

IN THE SUPREME COURT OF IOWA

19-1442

Webster County No. FECR358194

STATE OF IOWA,

Plaintiff-Appellee,

vs.

TRAVIS JAMES JORDAN,

Defendant-Appellant.

APPEAL FROM THE DISTRICT
COURT FOR WEBSTER COUNTY
HONORABLE KURT L. WILKE
DISTRICT COURT JUDGE

**APPELLANT'S FINAL BRIEF and
REQUEST FOR ORAL ARGUMENT**

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ROUTING STATEMENT

Pursuant to I.R.A.P. 6.1101(1), it would be appropriate for the Iowa Supreme Court to transfer the appeal to the Iowa Court of Appeal. See IRAP 6.1101(3)(a).

STATEMENT OF THE ISSUES FOR REVIEW

ISSUE I: DEFENDANT’S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE BREACHING THE PLEA AGREEMENT

Strickland v. Washington, 466 U.S. 668 (1984)
State v. Draine, 936 N.W.2d 205 (Iowa 2019)
State v. Macke, 933 N.W.2d 226 (Iowa 2019)
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State v. Bearse, 748 N.W.2d 211 (Iowa 2008)
State v. Maxwell, 743 N.W.2d 185 (Iowa 2008)
State v. Horness, 600 N.W.2d 294 (Iowa 1999)
Iowa Const. art. I § 10
U.S. Const. amend VI
Iowa Code § 814.6
Iowa Code § 814.7

ISSUE II: THE PROSECUTOR VIOLATED DEFENDANT’S DUE PROCESS RIGHTS BY BREACHING THE AGREEMENT

Santobello v. New York, 404 U.S. 257 (1971)
State v. Bearse, 748 N.W.2d 211 (Iowa 2008)
State v. King, 576 N.W.2d 369 (Iowa 1998)
State v. Kuchenreuther, 218 N.W.2d 621 (Iowa 1974)
Iowa Code § 814.7

STATEMENT OF THE CASE

Nature of the Case: This appeal requires the Court to decide if Defendant-Appellant, Travis Jordan, received ineffective assistance of counsel when his attorney failed to object to the State violating the plea agreement during the sentencing hearing, or in the alternative whether or not the breach of the plea agreement was plain error. Jordan appeals his judgment and sentence on the grounds that the State violated the terms of the plea agreement during sentencing. Jordan requests the matter be remanded for resentencing in front of another judge and for the State to honor the plea agreement during sentencing.

Course of Proceedings and Disposition Below: On September 27, 2018 the State filed a Trial Information charging Travis Jordan with burglary in the third degree in violation of Iowa Code § 713.1, a Class D Felony, and possession of burglar tools in violation of Iowa Code § 713.7, an Aggravated Misdemeanor. (Trial Information, App. p. 6) On October 22, 2018, Jordan entered into a plea agreement with the State, and ultimately pleaded to Count I of the Trial Information, burglary in the third degree. (Plea Hearing Tr. p. 2, Line 8-20) There was no written plea agreement and the entirety of the plea agreement was orally entered in the record on October 22, 2018. (Plea Hearing Tr. p. 2, Line 8-20) The plea agreement was that Jordan would plead guilty to Count I, burglary in the third degree, the State would dismiss Count II, Jordan would be released on supervision awaiting sentencing, the

State would remain silent during sentencing, and Jordan could ask for probation during sentencing. (Plea Hearing Tr. p. 2, Line 8-23)

Following the acceptance of the plea, the Court ordered a Presentence Investigation Report (PSI) be compiled. (Order Accepting Plea, App. p.13) Sentencing was scheduled to take place on November 26, 2019, however Jordan failed to appear, and a warrant was issued. (Order for Warrant, App. p. 22) The warrant was returned on June 2, 2019 when Jordan was arrested for failing to appear at his sentencing. (Return of Warrant, App. p. 24) On August 8, 2019, the Court entered an Order resetting Jordan's sentencing for August 19, 2019. (Order Setting Sentencing, App. p. 25)¹ An addendum to the PSI was ordered and submitted to the Court on August 15, 2019. At the sentencing hearing, the State recommended that Jordan be incarcerated. (Sentencing Hearing Tr. p. 5, Line 4 through p. 6, Line 5) Jordan asked for probation citing the need for mental health treatment, stability in the community, and newly forged supports within the community. (Sentencing Hearing Tr. p. 6, Line 7 through p. 9, Line 16) The District Court ultimately agreed with the State and sentenced Jordan to a term of incarceration. (Sentencing Order, App. p. 25) Jordan filed a timely Notice of Appeal. (Notice of Appeal, App. p. 28)

¹ The caption of this order states "Order for Plea." The undersigned believes this order was miscaptioned due to a clerical error and should have been "Order for Sentencing."

