



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed May 31, 1978
vs.	)	
TOMMY A. PINEGAR,	)	492
Appellant.	)	<u>59180</u>

Appeal from Polk District Court - A. M. Critelli, Judge.

Defendant appeals his guilty plea conviction of assault with intent to do great bodily injury, in violation of § 694.6, The Code 1975, alleging error in the denial of his motion in arrest of judgment and motion to withdraw plea of guilty. REVERSED AND REMANDED.

Gerald W. Crawford, of Des Moines, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, and Dan Johnston, Polk County Attorney, counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Defendant-Tommy A. Pinegar appeals his guilty plea conviction of assault with intent to do great bodily injury, in violation of § 694.6, The Code 1975, contending that he was entitled to have his motion in arrest of judgment granted because the ineffective assistance of his counsel prevented his plea from being knowingly and voluntarily entered. He also asserts that the trial court erred in failing to afford him an opportunity to withdraw his guilty plea once the court decided not to honor the plea agreement reached by counsel for defendant and the county attorney's office. Our resolution of the first issue renders consideration of the second one unnecessary.

The underlying facts are not in dispute. On June 25, 1975, defendant was arrested and charged with the instant offense. On August 14, Pinegar was arraigned and on September 8, a county attorney's information was filed. On September 11, defendant entered a plea of not guilty, but he changed that plea to one of guilty as charged on September 22. At the change of plea proceeding, the court accepted the guilty plea after personally questioning defendant, who was represented by attorney Mike Wilson. At that time, the court set October 22 as the date for sentencing and ordered that a presentence report be prepared. On October 31, after a continuance, defendant was sentenced to a prison term not to exceed one year. At the sentencing proceeding, neither the prosecutor, Wilson, nor defendant expressed a desire to address the court. On December 11, 1975, Pinegar filed, through his current attorney, the two motions which are the subject of the instant appeal.

An evidentiary hearing was held on these motions on December 12 before Judge Critelli, who also presided at the change of plea and sentencing proceedings, and on December 19, the court overruled both motions. With regard to the motion in arrest of judgment, the court concluded that although defendant elicited substantial testimony concerning difficulties he had encountered with his first attorney, especially in relation to the delay in his preliminary arraignment, such delay was not so indicative of incompetency of counsel as to necessitate the setting aside of the guilty plea. After noting that there was also some dispute in the record as to the degree of certainty of sentence that was allegedly expressed by Wilson to the defendant, the court found that Wilson did inform his client that discussions had been had with a representative of the

county attorney's office who indicated that their office would not object to probation for Pinegar. However, the court concluded that there was nothing in the record which would indicate that a recommendation of probation by the county attorney's office was ever conveyed to the court in any form.

In reaching this conclusion, the court placed particular emphasis on an item contained in defendant's petition to plead guilty and statements made by defendant at the time of his change of plea. In his signed petition to plead guilty, which Pinegar acknowledged he reviewed with his attorney, understood and accepted, the following provision appears:

12. That I state there have been no promises or threats made to get me to enter this plea and I understand this court may give me the maximum sentence.

During the change of plea proceedings, the following questions were asked of defendant by the court:

Q. In entering this plea of guilty, have you been threatened, coerced, or forced in any way? A. No, sir.

Q. Have you been promised any leniency to encourage this plea of guilty? A. No, sir.

Largely on the strength of these statements, the court overruled the motion in arrest of judgment.

Initially, we must determine our standard of review in this case. Because Pinegar asserts ineffective assistance of counsel, he claims a violation of a basic constitutional safeguard. Consequently, we make our own evaluation of the claim under the totality of the circumstances. *State v. Lemburg*, 257 N.W.2d 39, 45-46 (Iowa 1977). In other words, our review is *de novo*. *Long v. Brewer*, 253 N.W.2d 549, 552 (Iowa 1977).¹

In reviewing Pinegar's claim of ineffective assistance of counsel, we are governed by the "range of normal competency" standard enunciated in *Zacek v. Brewer*, 241 N.W.2d 41, 50-51 (Iowa 1976). See *Long v. Brewer*, *supra*, at 553. In other words, defendant may only attack the voluntary and intelligent character of the plea by

