

IN THE COURT OF APPEALS OF IOWA

No. 0-556 / 09-1774
Filed August 25, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BENJAMIN JERARD MEYERS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers,
Judge.

A defendant appeals his conviction and sentence for burglary in the third
degree, contending the State breached a plea agreement. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney
General, Michael J. Walton, County Attorney, and Amy K. Devine, Jay R.
Sommers, and Julie Walton, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes
no part.

DOYLE, J.

Benjamin Meyers appeals his conviction and sentence for burglary in the third degree. He contends the State breached the parties' plea agreement and his attorney was ineffective in failing to object to the breach. Because the record is not sufficient to resolve Meyers's ineffective-assistance-of-counsel claim, we preserve that claim for postconviction relief.

I. Background Facts and Proceedings.

The State charged Meyers with burglary in the third degree, in violation of Iowa Code section 713.6A(1) (2009). Meyers appeared in court and pled guilty to the charged offense, and a written plea agreement was submitted to the court. The plea agreement stated Meyers would plead guilty as charged and would testify against any codefendants, if necessary. In exchange, the State agreed it would "recommend against incarceration of [Meyers], recognizing that the court may grant a deferred judgment or place [Meyers] on probation." The court reviewed the plea agreement and deferred its decision on the agreement until it had an opportunity to review a presentence investigation report (PSI). The PSI states Meyers "has agreed to complete the Residential Corrections Facility and has been approved for placement."

A sentencing hearing was held. There, the court noted it had received and reviewed a copy of the PSI, which recommended that Meyers "be granted probation supervision with placement at the Residential Corrections Facility." The court asked the State if it had any comments or arguments it wished to offer concerning Meyers's sentencing, to which the State responded:

[A]fter reviewing the [PSI], [the county attorney assigned to this case] abides by the recommendation contained in her plea agreement. She also agrees with the recommendation in the [PSI] that as a special condition of probation Mr. Meyers be ordered to successfully complete the Residential Corrections Facility.

Meyers's counsel did not object to the State's response and said "Mr. Meyers will do that program if it is so required," but requested the court impose either a deferred judgment or regular "street" probation with no placement in the residential corrections facility.

The district court sentenced Meyers to the custody of the Iowa Department of Corrections for a term not to exceed five years. The court suspended Meyers's incarceration and placed him on probation for two years, in the custody and supervision of the Seventh Judicial District Department of Correctional Services. As a condition of probation, the court required Meyers to "successfully complete the program at the Residential Corrections Facility."

Thereafter, Meyers filed a motion to expand, enlarge or amend the sentencing order. Meyers requested the court defer his judgment with the requirement that he successfully complete the residential corrections facility program, or, alternatively, reconsider his sentence in the future and impose a deferred judgment. The court denied Meyers's motion.

Meyers appeals.

II. Discussion.

On appeal Meyers contends his attorney was ineffective in failing to object to the State's recommendation at the sentencing hearing that he be ordered to successfully complete the residential corrections facility program as a special

condition of probation. We conduct a de novo review of ineffective-assistance-of-counsel claims. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2009).

To establish ineffective assistance of counsel, a defendant must demonstrate by a preponderance of evidence (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009). A defendant's inability to prove either prong defeats the claim of ineffective assistance of counsel. *State v. Scalise*, 660 N.W.2d 58, 62 (Iowa 2003). Although we generally preserve ineffective assistance of counsel claims for postconviction relief proceedings, we consider such claims on direct appeal if the record is sufficient. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). However, only in rare cases will the trial record alone be sufficient to resolve the claim. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). Even a lawyer is entitled to his or her day in court, especially when the lawyer's professional reputation is impugned. *State v. Kirchner*, 600 N.W.2d 330, 335 (Iowa Ct. App. 1999).

Whether defense counsel breached an essential duty in failing to object to the State's recommendation that Meyers be ordered to successfully complete the residential corrections facility program turns on whether the State 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." *State v. Horness*, 600 N.W.2d 294, 298 (Iowa 1999) (quoting *Santobello v. New York*, 404 U.S. 257, 262, 92 S.

Ct. 495, 499, 30 L. Ed. 2d 427, 433 (1971)); see also *Brown v. United States*, 42 F. Supp. 2d 122, 128 (D. Puerto Rico 1998) (“The government may not breach any term of a plea agreement which induced a defendant to plead guilty.”). Moreover, “[t]he State’s promise to make a sentencing recommendation . . . [carries] with it the implicit obligation to refrain from suggesting more severe sentencing alternatives.” *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008) (quotation and citation omitted). “[V]iolations of either the terms or the spirit of the agreement’ require reversal of the conviction or vacation of the sentence.” *Horness*, 600 N.W.2d at 298 (quoting *Stubbs v. State*, 972 P.2d 843, 844 (Nev. 1998)).

Meyers argues placement in the residential corrections facility is a form of incarceration and therefore a breach of the plea agreement. The State maintains that the “no incarceration” recommendation meant no prison, as opposed to sanctions that accompany probation, and thus no breach occurred. We need not decide today whether placement at a residential corrections facility is “incarceration” in the context raised here, for even if it is, the record is insufficient to address Meyers’s claim the State breached the plea agreement.

The State’s sentencing recommendation in the memorandum of plea agreement states: “The State will recommend against incarceration of the [Meyers], recognizing that the court may grant a deferred judgment *or place [Meyers] on probation.*” (Emphasis added.) Clearly probation was contemplated by Meyers in his agreeing to the State’s recommendation. The PSI reports Meyers “agreed to complete the Residential Corrections Facility and has been

approved for placement.” Although Meyers’s counsel requested “street” probation and “a deferred” at the sentencing hearing, she indicated to the court that Meyers would do the residential corrections facility program “if it is so required.” Successful completion of the program at the residential corrections facility was a condition of probation imposed by the court.

There is nothing in the record concerning any conversations Meyers presumably had with his attorney regarding probation or potential conditions attached thereto, including the possibility of placement in a residential corrections facility program. There is nothing in the record concerning conversations between the prosecutor and Meyers’s counsel. The memorandum of plea agreement is not facially clear as to any agreement concerning conditions of probation. Based on the record before us it is not possible to determine whether Meyers agreed to complete such a program when he initially entered into the plea agreement, whether he may have later agreed to that condition, or whether he never agreed to the condition. Thus, it is not possible to determine if the State breached its agreement with Meyers. Therefore, we cannot decide this claim of ineffective assistance. Furthermore, Meyers’s counsel has not been given an opportunity to explain her actions and the trial court has not considered and ruled on the ineffectiveness claim. Because the record is not sufficient on appeal to resolve Meyers’s ineffective-assistance-of-counsel claim, we preserve that claim for postconviction relief. See *State v. Johnson*, ___ N.W.2d ___, ___ (Iowa 2010).

III. Conclusion.

For the foregoing reasons, we affirm Meyers's conviction and sentence, and we preserve Meyers's ineffective-assistance-of-counsel claim for postconviction relief.

AFFIRMED.