Facts: On September 24, 2018, Fort Dodge police officers observed a person walking down allies from garage to garage. Officers approached and stopped the person, later identified as Travis Jordan, questioned him as to what he was doing in the area and searched his backpack. (Minutes, App. p. 9) Jordan was arrested and charged with one count of burglary in the third degree and one count of possession of burglar tools. (Trial Information, App. p. 6) On October 22, 2018, the parties reached a plea agreement. (Plea Hearing Tr. p. 2, Line 8-23) The plea agreement was not written, but was orally put into the record. (Plea Hearing Tr. p. 2, Line 8-23):

THE COURT: Good morning. We are convened in State versus Travis Jordan, FECR358194. Originally this matter was scheduled for a bond review this morning, but I understand that the purpose of the hearing has changed. And I'll let the parties explain that to the Court.

Ms. Barnaby, do you want to explain what we're doing today?

MS. BARNABY: Yes, your Honor. Mr. Jordan is going to enter a guilty plea to Count I for burglary in the third degree. The State is agreeing to dismiss Count II. The parties are agreeing to release Mr. Jordan RWS after the hearing today.

The recommendation of the county attorney-- The county attorney's going to agree to remain silent at sentencing, and the defendant is free to argue for probation. And that's essentially the plea agreement.

THE COURT: Thank you.

Mr. McIntyre?

MR. McINTYRE: That is the plea agreement reached between the parties, your Honor.

(Plea Hearing Tr. p. 2, Line 8-20) The State agreed that the recitation of the plea agreement by defense counsel was the full agreement between the parties. The State did not add any caveats, or conditions to the plea. (Plea Hearing Tr. *passim*) Defense counsel did, at one point, expand on additional terms of the plea agreement:

THE COURT: Ms. Barnaby, are you aware of any defenses other than a general denial that would affect the outcome of the case?

MS. BARNABY: You Honor, my client and I had discussed on a previous occasion possibility of a suppression issue, but the plea agreement is such, the State's agreed not to file a habitual offender charge.

(Plea Hearing Tr. p. 5, Line 22 – p. 6, Line 3) After these additions, the State did not inform the Court of any other factors or conditions of the plea agreement that were not on the record. (Plea Hearing Tr. *passim*)

Jordan failed to appear for his original sentencing in November of 2018 and was arrested on a warrant on June 2, 2019. (Return of Warrant, App. p. 24) At the sentencing hearing in August of 2019, the State did not remain silent pursuant to the plea agreement, but instead stated the following to the Court:

MR. McINTYRE: Thank you. I have no witnesses or evidence, just a recommendation, and that recommendation matches that of the PSI that was filed in this case.

The defendant has a long criminal history that includes burglary and theft cases much like the one that is before the Court today and also includes violent charges. He has been previously incarcerated four times in the State of Iowa.

And in this case, he was set for sentencing in November of 2018, and as the addendum to the presentence investigation report states, he failed to appear at that time and his whereabouts were unknown from November until June 3rd of 2019, when he was arrested. So for seven months he absconded. He also has other abscondions on his record from the past.

Given his criminal history, the unknown whereabouts for seven months pending sentencing after his plea in this matter, the State believes that for protection of the community from future offenses and for rehabilitation of the defendant, that imposition of the five year -- the term not to exceed five years is appropriate.

(Sentencing Hearing Tr. p. 5, Line 4-25) Defense counsel did not object to the State's failure to adhere to the plea agreement, that the State remain silent at sentencing. (Sentencing Hearing Tr. *passim*) The District Court cited the State's recommendation and the recommendation of PSI as reasoning for sentencing Jordan to a term of incarceration. (Sentencing Hearing Tr. p. 10, Line 12-16) Jordan filed a timely Notice of Appeal. (Notice of Appeal, App. p. 28)

ARGUMENT

Standard of Review

“We review de novo claims of ineffective assistance of counsel arising from the failure to object to the alleged breach of a plea agreement.” *State v. Macke*, 933 N.W.2d 226, 230 (Iowa 2019) *citing* *State v. Lopez*, 872 N.W.2d 159, 168 (Iowa 2015).

