

IN THE COURT OF APPEALS OF IOWA

No. 2-609 / 11-2040
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DALE ALLEN RAISCH,
Defendant-Appellant.

Appeal from the Iowa District Court for Franklin County, Peter B. Newell,
District Associate Judge.

A defendant contends the prosecutor breached a plea agreement and his
attorney was ineffective in failing to object to the breach. **SENTENCE**
VACATED, CASE REMANDED FOR RESENTENCING.

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, and Dan Wiechmann, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

VAITHESWARAN, P.J.

We must decide whether the State breached a plea agreement.

I. Background Proceedings

Dale Allen Raisch entered a written plea of guilty to indecent exposure, in violation of Iowa Code section 709.9 (2011). The plea included the prosecutor's sentencing recommendation, as follows:

County Attorney will recommend 90 days in jail, with all but 2 days being suspended. Defendant to be placed on probation to the Department of Correctional Services for 1 year. Minimum \$315 fine, plus surcharge, court costs, and attorney's fees to be imposed.

Ten (10) year special sentence and sex offender registry as required by Iowa law.

After a plea colloquy, the district court ordered the preparation of a presentence investigation report. See Iowa Code §§ 709.9, 901.2 ("The court may order a presentence investigation when the offense is a serious misdemeanor only upon a finding of exceptional circumstances warranting an investigation."). The sentencing recommendation contained in the report differed from the prosecutor's recommendation; the report's preparer advocated a sixty-day jail sentence with no mention of a suspension, rather than a ninety-day sentence with all but two days suspended.

At the sentencing hearing, the district court asked the prosecutor for the State's recommendations. The prosecutor responded as follows:

The State *had* agreed, Your Honor, *when this was originally heard*, to impose 90 days of jail time, all but two days suspended; minimum \$315 fine, plus surcharge, court costs, attorney's fees; probation for one year to the Department of Corrections; register with the Sex Offender Registry, subject to special sentencing provisions; provide a DNA sample, and also impose a civil penalty fee of \$250.

(Emphasis added.) When asked for the defense recommendation, defense counsel stated, “We would be in agreement with the State, Your Honor.” The district court sentenced Raisch to 365 days in jail with all but sixty days suspended.

On appeal, Raisch contends the prosecutor breached the plea agreement and his attorney was ineffective in failing to object to the breach. Our review is de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008).

II. Analysis

“It is well established that ‘when 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 (1971)). It is not enough to simply inform the court of the promise. *Id.* at 299. The State’s promise to recommend a specific sentence requires the prosecutor to “present the recommended sentences with his or her approval, to commend these sentences to the court, and to otherwise indicate to the court that the recommended sentences are supported by the State and worthy of the court’s acceptance.” *Id.*; accord *Bearse*, 748 N.W.2d at 216 (noting State was obliged to “do more than merely inform the court of the promise made by the State”). “[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)).

At the sentencing hearing, the prosecutor did not say that he was presently recommending the sentence set forth in the written plea agreement.

Instead, he said they “had” originally agreed to that sentence when the matter was “originally heard.” See *id.* at 299. His statement could not even be construed as a tepid endorsement of the previously-recommended sentence.

Because the prosecutor did not commend to the court the sentence contained in the written plea agreement, he breached the plea agreement. Under our case law, Raisch’s attorney had a duty to object to this breach. *Id.* at 300. He failed to do so; an omission that amounted to ineffective assistance given the prejudice that flowed from counsel’s breached duty. See *id.* We vacate Raisch’s sentence and remand for resentencing before a different judge. See *id.*

SENTENCE VACATED, CASE REMANDED FOR RESENTENCING.