

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 APPLICATION FOR FURTHER REVIEW

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QUESTIONS PRESENTED FOR FURTHER REVIEW

Did the Iowa Court of Appeals err in dismissing Appellant's appeal by finding claims of due process violations by the State were not preserved, and are thus ineffective assistance of counsel claims that must be raised in a PCR?

TABLE OF CONTENTS

<u>Cases:</u>	<u>Page:</u>
Question Presented for Further Review	2
Table of Contents	3
Table of Authorities	4
Statement Supporting Further Review	5
Brief.....	5
Conclusion	14
Attorney’s Cost Certificate	15
Certificate of Compliance	15

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page:</u>
<i>Santobello v. New York</i> , 404 U.S. 257 (1971).....	11
<i>State v. Bearse</i> , 748 N.W.2d 211 (Iowa 2008).....	11
<i>State v. King</i> , 576 N.W.2d 369 (Iowa 1998).....	11,12
<i>State v. Kuchenreuther</i> , 218 N.W.2d 621 (Iowa 1974).....	11
<i>State v. Damme</i> , 944 N.W.2d 98 (Iowa 2020).....	13
<i>State v. Beres</i> , 943 N.W.2d 575 (Iowa 2020).....	13

<u>Statutes and Court Rules:</u>	
Iowa Code § 814.6.....	10,12,13

STATEMENT SUPPORTING FURTHER REVIEW

Further review should be granted because the Iowa Court of Appeals erred in determining that the Appellant's appeal was an ineffective assistance of counsel claim in nature. Appellant's claims were that the State of Iowa violated his due process rights when it breached the plea agreement at sentencing, and the record was clear enough to find a plain error even though the breach was not objected to.

Further review should be granted by the Iowa Supreme Court.

BRIEF

Procedural Background:

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."

Jordan's appeal was heard by the Iowa Court of Appeals and they issued an opinion on November 4, 2020 dismissing his appeal under Iowa Code § 814.6 (2020). Jordan now seeks further review by the Iowa Supreme Court.

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) On November 4, 2020, the Iowa Court of Appeals dismissed Jordan's

appeal finding it lacked subject matter jurisdiction under the amended Iowa Code § 814.6. Jordan now seeks further review from the Iowa Supreme Court.

ARGUMENT

THE IOWA COURT OF APPEALS ERRED IN DISMISSING APPELLANT’S DIRECT APPEAL FINDING THAT IT WAS IN NATURE AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AND THEREFORE BARRED BY IOWA CODE § 814.6(1)(a)(3)

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.”

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) It is clear on this record that the State breached the plea agreement when it recommended Jordan be incarcerated in prison.

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.'" *State v. Bearse*, 748 N.W.2d at 215 (Iowa 2008) *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). When the integrity of our entire judicial system is implicated by the conduct of the State, a defendant should not have to wait for the limited remedies

available in a postconviction relief proceeding. Prosecutorial misconduct in breaching a plea agreement, like the sentencing court relying on an impermissible factor, should not require an objection to preserve error. The breach is fundamentally unfair to a defendant, especially when the prosecutor is asking for a more punitive sentence than previously agreed to. An additional fairness issue is that all of the onus is on a defendant or defense counsel. When we have a blatant breach of a plea agreement, the question should rest on if the State acted in a way that violated the defendant's due process rights, creating an unfair proceeding. On the contrary, we look at if the defendant, or their counsel, preserved error, put every issue on the record, and appealed in the proper way. This system is exponentially unfair to a pro se defendant that more than likely does not understand the intricacies of the law. If it is determined that error preservation is necessary in prosecutorial misconduct cases in order to directly appeal, it is a grim prospect for pro se defendants. It is worrisome that a pro se defendant can plead guilty, the State can egregiously breach a plea agreement, and the defendant is essentially without remedy because their main avenue of relief (ineffective assistance of counsel PCR claims) is not available because they weren't represented and Iowa Code § 814.6 bars their direct appeal.

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 breaching

the plea agreement constitutes “good cause” as contemplated by Iowa Code § 814.6(1)(a)(3). “Good cause” has been clarified by the Iowa Supreme Court to mean, “a legally sufficient reason.” *State v. Damme*, 944 N.W.2d 98, at 104 (Iowa 2020) Jordan believes that the violation of his due process rights is a legally sufficient reason to warrant a direct appeal.

An additional argument is that Jordan is not challenging the plea or imposed sentence itself, but rather he is appealing the breach of the plea agreement; that the prosecutor did not abide by his end of the contract. *See State v. Beres*, 943 N.W.2d 575 (Iowa 2020) (“This case gives us the opportunity to reaffirm once more that plea agreements are contracts, and accordingly, they are subject to general principles of contract law.”) It is of significant import that this contract is ultimately negotiated with the intended result being that the defendant waives several constitutional protections. Jordan contends that a breach of contract by the State is a legally sufficient reason to allow a direct appeal.

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, and rights under contract law, were violated when the prosecutor failed to remain silent. This matter should be heard on further review and ultimately 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 hereby requests further review be granted, and the Iowa Court of Appeals November 4, 2020 decision be reversed. That the Court further 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.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
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This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 2329 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.

11/24/2020
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 \$1.60 and that the amount has actually been paid in full by me.

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

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 24th day of November 2020, I served this document through the EDMS system.

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I further certify that on the 24th day of November 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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