IN THE COURT OF APPEALS OF IOWA

No. 0-512 / 09-1772
Filed August 11, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MCKINLEY DUDLEY, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Bryan H. McKinley, Judge.

A defendant appeals a sentence imposed following his guilty plea, contending defense counsel was ineffective for failing to object to the prosecutor's breach of a plea agreement. **CONVICTION AFFIRMED, SENTENCE VACATED, CASE REMANDED FOR RESENTENCING.**

McKinley Dudley, Mason City, pro se.

Mark C. Smith, State Appellate Defender, and Thomas Gaul, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Paul L. Martin, County Attorney, and Steven D. Tynan, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

VAITHESWARAN, P.J.

McKinley Dudley, Jr. appeals a sentence imposed following a guilty plea to operating a motor vehicle while intoxicated (third). He contends the prosecutor breached a written plea agreement by presenting an alternate sentencing recommendation and his attorney was ineffective in failing to object to the breach.

I. Background Proceedings

The State charged Dudley with OWI (third). Dudley and the State executed a written plea agreement which provided in pertinent part that Dudley would plead guilty to operating while intoxicated (third) and

> [t]he State [would] recommend the OWI prison program, a fine of $3,125.00 and withdraw the Habitual Felon charge. Further the State will dismiss Probation Revocation proceedings in FECR017104.

At the plea hearing, the defense attorney and the prosecutor informed the court that Dudley would be released pending sentencing. The discussion was as follows:

> [DEFENSE COUNSEL]: Your Honor, as part of our plea agreement the State and I will jointly recommend that he be released pending the sentencing date and that he—that the bond be withdrawn on this matter.
>
> THE COURT: Is that correct, [Prosecutor]?
>
> [PROSECUTOR]: That is correct, your Honor. The only thing that I want to make sure Mr. Dudley understands is he still would technically be under probation so he needs to do whatever his probation officer tells him to do during that time period because the probation application won't be dismissed until sentencing.
>
> . . . .

> THE COURT: All right. Don't—I mean, obviously if you mess up between now and your sentencing date it isn't going to do you any good—[1]

Dudley pleaded guilty to OWI (third). He was released until sentencing, pursuant to the terms of the plea agreement.

At the sentencing hearing, the prosecutor made a recommendation consistent with the terms of the plea agreement, as follows:

> Your Honor, pursuant to the plea agreement, the State does recommend the defendant be sentenced to a term not to exceed five years, and the plea agreement was that the State would recommend that he serve that in the OWI prison program.

Immediately after making this recommendation, the prosecutor noted "some discrepancy" between his recommendation and the recommendation contained in the presentence investigation report. He asked to call the author of the report as a witness "to clarify his position." Defense counsel did not object to this witness, and the witness was called to the stand.

The PSI report's author recognized that the OWI prison program was available to Dudley but stated he was not recommending that program for him because he had a pending felony charge. He testified his recommendation was "a prison term, full term in prison, not the OWI prison program."

The court sentenced Dudley in accordance with the PSI report. The court stated:

> Based upon the presentence investigation, as well as the recommendation of the Department of Corrections, in addition to the comments that I've heard, it will be the judgment and sentence

[1] The court also advised Dudley that the court was not bound by the terms of the agreement. This advice does "not nullify the bargain nor furnish a ground for the State's subsequent breach of its promise." *State v. Weig*, 285 N.W.2d 19, 21 (Iowa 1979).

> of this Court that you are hereby committed to the custody of Adult Corrections for a term not to exceed five years . . . .

Dudley appealed.

II. Adequacy of the Record

Preliminarily, we must decide whether the record is adequate for review. *See State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008) (noting ineffective-assistance-of-counsel claims are generally preserved for postconviction relief but may be decided on direct appeal if the record is adequate). The State argues the record is inadequate. It maintains that the statements made at the plea hearing concerning Dudley's release pending sentencing and his need to follow the probation officer's instructions "suggest that the plea agreement was conditioned on defendant's compliance with the law;" this "condition" was not part of the written plea document; and, therefore, the case should be preserved for postconviction relief to develop the record "as to whether cooperating with the presentence investigation and avoiding new criminal charges were conditions of the plea agreement." We find this argument unpersuasive.

As in *Bearse*, "[t]he record in this case clearly reflects the written plea agreement and the circumstances giving rise to [the defendant's] claim that the prosecutor breached the agreement, as well as defense counsel's response." *Id.* Additionally, the agreement to release Dudley pending sentencing had no bearing on the key issue in this case: whether the State breached the plea agreement by presenting an alternate sentencing recommendation through the testimony of the PSI report's author. Finally, contrary to the State's implication, this "is not a case of an accused failing to keep his or her half of the bargain."

See State v. Weig, 285 N.W.2d 19, 21 (Iowa 1979); *see also State v. Foy*, 574 N.W.2d 337, 339 (Iowa 1998) ("If a defendant fails to uphold his or her end of the agreement, the State has no obligation to provide the defendant the anticipated benefits of the bargain."). The prosecutor could have chosen to include a provision in the written agreement that required Dudley's compliance with the law. *See Weig*, 285 N.W.2d at 22. He did not do so. The prosecutor also could have chosen to invoke and exercise his burden to show that Dudley failed to comply with the law, a showing that might have justified his decision to back away from the plea agreement. *See Foy*, 574 N.W.2d at 339 (noting the State has the burden to show the defendant has failed to live up to his or her end of the bargain). Again, he did not do so. We conclude the State is not entitled to a second bite at the apple to develop a record on a condition that was never part of the written plea agreement and was never invoked as a basis for retreating from that agreement. *See State v Barker*, 476 N.W.2d 624, 628 (Iowa Ct. App. 1991) ("There is no evidence in the record to show the factual basis for the State's withdrawal of the plea agreement.").

III. Merits

Dudley needs to 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. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008).

On the first prong, defense counsel would only have had a duty to object if the prosecutor breached the plea agreement. *See State v. Horness*, 600 N.W.2d 294, 298 (Iowa 1999). There is no question the prosecutor breached the plea

agreement by presenting the alternate sentencing recommendation. *Id.* at 300. While he initially recommended the OWI prison program to the court, he did so "with a wink and a nod." *See Bearse*, 748 N.W.2d at 218. When he elicited the alternate recommendation from the PSI report's author, he blatantly undermined his own recommendation. Defense counsel had a duty to call this action to the attention of the court and breached that duty in failing to object. *Horness*, 600 N.W.2d at 300.

On the second prong, Dudley only needs to show that the outcome of the proceedings would have been different. *Bearse*, 748 N.W.2d at 217. He has made that showing. *See Horness*, 600 N.W.2d at 300 ("The proper objection by the defendant's attorney would have alerted the sentencing court to the prosecutor's breach of the plea agreement. In that circumstance, the court would have allowed the defendant to withdraw his guilty plea[], or would have scheduled a new sentencing hearing at which time the prosecutor could make the promised recommendations. The outcome of the defendant's sentencing proceeding was different, however, because defense counsel did not make the necessary objection.").

Having found a breach and prejudice, we turn to the remedy. Dudley requests remand for resentencing or withdrawal of the plea. *See Bearse*, 748 N.W.2d at 218 (stating the remedies available where counsel is ineffective for failing to object to the prosecutor's noncompliance with a plea agreement). We conclude the case should be remanded for resentencing. *Id.*

CONVICTION AFFIRMED, SENTENCE VACATED, CASE REMANDED FOR RESENTENCING.