plea is entered in Illinois and that the Illinois prosecutor's office is agreeable to that arrangement as is the Illinois defense attorney. There is no concession as far as sentencing. Our recommendation will be incarceration, and basically that will be the determination of the Court.
>
> THE COURT: Is that correct?

MR. PIEPER: That's correct, Your Honor.

Q. (BY THE COURT): Mr. Hedges, you have heard your attorney and you have heard the County Attorney tell me what they perceive the terms of this plea agreement to be. Do you also agree those are, in fact, the terms of the plea agreement.

A. Yes, I do.

Subsequent to this discussion, and prior to the entry of judgment and imposition of sentence, defendant claimed that he in fact misunderstood the consequences of his plea. Defendant explained to the court that he interpreted a "concurrent" sentence to mean essentially that any time served in Iowa would completely satisfy the entire time required to be served in Illinois. Defendant's attorney also took the position that the consequences revealed after the entry of the guilty plea were not the same as what he understood them to be when he advised defendant to plead guilty.

Defendant moved therefore, to withdraw his guilty plea on the basis that, due to his misunderstanding of its consequences, his guilty plea was not knowingly and voluntarily made. The trial court denied defendant's motion and entered a judgment of guilty and sentenced defendant to an indeterminate ten year term of incarceration. On appeal, defendant alleges the trial court erred in denying his motion to withdraw his guilty plea. He also alleges that the trial court impermissibly relied upon unproven allegations of other crimes in imposing the sentence.

I.

The State argues that defendant's appeal is barred because he failed to file a motion in arrest of judgment according to Iowa Rule of Criminal Procedure 23(3)(a). We note, however, that the requirement to file such a motion is mandated when a guilty plea is challenged. That is not the issue before us. Here

the defendant chose to withdraw his plea rather than to challenge the plea. Rule 8 of Iowa Rules of Criminal Procedure provides the authority for both a withdrawal and challenge to a plea.[1] At times it is unclear whether a party is in reality withdrawing a plea or challenging it. In this case, however, we can discern no attempt to "challenge" this plea or any procedural defects. Defendant simply wishes to withdraw the plea since he alleges it has not been knowingly and voluntarily made.

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[1] Rule 8 of the Iowa Rules of Criminal Procedure provides in part:

> **2. Pleas to the indictment or information.**
>
> **a. In general.** A defendant may plead guilty, not guilty, or former conviction or acquittal. If the defendant fails or refuses to plead at arraignment, or if the court refuses to accept a guilty plea, the court shall enter a plea of not guilty. At any time before judgment, the court may permit a guilty plea to be withdrawn and a not guilty plea substituted.
>
> **b. Pleas of guilty.** The court may refuse to accept a plea of guilty, and shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis.
>
> Before accepting a plea of guilty, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) The nature of the charge to which the plea is offered.
>
> (2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.
>
> * * *
>
> **d. Challenging pleas of guilty.** The court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal.

"The defendant must have a full understanding of the consequences of a plea before constitutional rights can be waived knowingly and intelligently." State v. Boone, 298 N.W.2d 335, 337 (Iowa 1980). It follows, of course, that the terms of the plea bargain must be understood and accepted before a plea can be deemed knowing and voluntary. See Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 498, 30 L. Ed. 2d 427, 433 (1971); Stovall v. State, 340 N.W.2d 265, 267 (Iowa 1983); Wallace v. State, 245 N.W.2d 325, 327-28 (Iowa 1976).

A defendant has no absolute right to withdraw his guilty plea. Permission to do so is a matter of trial discretion, and we reverse only for an abuse of that discretion. State v. Pappas, 337 N.W.2d 490, 493 (Iowa 1983); State v. Tillman, 228 N.W.2d 38, 39 (Iowa 1975).

The trial court did not abuse its discretion by denying the defendant's attempt to withdraw his guilty plea. The trial court judge is in a better position to determine credibility on a matter such as whether or not defendant truly misunderstood the implications of his plea and, if defendant did misunderstand such implications, whether or not such a misunderstanding was reasonable. The judge made a clear record of the proceedings and determined that the defendant made an unwarranted assumption by thinking that if he served a sentence in Iowa, then he would not have to serve any time in Illinois. While a misstatement by the trial court which induces defendant to plead guilty, Stovall v. State, 340 N.W.2d 265, 267 (Iowa 1983), or undisclosed plea bargaining, Wallden v. State, 245 N.W.2d 325, 326-27 (Iowa 1976), can be grounds for withdrawing such a plea, it is abundantly clear that the trial judge does not have a duty to discover mistaken assumptions for which there is no reasonable basis. See Fryer v. Scurr, 309 N.W.2d 441, 443 (Iowa 1983). Defendant's attorney informed the court that defendant approved of a concurrent sentence. The consequences

of an unreasonable assumption made by defendant (i.e., that any time served in Iowa under a concurrent sentence would not require him to serve any time in Illinois) which he did not discuss with his counsel, should be borne by defendant.

II.

Defendant also maintains that the trial court considered the other pending charges in Iowa, which is an impermissible factor in sentencing. At sentencing, the judge stated:

> Now, the reason that I am giving the sentence that I have just imposed is because of the Defendant's prior criminal record, which is considerable. I have considered the fact that there are other charges that are being dropped here in the State of Iowa. I have considered the lack of motivation which he has demonstrated. I believe that incarceration is warranted under the record.

Iowa law on sentencing is well settled. Although imposition of sentences is within the trial court's discretionary power and will be set aside only for an abuse of discretion, see State v. Gibb, 303 N.W.2d 673, 687 (Iowa 1981), that discretion is not unlimited. State v. Thompson, 275 N.W.2d 370 (Iowa 1979).

In State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981), the court stated:

> [The trial court] relied on additional, unproven, and unprosecuted charges. No facts before the court showed those charges were valid, and defendant did not admit the additional charges by pleading guilty to this charge. Nor did trial court make any finding whether facts existed to substantiate the charges. See State v. McKeever, 276 N.W.2d 385, 389 (Iowa 1979). . . . We do not interpret trial court's statement to indicate the additional charges were in fact a secondary consideration. But even if they were, we cannot speculate about the weight trial court mentally assigned this factor, or whether it tipped the scales to imprisonment. Other grounds existed to support the sentence imposed in Thompson, see 275 N.W.2d at 372 (Harris, J., dissenting), but nonetheless we struck down the sentence because the trial court impermissibly also considered the higher charge. Thus, we remand the case to the trial court for resentencing without consideration of the other charges unless the facts before the court show defendant committed those offenses or they are admitted by him. We do not suggest what the sentence should be. See Gibb, 303 N.W.2d at 688.

The facts indicate that while pending charges are an impermissible factor, defendant and his counsel basically substantiated the charges by not objecting to discussing such charges during the plea bargain. Thus, we are not faced with a Messer-type situation. We find no abuse of discretion in the sentencing decision of the trial court.

AFFIRMED.

Sackett, J., concurs; Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent. I believe the trial court abused its discretion in denying defendant's application to withdraw his guilty plea. Not only does the record indicate defendant's misunderstanding of the plea bargain which served as a basis for his plea, but it also indicates that the prosecutor and defendant's attorney also misunderstood. Such a misunderstanding cannot lead to a knowing, intelligent, and voluntary plea.

It would be appropriate to deny the withdrawal of the plea, had the assumption upon which defendant entered his plea been his alone, or a mistaken assumption by defendant and his attorney alone. However, it is abundantly clear that the understandings at the time of the plea were acknowledged by all, and were explained to the Court in accordance with that understanding.

I would reverse and remand for permission to withdraw the plea.