IN THE COURT OF APPEALS OF IOWA

No. 2-170 / 11-0763
Filed March 28, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RONALD PAUL RAMSEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

A defendant appeals the judgment and sentence entered upon his guilty plea to conspiracy to manufacture more than five grams of methamphetamine, second offense**. AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

Ronald Paul Ramsey appeals the judgment and sentence entered upon his guilty plea to conspiracy to manufacture more than five grams of methamphetamine, second offense, in violation of Iowa Code sections 124.401(1)(b)(7) and 124.411 (2009). He contends his trial counsel was ineffective in failing to object to the State's alleged breach of the plea agreement. Because the State did not renege on its plea agreement at sentencing, we affirm.

I. Background Facts and Proceedings.

Ramsey was serving probation on his conviction for conspiracy to manufacture a controlled substance, when the State filed a trial information on November 29, 2010, charging him and three co-defendants with conspiracy to manufacture methamphetamine. On December 1, 2010, the State filed a second trial information noting Ramsey's prior offense and charging him as a second or subsequent offender.

Defense counsel Matthew Sheeley represented Ramsey during plea negotiations with Assistant Polk County Attorney Stephanie Cox. The order of pretrial conference filed on December 23, 2010, outlined the following plea agreement:

> State offers plea as charged, agree to 30 years OR argue term, 1/3 off for plea, argue consecutive v. concurrent to PV, all defendants must accept, open until status conference or motions, discovery, etc.

At a February 25, 2011 plea hearing, defense counsel Phil Reser represented Ramsey in place of Sheeley. The prosecutor explained the court had revoked Ramsey's probation and imposed the original sentence on his earlier charge.

She further explained that on the current charge Ramsey was facing an indeterminate term of incarceration ranging between twenty-five and seventy-five years—with a mandatory minimum of one-third to be served before he was eligible for parole.[1] The prosecutor then explained the plea agreement reached as follows:

> At the time of sentencing there will be options available to Mr. Ramsey in terms of our plea agreement. Mr. Ramsey will either be agreeable to 30 years in prison or to arguing—and he is allowed to argue whether this is consecutive or concurrent to his probation violation.

Reser asked the court for a moment to speak to his client before proceeding, and the court granted a short recess. When the hearing reconvened, the court asked Reser if he wanted to add anything to the record the prosecutor made. Reser replied, "Your Honor, that is a correct statement of our plea agreement. Instead of going through it again, we will indicate we are prepared to go ahead."

The district court engaged Ramsey and the other three defendants in a colloquy. It informed Ramsey the sentencing court was not bound by any agreement he made with the State. The court established a factual basis for the methamphetamine offense and accepted Ramsey's guilty plea. The court informed Ramsey of the necessity of filing a motion in arrest of judgment within forty-five days if he wished to set aside his guilty plea. In its order accepting the

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[1] Section 124.401(1)(b)(7) is a class "B" felony carrying a penalty not to exceed twenty-five years under section 902.9(2). Section 124.411 allowed the sentencing court discretion to enhance Ramsey's sentence by any amount of time as long as the increase did not exceed three times the indeterminate twenty-five-year term. *See State v. Vanover*, 559 N.W.2d 618, 635 (Iowa 1997). Under section 124.413, Ramsey faced a one-third mandatory minimum sentence, which could be reduced by one-third in light of his guilty plea under section 901.10(2).

guilty plea, the court noted, "At sentencing, the parties are expected to argue for the following: either agree to 30 years or argue."

The court held a sentencing hearing on April 8, 2011. The hearing began with attorney Sheeley informing the court Ramsey was dissatisfied with his representation. Sheeley stated:

> Throughout the course of these proceedings there have been ongoing discussions between Ms. Cox and myself concerning the terms of Mr. Ramsey's plea. It was apparent on February 25th, and it's apparent now, that those terms were that Mr. Ramsey would have the options of agreeing to an enhancement of five years for the instant and pending offense, which would make his sentence 30, and that sentence of 30 years would run consecutive to the 10-year sentence that he was on probation for a total effective term of 40 years. Or, in the alternative, the parties would be free to argue. Those terms were spelled out in the order of pretrial conference. Apparently, Mr. Ramsey is now indicating that that was not his impression, and he wanted to withdraw his guilty plea.

Sheeley stated he informed Ramsey the time for filing a motion in arrest of judgment had expired. He explained Ramsey "has reservations about the quality of the advice he's received from me and is of the opinion that I somehow misled him."

The sentencing court allowed Ramsey to explain his position. Ramsey stated he misunderstood the plea agreement he entered:

> I thought I pleaded out to 30 years. And I was coming here to argue whether I ran them concurrent or not. . . .
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> . . . I was under the assumption that I pleaded out to 30 now, and, worst-case scenario, I would get 40 years because I signed the plea agreement, and I was coming back to argue whether to run them concurrent or consecutive. . . . And I'm not arguing about anything of the 30 years being, you know, sufficient. That's not up to me. I just thought I was here to argue the consecutive or the concurrent. That's really all I thought. That's the problem I'm having with counsel.

