

SUPREME COURT No. 18-0839
POLK COUNTY No. AGCR309787

**IN THE
SUPREME COURT OF IOWA**

STATE OF IOWA,

Plaintiff–Appellee,

v.

ERIN MACKE,

Defendant–Appellant.

*ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE CAROL S. EGLY, DISTRICT COURT JUDGE*

REPLY BRIEF FOR APPELLANT

Angela Campbell
Counsel of Record for Defendant–Appellant
DICKY & CAMPBELL LAW FIRM, PLC
301 East Walnut Street, Suite 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008
FAX: (515) 288-5010
EMAIL: angela@dickeycampbell.com

PROOF OF SERVICE

On November 27, 2018, I served this brief on all other parties by mailing one copy thereof to their respective counsel:

Attorney General
Criminal Appeals Division
Hoover Building
Des Moines, Iowa 50319

I served the Appellant by mailing her a copy of the brief.

/s/ Angela L. Campbell
Angela Campbell, AT#0009086
Counsel of Record for Defendant–Appellant
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut Street, Suite 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008
FAX: (515) 288-5010
EMAIL: angela@dickeycampbell.com

CERTIFICATE OF FILING

I, Angela Campbell, certify I did file the attached brief with the Clerk of the Iowa Supreme Court by electronically filing the brief through the EDMS system on November 27, 2018.

/s/ Angela L. Campbell
Angela Campbell, AT#0009086
Counsel of Record for Defendant–Appellant
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut Street, Suite 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008
FAX: (515) 288-5010
EMAIL: angela@dickeycampbell.com

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	4
REPLY ARGUMENT	6
I. THERE IS NO “REASONABLE DISPUTE” ABOUT MACKE’S UNDERSTANDING OF THE PLEA AGREEMENT AND A SUBSEQUENTLY FILED DOCUMENT CANNOT ALTER THE AGREEMENT AS IT WAS UNDERSTOOD AT THE TIME OF MACKE’S PLEA. 6	
CONCLUSION	11
CERTIFICATES OF COUNSEL	12

TABLE OF AUTHORITIES

AUTHORITIES	PAGE
<u>United States Supreme Court</u>	
<i>North Carolina v. Alford</i> , 400 U.S. 25 (1970).....	6, 7
<i>Santobello v. New York</i> , 404 U.S. 257 (1971).....	9
<u>Iowa Supreme Court</u>	
<i>State v. Brown</i> , 911 N.W.2d 180 (Iowa 2018)	10
<i>State v. Foy</i> , 574 N.W.2d 337 (Iowa 1998).....	10
<i>State v. Philo</i> , 697 N.W.2d 481 (Iowa 2005)	8
<u>Iowa Court of Appeals</u>	
<i>State v. Barker</i> , 476 N.W.2d 624 (Iowa Ct. App. 1991).....	10
<i>State v. Coleman</i> , No. 12-1557, 2013 WL 3458181 (Iowa Ct. App. July 10, 2013).....	10
<i>State v. McConnelee</i> , No. 17-1696, 2018 WL 4923118 (Iowa Ct. App. Oct. 10, 2018).....	11
<i>State v. Powell</i> , No. 17-0882, 2018 WL 3912110 (Iowa Ct. App. Aug. 15, 2018).....	8, 10
<u>Federal Circuit Courts of Appeals</u>	
<i>Baker v. United States</i> , 781 F.2d 84 (6th Cir. 1986).....	10
<i>United States v. DeWitt</i> , 366 F.3d 667 (8th Cir. 2004)	8

Statutes and Rules

Iowa R. Crim. P. 2.8(2)(c) 10

Iowa R. Crim. P. 2.10(2)..... 10

REPLY ARGUMENT

I. THERE IS NO “REASONABLE DISPUTE” ABOUT MACKE’S UNDERSTANDING OF THE PLEA AGREEMENT AND A SUBSEQUENTLY FILED DOCUMENT CANNOT ALTER THE AGREEMENT AS IT WAS UNDERSTOOD AT THE TIME OF MACKE’S PLEA.

The State concedes that if the parties agreed to jointly recommend a deferred judgment, then the plea agreement was breached and Macke should get a new sentencing hearing. (Appellee Br. p. 10). The State goes on to claim though that there is a “reasonable dispute” about what the plea agreement was, because there were “two versions” of the plea agreement, and so the matter should have to go through a postconviction action to determine what the real plea agreement was. (Appellee Br. p. 11). This argument mistakes both the applicable law and the record in this case because there is no “reasonable dispute” as to what Macke believed the plea agreement was at the time she entered her plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).

There are two times on the record that Macke is officially advised of what the plea agreement is, once in writing signed by her lawyer and herself (App. at 9) and once on the record at the plea hearing informing her that the benefit to her in accepting the *Alford* plea was a “joint recommendation of a

deferred judgment to the charges.” (Plea Tr. p. 4, l. 16-18). Macke was personally present during both of these recitations of the agreement.

The Petition to Plead Guilty was filed at 8:02 a.m. on February 26, 2018, which the prosecutor received via EDMS. (App. at 9). The prosecutor did not object or clarify the plea agreement as it was set forth in the Petition to Plead Guilty. At 9:06 a.m. on February 26, 2018, a little over an hour after the Petition to Plead Guilty was filed, a plea hearing was held on the record, for which the prosecutor was personally present. (Plea Tr. p. 2, l. 1-4). The plea agreement was recited into the record, and the prosecutor did not object or correct it. In fact, the prosecutor said absolutely nothing during that section of the plea hearing, but chimed in as soon as the discussion about when the sentencing would be set. (Plea Tr. p. 6, l. 10-12.) The Court accepted the *Alford* plea, in part because of the benefits set forth in the plea agreement, including the joint recommendation. (Plea Tr. p. 5, l. 9-16).

