IN THE COURT OF APPEALS OF IOWA

No. 5-268 / 94-740

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFREY FRANCIS HONDL,
Defendant-Appellant.

FILED
JUL 25 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Tama County, John R. Sladek, District Associate Judge.

Jeffrey Francis Hondl challenges the judgment and sentence entered upon his guilty plea to operating while intoxicated, eluding police and possession of marijuana.

AFFIRMED.

Robert W. Thompson of Thompson & Metcalf, P.C., Reinbeck, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, and Brent D. Heeren, County Attorney, for appellee.

Heard by Sackett, P.J., and Habhab and Cady, JJ.

SACKETT, P.J.

Defendant-appellant Jeffrey Francis Hondl appeals following a plea of guilty and sentence for charges of driving under the influence, eluding a police officer, and possession of marijuana. We affirm.

Defendant signed a written plea of guilty, and his attorney entered the written plea of guilty for him. The plea had been entered after negotiations with the county attorney which resulted in a recommendation by the county attorney of an agreed sentence which was not followed by the trial court.

The focal question is whether the trial court is required to notify defendant it will not follow a plea bargain and allow defendant the opportunity to withdraw the plea of guilty where the written plea agreement states defendant waives his right to be personally addressed by the court on matters outlined in Iowa Rule of Criminal Procedure 8(2)(b). The written agreement defendant signed enumerated the minimum and maximum penalties of the offenses, and he acknowledged the trial court was not bound to follow the agreement.

Defendant's written plea was a plea to charges of operating a motor vehicle while intoxicated, eluding police, and possession of marijuana. The written plea detailed the county attorney agreed to recommend a ninety-day jail term with all but seven of the ninety days suspended; a $500 fine on the charge of driving while intoxicated; a concurrent seven-day term and the minimum fine on the charge of

eluding a police officer; and a concurrent five-day term and a minimum fine on the charge of possession of marijuana.

Defendant's plea was accepted by Judge Lewis on February 22, 1994. On April 5, 1994, defendant appeared for sentencing before Judge Sladek. Judge Sladek sentenced defendant to forty-eight hours in jail and a $500 fine on the charge of driving while intoxicated; one hundred and twenty days in jail on the charge of eluding an officer; and a $250 fine on the charge of possession of marijuana. Additionally, the court placed defendant on probation for two years. This appeal follows.

Defendant first contends Judge Sladek should have followed the plea bargain or should have allowed him to withdraw his plea.

We review to correct errors at law. Iowa R. App. P. 4.

The plea bargaining process is supported by the courts. *See Santobello v. New York*, 404 U.S. 257, 260, 92 S. Ct. 495, 498, 30 L. Ed. 2d 427, 431 (1971). The plea bargaining process has been endorsed by the Iowa courts. *State v. Barker*, 476 N.W.2d 624, 626 (Iowa App. 1991); *State v. Lummus*, 449 N.W.2d 95, 96-99 (Iowa App. 1989). 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 ensuring plea that implicates the Constitution. *Mabry v. Johnson*, 467 U.S. 504, 507-08, 104 S. Ct. 2543, 2546, 81 L. Ed. 2d 437, 442 (1984); *see also State v.*

Aschan, 366 N.W.2d 912, 915 (Iowa 1985), *aff'd Aschan v. Auger*, 861 F.2d 520 (8th Cir. 1988).

The State may withdraw from a plea bargain at any time prior to, but not after, actual entry of the guilty plea by defendant or other action by defendant constituting detrimental reliance upon the arrangement. *State v. Edwards*, 279 N.W.2d 9, 11 (Iowa 1979).

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 the defendant to withdraw the plea; (3) it may defer its decision until it receives the presentence report. *Barker*, 476 N.W.2d at 626; 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).

Defendant complains he was not allowed these options.

The State contends, because defendant failed to object when the alleged procedural irregularity became apparent at the sentencing hearing, the issue he raises is not a proper issue on appeal. We agree with the State that a trial court should generally have an opportunity to rule on the validity of a defendant's claimed error. *See State v. Messer*, 306 N.W.2d 731, 733 (Iowa 1981). That issue not raised before the trial court cannot be raised for the first time on appeal. *See State v. Hansen*, 286 N.W.2d 163, 165-66 (Iowa 1979). However, we do not consider the State's preservation of error argument but, rather, address defendant's claim on its merits.

Iowa Rule of Criminal Procedure 9(2) provides:

> If a plea agreement has been reached by the parties, the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon, *if the agreement is conditioned upon concurrence of the court in the charging or sentencing concession made by the prosecuting attorney*, the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until receipt of a presentence report. (Emphasis supplied).

The State advances this was not a conditional plea as defendant alleges. We agree. In entering the written plea, defendant agreed to the following:

> I am making this plea of my own free will and not based on any promises or threats, nor do I anticipate the imposition of a sentence more favorable than that stated below under Plea Agreement, and *I understand the Court may sentence me to the maximum penalty allowed by law.*
>
> . . . .
>
> My attorney has advised me that the recommendation 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 the 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. (Emphasis supplied).

The plea bargain was not conditioned on the court's acceptance of the county attorney's recommended sentence. 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); *State v. Wenzel*, 306 N.W.2d 769, 777 (Iowa 1981); *Barker*, 476 N.W.2d at 624.

Defendant's second contention is the sentencing court did not give reasons for the sentence selected.

The court said, "I've had a chance to review the Minutes with regard to the nature of the offenses, taking into account your age and past record, . . ."

The judge imposed a less severe sentence on the driving under the influence and possession charges than recommended in the plea agreement, but imposed a longer jail term on the eluding charge. The State advances the judge's reference to parts of the record of defendant's action to keep from being stopped which resulted in a high-speed chase supports the sentence imposed, and the court was within its discretion.

We review for an abuse of discretion. *See State v. Garrow*, 480 N.W.2d 256, 259-60 (Iowa 1992); *Lummus*, 449 N.W.2d at 96. We do not defer to the trial court in the matter of the applicable law. *Lummus*, 449 N.W.2d at 96. The trial court's order will be reversed if there is no reasonable basis for it in the record. *Id.*

The court referred to defendant's driving record and prior criminal record. Defendant says these items were not entered in the record and asks for a remand for this purpose. While not entered as an exhibit, a review of the transcript of the sentencing hearing reveals the trial judge had both records and defendant's attorney made comment to them. We affirm.

AFFIRMED.