IN THE COURT OF APPEALS OF IOWA

No. 1-058 / 10-1124
Filed March 7, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PRIMERO JAMES ZANDERS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jeffrey L. Harris, District Associate Judge.

Defendant appeals from denial of his motion to withdraw guilty plea and motion in arrest of judgment. **CONVICTION AND SENTENCE VACATED, CASE REMANDED WITH DIRECTIONS.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Dustin S. Lies, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

DANILSON, J.

The minutes of testimony indicate that on April 20, 2009, Primero Zanders grabbed the arm of Kristinea Stillmunkes while she was holding their child. As a result, Zanders was charged with (Count I) domestic abuse assault causing bodily injury—enhanced, in violation of Iowa Code section 708.2A(3)(b) (2009), and (Count II) child endangerment, in violation of section 726.6(a).

On April 6, 2010, Zanders rejected the State's initial plea offer[1] and the parties proceeded to voir dire potential jurors. Later, the parties informed the court Zanders had accepted a modified plea agreement, which the State described:

> Okay, your honor. It's actually somewhat modified from this morning. The plea agreement is for the State's recommended 180-all-but-two-day sentence, with one to two years of supervised probation. However, I think we need to do some investigation as far as how that would affect Mr. Zanders' work schedule. We want to make sure that he can continue to keep his employment. And I believe he does some trucking, so we would have to check into that. Suspension of the $625 fine. Also, Count I would drop the enhancement, so it would just be the serious misdemeanor, rather than the aggravated misdemeanor offense. It would just be the serious misdemeanor.
>
> Count II would then be dismissed at the defendant's cost, so that would be dismissed outright. The defendant, I believe is going to ask for a deferred judgment, and it would be an argued sentencing. I believe he is eligible for a deferred judgment. I don't think that he has a felony conviction or has previously received two deferred judgments, but we would need an informal presentence investigation to determine that eligibility. But I believe that is what

---

[1] On the record the State explained the plea offer:

> Count I would be amended to an Assault Domestic Abuse Causing Bodily Injury without the enhancement for the prior offense, a serious misdemeanor. The sentence would be either 180, all but four, or 365, all but two, whichever the defense would prefer, or obviously they would be free to argue that; one to two years of supervised probations, and suspension of the $625 fine, in exchange for the plea on Count I.
>
> Count II, the Child Endangerment, also the aggravated, would be dismissed.

> he would be requesting at the time of sentencing, and I think he would be asking for a delay in sentencing.

The court indicated it would accept Zander's written plea. When asked by the court: "your client is going to be requesting a deferred judgment; is that correct?" Defense counsel responded, "Yes, your honor."

A written guilty plea was entered April 6, 2010. Paragraph thirteen in the written guilty plea indicated the plea agreement was conditioned on the court's concurrence. Paragraph twelve states in part, "if this plea agreement is conditioned upon the Court's concurrence and the Court does not accept the agreement, the Court will allow me to withdraw this guilty plea." Paragraph fourteen contained an acknowledgment that to challenge the plea, a motion in arrest of judgment had to be filed no later than forty-five days after entry of the plea and at least five days prior to the date set for sentencing.

An order was filed that same date stating in part:

> Before the court reconvened the jury for final voir dire, the parties informed the court that the defendant had elected to accept the State's new plea agreement. The court proceeded to conduct a brief hearing on the record and out of the jury's presence. The defendant informed the court that he had accepted the plea agreement with the understanding that he would be free to argue for a deferred judgment. . . .
>
> . . . .
>
> IT IS HEREBY ORDERED that the defendant is guilty of the public offense of Assault Domestic Abuse Causing Bodily Injury, a serious misdemeanor, in violation of section 708.2A(3)(a) Code of Iowa.

The child endangerment charge was dismissed, and an informal presentence investigation report was ordered. Sentencing was set for May 20, 2010.

When the parties appeared on May 20 for sentencing, the district court informed the parties Zanders was not eligible for a deferred judgment[2] and that it would not accept the State's sentencing recommendation, which remained as stated in the plea agreement. Zanders' counsel moved in arrest of judgment

> in light of the information in—because the guilty plea that the defendant signed stated what the recommendations of the State would be and the client was under the impression that he would be eligible for a second deferred, neither I nor the State knew that he could not get a second deferred.

The court told counsel to "[s]ubmit it in writing and your legal authority for it and I'll review it and make a decision on it." Sentencing was continued. A written motion in arrest of judgment was filed, as was a motion to withdraw the guilty plea.[3]

The court entered a written order setting the motion in arrest of judgment for hearing on May 27, 2010. The court underscored the following: "In the event defendant's motion is denied, the defendant should be prepared to proceed to sentencing."

On May 27, 2010, the district court denied the defendant's motion in arrest of judgment and denied the motion to withdraw the plea and proceeded to sentencing. The district court sentenced Zanders to 365 days in jail with all but twenty days suspended. The court ordered one year of formal probation with

[2] This is based upon a statement in the informal presentence investigation report, which was not shown to defense counsel until that date.

