IN THE COURT OF APPEALS OF IOWA

No. 2-937 / 12-0445
Filed December 12, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KELLIE MILLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

A postconviction relief applicant alleges the prosecutor breached a plea agreement and her trial attorney was ineffective in failing to object to the breach. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ. Tabor and Bower, JJ., take no part.

VAITHESWARAN, J.

Kellie Miller has a lengthy criminal history, which came into play at a sentencing hearing following her pleas of guilty to several crimes. After sentence was imposed, Miller filed a postconviction relief application alleging the prosecutor breached a plea agreement and her trial attorney was ineffective in failing to object to the breach. The district court concluded the existence of an agreement was not clear, but in any event, Miller suffered no prejudice. The court denied the postconviction relief application, and this appeal followed.

On appeal, Miller reiterates her contention that her trial attorney was ineffective in failing "to object to the prosecutor's breach of the plea agreement." To prevail, she must show that counsel breached an essential duty and that prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In this context, the breach prong requires proof of the existence of a plea agreement and noncompliance with the agreement. *See State v. Horness*, 600 N.W.2d 294, 298 (Iowa 1999) ("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.'" (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971))). The prejudice prong requires a showing that the outcome of the proceeding would have been different. *Id.* at 300–01.

We first address the question of whether there was a plea agreement. On our de novo review, we are convinced there was. *See id.* at 297 (setting forth the standard of review). Of Miller's several criminal actions, the primary one was FECR162053, involving (1) possession of marijuana with intent to deliver as a

habitual offender (a felony), (2) a drug tax stamp violation as a habitual offender (also a felony), and (3) operating while intoxicated (a serious misdemeanor). The district court was advised that Miller would enter an *Alford*[1] plea to all three charges. The court summarized the plea agreement between Miller and the State as follows:

> The Court understands the agreement between the parties is Counts I and II will run concurrent with one another and concurrent with new charges. However, there will be argument concerning whether all of these charges should run consecutive to her present formal—or self-probation offenses. Fines that can be suspended would be suspended. It would be the mandatory minimums on the OWI.

Miller, her attorney, and the prosecutor unequivocally ratified this articulation of the plea agreement. We conclude this statement amounted to a plea agreement in FECR162053, the action that was the subject of the postconviction relief proceeding and this appeal.[2]

We turn to whether the prosecutor breached this plea agreement. At sentencing, the focus was on the "new charges" discussed in the plea agreement. Three new charges are relevant here.

After the trial information was filed in FECR162053, the State filed three additional trial informations, each charging Miller with the aggravated misdemeanor crime of third-degree theft. Miller entered written pleas of guilty to these charges. Pursuant to the plea agreement, the sentences on these "new

---

[1] An *Alford* plea is a variation of a guilty plea where the defendant does not admit participation in the acts constituting the crime but consents to the imposition of a sentence. *North Carolina v. Alford,* 400 U.S. 25, 37 (1970); *State v. Burgess,* 639 N.W.2d 564, 567 n.1 (Iowa 2001).

[2] Miller also pled guilty to a felony in a separate case, FECR160311, where all agreed there was no plea agreement. At sentencing, no one disagreed that the fifteen-year sentence in FECR160311 was also to run concurrently with the felony sentences in FECR162053.

charges" were to run concurrently with the sentences in FECR162053. Contrary to this agreement, the prosecutor recommended that two of the sentences on these new charges run consecutively to the sentences in FECR162053. His statement to the court was as follows:

> [T]he three counts in 162053 and the sole count in 160311, the State would recommend concurrent sentences for, again, the total of 15-year prison sentence with the applicable fines and surcharges . . . in the . . . three theft thirds . . . the State's sentencing recommendation, Your Honor, would be the maximum period of incarceration in each of those respective cases, two years on the theft thirds . . . .
>
> The sentences in those matters, Your Honor, *the State would recommend that two of the aggravated misdemeanors*, *any two*, *be ordered to run consecutively to the 15-year sentence* imposed in the other two cases while the other two case numbers, including the serious case number, be concurrent for a total of 19 years. . . .
>
> Again, 19 years, all cases concurrent with the exception of any two aggravated misdemeanor cases . . . .

(Emphasis added.) This recommendation was inconsistent with the prosecutor's agreement to have the sentences on the new charges run concurrently with the sentences in FECR162053. Miller's attorney did not object to this divergence from the plea agreement. Under *Horness*, he had an obligation to do so, and he breached an essential duty in failing to carry out this obligation. 600 N.W.2d at 300 ("[T]he defendant's trial counsel clearly had a duty to object [to the State's breach of the plea agreement]; only by objecting could counsel ensure that the defendant received the benefit of the agreement. Moreover, no possible advantage could flow to the defendant from counsel's failure to point out the State's noncompliance.").

We are left with the prejudice prong. The State essentially concedes that if counsel should have objected, prejudice is established. *See State v*. *Bearse*,

748 N.W.2d 211, 218 (Iowa 2008); *Horness*, 600 N.W.2d at 300. Accordingly, we conclude defense counsel was ineffective in failing to object to the breach of a plea agreement.

We reverse the denial of Miller's application for postconviction relief and remand for resentencing before another judge to allow Miller to receive the benefit of her bargain under the plea agreement. *See Bearse*, 748 N.W.2d at 218.

REVERSED AND REMANDED.