IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
JOHN JOE RAMIREZ,)
Defendant-Appellant.)

Filed September 25, 1986

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6-253
85-1501

Appeal from the Iowa District Court for Muscatine County (No. 1601-585) - Jack L. Burns and Margaret S. Briles (on sentencing), Judges.

Defendant appeals from judgment and sentence entered by the district court after defendant pled guilty to lascivious acts with a child in violation of Iowa Code section 709.8(2) (1985). **REVERSED.**

David W. Newell, Muscatine, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Rebecca L. Claypool, Assistant Attorney General; and Stephen J. Peterson, Muscatine County Attorney; for plaintiff-appellee.

Considered by Oxberger, C.J., and Snell and Sackett, JJ., but decided en banc.

SACKETT, J.

Defendant John Joe Ramirez appeals from judgment and sentence entered by the district court after he pled guilty to lascivious acts with a child in violation of Iowa Code §709.8(2)(1985). Ramirez contends the district court abused its discretion (1) in refusing to allow him to withdraw his guilty plea and (2) in sentencing him to an indeterminate term of incarceration of five years instead of placing him on probation. We determine Ramirez should have been allowed to withdraw his guilty plea.

Ramirez was charged initially with sexual abuse in the second degree in violation of Iowa Code §709.3(1985). Trial information and minutes of testimony alleged Rameriz had engaged in sexual acts with a ten-year-old girl, the daughter of the woman he planned to marry.

Ramirez denied guilt but believed a factfinder would probably find him guilty. Pursurant to a plea agreement, Ramirez agreed to plead guilty to a less serious charge, lascivious acts with a child, believing he would receive consideration for probation. Ramirez entered an Alford plea in a hearing before Judge J.L. Burns. Judge Burns deferred acceptance of the plea agreement, set a sentencing date and ordered a presentence investigation. The presentence investigation report was not presented until the sentence hearing. The report recommended against probation based on the fact Ramirez refused to admit he had done anything wrong.

At the sentence hearing Ramirez requested to withdraw his guilty plea. Judge Margaret Briles denied defendant's request, and then sentenced Ramirez to a term of imprisonment not to exceed five years. As reasons for sentencing Ramirez to imprisonment, Judge Briles referred to the presentence report, the need

to vindicate the rights of the child, the psychological makeup of the defendant. As a result, Judge Briles stated she believed incarceration would be the only effective deterrent for Ramirez. This appeal followed.

I.

Our scope of review in this action is on assigned error only. Iowa R. App. P. 4. Ordinarily, a defendant who has entered a plea of guilty may not withdraw it as of right, but may do so only with permission of the court. State v. Reed, 252 N.W.2d 455, 456-57 (Iowa 1977); State v. Tillman, 228 N.W.2d 38, 39 (Iowa 1975). Iowa R. Crim. P. 8(2)(a) provides in part:

> At any time before judgment, the court may permit a guilty plea to be withdrawn and a not guilty plea substituted. (emphasis added)

The analogous federal rule, Fed. R. Crim. P. 32 (d), provides that if a defendant moves to withdraw a plea prior to sentencing, "the court may permit withdrawal of the plea upon the showing by the defendant of any fair and just reason." (emphasis added). See United States v. Stitzer, 785 F:2d 1506, 1514 (11th Cir. 1986).

Granting or denying permission to withdraw a guilty plea is a matter of trial court discretion. Reed, 252 N.W. 2d at 457. The court should exercise its discretion liberally to allow a withdrawal of a guilty plea and as the law favors a trial on the merits, the court should resolve all doubts and exercise its discretion in favor of such a trial. State v. Kellison, 4 N.W.2d 239, 242, 232 Iowa 9, 13 (1942). See Meaton v. United States, 328 F. 2d 379, 380 (5th Cir. 1964), cert. denied 380 U.S. 916, 85 S. Ct. 902, 13 L. Ed. 2d 801, reh'g denied 380 U.S. 959, 85 S. Ct. 1091, 13 L. Ed. 2d 976 (1965); 22 C.J.S. Criminal Law §421(3)(a)(1961).

The discretion of the district court is subject to appellate review and abuse of discretion in refusing to allow a guilty plea to be withdrawn is reversible error. Tillman, 228 N.W. 2d at 42; 22 C.J.S. Criminal Law §421(2)(1961).