ISSUE I: DEFENDANT’S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE BREACHING THE PLEA AGREEMENT

Jordan claims his counsel was ineffective for failing to object when the prosecutor breached the plea agreement by not remaining silent during his sentencing. First, Jordan addresses his ability to make an ineffective assistance of counsel claim on direct appeal and the applicability of the amended Iowa Code § 814.7.

On July 1, 2019, the Iowa Legislature enacted the current version of Iowa Code § 814.7 barring ineffective assistance of counsel claims on direct appeal. Subsequent appeals have decided the issues of retroactivity and prospective applicability of the code change. *See State v. Macke*, 933 N.W.2d 226 (Iowa 2019) (We conclude the absence of retroactivity language in sections 814.6 and 814.7

means those provisions apply only prospectively and do not apply to cases pending on July 1, 2019); *State v. Draine*, 936 N.W.2d 205, 206 (Iowa 2019) (...the amendment to section 814.6(1) is not retroactive and the statutes controlling appeals are those that were in effect at the time the judgement or order appealed from was rendered).

Jordan's case is unique in that he pleaded guilty in October of 2018, well before Senate File 589 was passed, but was not sentenced until August 19, 2019. (Order Accepting Plea, App. p.13) (Sentencing Order, App. p. 25) Jordan's appeal has to do with the conduct of the prosecutor and conduct of his counsel throughout the entirety of the proceedings, not simply from the final sentencing order. Jordan's due process rights were violated due to the prosecutor's misconduct by breaching the plea agreement. His rights were also violated when counsel failed to object to the breach of the plea agreement. Jordan believes that under the unique circumstances of his case, that he should be allowed to directly appeal on a claim of ineffective assistance of counsel under the previous version of Iowa Code § 814, and that the record is sufficient for the Court to rule on the claim. In Jordan's case, the record clearly reflects the plea agreement terms, the county attorney's conduct which breached the plea agreement, and defense counsel's failure to object to the breach. (Plea Hearing Tr. *passim*)(Sentencing Hearing Tr. *passim*)

The record is adequate to decide Jordan's ineffective assistance of counsel claim on direct review. *State v. Fannon*, 799 N.W.2d 515, 520 (Iowa 2011)

Ineffective Assistance of Counsel

Jordan's primary claim is that his counsel was ineffective for failing to object when the State breached the terms of the plea agreement during sentencing. Jordan has a constitutional right to be represented by effective counsel. U.S. Const. Art. Amend. VI; Iowa Const. art. I § 10. "In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove: (1) counsel failed to perform an essential duty; and (2) prejudice resulted." *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "An attorney breaches an essential duty when 'counsel's representation falls below an objective standard of reasonableness.'" *Lado v. State*, 804 N.W.2d 248, 251 (Iowa 2011). It is presumed trial counsel acted competently, however that presumption can be overcome when there is a showing counsel failed to object to a prosecutor breaching a plea agreement. *State v. Bearse*, 748 N.W.2d 211, 215-17 (Iowa 2008). Further, Jordan does not need to show that he would have received a different sentence, but rather he must show the outcome of the sentencing proceeding would have been different. *Id.* Had defense counsel objected, the trial court would have allowed him to either withdraw his plea, or have a new sentencing hearing requiring the county attorney to specifically perform the terms

of the plea agreement. *Id.* at 218 citing *State v. Horness*, 600 N.W.2d 294, 301 (Iowa 1999)

On October 22, 2018, Jordan entered into a plea agreement, waiving his rights to a trial in these matters. (Plea Hearing Tr. *passim*) During the hearing his attorney set out the agreement of the parties:

MS. BARNABY: Yes, your Honor. Mr. Jordan is going to enter a guilty plea to Count I for burglary in the third degree. The State is agreeing to dismiss Count II. The parties are agreeing to release Mr. Jordan RWS after the hearing today.

The recommendation of the county attorney-- *The county attorney's going to agree to remain silent at sentencing, and the defendant is free to argue for probation. And that's essentially the plea agreement. Emphasis added.*

The county attorney had an opportunity to add to the record, and when asked if this was the agreement, he stated affirmatively that defense counsel had properly laid out the agreement. (Plea Hearing Tr. p. 2, Line 8-20) At the time of his sentencing, the county attorney did not remain silent but instead recommended that Jordan be incarcerated. (Sentencing Hearing Tr. p. 5, Line 4-25) This was clear breach of the plea agreement and defense counsel failed to object to the breach. (Sentencing Hearing Tr. *passim*) Failure to object to this breach cannot be characterized as strategic as “no possible advantage could flow to the defendant from counsel’s failure to point out the State’s noncompliance.” *Horness*, 600 N.W.2d at 300. At the time of the breach, Jordan’s counsel had a duty to object, and failure to do so

was a failure to perform an essential duty and it resulted in prejudice to Jordan.