¹ We reach this conclusion in spite of the holding in *State v. Hellickson*, 162 N.W.2d 390, 395 (Iowa 1968) that the reviewing court's task, on appeal from the denial of a motion in arrest of judgment, is to determine only whether there is substantial evidence to support the trial court's findings and conclusions. See *State v. Bastedo*, 253 Iowa 103, 108, 111 N.W.2d 255 (1961).

showing counsel's advice was outside the range of competence demanded of attorneys in criminal cases. See *McManh v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) and *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). In analyzing Pinegar's claim, we are called upon to determine whether he has established "an affirmative factual basis demonstrating counsel's inadequacy of representation." *Zacek v. Brewer*, supra, at 51; see generally *Reynolds v. Mabry*, ____ F.2d ____ (8 Cir., filed May 2, 1978).

Pinegar raises two grounds in support of his contention that he was denied effective assistance of counsel. First, he asserts that his counsel failed to discuss the range of available options should the case have proceeded to trial, and secondly, he argues that he pleaded guilty because of unqualified and false representations by his attorney that a plea bargain had been arranged, when in fact it had not.

With regard to the first ground, defendant relies upon *State v. Rife*, 260 Iowa 598, 602, 149 N.W.2d 846 (1967), for the proposition that he was entitled to be enlightened by his attorney concerning the probable outcome of the trial if he were not to plead guilty, based upon an experienced appraisal of the available evidence. At the hearing on the instant motions, defendant's current counsel only asked Wilson two or three general questions bearing on this issue. Consequently, we are unable to say that a factual basis exists upon which we can determine whether or not Wilson's performance fell within the normal range of competency. See *State v. McCray*, 231 N.W.2d 579, 581 (Iowa 1975); *State v. Kendall*, 167 N.W.2d 909, 911 (Iowa 1969). If anything, defendant's argument is undermined by the provision in the petition to plead guilty that defendant has been informed of possible defenses and waives them by pleading guilty.

Pinegar next contends that the only reason he changed his plea to guilty was because he was told by his attorney that a plea bargain had been made, when in reality it had not. In so arguing, he relies upon the following language from *State v. Rife*, supra, at 602-603:

...[I]f the defendant claims his plea was prompted by erroneous advice of counsel, it may well be that he has misinterpreted remarks that amounted to no more than an educated guess as to the consequence of the plea. To avoid the difficulty of ascertaining the exact nature of conversations between counsel and client, the courts have generally been reluctant to entertain this type of claim unless it appears that

counsel unqualifiedly and falsely represented that the State had accepted a plea bargain and that the defendant justifiably relied on that representation. (emphasis added)

Pinegar contends that the judgment should be vacated because his decision to plead guilty was motivated by the unqualified and false representation by Wilson that the State had accepted the plea agreement and because he justifiably relied on that representation. See State v. Lindsey, 171 N.W.2d 859, 863-865 (Iowa 1969).

At the hearing on the motions, Pinegar testified that Wilson had told him that he had reached an agreement with the county attorney's office whereby Pinegar could get a two-year probation in exchange for his plea of guilty. Pinegar stated that there was no doubt in his mind that a deal had actually been made and that Wilson also told him that if he stayed clean and out of trouble for a year, Wilson could get the second year of the probation suspended. He testified that he only pleaded guilty because of the assurances made by Wilson that he would receive probation. See generally State v. Tillman, 228 N.W.2d 38 (Iowa 1976).

Wilson testified that he had engaged in plea bargaining with the county attorney's office on defendant's behalf and that an agreement had been reached whereby the prosecutor said that his office would recommend probation. Wilson stated that he informed defendant of this fact and indicated that the probation would probably be for two years. He also told Pinegar that there would be a recommendation of probation and the courts "very closely follow the recommendation of the County Attorney down here." Wilson also testified that to the best of his recollection, neither he, the county attorney, nor the two of them together, ever discussed the matter with the judge until after Pinegar had pleaded guilty and the presentence report had been received, at which time the judge indicated to Wilson that, on the basis of the report, he intended to sentence defendant to a prison term.²

² We are aware that Pinegar's current counsel elicited substantial testimony at the hearing concerning the failure of Wilson to inform defendant that he may have had the right to withdraw his guilty plea prior to judgment since it was allegedly induced by promises and assurances by Wilson that a recommendation of probation would be forthcoming from the county attorney's office. See State v. Fisher, 223 N.W.2d 243, 244-246 (Iowa 1974). Pinegar now apparently implies that Wilson's failure to so inform him after Wilson knew that the judge expressed his intention to sentence him to a prison term constituted ineffective assistance of counsel. We need not decide this issue since it was not presented to us for review. However, we wish to note that it is entirely possible that the present appeal might not have been necessary if Wilson had informed Pinegar of this possible course of action and if Pinegar had made a timely motion to withdraw his plea prior to entry of judgment. See § 777.15, The Code.