Ramirez first argues the district court abused its discretion in refusing to allow him to withdraw his guilty plea since the district court had not yet even accepted the plea agreement. In making his request to withdraw his guilty plea Ramirez noted that the plea agreement was conditional and referred to the order issued by Judge Burns subsequent to the plea hearing:

> NOW, on this 4th day of September, 1985, in open Court the Defendant appearing in person and with counsel and the State being Represented, the Court has reviewed the Memorandum of Plea Agreement finds:
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> * * *
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> That Concurrence of the Court is a part or condition of the Agreement and the Court therefore:
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> * * *
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> defers its decision as to acceptance or rejection of the plea agreement until its receipt of a presentence report. The Defendant is informed that if upon review of the presentence report, the Court decides to reject the plea agreement that the Defendant will be afforded the opportunity of withdrawing the plea of guilty. (emphasis added).

Iowa R. Crim. P. 9(2) establishes the procedures for the court once a plea agreement has been reached by the defendant and prosecuting attorney:

> 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.

If the court does not accept the plea agreement, Iowa R. Crim. P. 9 (4) provides:

> If at the time the plea of guilty is tendered, the court refuses to be bound by or rejects the plea agreement, the court shall inform the parties of this fact, afford the defendant the opportunity to then withdraw his or her plea, and advise the defendant that if he or she persists in his or her guilty plea the disposition of the case may be less favorable to the defendant than the contemplated plea agreement.

Fed. R. Crim. P. 11 (e)(2)(4) is analogous, providing that the district court may accept or reject the plea agreement or may defer its decision until there has been an opportunity to consider the presentence report. Rule 11(e)(2)(4) also provides where the district court does not accept the plea agreement it must afford the defendant the opportunity to withdraw his plea.

The federal courts have recognized the trial court's acceptance of the tendered plea plays a critical role in plea agreement process and is an important factor in determining whether withdrawal of a guilty plea should be allowed. In United States v. Ocanas, 628 F. 2d 353, 358 (5th Cir. 1980), cert. denied 451 U.S. 984, 101 S. Ct. 2316, 68 L.Ed. 2d 840 (1981), the court stated:

> We have previously suggested that a plea bargain is contractual in nature and that when the prosecutor breaches it the underlying basis for the plea fails. We recognize the principles of contract law provide a useful analytical framework, but surely they cannot be blindly incorporated into the criminal law in the area of plea bargaining.
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> The danger in a pure contractual approach to plea bargaining is that it may seduce one into thinking that the plea bargain involves only two parties, the prosecutor and the defendant, when in fact the trial court plays a critical role in the process.
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> * * *
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> Thus, the realization of whatever expectations the prosecutor and defendant have as a result of their bargain depends entirely on the approval of the trial court. Surely neither party contemplates any benefit from the agreement unless and until the trial judge approves the bargain and accepts the guilty plea. Neither party is justified in relying substantially on the bargain until the trial court approves it. We are therefore reluctant to bind them to the agreement until that time. As a general rule, then, we think that either party should be entitled to modify its position and even withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court. (emphasis added). See

In the instant case, Ramirez requested to withdraw his guilty plea at the sentencing hearing on September 30, 1985. The presentence report which Judge

Burns had ordered was not filed until that date. As such, the district court only had that day to review the report and had not yet accepted the plea agreement for the record when Ramirez requested to withdraw his guilty plea. In addition, since the prosecuting attorney had not made any sentencing recommendation, it was the acceptance of Ramirez's guilty plea to lascivious acts with a child which Judge Burns deferred in his order of September 4, 1985.

The State, on the other hand, attempts to characterize the instant case as one of "disappointed expectations." The State argues State v. Lindsey, 171 N.W. 2d 859 (Iowa 1969), and State v. Vantrump, 170 N.W. 2d 453 (Iowa 1969), are controlling. In Vantrump, the court affirmed the denial of defendant's request to withdraw his guilty plea:

> [W]hen trial court asked his reason for requesting leave to change the plea, he answered, in substance, a $500 fine or 100 days in jail was "kind of steep for a first offense." This was the only explanation offered.
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> * * *
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> "A defendant should not be permitted to enter a guilty plea, gamble on the sentence and then move to withdraw the plea if he is disappointed with the severity of the sentence imposed."

