

IN THE COURT OF APPEALS OF IOWA

No. 2-295 / 11-1021
Filed May 9, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLES RENARDO WOODS,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Deborah Farmer Minot, District Associate Judge.

The defendant appeals following his guilty plea, judgment, and sentence to the charge of operating while intoxicated, second offense. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

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

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, Janet M. Lyness, County Attorney, and Anne M. Lahey, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DANILSON, J.

Charles Renardo Woods appeals following his guilty plea, judgment, and sentence to the charge of operating while intoxicated, second offense, in violation of Iowa Code section 321J.2(4) (2011). The State concedes its breach of the plea agreement and trial counsel's breach of an essential duty to object. Had Woods' counsel objected to the State's breach, he would have been entitled to a new sentencing hearing in which the prosecutor's recommendation complied with the terms of the plea agreement. We vacate defendant's sentence and remand for resentencing.

I. Background Facts and Proceedings.

On March 21, 2011, Iowa City police officers observed Woods and his vehicle at the Creekside Market. The officers knew Woods' license was suspended. Woods drove the vehicle to a condo parking lot. Officers approached Woods to question him about driving with a suspended license. They smelled the odor of alcohol and observed Woods had bloodshot, watery eyes and slow, mumbling speech. Woods consented to field sobriety and breath tests, which both indicated impairment.

Woods was previously convicted of operating while intoxicated on July 8, 2009. On March 29, 2011, the State charged Woods with operating while intoxicated, second offense. On May 6, 2011, Woods filed a written guilty plea in which the State agreed to recommend a 180-day jail term with all but seven days suspended, supervised probation for two years, and an \$1875 fine. The State further agreed to dismiss the charge for driving under suspension at Woods' cost. The court accepted the guilty plea on May 10, 2011.

At the July 6, 2011 sentencing hearing, the prosecutor recommended a two-year sentence with all but seven days suspended. The remaining recommendations complied with the terms of the plea agreement. Defense counsel requested a sentence of sixty days with all but seven days suspended and unsupervised probation, but failed to object to the State's breach of the plea agreement.

The court expressed concern that the substance abuse evaluation had taken over three months to complete, at least in part because of Woods' failure to agree to drug testing. Further noting Woods' previous conviction for possession of a controlled substance, the court found supervised probation was warranted. The court sentenced Woods to ninety days in jail with all but seven days suspended and two years of supervised probation. He was further ordered to pay an \$1875 fine and complete the drinking driver's course.

II. Standard of Review.

We review claims of ineffective assistance of counsel de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). Claims of ineffective assistance are an exception to the error preservation rules. *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982). Ordinarily, ineffective-assistance-of-counsel claims are preserved for postconviction relief actions. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981). However, if the court finds the record is sufficient to evaluate the merits of the claim, the matter may be resolved on direct appeal. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010); Iowa Code § 814.7(2).

III. Discussion.

Woods appeals after his guilty plea, judgment, and sentence alleging his counsel's failure to object to the State's breach of the plea agreement was ineffective assistance. The record is sufficient to evaluate the merits of the claim on direct appeal.

The right to assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 10 of the Iowa Constitution is the right to "effective" assistance of counsel. To establish a claim of ineffective assistance of counsel, the defendant must prove by a preponderance of the evidence: (1) that trial counsel failed to perform an essential duty, and (2) that prejudice resulted from this failure. The claim fails if the defendant is unable to prove either element of this test.

State v. Fountain, 786 N.W.2d 260, 265–66 (Iowa 2010) (citations omitted). In the case at bar, the State concedes that the prosecutor breached the plea agreement and Woods' trial counsel violated counsel's essential duty in failing to object to that breach. Thus, we will proceed directly to analysis of prejudice.

To satisfy the prejudice element of the claim, Woods must demonstrate that but for counsel's failure to object, "the outcome of the [sentencing] proceeding would have been different." *State v. Fannon*, 799 N.W.2d 515, 523 (Iowa 2011). He does not have the burden to prove his sentence would have been different. *Id.*

"When trial counsel fails to object to the prosecutor's breach of the plea agreement and thereby prevents the defendant from receiving the benefit of the plea agreement, the defendant is prejudiced." *State v. Bergmann*, 600 N.W.2d 311, 314 (Iowa 1999). A defendant does not receive the benefit of the bargain if the prosecutor does not make a recommendation in compliance with the terms

and the spirit of the agreement. See *State v. Horness*, 600 N.W.2d 294, 296 (Iowa 1999) (holding the State must comply with the technical terms and the spirit of the plea agreement). Because the State recommended a two-year sentence instead of the 180 days contemplated by the agreement, Woods did not receive the benefit of his bargain.

We recognize the sentence imposed was more favorable than that contemplated by the plea agreement. The court also provided independent justification for the sentence imposed. However, we cannot know what sentence the court would have imposed had the State fulfilled its obligation. *State v. Carillo*, 597 N.W.2d 497, 501 (Iowa 1999); see also *State v. Bearse*, 748 N.W.2d 211, 217 (Iowa 2008) (declining to speculate regarding what sentence would have been imposed absent the State's breach or upon resentencing, despite independent factors listed by sentencing judge as justification for the sentence).¹

If Woods' counsel had objected to the State's breach, the outcome would have been different "in the sense that [Woods] would either have been allowed to withdraw his plea, or he would have been entitled to a resentencing in proceedings not tainted by the State's recommendation." *Carillo*, 597 N.W.2d at 501. While Woods does not seek the opportunity to withdraw his plea, he is entitled to a sentencing hearing in which the prosecutor's recommendation

¹ We note one court has observed even a strategically sound decision by defense counsel to forgo an objection to a prosecutor's breach without consulting with the defendant constitutes deficient performance because it is 'tantamount to entering a renegotiated plea agreement without [the defendant's] knowledge or consent.' Further, '[b]ecause counsel's deficient performance involved a breach of a plea agreement, [the defendant] is automatically prejudiced.' *State v. Liukonen*, 686 N.W.2d 689, 697 (Wis. Ct. App. 2004) (quoting *State v. Sprang*, 683 N.W.2d 522, 531 (Wis. Ct. App. 2004)) (emphasis omitted).

complies with the terms of the plea agreement. Thus, in an abundance of caution, we remand for resentencing.

IV. Conclusion.

We conclude Woods has demonstrated his counsel was ineffective. We vacate Woods' sentence and remand for resentencing before a different judge.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.