Wallace v. State, 245 N.W.2d 325 (Iowa 1976), a postconviction proceeding in which the petitioner sought to set aside his guilty plea as involuntarily entered because he did not understand the agreement resulting from a plea bargain, centered around the question of what charges the State had agreed to dismiss. In *Wallace*, only two witnesses testified at the postconviction hearing, the petitioner and his then attorney. The fact of plea bargaining was not contested. The only disagreement concerned the terms of the bargain. Petitioner there claimed he "misunderstood" the agreement and believed that all other pending charges were to be dropped. However, his trial counsel stated that it was his "impression" that all of the charges except one were to be dismissed. *Id.* at 326-327. The *Wallace* court emphasized that what was important was what petitioner understood, not what his attorney thought, and that the decision to plead guilty or not was defendant's alone. *Id.* at 327; *State v. Thomas*, 205 N.W.2d 717, 723 (Iowa 1973); see *Allison v. Blackledge*, 533 F.2d 894 896-897 (4 Cir. 1976), aff'd sub nom *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

The *Wallace* court went on to say that guilty pleas have been upheld in a number of plea bargaining cases even though the requirements of *State v. Sisco*, 169 N.W.2d 542 (Iowa 1969) were not literally followed. Only "meaningful compliance" with the standards there adopted is required. *Id.* at 327. In the cases cited in *Wallace* in which pleas have been upheld, inquiry had been made concerning promises and threats generally, and in each instance, such inquiry brought a negative response. The supreme court "held this sufficient because, if there were no threats or promises, there could have been no plea bargaining threats or promises either." In *Wallace*, petitioner was permitted to plead anew because there was no inquiry of the nature held sufficient in the other cases discussed.

A cursory examination of the record in the instant case initially suggests that "meaningful compliance" with the *Sisco* requirements was achieved. An inquiry of the type deemed sufficient in *Wallace* was made by the trial court in the petition to plead guilty, at the change of plea proceeding, and, to some degree, at sentencing. All inquiries regarding promises and threats brought a negative response. However, we are persuaded that two factors which exist here and which were not present in *Wallace* serve to tip the scales in favor of defendant. First, Pinegar testified that the only

reason he gave negative responses to the questions asked by the court was because he was told to do so by Wilson in order to obtain probation. See Blackledge v. Allison, 431 U.S. 63, 70-76 and nn. 5 and 8, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977); Brown v. United States, 565 F.2d 862, 863 and n. 2 (3 Cir. 1977). Second, Pinegar stated at the hearing that inasmuch as the offense with which he was charged only carried a maximum sentence of one year in prison, he would have been no worse off taking his chances at trial rather than pleading guilty had he not been sure that he would receive probation, since a one-year sentence was the worst that he could receive in any event.

The litany of questions asked by the trial judge nowhere indicated to Pinegar (or indeed to the lawyers involved) that plea bargaining was a legitimate practice that could be freely disclosed in open court. Neither lawyer was asked to disclose any agreement that had been reached or sentencing recommendation that had been promised. The process thus did nothing to dispel defendant's belief that any bargain struck must remain concealed. Blackledge v. Allison, supra, 431 U.S. at 77. In light of these facts and the deference which we must accord defendant's understanding of any purported plea agreement, we conclude that Pinegar must be given the opportunity to plead anew. Consequently, the judgment of the district court is reversed and the cause is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Carter and Oxberger, JJ. concur specially.

CARTER, J., (specially concurring)

I concur in the result based solely on my belief that the evidence at the hearing on motion in arrest of judgment conclusively establishes that defendant's plea was induced by a false belief and thus not voluntary. I do not view this as an incompetency of counsel case or a case involving the sufficiency of the record at the time the plea was taken.

OXBERGER, J., joins in this special concurrence.