FILED
JAN 26 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

127

STATE OF IOWA,)

Plaintiff-Appellee,) Filed January 26, 1982

vs.)

THEODORE CLIFFORD HAND,) 1-372/66092

Defendant-Appellant.)

Appeal from Jasper District Court - A. V. Hass and Harry Perkins, Judges.

Defendant appeals from his conviction and sentence, pursuant to his guilty plea, for the crimes of conspiracy to commit escape and assault. AFFIRMED.

Charles L. Harrington, State Appellate Defender's Office, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Thomas N. Martin, Assistant Attorney General, for plaintiff-appellee.

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

DONIELSON, J.

Defendant appeals from his conviction and sentence, pursuant to his guilty plea, for the crimes of conspiracy to commit escape and assault. Both of these crimes occurred while defendant was serving a sentence for an earlier crime. Defendant contends his guilty plea was not entered knowingly and intelligently because he was led to believe that concurrent sentencing was a possibility, when in fact, section 901.8 required consecutive sentencing because the crimes in question occurred while defendant was already incarcerated. We affirm.

Ordinarily, our review of criminal proceedings is at law for correction of errors only, and not de novo. Iowa R. App. P. 4. "However, when, as here, issues as to violation of constitutional safeguards are raised this court is obliged to make an independent evaluation of the totality of the relevant circumstances shown by the entire record under which rulings on those constitutional rights were made. That is, when a constitutional issue is presented, the evidence relevant to the issue is reviewed de novo." Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

Defendant's guilty plea was entered pursuant to a plea bargain which called for the prosecutor to recommend that the sentences imposed for conspiracy to commit escape and assault be served concurrently to each other and also concurrent to the sentence defendant was serving when these crimes were committed. Defendant argues that the transcript of his plea proceeding set out in part below indicates that his guilty plea was not knowingly and intelligently entered because the trial court and defendant's trial counsel misinformed defendant concerning the penal consequences of his plea. The pertinent portion of the plea proceeding transcript is as follows:

> [THE COURT] Have you been advised by your attorney or by anyone what the penalties might be if the Court does accept the plea of guilty you now tender to Count 2 and Count 3 of the Information?

What have you told him in that respect, Mr. Liles?

Mr. LILES. Yes. I have advised Mr. Hand that the maximum penalty for the offense of conspiracy to commit escape, a Class B felony, would be a term not to exceed 5 years, and I believe a fine of not to exceed $5,000, further, that the maximum penalty on the assault charge, the simple misdemeanor, is 30 days in jail or a hundred-dollar fine.

The COURT. Has he shown recognition of those limits? I believe the limit is a thousand-dollar fine on the felony, not to exceed a thousand dollars.

The defendant recognizes the range of penalties then, in your opinion?

Mr. LILES. Yes, he does realize the Court has full authority to sentence him for a term of up to 5 years and a fine.

The COURT. I take it from what you have said, Mr. Neighbor, there have been discussions about disposition of which the Court should be made aware if the plea of guilty is accepted.

Mr. NEIGHBOR. There have been, Your Honor. In consideration for the defendant's plea of guilty to Counts 2 and 3 of the trial information, the State will dismiss Count 1 of the trial information, that being the Class D felony offense. The State will recommend a 5-year sentence on Count 2 and a 30-day sentence on Count 3, those two sentences to run concurrently with each other.

The further element of the plea bargain is that the State will make no recommendation as to whether or not Count 2 and Count 3 should run concurrently or consecutively with the term the defendant is now serving, but that the defendant enters this plea of guilty with the knowledge and understanding that the judge may sentence the defendant to a consecutive term to that sentence which he is now serving, as provided by Section 908.1 [sic] of the 1979 Code of Iowa.

The COURT. Mr. Liles, do you have any comment or anything to add to the county attorney's statement?

> Mr. LILES. Well, just, Your Honor, in essence I believe our plea bargain was--and I think Mr. Neighbor would state it and perhaps he won't, a little beyond in terms of clarification, but the State of Iowa would certainly not resist the Court running any sentence Mr. Hand may receive for Count 2 of the information, would not resist the running of that sentence concurrently with his present sentence at the Iowa State Penitentiary.
>
> Mr. NEIGHBOR. That is correct, but I think, for the record, it is important to expand upon that, that the defendant also realizes that the Court may run that sentence consecutively. Is that correct, Mr. Liles?
>
> Mr. LILES. Yes; it is.
>
> Mr. NEIGHBOR. All right.
>
> The COURT. That would be for the sentencing judge to determine anyway regardless of any recommendation that might be made or any bargains that might have been made if the Court didn't want to honor those.

Defendant's primary authority is State v. Boone, 298 N.W.2d 335, 338 (Iowa 1980), where the trial court incorrectly told the defendant that the sentencing possibilities included a deferred judgment or probation and thereby gave the defendant a "flickering hope of a sentencing disposition that was not possible." Id. Boone is readily distinguishable from the instant case in that the transcript clearly shows that any misstatements about sentencing alternatives were by either the defendant's attorney or the prosecutor, not the trial judge. Additionally, in this case defendant knew he would again be incarcerated. The only question was for how long, and he was properly informed that the sentencing judge could give consecutive sentences. Defendant was never given a "flickering hope" of avoiding incarceration as in Boone. This case is similar to State v. Woolsey, 240 N.W.2d 651, 653 (Iowa 1976), which held it was not necessary for the court to tell the defendant he was ineligible for a deferred judgment or suspended sentence. We find the trial judge was not required to tell defendant that concurrent sentencing

was not available. Since the trial judge did not make an affirmative misstatement with regard to sentencing alternatives as in Boone, we affirm the trial court.

AFFIRMED.

SNELL, J., dissenting.

The time had passed for filing a motion in arrest of judgment when defendant learned a concurrent sentence was prohibited by statute. There is no procedural device available to defendant thereafter that must be used on pain of losing his right to appeal. Defendant's appeal is timely and appropriate.

It is clear that "one of the very important aspects" of the plea bargain was that the county attorney would not resist a concurrent sentence being given defendant on the crime of conspiracy to escape. Defendant's attorney so described it at the hearing on sentencing and obviously presented it as part of the bargain during the inquiry by the judge accepting the plea.

Although unintended, the misconception that a concurrent sentence could be given carried through the county attorney's words and was left unscathed by the judges' comments. That which is not available to the State to give should not be represented as a consideration the State has accorded defendant for his plea. Otherwise, the plea bargain is tinged with a deception that violates defendant's rights and disparages the judicial system. I would set aside the guilty plea and allow defendant to plead anew.