[3] The motion to withdraw noted that counsel had been unable to view the court file. A motion to continue was filed on May 25, 2010, again noting that counsel had not had access to the court file or transcripts of plea proceedings and could not prepare for the hearing.

anger management classes as a condition of probation, imposed a $315 fine, and ordered defendant to complete a batterer's education program.

Zanders now appeals, contending the district court erred in denying his motion in arrest of judgment. Because we agree, we reverse and remand.[4]

> A defendant who enters a plea of guilty waives several constitutional rights. For the waiver to be valid under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, there must be an intentional relinquishment of known rights or privileges. If a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of constitutional guarantees of due process and is therefore void. The defendant must have a full understanding of the consequences of a plea before constitutional rights can be waived knowingly and intelligently.

State v. Boone, 298 N.W.2d 335, 337 (Iowa 1980) (citations omitted); *see also State v. Philo,* 697 N.W.2d 481, 488 (Iowa 2005) ("Due process requires the defendant enter his guilty plea voluntarily and intelligently.").

In *Boone*, the court set aside a defendant's guilty plea as not knowingly or intelligently entered where the defendant "was incorrectly told that the sentencing possibilities included a deferred judgment or probation." 298 N.W.2d at 338. "[T]he court placed in the defendant's mind the flickering hope of disposition on sentencing that was not possible." *Id.* So, too, in *State v. West*, 326 N.W.2d

---

[4] Because we find this issue dispositive, we need not address the additional issues raised by defendant. However, we note that, alternatively, the defendant should have been given the opportunity to withdraw his plea once it became apparent that the court did not intend to adopt the sentencing recommendations in the written plea agreement. Iowa Rs. Crim. P. 2.10(3) ("When the plea agreement is conditioned upon the court's concurrence, and the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided in the plea agreement."); 2.10(4) ("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 . . . ."); *State v. Barker*, 476 N.W.2d 624, 629 (Iowa Ct. App. 1991).

316, 317-18 (Iowa 1982), the defendant's guilty plea was set aside where, before accepting the plea, the court made it appear the court had discretion concerning what the sentence would be. We find these cases directly on point and require a remand.

Here, all parties believed Zanders was eligible for a deferred judgment. The court indicated its awareness Zanders intended to argue for deferred judgment. The parties only became aware he was not eligible for deferred judgment after the court accepted the plea, and at that point defendant moved in arrest of judgment.[5] Because the defendant was misinformed about the collateral consequences of his plea, we are not able to conclude his plea was knowingly and intelligently entered. *See Boone*, 298 N.W.2d at 338; *cf. Meier v. State*, 337 N.W.2d 204, 207-08 (Iowa 1983) (vacating guilty plea, conviction, and judgment and allowing postconviction petitioner to plead anew based on misstatement by defense counsel).

We also find merit in Zanders's request for further proceedings before another judge. The record reflects that during a reported discussion in chambers before the trial began, the presiding judge stated: "Ms. Wortham-White, consistent with my policy, if he's convicted at sentencing, he goes to prison from

---

[5] The district court denied the motion as untimely. While it is true the motion was not filed five days before the original sentencing hearing (May 20), *see* Iowa R. Crim. P. 2.24(3)(*b*), the parties were not aware of defendant's ineligibility for deferred judgment until the May 20, 2010, hearing and sentencing was continued. Forty-five days from entry of plea (April 6, 2010) is May 21, 2010. The motion was filed on May 20 and thus was within that forty-five day period. Under these unique circumstances, we find the motion in arrest of judgment was timely. *Id.* In any event, "the court may permit a guilty plea to be withdrawn "[a]t any time before judgment." Iowa R. Crim. P. 2.8(2)(*a*). "The court may also, upon its own observation of any of these grounds [supporting a motion in arrest of judgment], arrest the judgment on its own motion." Iowa R. Crim. P. 2.24(3)(*c*). When the court became aware that the defendant was not entitled to a deferred judgment, the court should have allowed the defendant to withdraw his plea.

the sentencing hearing. That's it—if he's convicted." We surmise the presiding judge may have simply misspoke, and intended to convey that if Zanders was convicted, Zanders would not be granted time after the sentencing hearing before being required to report to serve any period of incarceration. However because a prison sentence was not mandatory on the pending charges, the words actually spoken give cause to question the judicial officer's objectivity.[6]

We vacate Zanders's conviction and sentence and remand to a different judge for further proceedings to allow him to plead anew. *See State v. Kress*, 636 N.W.2d 12, 22 (Iowa 2001).

CONVICTION AND SENTENCE VACATED, CASE REMANDED WITH DIRECTIONS.

---

[6] We also note a sentencing court must exercise its discretion without application of a fixed policy to govern in every case. *State v. Lathrop*, 710 N.W.2d 288, 299 (Iowa 2010); *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979).

Finally, we note the district court stated during the sentencing hearing, "Although the state has dismissed Count II, the Child Endangerment, I can consider that." "A court may not consider an unproven or unprosecuted offense when sentencing a defendant unless (1) the facts before the court show the defendant committed the offense, or (2) the defendant admits it." *State v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998).