Bearse, 748 N.W.2d at 216-18.

Jordan requests that this case be remanded for resentencing in front of a different judge, requiring the county attorney to specifically perform their end of the plea agreement and remain silent during sentencing.

**ISSUE II: THE PROSECUTOR VIOLATED DEFENDANT’S DUE
PROCESS RIGHTS BY BREACHING THE AGREEMENT**

Iowa Code § 814.6(1)(a)(3) currently reads, “right of appeal is granted the defendant from a final judgment of sentence, except in the following cases: (3) A conviction where the defendant has plead guilty. This subparagraph does not apply to a guilty plea for a class “A” felony or in a case where the defendant establishes good cause.”

Again, Jordan asserts that his guilty plea was accepted by the District Court in October of 2018, prior to the enactment of the code section and therefore should be subject to the prior version allowing his appeal to go forward. (Order Accepting Plea, App. 13) Jordan was never advised of the rule change beginning July 1, 2019, and was never afforded an opportunity to file a motion in arrest of judgment following his arrest on June 2, 2019. (Return of Warrant, App. p. 24) Additionally,

Jordan's sentencing order did not indicate the change to Iowa Code § 814.6 limiting his appellate rights. (Sentencing Order, App. p. 25)

The State breaching the plea agreement was a violation of Jordan's due process rights as Jordan had to give up his trial rights and potential suppression defenses to avail himself of the plea agreement. *Santobello v. New York*, 404 U.S. 257, 262 (1971) (Plea Hearing Tr. *passim*) Improper use of a plea agreement, or breaching a plea agreement, threatens "the liberty of the criminally accused as well as 'the honor of the government' and 'public confidence in the fair administration of justice.'" *Bearse*, 748 N.W.2d at 215 *citing State v. Kuchenreuther*, 218 N.W.2d 621 (Iowa 1974). "Violations of plea agreements 'adversely impact the integrity of the prosecutorial office and the entire judicial system.'" *Bearse* 748 N.W.2d at 215 *citing State v. King*, 576 N.W.2d 369, 370 (Iowa 1998).

If the Court believes that the current version of Iowa Code § 814.6 is applicable to Jordan's appeal, Jordan believes that the county attorney violating his constitutional due process rights constitutes "good cause" contemplated by § 814.6(1)(a)(3). Jordan is not challenging the plea itself, but rather is appealing the breach of the plea agreement by the prosecutor and is challenging the sentence that resulted from the breach. "Good cause" should be held to incorporate situations such as Jordan's where the issue is prosecutorial misconduct and not the plea colloquy itself.

The plea agreement in this case was that the county attorney would remain silent during sentencing. During the sentencing, the county attorney did not remain silent and in fact asked the trial court to sentence Jordan to incarceration. (Sentencing Hearing Tr. p. 5, Line 4-25) Jordan's due process rights were violated when the prosecutor failed to remain silent, and this matter should be remanded for resentencing in front of a different judge, requiring the county attorney to specifically perform their end of the plea agreement and remain silent during sentencing.

CONCLUSION

For the foregoing reasons, Travis Jordan respectfully requests the Court order his sentence vacated and remand his case for resentencing in front of a different judge, requiring the county attorney to specifically perform their end of the plea agreement and remain silent during sentencing.

REQUEST FOR ORAL ARGUMENT

Counsel for Defendant-Appellant respectfully requests that he be heard in oral argument upon the submission of this case.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE
REQUIREMENTS**

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 3513 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. app. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman font.

/s/Jesse A. Macro, Jr.
Jesse A. Macro, Jr.

7/25/2020
Date

ATTORNEY'S COST CERTIFICATE

I, Jesse A. Macro, Jr., hereby certify that the actual cost of reproducing the necessary copies of the Proof Brief was \$1.90 and that the amount has actually been paid in full by me.

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PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 25th day of July 2020, I served this document through the EDMS system.

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I further certify that on the 25th day of July 2020, I filed this document with the Clerk of the Iowa Supreme Court at the Iowa Judicial Branch Building, 1111 East Court Avenue, Des Moines, IA 50319 by the EDMS system.

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Jesse A. Macro, Jr.