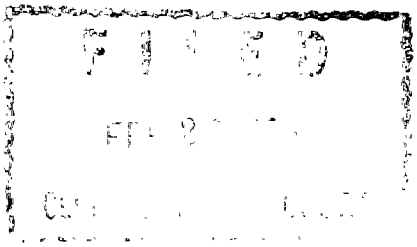
IN THE COURT OF APPEALS OF IOWA

No. 5-050 / 94-0674



STATE OF IOWA,

Plaintiff-Appellee,

vs.

KEVIN D. HEWITT,

Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, E. Richard Meadows, Jr., District Associate Judge.

Kevin D. Hewitt appeals the judgment and sentence entered upon his plea of guilty to the offense of domestic abuse assault (serious) in violation of Iowa Code sections 708.1 and 708.2A(2) (1993). **AFFIRMED AS MODIFIED.**

Steven Gardner of Kiple, Kiple, Denefe, Beaver & Gardner, Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, William H. Appel, County Attorney, and Laura M. Roan, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Sackett and Habhab, JJ.

SACKETT, J.

Defendant-appellant Kevin D. Hewitt appeals the sentence entered after he pled guilty in accordance with a plea bargain agreement to domestic assault in violation of Iowa Code sections 708.1 and 708.2A(2) (1993). Defendant contends the trial court judge erred: (1) in failing to advise him the court was not bound by the plea bargain and intended to impose a different sentence; (2) in filing a judgment entry imposing a sentence different than the sentence stated orally at the sentencing hearing; and (3) in failing to advise him of the reason for the sentence. Defendant asks he be allowed to withdraw his plea or we remand to the trial court to resentence in accordance to the plea bargain.

Defendant was charged by a county attorney's trial information with the offense of domestic abuse assault in violation of Iowa Code sections 708.1 and 708.2A(2)(b). Defendant pled guilty. When defendant appeared to enter the plea, his attorney advised the court there was an agreement with the county attorney's office that the defendant enter a plea of guilty to the pending charge with the agreement he receive a three-day jail sentence and credit for one day time served.

The court accepted defendant's plea; advised him he had a right to challenge the plea proceedings by filing a motion in arrest of judgment no later than five days before he was sentenced and told him, if he did not file a motion

in arrest of judgment, he waived the right to challenge the proceedings later. Defendant was also told he was entitled to fifteen days before sentencing. He was told he could waive the time but, if he did, he also would waive his right to file a motion in arrest of judgment.

Defendant waived the time. The court then sentenced defendant to pay a fine of $250, a thirty percent surcharge, court costs, and restitution for his court-appointed attorney. The court suspended all but three days of the thirty days' time and gave him credit for serving one day's time. Defendant was placed on probation to the court conditioned on his good behavior. The court further ordered, as a condition of defendant's probation, defendant was to complete the Batterer's Education Program through the Department of Correctional Services for the Eighth Judicial District as soon as it was available. An earlier restraining order was to remain in effect until further order of the court or until defendant was discharged from probation. Defendant was further ordered, as a condition of his probation, to satisfy an outstanding obligation on another matter to the district court. Defendant was given the opportunity to do community service as a credit against his fine.

Defendant's attorney then asked that the court withdraw the restraining order. The court said it would consider it.

When the court filed its written judgment entry, the terms of the probation stated to defendant in open court were changed by placing defendant under probation to the Eighth Judicial District Department of Correctional Services for two years and ordering him to make arrangements to be supervised by the Department.

When defendant learned of the change, he objected to his attorney who told the court. Consequently, on March 18, the court, on its own motion, ordered the sentence set for consideration on April 1.

The matter came on for hearing on April 18. The court took a record. On April 21, the court filed a written order reaffirming the probation to the Department of Correctional Services and ordering the probation begin immediately.

On April 22, defendant filed a motion in arrest of judgment asking to be allowed to withdraw his plea of guilty and proceed to trial. Defendant alleged he was influenced to waive his right to file the motion in arrest of judgment and waive his fifteen-day waiting period in light of the record made at the guilty plea and sentencing hearing. Defendant contended, therefore, his motion was timely. Defendant also filed a notice of appeal.

Defendant first contends the court erred when it failed to advise him it did not intend to follow the plea bargain and allow him to withdraw the plea of guilty.

