IN THE COURT OF APPEALS OF IOWA

No. 2-309 / 11-1661
Filed May 23, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TANAKA TERMAINE CLAY,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick (possession plea), John D. Telleen (sex offender registry plea), and Mark D. Cleve (sentencing), Judges.

Tanaka Clay appeals from the judgment and sentences entered following his guilty pleas to failure to comply with the sex offender registry and possession of a controlled substance (marijuana) with intent to deliver. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Michael J. Walton, County Attorney, and Amy Devine, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

VOGEL, P.J.

Tanaka Clay appeals from the judgment and sentences entered following his guilty pleas to failure to comply with the sex offender registry and possession of a controlled substance (marijuana) with intent to deliver. Because Clay did not prove counsel breached an essential duty regarding the plea agreement at sentencing, his ineffective-assistance-of-counsel claim must fail.

I. Background Facts and Proceedings

On December 13, 2010, the State charged Clay by trial information with failure to comply with sex offender registry requirements (second offense) in violation of Iowa Code section 692A.111(1) (2009). On February 15, 2011, Clay entered a plea agreement (case AGCR334706) where he would plead guilty as charged and the State would make "no recommendations as to sentencing," unless "special conditions" would occur. On May 19, 2011, Clay was charged by trial information with possession with intent to deliver a controlled substance (marijuana) in violation of Iowa Code section 124.401(1)(d) (2011). The trial information noted Clay was an habitual violator under Iowa Code section 902.8. On August 10, 2011, Clay entered a plea agreement (case FECR338431) where he would plead guilty as charged and the State would make "no

recommendations as to sentencing," again, absent "special conditions,"[1] nor would the State "pursue habitual status."

Clay appeared on September 30, 2011, for sentencing in both cases. During the course of the sentencing hearing, the court asked the State to make a sentencing recommendation. In response, the prosecutor stated, "[T]he State makes no recommendation as to sentencing but does note that it's not pursuing the habitual offender sentencing enhancement." Clay's counsel did not object to the prosecutor's statement regarding Clay's habitual offender status. Clay was sentenced to two five-year terms of imprisonment, to be served consecutively. Clay appeals.

II. Standard of Review

We review ineffective-assistance-of-counsel claims de novo. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). Clay must establish his counsel (1) failed to perform an essential duty and (2) prejudice resulted from such failure. *See State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To show prejudice in the context of a plea agreement, Clay must show that "the outcome of the [sentencing] proceeding would have been different." *State v. Fannon*, 799 N.W.2d 515, 523

[1] The "Special Conditions of the Agreement" provision stated,

> Should the Defendant have a criminal history more extensive than that revealed in the pleadings, or should the Defendant fail to cooperate with Correctional Services in preparing the P.S.I., fail to appear where and as required, or be arrested for further offenses, the State may withdraw any recommendations previously made. If the defendant fails to cooperate with Correctional Services in preparing the P.S.I. or fails to appear where and as required, the Court may sentence the defendant to a less favorable disposition than provided for in the memorandum of plea agreement and the defendant shall not be afforded the opportunity to withdraw his guilty plea.

(Iowa 2011). Clay must prove both elements by a preponderance of the evidence. *Utter*, 803 N.W.2d at 652.

III. Adequacy of the Record

As a preliminary matter, we must decide whether the record is adequate for review.[2] *See State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008) (noting that although ineffective-assistance-of-counsel claims are generally preserved for postconviction relief proceedings, we will consider such claims on appeal when the record is adequate). As the record in this case clearly reflects the written plea agreement and the circumstances giving rise to Clay's claim that the prosecutor breached the agreement, as well as the absence of objection by defense counsel, we find the record adequate to review Clay's ineffective-assistance-of-counsel claim on direct appeal.

IV. Merits

Defense counsel only has a duty to object if the prosecutor breached the plea agreement. *State v. Horness*, 600 N.W.2d 294, 298 (Iowa 1999). Consequently, we must first determine whether the State breached the plea agreement. *See Bearse*, 748 N.W.2d at 215.

Clay's appeal only concerns the sentence pertaining to case FECR338431 (possession of marijuana with intent to deliver), as this is the sentence to which the habitual offender status applied. Clay understands the prosecutor's comment—that the State was "not pursuing the habitual offender sentencing enhancement"—as a violation of the State's promise not to make a sentencing

[2] Neither party alleges the record is inadequate for our review in this case.

recommendation. With no objection to the State's comment, Clay alleges trial counsel breached an essential duty.

Clay's memorandum of plea agreement in case FECR338431 (possession with intent to deliver), provided the sentencing concessions that were part of the agreement. The concessions were, in their entirety: "State makes no recommendation as to sentencing. State will not pursue habitual status." This memorandum was filed on August 10, 2011, more than one month before the sentencing hearing was held. In addition, the trial information filed in case FECR338431 (possession with intent to deliver) included a subsection entitled "Habitual Violator," which stated Clay was previously convicted of two felonies. As the district court already had knowledge of the possible sentence enhancement under Iowa Code section 902.8, based on Clay's status as an habitual offender, any reference by the prosecutor of the State's decision to not pursue the habitual offender sentencing enhancement was not a breach of the plea agreement. Moreover, the written memorandum of plea agreement, which Clay, his attorney, and the assistant county attorney signed, clearly stated, "State makes no recommendation as to sentencing. State will not pursue habitual status."

As the prosecutor's reference to the State's decision to not pursue habitual offender sentencing enhancement was not a breach of the plea agreement, Clay's counsel had no duty to object at the sentencing hearing. *Fannon*, 799 N.W.2d at 522 ("If the State breaches a plea agreement during the sentencing hearing, a reasonably competent attorney would make an objection on the record to ensure that the defendant receives the benefit of the

agreement." (internal citation omitted)); *see Horness*, 600 N.W.2d at 298 (recognizing defense counsel only has a duty to object if the prosecutor breached the plea agreement). Therefore, defense counsel did not breach an essential duty to Clay and Clay's ineffective-assistance-of-counsel claim must fail.[3] *See State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003) (stating that failure to prove either element of an ineffective-assistance-of-counsel claim is "fatal" to such a claim).

AFFIRMED.

[3] We further note that Clay breached the plea agreement by failing to comply with the "Special Conditions" provision of the agreement. Clay's presentence investigation report (P.S.I.) states that on August 18, 2011, Clay quickly ended the P.S.I. interview, stating it was "bullshit" and "why waste his time," and requesting to be returned to his cell. Performance of a plea agreement must be mutual. *State v. Foy*, 574 N.W.2d 337, 339 (Iowa 1998). "If the 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." *Id.* Without the cooperation promised by Clay, the State had no obligation to uphold its end of the plea agreement.