Vantrump, 170 N.W. 2d at 453. In Vantrump the court affirmed the district court's denial of the motion to withdraw because defendant had waited until after judgment had been entered, when he saw that the sentence was more severe than anticipated, before moving to withdraw his guilty plea. Vantrump, 170 N.W.2d at 453. Therefore, the court held defendant's postjudgment motion was not timely and defendant's motion was solely the result of disappointed expectations. Vantrump, 170 N.W.2d at 453.

We find the instant case is distinguishable from Vantrump. Here, Ramirez moved to withdraw his plea before it was accepted, before he was sentenced, and before judgment was entered. As such, this is not a situation where Ramirez waited until sentenced was passed, was disappointed with the failed expectation of leniency, and then moved to withdraw his guilty plea. In fact, Ramirez was gambling by moving to withdraw his guilty plea since the district court was not bound by the presentence report and since the prosecuting attorney had not recommended incarceration in the plea agreement.

We also find Lindsey is not controlling in the instant case. In Lindsey, defendant entered a guilty plea, a date was set for sentencing and a presentence investigation was ordered. Lindsey, 171 N.W. 2d at 860. At the sentence hearing the prosecuting attorney, who had originally indicated to defendant that probation would be recommended, decided no probation should be recommended. Lindsey, 171 N.W. 2d at 861. At that point defendant's counsel did not motion to withdraw his guilty plea, but rather urged the court to grant probation. Lindsey, 171 N.W. 2d at 860. Defendant did not move to withdraw his guilty plea after sentencing either. Lindsey, 171 N.W. 2d at 860. The court stated defendant's appeal was not one where the prosecuting attorney deliberately misled defendant, but rather was a case where defendant "was merely disappointed by that change of intent by the county attorney." Lindsey, 171 N.W. 2d at 864.

In the instant case Ramirez did file a motion to withdraw his guilty plea. At the sentence hearing, Ramirez did not simply urge the court to grant probation. Ramirez attempted to show why good cause existed to permit withdrawal of his guilty plea as the Lindsey court stated the defendant there should have done. Lindsey, 171 N.W.2d at 861. We think the court should have granted his request.

We also determine the facts of the instant case are such that the district court should have exercised its discretion in favor of permitting Ramirez to withdraw his guilty plea.

Ramirez claimed he was innocent and entered an Alford plea. See North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27, L. Ed. 2d 162, (1970). Pursuant to Alford, a defendant in Iowa may enter a valid guilty plea even though asserting innocence of the crime charged. Reed, 252 N.W. 2d at 457; State v. Schultz, 245 N W. 2d 316, 317 (Iowa 1976).

However, precisely because Ramirez asserted his innocence and elected to enter an Alford plea, the Department of Correctional Services recommended incarceration in its presentence investigation report:

> CORRECTIONAL PLAN:
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> Considering the results of this investigation, it is believed that a prison sentence is the appropriate disposition for this case. This statement is based on the defendant's refusal to admit that he did anything sexual to the victim whereas, the victim's testimony alludes to much more. This agent feels that Mr. Ramirez does not plan to accept the full responsibility for his actions and does not possess sympathy or remorse for his actions against the child.
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> RECOMMENDATION:
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> It is the recommendation of this agent that John Joe Ramirez be placed into the custody of the Department of Corrections to begin serving a five year prison sentence for the crime of Lascivious Acts With a Child. It is further recommended that he be held accountable for the Court costs in this case.

The import of the presentence report is that the only way Ramirez could be considered for probation was if he admitted guilt. The presentence report suggests that Ramirez would be denied consideration for probation as long as he asserted his innocence.

There are many reasons why a person charged with a crime may voluntarily agree to plead guilty and there is nothing wrong with the universal practice

of using plea bargaining as a device for disposing of criminal cases. State v. Whitehead, 163 N.W. 2d 899, 902 (Iowa 1969). However, a plea agreement is only valid where the defendant is not coerced, deceived or induced by misrepresentations or false promises. Whitehead, 163 N.W. 2d 903.

