

FILED

AUG - 9 1979

CLERK SUPREME COURT

401

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff - Appellee,)

Filed August 9, 1979

vs.)

210

GARY DALE NELSON,)

61873

Defendant - Appellant.)

Appeal from Muscatine District Court - R. K. Stohr, Judge.

Defendant appeals conviction of violation of section 719.1, The Code 1973,
alleging trial court lacked factual basis to accept his guilty plea. - DISMISSED.

Thomas M. Kelly, Jr., Davenport, for Defendant - Appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann Fitzgibbons, Assistant
Attorney General, for Plaintiff - Appellee.

Submitted to Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant Gary Dale Nelson appeals from sentence imposed after plea of guilty to conspiracy to commit a public offense in violation of section 719.1, The Code 1973. We dismiss.

The trial court accepted defendant's plea of guilty, and entered judgment and sentence on March 3, 1978. Nelson filed this appeal April 3, 1978, and on May 15, 1978, he filed a motion in arrest of judgment which the trial court thereafter denied. On appeal, Nelson contends the trial court had no factual basis upon which it could accept his guilty plea.

Under the provisions of the new criminal code, chapter 800, The Code 1979, code provisions in effect at the time a crime is committed control the prosecution of that crime unless the defendant requests trial under the provisions of the new code. § 801.5, The Code 1979. Here, Nelson did not seek to be tried under the provisions of the new code; the former code therefore applies. In appeals after May 25, 1977, "an accused challenging the adequacy of his guilty plea proceeding must: A. first present such claim to the trial court in a motion in arrest of judgment under chapter 788, The Code." State v. Reaves, 254 N.W.2d 488, 493 (Iowa 1977). While Reaves has been limited to cases arising under the old criminal code, State v. Gardner, 274 N.W.2d 328 (Iowa 1979), it remains controlling in cases such as this where the appeal arose out of a prosecution under the old criminal code and was filed after May 25, 1977.

Thus, under Reaves, Nelson first must have presented his challenge to the guilty plea proceeding to the trial court for his appeal to be heard. In this case, Nelson's appeal was filed prior to the motion in arrest of judgment. Perfection of appeal divested the trial court of jurisdiction. Matter of Estate of Tollefsrud, 275 N.W.2d 412, 417 (Iowa 1979); McCauley v. Municipal Court of D.M., 254 Iowa 1345, 1346, 121 N.W.2d 96, 97 (1963); In re Marriage of Novak, 220 N.W.2d 592, 596 (Iowa 1974). The trial court was without jurisdiction, absent a limited remand from the Supreme Court to entertain the motion in arrest of judgment. See McCauley, 254 Iowa at 1346, 121 N.W.2d at 97, wherein the court stated, "Having lost jurisdiction pending an appeal, the lower court may not proceed with the trial . . . or entertain a bill to review the judgment." (Emphasis original). The motion in arrest of judgment was made to a court without

jurisdiction and is of no effect. The posture of this case thus is one where an accused is challenging the adequacy of his guilty plea proceeding without first having presented the claim to the trial court in a motion in arrest of judgment. Reaves is controlling here.

Appeal dismissed.