IN THE COURT OF APPEALS OF IOWA

No. 0-258 / 99-1144
Filed May 31, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICKY LEE BOWMAN, SR.,
Defendant-Appellant.

FILED
MAY 3 1 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire (plea) and James E. Kelley (sentencing), Judges.

On appeal following his convictions and sentences on three counts of third-degree burglary, defendant contends the court erred in not allowing him to withdraw his guilty pleas. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Denise A. Timmins, Assistant Attorney General, William E. Davis, County Attorney, and Donald Frank, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

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MAHAN, J.

On appeal following his convictions and sentences on three counts of third-degree burglary, defendant contends the court erred in not allowing him to withdraw his guilty pleas. We reverse and remand.

Ricky Bowman, Sr. was charged by trial information with three counts of burglary in the third degree and for being a habitual offender. On May 7, 1999, Ricky, pursuant to a rule 9 plea agreement, entered a plea of guilty to all three counts. Under the terms of the plea agreement, Ricky was to receive concurrent sentences. The district court judge accepted Ricky's pleas and agreed to be bound by the terms of the plea agreement.

A different district court judge presided over the sentencing on June 24, 1999. This judge informed Ricky he was rejecting the plea agreement and allowed Ricky an opportunity to speak with his attorney and withdraw his guilty pleas. Ricky informed the court he wished to go forward with the sentencing.[1] Soon after, defense counsel requested a continuance of the sentencing which was granted until June 28. On that later date, Ricky requested to withdraw his previously entered guilty pleas. He contends he was drinking prior to his first sentencing hearing and therefore did not have the proper state of mind to make decisions regarding his pleas. The request was denied by the court. The defendant was sentenced to an indeterminate term not to exceed fifteen years on each count with Counts I and II to be served consecutively and Count III to be served concurrently with Count II. Ricky appeals.

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[1] This decision was made without consulting counsel.

Withdrawal of Guilty Plea. We review a trial court's decision to grant or deny a request to withdraw a guilty plea for abuse of discretion. *State v. Hightower*, 587 N.W.2d 611, 612 (Iowa App. 1998) (citing *State v. Speed*, 573 N.W.2d 594, 596 (Iowa 1998)). We do not find an abuse of discretion unless the defendant shows it was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

Ricky contends the district court erred when it refused to allow him to withdraw his pleas of guilty. After being informed the court would reject the plea agreement, Ricky indicated he still wanted to proceed. Ricky was given the opportunity to speak on his own behalf on the issue of sentencing. His comments were somewhat rambling and, at times, incoherent. In addition, a victim was called and made a statement. Prior to the completion of the sentencing hearing, defense counsel requested a continuance in order to confer with Ricky. Four days later, when the sentencing hearing resumed, Ricky moved to withdraw his pleas of guilty based on his claim he had been drinking prior to the previous sentencing hearing. He concedes the court did, at the original sentencing, give him the opportunity to withdraw his guilty plea and he chose to continue with his plea. However, Ricky claims because he had been drinking prior to that first proceeding, he was not in the proper state of mind to make such a decision.

Defendants have no constitutional right to have a plea accepted and the trial courts have broad discretion in deciding whether to accept guilty pleas. *State v. Wenzel*, 306 N.W.2d 769, 771 (Iowa 1981). The court in *Wenzel*

concluded that although rule 9 of the Iowa Rules of Criminal Procedure does not specifically provide for acceptance of a plea agreement at the time the plea is offered and then rejection at the time of sentencing, such a procedure will be allowed as long as a defendant is given the opportunity to withdraw the plea. *Id.* Iowa Rule of Criminal Procedure 9(4) sets out the following requirement if the court were to reject a plea agreement:

> 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 defendant's plea, *and advise the defendant that if persistence in a guilty plea continues, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.* If the defendant persists in the guilty plea and it is accepted by the court, the defendant shall not have the right subsequently to withdraw the plea except upon a showing that withdrawal is necessary to correct a manifest injustice.