Sheeley countered that he made it clear to Ramsey "that he was either agreeing to a 30-year sentence consecutive to a 10 year, for a total effective term of 40; or we can come in here and argue the entire sentence." Sheeley went on to state, "And, you know, I'm not suggesting that Mr. Ramsey didn't, perhaps was misunderstanding something. I'm not exactly the most articulate sometimes. But I feel that I've been clear up to this point."

The sentencing court informed Ramsey it was going forward with sentencing and gave him the option of taking the agreed-upon sentence of thirty years on the instant felony to run consecutively with his ten-year sentence for the probation violation, or both the defense and prosecution arguing for a different sentence, which could be up to the maximum of seventy-five years consecutive to the prior ten-year sentence. Ramsey stated he would take the agreed-upon thirty-year term, understanding it would be imposed consecutively to the existing ten-year term. The court sentenced Ramsey accordingly.

II. Scope and Standard of Review.

We review ineffective-assistance-of-counsel claims de novo. *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008). Where, as here, an ineffective-assistance-of-counsel claim is raised on direct appeal from the criminal proceedings, the court must decide whether the record is adequate to decide the claim on direct appeal or whether it should be preserved for postconviction proceedings. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). Although such claims are generally preserved for postconviction relief, we will consider them on direct appeal where the record is adequate. *Id.*

To succeed on a claim of ineffective assistance of counsel, a defendant must prove: (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010). Proof of both prongs of the test is required. *State v. Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004). If a defendant fails to prove one prong, we need not consider whether proof of the other was met. *Id.*

To prove counsel failed to perform an essential duty, a defendant must show counsel's performance was deficient in that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Lyman*, 776 N.W.2d at 878 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). We measure counsel's performance objectively by determining whether counsel's assistance was reasonable under prevailing professional norms, considering all the circumstances. *Id.* There is a strong presumption that trial counsel's conduct "fell within the wide range of reasonable professional assistance." *Id.*

To establish the prejudice prong, a defendant must prove a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A defendant "need only show that the probability of a different result is sufficient to undermine confidence in the outcome." *Id.*

III. Did the State Breach the Plea Agreement?

Ramsey contends his counsel was ineffective in failing to object to the State's alleged breach of the plea agreement. To prove counsel was ineffective, Ramsey must first show the plea agreement was breached, giving rise to his counsel's duty to object. *See State v. Fannon*, 799 N.W.2d 515, 520 (Iowa 2011) (considering first whether the State breached the plea agreement during the sentencing hearing before addressing whether counsel adequately responded to the State's breach).

Because a guilty plea constitutes the waiver of fundamental rights, violations of either the terms or the spirit of the agreement require reversal of the conviction or vacation of the sentence. *Id.* A prosecutor has an obligation to strictly comply with the terms of a plea bargain; inadvertence will not excuse noncompliance. *Bearse*, 748 N.W.2d at 215.

Here, the prosecutor and counsel Sheeley shared an understanding of the terms of the plea agreement as follows: Ramsey could either receive a thirty-year sentence on the current charge, which would be run consecutively with the ten-year sentence on his former conviction, or the parties would be free to argue any allowable term, including the one-third reduction in the mandatory minimum for his guilty plea and whether the terms ran consecutive or concurrent.

Ramsey expressed a different understanding at the sentencing hearing. He told the court he believed he was agreeing to a thirty-year sentence on the instant felony, but would be allowed to argue whether this sentence should run consecutive or concurrent to the ten-year sentence. A different attorney, Phil

Reser, represented Ramsey at the plea hearing, where the prosecutor articulated the agreement as, "Mr. Ramsey will either be agreeable to 30 years in prison or to arguing—and he is allowed to argue whether this is consecutive or concurrent to his probation violation." After a discussion with Ramsey, Reser agreed the prosecutor had correctly stated the agreement. The district court memorialized the agreement in its order as "either agree to thirty years or argue."

We acknowledge the prosecutor's statement that Ramsey would be allowed to argue whether "this" is consecutive or concurrent to the prior ten-year term could have been interpreted as either "this thirty-year sentence" or "this yet-to-be-determined term not to exceed seventy-five years." But at the sentencing hearing, attorney Sheeley stated he explained the terms of the plea agreement to Ramsey as a thirty-year sentence to be run consecutive with the ten-year sentence *or* Ramsey could argue the terms of his sentence to the court. Sheeley also told the sentencing court that he conveyed those terms to his colleague Phil Reser, who represented Ramsey at the plea hearing. On this record, we do not find that counsel acted unreasonably in not interpreting the State's rendition of the plea agreement at the plea hearing as more favorable to Ramsey than the offer communicated to the defense in the pretrial conference order. Because defense counsel understood the State's plea offer to consistently be thirty years consecutive to the probation violation or, in the alternative, the parties could argue consecutive versus concurrent sentences of any term up to seventy-five years, counsel had no duty to object at sentencing. Unlike the situation in *State v. Horness*, 600 N.W.2d 294, 300 (Iowa 1999), and *Bearce*, 748 N.W.2d at 216,

the State took no action at the sentencing hearing that was not contemplated under the plea agreement.

