IN THE COURT OF APPEALS OF IOWA

No. 0-319 / 09-1527
Filed May 26, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PAMELA SUE HEUTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell (guilty plea) and Marsha A. Bergan (sentencing), Judges.

A defendant appeals her conviction and sentence for operating a motor vehicle while intoxicated, contending that the State breached a plea agreement and that her attorney was ineffective in failing to object to the breach. **CONVICTION AFFIRMED, SENTENCE VACATED, CASE REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, and Janet M. Lyness, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Doyle, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VAITHESWARAN, P.J.

Pamela Heuton appeals her conviction and sentence for operating a motor vehicle while intoxicated, third offense. She contends that the State breached a plea agreement and that her attorney was ineffective in failing to object to the breach.

I. Background Facts and Proceedings

The State charged Pamela Heuton with operating a motor vehicle while intoxicated, third offense (Count I) and driving with a revoked license (Count II). At a hearing, the prosecutor informed the court that a plea agreement had been reached as follows: "In exchange for a plea as to Count One, the State would recommend a five-year suspended sentence with thirty days in jail; and as to Count Two, a fine of $1,000." Heuton's attorney added that the State would recommend the minimum fine on the OWI charge and Heuton would request credit for time served for participating in a fifteen-day residential treatment program.

When Heuton appeared for sentencing, the prosecutor backed away from the agreement. She pointed to a presentence investigation (PSI) report prepared by one Ms. Burke and a misstatement Heuton made to Ms. Burke about her last alcohol usage. Then, the prosecutor stated,

> Perhaps the best thing to do is to place her in the OWI program on the five years—sentence her to the five years and have her in the OWI program where we can guarantee she will be getting treatment and will be watched for a period of time.

This new recommendation was consistent with the recommendation in the PSI report. Heuton's attorney objected to the recommendation, stating, "The State is

bound to agree to a suspended sentence." The prosecutor responded that Heuton was free to withdraw her plea without objection by the State and the matter could proceed to trial. After an off-the-record discussion, the court ordered the postponement of the sentencing proceeding to allow Heuton to schedule another substance abuse evaluation.

At the rescheduled sentencing hearing, the prosecutor confirmed that a plea agreement had been reached with Heuton. She summarized the agreement as follows:

> [W]e would recommend five years incarceration and that that be suspended, she be placed in the OWI program—that she be given thirty days in jail, that she obtain substance abuse evaluation and treatment, and that she comply with any kind of treatment recommendations.
>
> We would also ask for the mandatory fine in this case of . . . $3125, plus surcharge, court costs as well as attorney's fees.
>
> The State made this recommendation back on July 2 with the belief that Miss Heuton had completed her substance abuse evaluation and her treatment back in April of '09. We would ask the court and the state is bound by that plea agreement. We would ask the court to review the pre-sentence investigation. I have spoken to Miss Burke since she is here and present as well.
>
> [Defense counsel] did provide me this morning with a letter from ASAC about a more recent substance abuse evaluation Miss Heuton had, and it's my understanding from Miss Burke that she has not changed her recommendation in the PSI but she could elaborate on that further. Thank you.

The district court imposed sentences consistent with the recommendation in the PSI report. Heuton appealed.

II. Analysis

Heuton contends her attorney was ineffective in failing to object to the prosecutor's equivocal recommendation at the second sentencing hearing. Generally we preserve this type of claim for postconviction relief proceedings to

develop the record. *See State v. Horness*, 600 N.W.2d 294, 297 (Iowa 1999). The State argues that we could preserve this claim because a portion of the discussion between the court and counsel at the first sentencing hearing was off the record and "[c]ounsel deserves the opportunity to explain why he would object to a supposed breach at the first sentencing hearing but then pass on the opportunity to object to a similar issue at the second hearing." The State's argument in favor of preservation is appealing at first blush. However, on closer examination of the record, we are convinced the off-the-record discussion at the first sentencing hearing had little, if any, bearing on whether the prosecutor breached the plea agreement at the second sentencing hearing. Additionally, the prosecutor's statements at the second sentencing hearing as well as defense counsel's response were reported. For these reasons, we conclude the record is adequate to decide the issue on direct appeal. *See State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008) (finding record adequate to address ineffective-assistance-of-counsel claim on direct appeal); *Horness*, 600 N.W.2d at 297–98 (same).