Thus, there is a strong argument that a plea agreement is nothing more than a hollow promise when probation will not even be considered as long as the defendant has entered an Alford plea. Instead, we believe the better rule is that where it appears that there is doubt of the guilt of the defendant, the court should exercise its discretion to permit a withdrawal of a guilty plea. 22 C.J.S. Criminal Law §421 (3) (1961). In addition, we determine where a proper showing is made to support withdrawal of a plea, the court should not deny such motion merely because, on a trial, the defendant might be proved and found guilty. Id.

We note that at the sentence hearing and in its brief the State has not asserted and has not produced evidence it would be prejudiced if Ramirez were allowed to withdraw his plea and stand trial. We therefore determine that Ramirez showed good cause why he should have been allowed to withdraw his guilty plea and determine the district court abused its discretion in denying the request.

II.

Having determined the defendant's motion to withdraw his guilty plea should be sustained, we need not reach the issue Ramirez raises of whether the district court abused its discretion in sentencing Ramirez to five years in prison rather than placing him on probation.

We therefore reverse and remand for a trial on the merits.

REVERSED.

All judges concur except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I respectfully dissent. I would affirm the district court's refusal to allow the defendant to withdraw his guilty plea.

Under Iowa law, a defendant has no absolute right to withdraw his guilty plea, and permission to do so is left to the sound discretion of the trial court. State v. Tillman, 228 N.W.2d 38, 39 (Iowa 1975). The trial court has considerable discretion when considering a motion to withdraw. State v. Reed, 252 N.W.2d 455, 456-57 (Iowa 1977). An appellate court on review will reverse a decision of the trial court only for an abuse of discretion. Tillman, 228 N.W.2d at 42. Such abuse is not shown unless it appears that discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Hawkeye Bank & Trust Co. v. Michel, 373 N.W.2d 127, 129 (Iowa 1985).

In the present case, I cannot find any evidence of an abuse of discretion on the part of the trial court. The order signed by Judge Burns on September 4, 1985, stated as follows:

> That Concurrence of the Court is a part or condition of the Agreement and the Court therefore:
>
> defers its decision as to acceptance or rejection of the plea agreement until its receipt of a presentence report. The Defendant is informed that if upon review of the presentence report, the Court decides to reject the plea agreement that the Defendant will be afforded the opportunity of withdrawing the plea of guilty. (emphasis added)

On September 30, 1985, the presentence investigation report was filed with the trial court, the same day as the defendant's sentencing hearing. Upon reviewing the presentence investigation report, Judge Briles, the sentencing judge, accepted the defendant's plea of guilty and refused defendant's request to withdraw his guilty plea, pursuant to Judge Burns' order. Judge Briles noted that Judge Burns had painstakingly explained the nature of the charges against the defendant, had thoroughly informed the defendant as to the consequences of

pleading guilty and his right to file a motion in arrest of judgment, and questioned the defendant at length as to whether defendant's plea was made knowingly and voluntarily and not based on fear or persuasion. The defendant stated that he understood the consequences of his plea and that such plea was voluntary and free from undue persuasion. Armed with these facts, I do not believe the trial court abused its discretion in denying defendant's motion.

I additionally note that the defendant did not attempt to withdraw his guilty plea until after the unfavorable presentence investigation report was filed, despite the fact that defendant could have raised his motion to withdraw his guilty plea at any time before sentencing and judgment. The record reveals that the defendant, though professing innocence, entered his guilty plea to lascivious acts with a child due to his concern that a jury would probably find him guilty of the more serious offense of sexual abuse in the second degree. The defendant obviously hoped that by pleading guilty, he would stand a much better chance of being placed on probation, though pursuant to the plea agreement the State made no sentencing recommendations. Upon learning that the presentence report recommended incarceration, the defendant then chose to withdraw his guilty plea. A defendant, however, cannot be permitted to enter a guilty plea, gamble on the sentence, and then move to withdraw if he is disappointed with the sentence. State v. Lindsey, 171 N.W.2d 859, 865 (Iowa 1969). I therefore would affirm the trial court's decision since I can find no abuse of discretion under these facts before the court.

As an aside, considering the victim of this alleged crime was a ten-year-old girl and giving some respect to victim's rights as well as those of defendant's, I can well imagine this was one of the factors involved in the decision. I agree wholeheartedly.