In *Horness*, our supreme court concluded the county attorney breached the plea agreement "by failing to commend the recommended sentences to the court or otherwise inform the court that the State supported the suggested sentencing of the defendant." 600 N.W.2d at 300. Further, the prosecutor also informed the court of an "alternative recommendation" and made statements implying that alternate recommendation was more worthy of acceptance, which also breached the plea agreement. *Id.* The prosecutor requested the court impose "an appropriate sentence" rather than the sentence the parties had agreed upon. *Id.* Unlike *Horness*, in the instant case the assistant county attorney never advocated for a punishment outside the one agreed upon by the parties, but rather specifically asked the court to impose the sentence as set forth in the plea bargain.

In *Bearse*, the court found the prosecutor not only demonstrated "noncompliance with the express terms of the plea agreement, but also with the spirit of the plea agreement." 748 N.W.2d at 216. Although the prosecutor was initially confused as to the terms of the plea agreement, after the confusion was resolved and the prosecutor understood the terms, he failed to comply with the obligation to recommend against incarceration. *Id.* Instead, the prosecutor informed the court the State would "abide by the agreement," but also informed the court it was not bound by the agreement. *Id.* The prosecutor followed up that statement with a reminder the court had the presentence investigation

report. *Id.* By suggesting incarceration should be imposed, the State "clearly breached" the plea agreement. *Id. Bearse* differs from the case at bar, where the assistant county attorney never implied the sentence the parties agreed to was insufficient.

Ramsey relies on *Wallace v. State*, 245 N.W.2d 325, 327 (Iowa 1976), for the proposition that only the defendant's understanding of the plea bargain matters when determining whether a breach occurred because the decision to plead guilty is the defendant's alone. We find *Wallace* is distinguishable. *Wallace* did not involve a question of whether counsel should have objected to the State's alleged breach of a plea agreement; rather it concerned whether a guilty plea was involuntarily entered into because of Wallace's misunderstanding as to the terms of the plea agreement. 245 N.W.2d at 326.

We note Ramsey is not arguing his trial counsel was ineffective for allowing him to enter a guilty plea without a complete understanding of the plea agreement. His only claim is that counsel had a material duty to object to the prosecution's conduct at the sentencing hearing. Because the prosecutor did not breach the plea agreement at the sentencing hearing, counsel had no duty to object.

AFFIRMED.

Vaitheswaran, P.J., concurs; Mullins, J., dissents.

MULLINS, J. (dissenting)

For the reasons stated below, I respectfully dissent.

During the plea hearing, the prosecutor said in relevant part:

> At the time of sentencing there will be options available to Mr. Ramsey in terms of our plea agreement. Mr. Ramsey will be either be agreeable to **30 years in prison or to arguing – and he is allowed to argue to whether this is consecutive or concurrent to his probation violation**. In his case, as I said, the maximum would be for the Court to sentence him to 75 years with the mandatory one-third and run it consecutive to his probation violation. He also faces a fine . . . .

(Emphasis added.)

Defense counsel said on the record at the plea hearing: "Your honor, that is a correct statement of our plea agreement. Instead of going through it again, we will indicate we are prepared to go ahead."

It matters not that the attorneys had a different understanding during plea negotiations. What matters is that the defendant waived his rights and entered a guilty plea pursuant to a plea agreement. That plea agreement was dictated into the record. The State offered consideration for the plea; the defendant accepted the offer. That is the agreement to which the State was bound.

The clear meaning of the bolded portion of the above quote is that the defendant could take the thirty years in prison and argue whether the sentence should run concurrent or consecutive to the probation violation, or he could argue for a lesser sentence and risk the State seeking the maximum penalty allowable. While not a model of clarity, the record of the plea agreement comes much closer to the defendant's understanding as articulated at the sentencing hearing than does either the prosecutor's or defense counsel's attempts to make the

agreement sound as though theendant was required to accept a consecutive sentence. The extent to which there was a misunderstanding arising out of any ambiguity, such ambiguity should be resolved against the party creating the ambiguity.

I would find defense counsel failed to object to the State's breach of the plea agreement that was tendered at the plea hearing and which induced the defendant to plead guilty. Such failure was ineffective assistance of counsel. Prejudice resulted.

I would vacate the sentence and remand this case for resentencing.