Iowa R. Crim. P. 9(4) (emphasis added). The clear language of this rule mandates the court to inform the defendant if it does not intend to be bound by the plea agreement. *State v. Baker*, 476 N.W.2d 624, 628 (Iowa App. 1991). In the absence of such a statement, the court is bound to the plea agreement and thereafter, if the court does not go along with the plea agreement, it must allow the defendant an opportunity to withdraw his or her plea of guilty. *Id.*

In the case at bar, Ricky was informed at the original sentencing hearing on June 24, 1999 that the court was rejecting the plea agreement and Ricky was then given the opportunity to confer with his attorney and to withdraw his guilty plea. At this hearing, the following exchange was made:

> THE COURT: The court at this time rejects and refuses to be bound by the plea agreement. The defendant is so informed. Mr. Bowman –

RICKY: You're rejecting - - that's cool. Now I can get it consecutive.

THE COURT: No, I'm just rejecting the plea agreement. It's up to you to determine whether you want to withdraw your plea and go back to trial on the three counts, or persist in your plea and we'll go forward with the sentencing. It's your choice. You may talk with your counsel.

RICKY: Let's go forward. I really didn't get to finish. I'm sorry. That sounded so rude. There are a million things I want - - I feel bad for the people out there that feel violated. It was never in my mind to hurt anybody physically and I never will. I got one like of violence on my record and I ain't never hurt nobody. I know I hurt them emotionally and financially, but I'm getting ready to do fourteen, twenty years of my life and I know this. Especially now that you're rejecting my plea.

I'll have to do - - before it was only seven and a half years until I told him what it is. Now, it's going to be twenty-one years. I just tripled it for those two words. You ain't worth it. My youngest one is four years old and my oldest one is fourteen and I'm sorry to the whole world for that; but the spare of the moment I said to that man and I know that's why you're rejecting the plea - -

You don't feel sorrowful. I've cried for weeks for my kids. Maybe I haven't cried for that man, but I will at some time. I didn't hurt him physically. I never had no intentions to hurt him and his wife.

It ain't right what I did, but I'm getting ready to pay for it more than I ever deserved because you're rejecting my plea.

However, there was no indication in the record the district court judge informed Ricky if he persisted with the guilty pleas, the disposition of the case may be less favorable to him than that contemplated by the plea agreement as required by rule 9. The court may have been attempting to inform Ricky of this before it was interrupted, but the record is incomplete in this regard.

In addition, although Ricky informed the court he wished to proceed with sentencing and the proceedings began, defense counsel made a request to have the proceeding continued. Defense counsel did so because of Ricky's obvious

condition and the incoherent nature of some of his statements. Defense counsel stated:

> Your Honor, I am going to request a continuance in the sentencing. I'm not sure that my client is capable and in a mental state that he can understand the consequences of the Court not accepting the plea agreement and his statement to the Court that he wanted to proceed to sentencing today. I'm not sure that he understands the consequences of that *and for those reasons* I would ask for a continuance in this matter. (Emphasis added).

The court granted this continuance and revoked Ricky's bond so he would be remanded to the custody of the Scott County Sheriff until the new sentencing date. The court, itself, acknowledged the reason for this was so Ricky would "not have access to alcoholic beverages and other controlled substances and *can properly confer with his counsel at that time about whether he wishes to proceed with the sentencing hearing.*" (Emphasis added).

It is clear defense counsel requested a continuance to specifically discuss the rejection of the plea agreement and for no other reason. It is also clear the district court understood this was the reason for the requested continuance and granted the same. Both the court and defense counsel were aware of Ricky's impaired condition during the hearing.

We conclude from the record the district court did not fully comply with the requirements of rule 9 of the Iowa Rules of Criminal Procedure. In addition, we further conclude Ricky's request to withdraw his guilty pleas should have been granted at the June 28 continuation of the sentencing hearing. We certainly do not condone Ricky's behavior at the June 24 sentencing hearing. The record indicates the district court was faced with a difficult and, at times, antagonistic

situation. However, based upon the discussion set out above, we reluctantly reverse and remand for further proceedings consistent with this decision.

REVERSED AND REMANDED.