When taking defendant's plea, the court told him neither that the court was not bound by the plea bargain nor that the court did not intend to follow the plea bargain agreement either before or after defendant waived his right to file a motion in arrest of judgment.

Our scope of review is on errors of law. Iowa R. App. P. 4. Our standard of review is abuse of discretion. State v. Lummus, 449 N.W.2d 95, 96 (Iowa App. 1989). We do not defer to the trial court in the matter of the applicable law. Id. The trial court's order will be reversed if there is no reasonable basis for it in the record. Id.

The United States Supreme Court has upheld the plea bargaining process. Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971).

The Iowa courts have endorsed the plea bargaining process. State v. Barker, 476 N.W.2d 624, 626 (Iowa App. 1991); see Lummus, 449 N.W.2d at 96-99 (an extensive analysis traces the limits of due process in plea bargaining, including unilateral withdrawal by the prosecutor).

The United States Supreme Court in Mabry v. Johnson, 467 U.S. 504, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984), defined the constitutional significance of the phases of the plea bargaining process. The court said, "[a] plea bargain standing alone is without constitutional significance; it is a mere executory agreement which, until

embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing plea that implicates the Constitution." Id. 467 U.S. at 507-08, 104 S. Ct. at 2546, 81 L. Ed. 2d at 442.

The Iowa Supreme Court has followed the rationale of Mabry in State v. Aschan, 366 N.W.2d 912, 915 (Iowa 1985), aff'd on habeas corpus review Aschan v. Auger, 861 F.2d 520 (8th Cir. 1988).

Once the plea is entered, defendant's due process rights attach to the plea agreement. See State v. Hinners, 471 N.W.2d 841, 845 (Iowa 1991).

The trial court has broad discretion on whether to accept a guilty plea. State v. Wenzel, 306 N.W.2d 769, 771 (Iowa 1981). If the plea bargain is conditioned on the court's acceptance, the trial court has three options: (1) it may accept the plea bargain arrangement; (2) it may reject the arrangement and allow defendant to withdraw the plea; or (3) it may defer its decision until it receives the presentence report. Id.; Iowa R. Crim. P. 9(2). The court may also inform defendant it will not be bound by the plea agreement and allow withdrawal of the plea. Iowa R. Crim. P. 9(4); see Wenzel, 306 N.W.2d at 771. None of these things happened here. Rather, the court took the plea and pronounced a sentence.

We agree with defendant that the trial court should have advised him the court would not accept the plea

bargain and afforded defendant an opportunity to withdraw the plea. See Wenzel, 306 N.W.2d at 771.

The State advances defendant did not preserve error on this issue because, during the oral delivery of the sentence, defendant did not object to conditions that were not a part of the plea agreement and verbally agreed to comply with some of them.

The State further alleged, by the time of the second hearing, defendant had served two days of his jail term and was only complaining he could not be placed on probation to the Department of Correctional Services.

We agree with the State that defendant lost his right to complain the oral sentence did not conform to the agreement by not objecting to the sentence when pronounced and by agreeing to certain of its terms.

We are troubled by the written sentence which changed the terms of the oral sentence as to supervision of probation. Defendant did not waive a challenge to this provision at the time of the oral sentencing because he was not aware of it.

The better manner of challenging the amendment would have been to file a motion in arrest of judgment. However, the record reflects the trial court was clearly alerted to the problem and ordered the sentence reconsidered because of defendant's objection. We, therefore, determine the issue was properly before the trial court in the second hearing.

We consider, too, the State's contention, by serving the jail time, defendant accepted the plea and waived his right to challenge. The record reflects defendant appeared to enter his plea on March 14, 1994, a Monday. At that time, it was agreed he would begin serving his jail time on Friday, which would have been March 18. The written sentencing order was not filed until Thursday, March 17, at 8:57 a.m. It, therefore, is not clear defendant was aware of the modification before he commenced to serve his jail time. We, therefore, reject the State's contention defendant waived a challenge by commencing to serve his jail time.

We modify the sentence to strike the provision the defendant be supervised by the Eighth Judicial District Department of Corrections. In all other respects, we affirm.

AFFIRMED AS MODIFIED.