IN THE COURT OF APPEALS OF IOWA

No. 1-872 / 11-0731
Filed December 21, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROGER MCCRAY,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mary E. Howes (plea) and C.H. Pelton (sentencing), Judges.

Roger McCray appeals from his convictions and sentence following his guilty plea to two counts of possession of a controlled substance with the intent to deliver. **CONVICTION AND SENTENCE VACATED; CASE REMANDED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly G. Cunningham, Assistant County Attorney, for appellee.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

Roger McCray appeals following his guilty plea, judgment, and sentence to two counts of possession of a controlled substance with the intent to deliver. *See* Iowa Code §§ 124.401(1)(c)(1) & (3), 124.206(2)(d), 124.204(3)(j) (2009). He argues his plea was not knowing and voluntary because the district court gave him conflicting information as to the possibility of the imposition of mandatory minimum sentences. We vacate McCray's conviction and sentence and remand for further proceedings.

During a traffic stop, McCray was found with ten individually packaged bags consisting of crack cocaine, powder cocaine, and heroin. When being placed under arrest, McCray struggled against the police officers. McCray was subsequently charged with two counts of possession of a controlled substance with the intent to deliver, drug tax stamp violation, and interference with official acts.

McCray and the State eventually entered into a memorandum of plea agreement. The agreement provided that McCray would plead guilty to the two counts of possession of a controlled substance with the intent to deliver in exchange for the State dismissing the remaining charges at McCray's cost and recommending concurrent sentencing. The agreement further provided in relevant part:

> Defendant understands any period of incarceration now or hereafter imposed in this case may carry a minimum period of one-third of the sentence before the Defendant would be eligible for parole pursuant to Section 124.413 of the Code of Iowa. The Court may waive imposing the minimum one-third sentence only for a first

> conviction if mitigating circumstances exist pursuant to Section 901.10 of the Code of Iowa.
>
> Defendant understands all Class "C" felony violations of Chapter 124 of the Code of Iowa may carry mandatory minimum fines of $1,000.00.

A plea hearing was held on March 2, 2011. During the colloquy, the court informed McCray that his possession with the intent to deliver charges were class "C" felonies punishable with a maximum of twenty years in prison and a $10,000 fine on each charge. The court then stated:

> And then the minimum. Let's see. He's never been convicted of delivery, has he. So there's no mandatory minimum prison sentence. And there's a minimum fine of a thousand dollars on each of them, plus some surcharges and driver's license suspensions. Do you understand your maximum and minimum penalties?
>
> DEFENDANT: Yes, ma'am.

The court proceeded to explain the trial rights McCray was waiving by pleading guilty, and then turned back to the plea agreement between the parties. During this discussion, the court stated:

> There's also some special provisions of the plea agreement regarding minimum periods of incarceration may be imposed, minimum fines, driver's license suspension, and some surcharges. Do you have any questions about the plea agreement?
>
> THE DEFENDANT: No, ma'am. He explained it to me.

The district court determined McCray made his guilty plea voluntarily and intelligently and accepted it.

On May 6, 2011, McCray was sentenced to serve an indeterminate term of ten years on both counts to run concurrently. The court further required McCray to serve one-third of his sentence before being eligible for parole. McCray was also assessed a $1000 fine on each count, surcharges, court costs, court-appointed attorney's fees, law enforcement initiative and DARE

surcharges, had his driving privileges revoked, and was given credit for time served.

Defendant now appeals arguing his plea was not knowing and voluntary due to the alleged confusion over the imposition of a mandatory minimum sentence.[1] We review this constitutional claim de novo. *State v. Loye*, 670 N.W.2d 141, 150 (Iowa 2003).

Under Iowa Rule of Criminal Procedure 2.8(2)(*b*)(2), the district court is required to inform the defendant of and determine that the defendant understands "[t]he mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered." Iowa R. Crim. P. 2.8(2)(*b*)(2); *State v. Kress*, 636 N.W.2d 12, 21 (Iowa 2001). This rule requires substantial compliance in order to assure the plea is made knowingly and voluntarily. *Kress*, 636 N.W.2d at 21.

When a defendant has been misinformed about a sentence, the knowing and voluntary nature of the plea is affected only if the misstatement placed "in defendant's mind 'the flickering hope of a disposition on sentencing that was not possible.'" *State v. West*, 326 N.W.2d 316, 317 (Iowa 1982) (quoting *State v. Boone*, 298 N.W.2d 335, 338 (Iowa 1980)). Any misstatement must be material in the sense that it is part of the inducement for the defendant's decision to plead guilty, and the misstatement must go uncorrected. *Stovall v. State*, 340 N.W.2d 265, 267 (Iowa 1983).

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[1] McCray raises his claim directly and alternatively as ineffective assistance of counsel. The State concedes that McCray was not advised of the consequences of failing to file a motion in arrest of judgment, and thus is not precluded from challenging his plea on direct appeal. *See State v. Meron*, 675 N.W.2d 537, 540-41 (Iowa 2004).

As a person sentenced pursuant to section 124.401(1)(c), if either of his sentences of incarceration were not suspended, McCray would not be eligible for parole until he served one-third of the maximum indeterminate sentence prescribed by law on each such term of incarceration. Iowa Code § 124.413(1). The court was required to inform him of those mandatory minimums. However, since this was McCray's first conviction under section 124.413, the district court had discretion to sentence McCray to a term less than provided by statute if mitigating circumstances existed and are stated on the record. *Id.* § 901.10(1). In the absence of the discretionary reduction, McCray faced the mandatory minimum. The court's statement that "there's no mandatory minimum prison sentence" was not correct. Thus, the district court's statement regarding the imposition of no mandatory minimum sentence may have placed into McCray's mind the flickering hope of a disposition that was not possible. *See Kress*, 636 N.W.2d at 21-22 (holding the district court erred when it misinformed the defendant that the sentencing court could waive the one-third mandatory minimum sentencing requirement in section 124.413, when she was not eligible for it since she had a prior conviction for possession of a controlled substance with intent to deliver).

In addition, the contents of the plea agreement recited that the sentence "*may* carry a minimum period of one-third of the sentence" and that the court "*may waive*" the minimum one-third. (Emphasis added.) Without deciding whether the written plea agreement was adequate for its intended purposes, it was not precise enough to satisfy the court's duty to inform the defendant of the

mandatory minimum sentence that must be ordered by the court if the sentence of incarceration is not suspended, nor was it accurate in stating that the court may "waive" the minimum one-third. *Loye*, 670 N.W.2d at 153-54 ("A written plea agreement is not a substitute for the in-court colloquy required by rule 2.8(2)(*b*) in felony cases."). If the court were not to reduce the term pursuant to section 901.10(1), it shall (not "may") order the mandatory minimum of one-third. Iowa Code § 124.413(1)

The district court did not substantially comply with Rule 2.8(2)(*b*)(2), and McCray's plea was not knowingly and voluntarily made. In such circumstances, the remedy is to set aside the conviction and sentence and allow the defendant to plead anew. *Kress*, 636 N.W.2d at 21.

CONVICTION AND SENTENCE VACATED; CASE REMANDED.