Subsequent to the plea hearing and the acceptance of the plea, at 9:11 a.m., the court entered an order that the State now relies on for its argument that there is a “reasonable dispute” about the plea agreement. (App. at 11). This document was not read to the defendant on the record, was not signed

by the defendant, and did not reflect the terms of the plea agreement as was set forth in the Petition to Plead Guilty, or in the plea colloquy.

There is simply no question on this record that Macke and her lawyer believed the plea agreement was to a joint recommendation for a deferred judgment. When they stated that agreement, twice, to the court, the prosecutor stood silent both times. It is the defendant, not the State of Iowa, who must enter a knowing and voluntary plea. *State v. Philo*, 697 N.W.2d 481, 488 (Iowa 2005). On this record it is clear that Macke was informed that the plea agreement included the state's agreement to request a deferred judgment twice before her plea was accepted. For the State to now claim that this understanding might end up having been incorrect is the same as the State agreeing that the entire plea was unknowing and involuntary. If so, the remedy is not forcing the defendant to go through a postconviction procedure, but instead the remedy would be for the defendant to be allowed to withdraw her entire plea, rather than simply ask as she has done, for the plea agreement to be enforced.

Plea agreements should be interpreted using general contract principles. *United States v. DeWitt*, 366 F.3d 667, 669 (8th Cir. 2004); *State v. Powell*, No. 17-0882, 2018 WL 3912110, *3 (Iowa Ct. App. Aug. 15, 2018). As the United States Supreme Court has noted,

[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

On this record, petitioner ‘bargained’ and negotiated for a particular plea in order to secure dismissal of more serious charges, but also on condition that no sentence recommendation would be made by the prosecutor. It is now conceded that the promise to abstain from a recommendation was made, and at this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial. The staff lawyers in a prosecutor's office have the burden of ‘letting the left hand know what the right hand is doing’ or has done. That the breach of agreement was inadvertent does not lessen its impact.

Santobello v. New York, 404 U.S. 257, 262 (1971). Here, the State is attempting to claim that there was some sort of inadvertent mistake by the prosecutor in not correcting the plea agreement on the record before breaching it in a subsequent proceeding. There can be no realistic argument made that Macke did not rely upon the promise of a joint recommendation for a deferred judgment when she accepted the plea offer. Instead, the State can only argue, as it has, that somehow the State “missed” the two references to the plea agreement on the record. This mistake, if it could even be called that, does not save the State’s position because Macke so clearly relied upon it.

The State could not after the plea was entered change the terms of the bargain. So, even taking into account the subsequent order entered by the

Court (and most likely drafted by the State for the Court’s signature), that post-plea order could not have changed the plea bargain as it was set forth in the record both before, and during, the plea proceeding.

Once a plea based upon a plea bargain has been accepted by the trial court, the prosecutor may not unilaterally withdraw the plea bargain without providing some sort of basis for its action or affording some sort of due process.” *State v. Barker*, 476 N.W.2d 624, 628 (Iowa Ct. App. 1991). In such cases, the remedy is either specific performance of the agreement or withdrawal of the guilty plea. *See [State v.] Foy*, 574 N.W.2d [337] at 339 [Iowa 1998]. If the prosecutor breaches the plea agreement and defense counsel fails to object to the breach, counsel is ineffective. *See State v. Brown*, 911 N.W.2d 180, 186 (Iowa 2018).

Powell, 2018 WL 3912110, at *4.

And, only the plea agreement that is set forth in the record at the time of the plea is the one that can be enforced. As the Iowa Court of Appeals has explained,

Our first step in determining whether the State breached the plea agreement is to determine which sentencing recommendation is part of the plea agreement. The Iowa Rules of Criminal Procedure require the terms of a plea agreement to be disclosed on the record at the plea hearing at the time the plea is offered. Iowa Rs. Crim. P. 2.8(2)(c) (“The terms of any plea agreement shall be disclosed of record as provided in rule 2.10(2).”), .10(2) (“If a plea agreement has been reached by the parties the court shall require the disclosure of the agreement in open court at the time the plea is offered.”). “The terms disclosed in open court at the time the plea is offered are the only enforceable terms of the agreement—absent some extraordinary circumstances.” *State v. Coleman*, No. 12-1557, 2013 WL 3458181, at *3 (Iowa Ct. App. July 10, 2013); *see Baker v. United States*, 781 F.2d 84, 90 (6th Cir. 1986) (holding

where the plea colloquy was fully adequate and absent extraordinary circumstances the plea agreement consists of the terms revealed in open court).

State v. McConnelee, No. 17-1696, 2018 WL 4923118, at *2 (Iowa Ct. App. Oct. 10, 2018).

And so, this is not a situation where a postconviction court will be considering “which version” of the plea agreement it should accept. The rules and the case law make it clear that there is only one plea agreement that can be considered in this circumstance – the one Macke recited in her Petition to Plead Guilty that was put into the record at the time of her plea. Because the State has now conceded that if that is the case, Macke should prevail, this Court should remand for a new sentencing.

CONCLUSION

For the reasons articulated herein, and for the reasons stated in her principal brief, Erin Macke asks the Court to vacate her sentences and remand the matter to the district court for resentencing in front of a different judge.

COST CERTIFICATE

I hereby certify the costs of printing this brief was \$0.00 because it was filed electronically.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

[x] this brief contains 1510 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. 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:

[x] this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point.

/s/ Angela L. Campbell

Angela Campbell, AT#0009086

Counsel of Record for Defendant–Appellant

DICKEY & CAMPBELL LAW FIRM, PLC

301 East Walnut Street, Suite 1

Des Moines, Iowa 50309

PHONE: (515) 288-5008

FAX: (515) 288-5010

EMAIL: angela@dickeycampbell.com