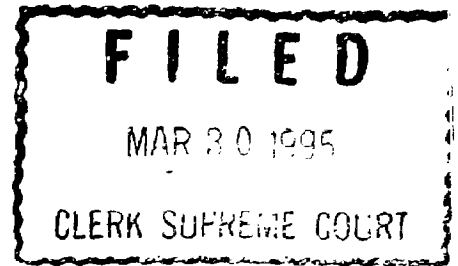


IN THE COURT OF APPEALS OF IOWA

No. 4-505 / 93-1779



STATE OF IOWA,

Plaintiff-Appellee,

vs.

KENNETH MICHAEL POTTORFF,

Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Phillip S. Dandos,
Judge.

Kenneth Michael Pottorff appeals the judgment and sentence entered upon his
conviction of second-degree theft in violation of Iowa Code sections 714.1(1) and
714.2(2) (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Annette L. Hitchcock,
Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher, Jr., Assistant
Attorney General, Thomas S. Mullin, County Attorney, and Mark A. Campbell,
Assistant County Attorney, for appellee.

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

SACKETT, J.

Defendant-appellant Kenneth Michael Pottorff appeals a judgment and sentence of conviction of second-degree theft in violation of Iowa Code sections 714.1(1) and 714.2(2). Defendant contends: (1) the trial court erred in denying his motion to enforce a negotiated plea; and (2) there was not sufficient evidence to support his conviction. We affirm.

The charges that formed the basis of defendant's conviction were the result of an alleged scheme between defendant, who worked for Steffen Truck Equipment, and Thayer, who worked for Luppes Transport. Luppes purchased goods from Steffen Truck and Thayer was the employee of Luppes who placed and paid for the orders. Allegedly Luppes ordered items that were invoiced to Luppes but not delivered. Thayer, on behalf of Luppes, would pay for all the items. Defendant would then put in motion the procedure to issue a refund check to Thayer for the items not delivered. Thayer would cash the refund check and give defendant a portion of the money. There were also times when defendant would deposit the refund check made to Thayer's order in his own account and would give Thayer a portion of the money and retain a portion of the money for himself.

In June 1992, defendant was interviewed by a Sioux City police officer and an agent with the Iowa Division of Criminal Investigation about irregularities in the books at Steffen Trucking. During the interview, defendant explained the scheme and agreed to help in the investigation by recording phone calls he made to Thayer.

On October 20, 1992, defendant was charged with second-degree theft in violation of Iowa Code sections 714.1(1) and 714.2(2). On January 7, 1993, the matter was continued on the oral agreement of defendant, and a trial date was set for March 9, 1993. On March 3, 1993, the case was again continued on an oral motion by defendant and the State and trial was set for April 20, 1993. On April 14, 1993,

the same thing happened, and the case was set for trial on June 22, 1993. On June 14, 1993, again an order on the oral motion by the State and defendant continued the trial date to August 17, 1993. Additionally, on June 14, 1993, there was an order entered setting the date for plea taking and sentencing for August 9, 1993, and a joint application for a pretrial investigation and an order sustaining the application for presentence investigation. The July 14, 1993, applications and orders were the result of a plea bargain offered by the State and accepted by defendant. The county attorney and defendant negotiated an agreement that provided defendant plead guilty to the aggravated misdemeanor of theft in the third degree in violation of Iowa Code section 714.2(3). Part of the agreement called for defendant to cooperate with the preparation of a presentence investigation by the department of correctional services. Defendant told his current employer, H & B Electric, he would be finally charged with a misdemeanor and would enter a guilty plea.

The State acknowledges the plea agreement was withdrawn and characterizes the issue as to whether defendant was prejudiced by the State withdrawing the plea agreement. The State also acknowledges the issue was preserved for appellate review when defendant filed a motion to enforce the plea agreement. State v. Aschan, 366 N.W.2d 912, 915 (Iowa 1985).

In Mabry v. Johnson, 467 U.S. 504, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984), the court explained the due process clause does not, in itself, entitle an individual to enforcement of a bare promise or agreement. Aschan, 366 N.W.2d at 915. A plea bargain, standing alone, is without constitutional significance; in itself, 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. Id. It is the ensuing guilty plea that implicates the Constitution. Id.

There is precedent outside the due process clause for requiring the prosecutor's conduct with respect to plea bargaining be measured by "our time-honored fair play norm." State v. Kuchenreuther, 218 N.W.2d 621, 624 (Iowa 1974) (setting aside felony conviction because county attorney reneged on plea bargain promise to charge only misdemeanor, though due process claim not preserved). Moreover, Standard 3-4.2(c) of the American Bar Association's Standards for Criminal Justice (1982 Supp.) provides:

It is unprofessional conduct for a prosecutor to fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present.

Id.; Aschan, 366 N.W.2d at 915; see Iowa R. Crim. P. 9(5) (plea agreement and guilty plea are inadmissible at trial when plea discussion does not result in accepted guilty plea). Defendant lodges no complaint concerning the fairness of the trial which resulted in his conviction. Aschan, 366 N.W.2d at 917. Plea bargaining flows from "the mutuality of advantage" to the defendant and the prosecutor, each with reasons for wanting to avoid trial. Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604, 611 (1978) (quoting from Brady v. United States, 397 U.S. 742, 752, 90 S. Ct. 1463, 1471, 25 L. Ed. 2d 747, 758-59 (1970)). The performance of a plea-bargained agreement must also be mutual.

We find no evidence to support defendant's claimed prejudice.

AFFIRMED.