IN THE COURT OF APPEALS OF IOWA

No. 7-895 / 06-1990
Filed February 13, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICKEY LEE HARMON,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith, III, Judge.

Mickey Lee Harmon challenges the district court's refusal to allow him to withdraw his entire guilty plea. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Matthew Wilber, County Attorney, and Jon Jacobmeier and Tom Nelson, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

Mickey Lee Harmon was allowed to withdraw his guilty plea to one of several criminal counts. On appeal, he challenges the district court's refusal to allow him to withdraw his entire plea.

I. Background Proceedings

Harmon was charged with attempted murder, two counts of assault on a peace officer with intent to cause serious injury, two counts of disarming a peace officer of a dangerous weapon, two counts of interference with official acts causing bodily injury, and two counts of assault on a peace officer causing bodily injury. During trial, the State and Harmon entered into a plea agreement. Harmon agreed to plead guilty to one count of assault on a peace officer with intent to cause serious injury, one count of disarming a peace officer of a dangerous weapon, two counts of interference with official acts causing bodily injury, and one count of assault on a peace officer causing bodily injury. The State, in turn, agreed to dismiss the remaining charges. The State also agreed any prison sentence on those charges would be served concurrently. With that exception, the State and Harmon agreed sentencing would be "open," leaving the sentencing court free to suspend or defer the sentence. The district court accepted the plea.

Harmon later filed a combined motion in arrest of judgment and application to withdraw the guilty plea. He asserted that

> he entered into a plea agreement which improperly failed to disclose the material and substantial results of his plea, including the fact that said plea agreement included a plea to a felony, which was not disclosed or otherwise understood by [him] to be a forcible felony.

The State resisted on the ground the motion in arrest of judgment was untimely. At sentencing, the district court overruled the motion in arrest of judgment but determined it did not advise Harmon that the count of assault on a peace officer with intent to cause serious injury to which he pled guilty "was, in fact, a forcible felony." The court also noted the prior discussion concerning open sentencing. "[T]o prevent manifest injustice," the district court allowed Harmon to withdraw his plea to the forcible felony count.

Harmon's counsel then urged the court to set aside the guilty plea to the remaining counts on the ground that the enticement for the pleas was based on the entire plea bargain. The court declined to do so and proceeded to sentence Harmon on the remaining counts. Harmon appealed.

II. Analysis

As a preliminary matter, we must address error preservation concerns. Although Harmon did not timely file his motion in arrest of judgment, he alternately applied to have the plea withdrawn. The State concedes error was preserved on this alternate application, as a plea may be withdrawn "any time before judgment." *See* Iowa R. Crim. P. 2.8(2)(*a*).

Turning to the merits, Harmon frames the issue as follows: "whether or not a district court may allow withdrawal . . . on only one count of a multi-count plea agreement." The issue as framed presumes that the district court acted appropriately in permitting withdrawal of Harmon's plea to the forcible felony count. Therefore, we reject the State's attempt to re-litigate that question. We also note there is authority fully supporting the district court's decision to allow withdrawal of the plea to that count. *See* Iowa Code §§ 708.3A(1), 702.11, 907.3

(2005) (precluding a court from entering a deferred judgment or deferred sentence on a forcible felony); *State v. West*, 326 N.W.2d 316, 317 (Iowa 1982) ("[T]he voluntary and intelligent nature of the plea would be affected by any misstatement of the court placing in defendant's mind 'the flickering hope of a disposition on sentencing that was not possible.'" (*citing State v. Boone*, 298 N.W.2d 335, 338 (Iowa 1980)); *State v. Boone*, 298 N.W.2d 335, 337 (Iowa 1980) (reversing a plea where "during the guilty plea proceedings the district court incorrectly indicated to the defendant that there was a possibility of a suspended sentence or a deferred judgment").

The crux of this appeal is the district court's decision to only permit a partial plea withdrawal. Iowa Rule of Criminal Procedure 2.8(10)(4) allows a defendant to withdraw "the plea" after it has been accepted, "to correct a manifest injustice." The rule does not authorize a partial withdrawal of a plea and neither the State nor Harmon points to any case law that permits a partial withdrawal.[1] For this reason, we agree with Harmon that he should have been afforded the opportunity to withdraw his entire plea. Given the language of the

[1] Our survey of case law from other states reveals varying approaches to this issue. *See People v. Rotroff*, 188 Cal. Rptr. 378, 382 (Cal. Ct. App. 1982) (holding court did not "disturb the balance of the bargain" by granting partial withdrawal of the plea); *Whitaker v. State*, 881 So. 2d 80, 82 (Fla. Dist. Ct. App. 2004) (holding trial court erred in granting partial withdrawal of plea, as negotiated plea deal was a package); *State v. Bisson*, 130 P.3d 820, 826 (Wash. 2006) (holding remedy of withdrawal of plea agreement limited to withdrawal of entire plea agreement, as agreement was indivisible package deal); *State v. Roou*, 738 N.W.2d 173, 178-181 (Wis. Ct. App. 2007) (examining totality of circumstances to decide whether defendant should have been allowed to withdraw entire plea, including whether breach of plea agreement was material and substantial, whether defendant would have pled guilty to one charge had he known of problem with other charge, and whether there was agreement not to reinstate original charges); *State v. Nelson*, 701 N.W.2d 32, 41 (Wis. Ct. App. 2005) (stating appropriate remedy depended on totality of circumstances, including whether defendant would obtain a windfall from breach of plea agreement).

rule, we find it unnecessary to decide whether Harmon received the benefit of the bargain. We also find it unnecessary to preserve or decide the alternate ineffective-assistance-of-counsel claims raised by Harmon.

REVERSED AND REMANDED.