To prevail on her ineffective-assistance-of-counsel claim, Heuton must show that counsel breached an essential duty and that prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Our review is de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005).

Whether defense counsel breached an essential duty in failing to object to the prosecutor's statements at the second sentencing hearing turns on whether the prosecutor breached the plea agreement at that hearing. The pertinent law on this question is as follows. "'[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 [for the plea], such promise must be fulfilled.'" *Horness*, 600 N.W.2d at 298 (quoting *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427, 433 (1971)). "'[V]iolations of either the terms or the spirit of the agreement' require reversal of the conviction or vacation of the sentence." *Id.* (quoting *Stubbs v. State*, 972 P.2d 843, 844 (Nev. 1998)). Here, the prosecutor violated both the terms and the spirit of the plea agreement.

First, the prosecutor made reference to Heuton's participation in an OWI program—a condition that was not part of the original plea agreement. While the State argues that the prosecutor simply misspoke and immediately corrected herself, the fact that the OWI program was mentioned in the PSI report as part of the recommended sentence and the fact that the prosecutor exhorted the court to examine the PSI report lead us to conclude that the reference was not a slip of the tongue.[1]

Second, the prosecutor did not commend the plea agreement to the court. As in *Horness*,

> One hearing the county attorney's comments would at best be ambivalent with respect to which recommendation met with the State's approval—the recommendation it promised to make in the plea agreement or the recommendation made by the presentence investigator. At worst, the county attorney appeared to make an official recommendation in compliance with the plea agreement and an alternative recommendation, the PSI recommendation, that the

[1] We recognize that the prosecutor's reference to the OWI program along with a suspended sentence makes little sense because the OWI program is specifically for prisoners—not probationers. *See* Iowa Code §§ 321J.2(2)(c), 904.513 (2007). However, when the statement about the program is viewed in the context of the entire hearing transcript, we cannot agree with the State that reference to the program was merely a slip of the tongue.

> prosecutor considered as more appropriate given the circumstances of the offenses.

600 N.W.2d at 299.

We recognize that the prosecutor did not state she was making an alternate sentencing recommendation as the prosecutor did in *Horness*. *Id.* at 296–97. However, her tepid endorsement of the original plea agreement and her repeated reference to the PSI report signaled that this was her intent. Accordingly, we conclude the prosecutor breached the plea agreement at the second sentencing hearing.

According to *Horness*, "When the State breached the plea agreement, the defendant's trial counsel clearly had a duty to object." *Id.* at 300. Based on *Horness*, we conclude defense counsel breached an essential duty in failing to object to the prosecutor's recommendation at the second sentencing hearing.

Next, we consider whether Heuton was prejudiced by counsel's breach. *See Bearse*, 748 N.W.2d at 218. The sentencing hearing was rescheduled once before a different judge, arguably removing the taint of the prosecutor's statements at the first sentencing hearing. However, the proceeding was re-tainted at the second sentencing hearing. While the prosecutor softened her statements at this hearing, she persisted in endorsing the sentencing recommendation in the PSI report rather than the suspended sentence in the plea agreement. For that reason, Heuton was prejudiced. As the court stated in *Bearse*, "[T]he outcome of the sentencing proceeding in this case would have been different if defense counsel would have objected. The sentencing hearing

would have been rescheduled, or the plea of guilty would have been withdrawn." *Id.*

We turn to the appropriate remedy. Heuton requests a remand to the district court for resentencing before a different judge who did not hear the prosecutor's comments. The State favors withdrawal of the plea. Both are permissible options. *See id.* As in *Bearse*, we believe "[t]he interests of justice are adequately served in this case by remanding for resentencing." *Id.*

We vacate Heuton's sentence and remand for resentencing before a district court judge who did not preside over either the first or second sentencing hearing.

CONVICTION AFFIRMED, SENTENCE VACATED, CASE REMANDED FOR RESENTENCING.