



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

vs.

)

NORMAN ASKEW MOONEY,

)

Defendant-Appellant.

)

Filed March 9, 1988

8-25
87-918

457

Appeal from the Iowa District Court for Story County (No. 12205), M. D.
Seiser, Judge.

Defendant appeals his section 902.7 minimum sentence imposed following
a guilty plea to a charge of robbery in the first degree in violation of Iowa Code
sections 711.1(2) and 711.2. **AFFIRMED.**

Charles L. Harrington, Chief Appellate Defender, and James F. Whalen,
Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney
General; Mary E. Richards, Story County Attorney; and Douglas R. Marek, Assis-
tant County Attorney, for plaintiff-appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Defendant appeals his sentence following a guilty plea to a charge of robbery in the first degree in violation of Iowa Code sections 711.1(2) and 711.2. The sole issue on appeal as framed by the appellant is: "Did the sentencing court err in imposing the mandatory five-year sentence under Iowa Code section 902.7 (1987), despite the fact that the trial information did not allege use of a firearm?" We affirm the trial court.

The defendant and Corvelle A. Beeks were jointly charged by trial information with the crime of first-degree robbery. The information stated that the crime was committed as follows:

The said Corvelle A. Beeks and Norman A. Mooney . . . on or about the 17th day of October, 1986, at approximately 8:15 p.m. at the Viking Motor Inn, Story City in the County of Story and State of Iowa, in violation of section 711.1(2) and 711.2 of the Iowa Criminal Code, did while armed with a dangerous weapon, commit an assault upon another by threatening the person with a weapon with the intent to commit a theft of property.

On March 9, 1987, the defendant appeared for arraignment and entered a plea of not guilty. On April 1, he filed a motion to dismiss, which was later withdrawn.

At a pretrial conference, defendant's attorney informed the court that defendant desired to enter a plea of guilty. The defendant appeared on April 30 to enter his plea, but the court raised the question of whether the defendant's right to a speedy trial under Iowa Rule of Criminal Procedure 27(2)(b) had been violated. Therefore, the defendant filed a second motion to dismiss on speedy trial grounds. That motion was later overruled.

On June 24, 1987, the defendant again appeared and entered a guilty plea. His plea was accepted; he waived time for filing a motion in arrest of judgment and requested that he be sentenced immediately. The court obliged.

The codefendant, Corvelle A. Beeks, had previously entered a plea of guilty to the joint charge lodged against them in the trial information. Following

recommendations of the State, Judge Seiser sentenced Mr. Beeks to a term of confinement not to exceed twenty-five years with a mandatory minimum of not to exceed five years because a firearm was used in this robbery incident. Mr. Beeks' sentence was to run concurrent with a sentence that had been imposed in Hamilton County, Iowa. We refer to the sentencing of Mr. Beeks because it has significance insofar as the guilty plea and plea bargaining proceedings of this defendant are concerned.

Before proceeding further, we believe that the following colloquy is of significance:

MR. JAHN (defense counsel): The firearm was involved, but Mr. Beeks or I'm sorry, Mr. Mooney was not the person who armed the firearm.

THE COURT: Well, robbery in the first degree is when a person purposely inflicts or attempts to inflict serious injury or is armed with a dangerous weapon. . . .

I would have to say for the record, that Mr. Beeks pled before me . . . and was sentenced and his evidence was very clear. He said that he was caught by surprise when his friend pulled the gun, so we have those conflicts; but I don't see any basis for robbery in the first degree on these facts as I understand it, unless there's something other than the firearm. And if you use a firearm then there's a mandatory five-year minimum sentence.

MR. JAHN: I understand, Your Honor.

THE COURT: And if you need to confer with your client or delay the matter to talk it over or think it over, go right ahead. . . .

MR. JAHN: Yes, Your Honor. Can I approach the bench, Your Honor?

THE COURT: Surely. Is it a question to be asked on the record in the presence of your client?

* * *

MR. JAHN: And I have no problem making it on the record. There are two defendants in this case and you've said on the record that Mr. Beeks has been sentenced?

THE COURT: Yes, sir.

MR. JAHN: In this case my client's question of me and to the Court is whether Mr. Beeks received a mandatory minimum sentence?

THE COURT: He did.

MR. JAHN: Okay. There was a little confusion about that on the part of my client.

* * *

MR. JAHN: Your Honor, the record will reflect I've had a conference with my client at the counsel table and he wishes to proceed at this time.

THE COURT: Very well. Mr. County Attorney, anything that you want to say, or is that a correct understanding of the plea bargain and agreement?

MR. MAREK: Your Honor, it is correct. My understanding of the agreement is that the State in exchange for the plea of guilty today, will recommend concurrent sentencing, that sentencing in Story County served concurrently with the Hamilton County sentence in Hamilton County, Number 4995.

THE COURT: And that was the State's recommendation in State v. Beeks who apparently was the companion, and Mr. Beeks received a 25-year sentence and a five-year minimum and to run concurrent.

MR. MAREK: That is my understanding, Your Honor. And I would also note that the information in the Story County Case, 12205 does charge the defendants jointly and the language used in the charging does indicate while armed with a dangerous weapon. It is my understanding that either the person acts or holds the weapon or one who aids and abets that person either would be liable for the mandatory minimum sentence.

THE COURT: Very well. Mr. Mooney, have you heard what your attorney and the County Attorney and I have said here today?

THE DEFENDANT: Yes, I have.

THE COURT: Do you understand it?

