IN THE COURT OF APPEALS OF IOWA

No. 7-504 / 96-1299

000471

STATE OF IOWA,
Appellee,

vs.

TOAN SONG VO,
Appellant.

FILED
OCT 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

The defendant appeals his conviction and sentence for attempt to commit murder, in violation of Iowa Code section 707.11 (1995). **AFFIRMED.**

Ta-Yu Yang, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Jaime D. Bowers, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Huitink and Streit, JJ.

CADY, C.J.

Toan Song Vo appeals the judgment and sentence for his conviction of attempt to commit murder. He claims the State breached its plea agreement with him and the district court erred in not allowing him to withdraw his guilty plea. We affirm.

Vo was originally charged, along with six other persons, with first-degree murder and other crimes committed on August 6, 1995, at the Di Vang Cafe. Vo later entered an *Alford* plea to an amended charge of attempt to commit murder in exchange for dismissal of the other charges pursuant to a plea agreement.

During the plea negotiations which led to the plea agreement, the county attorney indicated to Vo and his attorney that none of the other defendants would be offered a "better deal." The representation was made in the context that the prosecutor intended to treat all the defendants in a consistent manner. The written plea agreement signed by all of the parties, however, did not include the representation as a condition of the plea. Vo later cooperated with the State by testifying at the co-defendants' trials. After co-defendant Kiet Nguyen's mistrial, the State allowed Nguyen to plead guilty to terrorism.

Vo subsequently filed a motion in arrest of judgment on the grounds the State violated the terms of the plea agreement. Although the motion did not contain a request to withdraw the guilty plea, the district court and county attorney treated Vo's motion as including a request to withdraw the guilty plea. The district court denied the motion and found no legal basis to set aside the plea. The court then found Vo

guilty of attempted murder and sentenced him to an indeterminate term of twenty-five years.

On appeal Vo argues the district court erred in failing to allow him to withdraw his guilty plea. The State initially responds Vo used the incorrect motion to withdraw his plea and the motion was untimely. It also asserts the grounds raised by Vo did not support a withdrawal of the plea.

I. Standard of Review

Our review of a trial court's denial of a request to withdraw a guilty plea is for abuse of discretion. *State v. Mattly*, 513 N.W.2d 739, 741 (Iowa 1994); *State v. Hinners*, 471 N.W.2d 841, 843 (Iowa 1991). No abuse of discretion will be found unless the defendant shows the discretion was exercised on clearly untenable grounds or was clearly unreasonable. *Mattly*, 513 N.W.2d at 741.

II. Appropriateness and Timeliness of Motion

Our rules of procedure recognize both a motion in arrest of judgment and a motion to withdraw a guilty plea. To determine a motion, however, we look to the substance of a motion rather than merely to its label. *Kanzmeier v. McCoppin*, 398 N.W.2d 826, 828-29 (Iowa 1987) (substance of motion to reconsider was a 179(b) motion); *Peoples Trust & Sav. Bank v. Baird*, 346 N.W.2d 1, 2 (Iowa 1984) (motion for rehearing was essentially a motion for enlarged and amended findings); *State v. Wilt*, 333 N.W.2d 457, 460 (Iowa 1983) (failure of defendants to formulate their motions as applications to adjudicate law points was not dispositive).

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. Iowa R. Crim. P. 23(3)(a). It is the recognized method to raise challenges to a plea of guilty based on defects in the plea proceedings. *See State v. Lucas*, 323 N.W.2d 228, 230 (Iowa 1982). Generally, a motion in arrest of judgment must be filed no later than forty-five days after the plea of guilty and not later than five days before the date set for pronouncing judgment. Iowa R. Crim. P. 23(3)(b). The effect of an order arresting judgment on any ground other than a defect in a guilty plea proceeding is to place the defendant in the same situation in which he or she was immediately before the indictment was found or trial information filed. Iowa R. Crim. P. 23(3)(d). The effect of a defect in the plea proceeding is to place the defendant in the position immediately after the indictment. *Id.*

On the other hand, a court may permit a guilty plea to be withdrawn and substituted with a not guilty plea at *any time* before judgment. Iowa R. Crim. P. 8(2)(a). An application for leave to withdraw a guilty plea is untimely only after judgment. *State v. Whitehead*, 163 N.W.2d 899, 901 (Iowa 1969).

Technically, a motion in arrest of judgment may be granted when no legal judgment can be pronounced "upon the whole record." Iowa R. Crim P. 23(3)(a). Claims that a prosecutor failed to comply with a plea agreement may rest on evidence outside the record and, for this reason, may fall outside the scope of a motion in arrest of judgment. The remedy for the breach of a plea bargain by the prosecutor is to

require specific performance or permit the withdrawal of the plea. *Hinners*, 471 N.W.2d at 845.

Although Vo filed a motion in arrest of judgment, the remedy sought was the withdrawal of his plea based on the breach of a plea agreement. The district court and the county attorney considered the motion as one to withdraw a plea and the court specifically addressed the issue.

We conclude the motion was timely under Rule 8(2)(a). Moreover, the grounds to support the action did not arise until after the deadline for filing a motion in arrest of judgment. We find the claim of error raised by Vo on appeal was not waived.

III. Validity of Plea Agreement

Typically, a breach of a plea agreement occurs when the State offers a plea bargain and withdraws it, or when the State violates a term of the agreement. *See e.g., Santobello v. New York*, 404 U.S. 257, 258-59, 92 S. Ct. 495, 30 L.Ed. 427, 431 (1971) (prosecutor breached plea agreement by failing to make no sentencing recommendation as agreed); *State v. Lummus*, 449 N.W.2d 95, 96 (Iowa App. 1989) (State had withdrawn from plea agreement); *State v. Weig*, 285 N.W.2d 19, 20 (Iowa 1979) (county attorney broke promise to recommend probation at sentencing hearing). In either case, the defendant must show a violation of the "fair play norm" and that prejudice occurred before a motion to withdraw will be permitted. *See State v. Malone*, 511 N.W.423, 425 (Iowa App. 1993) (appeals court considered fair play and prejudice when sentencing judge refused to accept plea agreement another judge

already accepted and refused defendant's motion to withdraw her plea); *Lummus*, 449 N.W.2d at 99 (both elements must exist to enforce a plea agreement).

Vo asserts the district court erred in failing to allow him to withdraw his guilty plea after the county attorney indicated none of the other co-defendants would receive a better plea bargain, but later breached the plea agreement when co-defendant Kiet Nguyen was allowed to plead guilty to terrorism. We do not believe this violated the fair-play norm or resulted in prejudice. First, the representation was too nebulous to become a term of a plea agreement. Second, there was no indication the representation was not made in good faith. Nguyen was permitted to plead guilty to terrorism only after his trial for first-degree murder resulted in a mistrial and the State experienced problems with witnesses. Finally, the formal written plea agreement did not include the representation as a term. *See Ridinger v. State*, 341 N.W.2d 734, 737 (Iowa 1983). We therefore conclude the district court did not abuse its discretion in failing to allow Vo to withdraw his guilty plea and in denying his motion in arrest of judgment.

AFFIRMED.