

IN THE COURT OF APPEALS OF IOWA

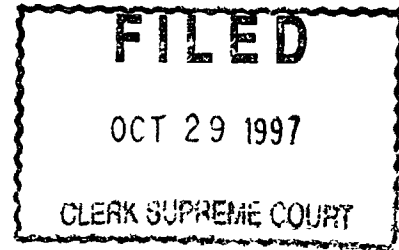
No. 7-371 / 96-1447

000401

STATE OF IOWA,
Appellee,

vs.

JEREMY DENNIS HAZEN,
Appellant.



Appeal from the Iowa District Court for Mahaska County, Daniel P. Wilson,
Judge.

The defendant appeals the judgment and sentence entered upon his conviction
for delivery of methamphetamine in violation of Iowa Code section 124.401(1)(c)(6)
(1995). **AFFIRMED.**

Ryan B. Moorman, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney
General, and Charles A. Stream, County Attorney, for appellee.

Heard by Cady, C.J., and Huitink and Vogel, JJ.

VOGEL, J.

Jeremy Dennis Hazen appeals the judgment and sentence entered upon his conviction for delivery of methamphetamine in violation of Iowa Code section 124.401(1)(c)(6) (1995). He argues the trial court erred in not informing him that it would not follow the plea agreement and in not allowing him an opportunity to withdraw his plea. He also argues his trial counsel was ineffective in failing to ensure that his guilty plea was tendered under Iowa Rule of Criminal Procedure 9. We affirm.

Background facts. Pursuant to a plea agreement, Hazen filed a written guilty plea. He agreed to plead guilty to one count of delivery of methamphetamine in exchange for the dismissal of the other counts and the State's recommendation of a suspended sentence.

A plea and sentencing hearing was held. There were no statements made at the hearing or in the written plea which indicated the plea agreement was subject to the court's concurrence. The court sentenced the defendant to a term of incarceration not to exceed ten years. The defendant subsequently filed a motion to reconsider his sentence pursuant to Iowa Code section 902.4 (1995). The motion was denied. Hazen appeals.

Scope of review. Our scope of review on plea agreement issues is limited to errors at law. Iowa R. App. P. 4. We review the district court's sentencing decision

for an abuse of discretion. *State v. Lummus*, 449 N.W.2d 95, 96 (Iowa App. 1989).

I. Plea agreement. Hazen argues the trial court erred in not informing counsel that it would not follow the plea agreement, and that the court erred in not allowing Hazen an opportunity to withdraw its plea.

We find Hazen failed to preserve error on this issue as he failed to make a motion in arrest of judgment. A defendant may not challenge the integrity of a plea proceeding on appeal unless it is first presented to the trial court by a motion in arrest of judgment. Iowa R. Crim. P. 23(3)(a). The district court has a duty to inform the defendant that any challenges arising from alleged defects in the plea proceedings must be raised in this motion and that failure to file the motion in arrest of judgment precludes a defendant from asserting any challenges on appeal. Iowa R. Crim. P. 8(2)(d).

Our review of the record reveals the plea agreement addressed Hazen's right to file a motion in arrest of judgment and his waiver of that right if he proceeded to an immediate sentencing. The trial court also successfully discharged its duty to apprise Hazen of the consequences of failing to file a motion in arrest of judgment. Hazen expressly waived his right to make such a motion and elected to immediately proceed to sentencing.

Even if we were to reach the merits, we find Hazen's claim must fail. Hazen argues the trial court erred by not following the plea agreement by refusing to suspend

his sentence. We disagree. Although a copy of Rule 9 of the Iowa Rules of Criminal Procedure was attached to the written plea agreement, the plea contained no language indicating it was conditioned on the trial court's acceptance of the sentencing concession. The agreement stated:

My attorney has advised me that the recommendations of the prosecuting attorney and my attorney are not binding on the Court. I know that it is within the discretion of the Court to accept or reject any plea agreement between my attorney and the prosecutor. I also understand that the sentence I receive is solely a matter within the discretion of the judge.

The agreement is clear, yet, if there were any ambiguity in the agreement as Hazen claims, we find it would have been resolved by the court. At the plea proceeding, the court advised Hazen of the maximum penalties for his crime, reviewed the terms of the plea agreement, asked Hazen if he understood the plea agreement, and asked him whether he still wanted to plead guilty:

COURT: Mr. Hazen, the charge that you're pleading guilty to is a Class C felony The maximum penalty for this offense is that you could be incarcerated for a period not to exceed ten years. The fines range from a minimum of one thousand to a maximum of \$50,000. I have to impose a thousand dollar fine if I accept your plea and sentence, do you understand that?

DEFENDANT: Yes, sir.

. . . .

COURT: Bearing in mind these maximum penalties that may be imposed at sentence, do you still want to plead guilty?

DEFENDANT: Yes.

. . . .

COURT: Is this plea the result of a plea negotiations and agreement, counsel?

[PROSECUTOR]: It is your Honor

COURT: Mr. Hazen, did you hear the county attorney and your attorney discussing the plea agreement?

DEFENDANT: Yes, sir.

COURT: Do you understand it?

DEFENDANT: Yes, sir.

....

COURT: Mr Hazen, you understand what the plea agreement is? I need to tell you that if I'm the sentencing judge or if some other judge sentence you another day, he or she may impose the maximum penalties that we discussed her earlier, do you understand that?

DEFENDANT: Yes, sir.

COURT: I can't give you any guarantee that I or some other sentencing judge will do anything other than that, do you understand that?

DEFENDANT: Yes, sir.

COURT: Bearing that in mind, do you still want to plead guilty?

DEFENDANT: Yes, sir.

As we have determined, Hazen was informed, both by the court and the written plea agreement, that the court was not bound by the terms of the agreement and the trial court retained the right to impose any sentence permitted by law for these offenses. As the court was not bound by the terms of the written plea agreement, and so informed Hazen, it did not err in sentencing Hazen. We accordingly affirm on this issue.

II. Ineffective assistance of counsel. Ineffective assistance of counsel claims involve a constitutional challenge and are thus reviewed *de novo*. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1995). Ineffective assistance of counsel claims are usually preserved for postconviction relief actions; however, a court will review the claim on direct appeal "where the evidence available is sufficient to establish the validity of the

claim.” *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990). Hazen argues his counsel was ineffective by failing to ensure his guilty plea was tendered under Iowa Rule of Criminal Procedure 9(4). Hazen never claims his attorney told him the plea agreement would be binding on the court and the record is bereft of evidence indicating the attorney made such a representation. Accordingly, Hazen’s ineffective assistance claim must fail.

We affirm the trial court’s sentencing.

AFFIRMED.