THE DEFENDANT: Yes, I do.

THE COURT: Mr. Mooney, you wish to plead guilty; is that correct?

THE DEFENDANT: Yes.

* * *

THE COURT: Are you aware that this is known in the law as a class B felony, which means that there is a 25-year sentence not to exceed 25 years with a mandatory minimum of not to exceed five years because of a firearm, and that you could be ordered to pay the cost of this action and reimburse Story County for your court-appointed attorney fees and make restitution if any restitution is involved?

THE DEFENDANT: Yes.

Prior to passing judgment on his guilty plea, the defendant was advised of his rights under a motion in arrest of judgment. Those rights were not exercised. After complying with Iowa Rule of Criminal Procedure 22(3)(a), the court committed the defendant to the custody of the Director of the Division of Adult Corrections for a term not to exceed twenty-five years, with a five-year minimum. The defendant's sentence was to run concurrent with a sentence in Hamilton County, No. 4995. It is readily apparent that the sentence imposed

is consistent with the plea bargain agreement reached between the defendant and the State.

Notwithstanding the plea agreement, the defendant now asks us to vacate that part of the sentencing order that imposed the five-year mandatory minimum sentence under Iowa Code section 902.7. He reasons that this part of the sentence is illegal for the trial information failed to allege that the defendant or his accomplice used a "firearm" as required under Iowa Rule of Criminal Procedure 6(6).

The State counters by asserting there has been substantial compliance with criminal rule 6(6), for the information did charge the defendant with committing first-degree robbery "while armed with a dangerous weapon" and the minutes of testimony reveal that the weapon used by the defendant in the robbery was a handgun. The State further reasons that the definition of "dangerous weapon" under section 702.7 of the Code includes "pistol, revolver, or other firearm."

I.

Because of the result reached under division II, we need not address the question of whether the use of the word "dangerous weapon" in the trial information satisfies the requirement of criminal rule 6(6) that provides, "If the offense charged is one for which the defendant, if convicted, will be subjected . . . to a minimum sentence because [of] use of a firearm, the allegation of such use . . . shall be contained in the indictment." In this respect, we are mindful of the court's ruling in State v. Lockett, 387 N.W.2d 298 (Iowa 1986), that held it was mandatory that a trial information allege use of a firearm if the State intended to seek the imposition of the minimum sentence law. But it cannot go unnoticed here that the information did charge the defendant with the commission of the crime of robbery while armed with a dangerous weapon. As stated, we pass this question and resolve the problem at hand under division II.

II.

Our supreme court in State v. Fluhr, 287 N.W.2d 857, 864 (Iowa 1980), stated:

This holding should not be construed to mean that every minor omission from the oral colloquy in a guilty plea proceedings should be fatal. As Sisco announced, "meaningful compliance," 169 N.W.2d at 548, or "substantial compliance," id. at 551, with procedural guidelines for taking guilty pleas is sufficient. Certainly a plea-taking error which raises no doubt as to the voluntariness or factual accuracy of the plea may be properly disregarded, provided the defendant is unable to prove prejudice. For instance, an inadvertent omission of reference to the accused's right to assistance of counsel at trial during the oral colloquy should not alone vitiate a plea in a situation where the defendant is already represented by appointed counsel, he has read and signed the form adequately explaining this right and the trial judge has determined through appropriate inquiry that the defendant possesses a clear understanding of the remainder of the form. A contrary result would serve only to exalt formalism at the expense of the societal interest in finality of judgments. (citations omitted)

Fluhr at 864.

We first point out that we are not suggesting that the factual setting in Fluhr is similar to the facts in the case at bar. But after considering the statement from Fluhr that "...a plea-taking error which raises no doubt as to the voluntariness or factual accuracy of the plea may be properly discarded, provided defendant is unable to prove prejudice," id., we too determine that under the circumstances where a sentence is imposed in accordance with the plea bargain that a plea-taking error which raises no doubt that the defendant understood the nature of the charge and the penalty that is to be imposed may be properly disregarded, provided the defendant is unable to prove prejudice.

Thus, in the case at bar, the trial court carefully informed the defendant of the nature of the charge and advised "if you use a firearm then there is a mandatory five-year minimum." In explaining the sentence, the court stated further, "are you aware that this is known in law as a class B felony, which

means that there is a 25-year sentence not to exceed 25 years because of a firearm" To this statement the defendant answered, "yes."

It is clear to us that the defendant understood the nature of the charge, the penalty that could be imposed and that because a firearm was used that a mandatory minimum sentence of five years would be ordered. When you couple this circumstance with the fact that the sentencing was consistent with the plea bargain agreed to by the defendant, we conclude that the defendant was not prejudiced in any respect.

We reach this result after a de novo review of the proceedings. The record is completely devoid of any evidence that the defendant would have pleaded not guilty and stood trial had the trial information been more exact by using the word "firearm."

The defendant was informed as to the consequences of his guilty plea and that the mandatory minimum sentence would be imposed. There is no question that his guilty plea was "voluntary" and "intelligently" entered with full knowledge of the penal consequences. He ought not now to complain. Compare Hill v. Lockheart, 474 U.S. 52, 60, 106 S. Ct. 366, 371, 88 L. Ed. 2d 203, 211 (1985) (fact that petitioner did not allege that he would have pleaded not guilty and insisted on going to trial had counsel correctly informed him about his parole eligibility date held not to establish prejudice under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Accordingly, we affirm.

AFFIRMED.