IN THE COURT OF APPEALS OF IOWA

No. 0-021 / 09-1271
Filed February 10, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

FERNANDO MEDINA GALVEZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, James D. Birkenholz, Judge (plea hearing) and Odell McGhee, District Associate Judge (sentencing hearings).

A defendant appeals his conviction and sentence for operating a motor vehicle while intoxicated, third offense, contending that the record fails to establish that a sentencing agreement was revealed to the court at the time of his guilty plea, thereby making his plea unknowing and involuntary. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John P. Sarcone, County Attorney, and David Porter, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

VAITHESWARAN, P.J.

The State charged Fernando Galvez with operating a motor vehicle while intoxicated, third offense, a Class D felony. Galvez filed a "petition to plead guilty" to the charge. The written application form did not contain a question or space in which to indicate there was a plea agreement.

At the plea hearing, the district court engaged in a colloquy with Galvez about the charge, the rights he was relinquishing by virtue of the plea, and the minimum and maximum sentences. Galvez responded to the judge's questions and pleaded guilty to OWI, third offense. The district court accepted the plea after finding that it was supported by a factual basis and was voluntary. No mention was made of any plea agreement during the hearing.

At the subsequent sentencing hearing, the defense and State both acknowledged the accuracy of the pre-sentence investigation report. When the court gave Galvez an opportunity to allocute, Galvez responded that he was "kind of lost." His attorney responded, "You're going to go to jail for 60 days. You're going to come out on probation, if the Court accepts the recommendation." At this point, the district court explained to Galvez that defense counsel had "an agreement with the prosecutor for the 60 days."

Defense counsel agreed he had a "deal" which he "struck with [the prosecutor]." The district court then stated, "I just want to understand what the deal was because I didn't understand that. I guess you didn't understand it either, did you, Mr. Galvez?" Galvez again stated he was "kind of lost" and asked for an interpreter. The hearing was postponed so one could be retained.

At the second sentencing hearing, defense counsel stated he had "an agreement to recommend to the court" which was "contained in the sentencing order." The court advised Galvez that the agreement was "for 60 days and probation." Galvez acknowledged this was his understanding of the agreement but equivocated when asked if he agreed to it. The district court adjudged him guilty and sentenced him to incarceration for sixty days, with credit for time served and two years of probation.

On appeal, Galvez contends "the record fails to establish that the plea was revealed to the court." As a preliminary matter, the State counters that error was not preserved because Galvez did not file a motion in arrest of judgment to challenge the plea. *See* Iowa R. Crim. P. 2.24(3)(*a*). We disagree with the State.

> The sanction of rule 2.24(3)(*a*) does not apply
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> > unless the court has complied with rule [2.8(2)(*d*)] during the plea proceedings by telling the defendant that he must raise challenges to the plea proceeding in a motion in arrest of judgment and that failure to do so precludes challenging the proceeding on appeal.

State v. Worley, 297 N.W.2d 368, 370 (Iowa 1980). Although the district court advised Galvez that he had a right to file a motion in arrest of judgment and was required to do so if he felt he had a legal basis to set aside the plea, the court did not advise him that failure to file the motion would preclude a direct appeal of the plea. Because this advice was not given, Galvez is not precluded from challenging his plea on appeal. *State v. Meron*, 675 N.W.2d 537, 541 (Iowa 2004). We proceed to the merits.

The terms of any plea agreement, which includes a charging or sentencing concession by the prosecuting attorney, must be disclosed on the record in open court at the time the plea is offered. Iowa Rs. Crim. P. 2.8(2)(*c*), 2.10(1), (2). The State concedes that "no plea agreement was disclosed in [Galvez's] written guilty plea or in the colloquy before the court." Yet, it is clear from the records of the two sentencing proceedings that defense counsel reached some sort of agreement with the State. It is also clear that any agreement was not a Rule 2.10(2) agreement, "conditioned upon concurrence of the court." What is unclear is when this agreement was reached and whether the agreement as to sentence was reached in exchange for the guilty plea, or whether the agreement was simply a joint sentencing recommendation to the court following a guilty plea to the charge.

The cited rules of criminal procedure unequivocally require the disclosure of the terms of any plea agreement at the time the plea is offered. Therefore, if the sentencing recommendation alluded to at the sentencing hearings was in place at the time of the plea colloquy, it should have been disclosed on the record.

The State argues, however, that in the absence of any indication that the parties misrepresented Galvez's expectations at the time of the plea hearing, the sentencing court was entitled to rely on the propriety of the court's earlier acceptance of the guilty plea. We agree with the State.

There is no indication in the written application to plead guilty or in the plea proceeding that the State offered a sentencing concession in exchange for the guilty plea or that the joint sentencing recommendation had been agreed

upon at the time of the plea. As there was no plea agreement at that time, there was nothing to disclose to the court that could have affected the voluntariness of Galvez's guilty plea. We affirm Galvez's conviction and sentence.[1]

AFFIRMED.

[1] There is no claim that the sentence was inconsistent with the joint sentencing recommendation or otherwise inappropriate for a conviction of OWI third offense.