

IN THE COURT OF APPEALS OF IOWA

No. 3-944 / 13-0130
Filed November 6, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JASON LEE FOWLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Andrea J. Dryer, Judge.

A defendant appeals following his guilty plea to conspiracy to manufacture methamphetamine as a second offender and habitual offender, and possession of lithium with intent to manufacture as a second offender and habitual offender, contending the State breached a plea agreement and that his attorney was ineffective in failing to object to the breach. **AFFIRMED.**

Gary Dickey of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Thomas A. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

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

VAITHESWARAN, J.

Jason Lee Fowler agreed to plead guilty to (1) conspiracy to manufacture methamphetamine as a second offender and habitual offender and (2) possession of lithium with intent to manufacture as a second offender and habitual offender. At the plea proceeding, the prosecutor summarized the plea agreement as follows:

There is a partial agreement. The defendant will plead guilty. The State will agree not to recommend any tripling on Count I, to recommend concurrent sentences. Also, the State would be agreeing to the release of the defendant to intensive pretrial supervision with a further requirement that he abide by any substance abuse requirements. *The State would then be—we would be arguing sentencing, seeing how the defendant did on intensive pretrial supervision.*

(Emphasis added.) Fowler's defense attorney agreed with this summary. The district court proceeded to apprise Fowler of the rights he was waiving. The court then released him to intensive pretrial supervision and scheduled sentencing for a later date.

At the sentencing hearing, the prosecutor recommended a fifteen-year prison term on each count, to be served concurrently. The district court imposed terms not exceeding fifteen years, subject to mandatory minimum sentences, and ordered them served concurrently.

On appeal, Fowler contends the prosecutor breached the plea agreement by failing to consider his success on pretrial release and his attorney provided ineffective assistance in failing to "object to the State's failure to take into account [his] success while on pretrial release in arriving at its sentencing recommendation." To prevail, Fowler must show that his attorney failed to

perform an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). While we normally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings, we find the record adequate to address the issue. *State v. Fannon*, 799 N.W.2d 515, 520 (Iowa 2011).

We begin with the question of whether the prosecutor breached the plea agreement. See *State v. Bearse*, 748 N.W.2d 211, 215 (Iowa 2008) (“[T]o determine whether counsel failed to perform an essential duty in failing to object to the prosecutor’s recommendation, we must first determine whether the State breached the plea agreement.”). “Violations of either the terms or the spirit of a plea agreement require reversal of a conviction or vacation the sentence.” *Fannon*, 799 N.W.2d at 520 (citations omitted).

On our de novo review, we are not persuaded that the prosecutor’s reference to “how the defendant did on intensive pretrial supervision” was a promise to recommend a lenient sentence if Fowler successfully completed pretrial release. In our view, the reference was simply an acknowledgment that Fowler’s performance in the pretrial supervision program would arise at sentencing. That is precisely what happened.

At sentencing, the prosecutor recommended prison terms. As agreed, he did not recommend tripling of the sentence on the first count, and he did recommend “that those sentences run concurrently with each other.”

Fowler’s attorney disagreed with the recommendation of prison terms. He asserted, “[T]he State believes the *only* alternative is prison. We disagree. Probation *is* an alternative, and we’re asking the court to consider that alternative.” He sought suspension of the sentences partially relying on Fowler’s

performance on pretrial release. He did not suggest that this performance was something the prosecutor had agreed to consider, a suggestion that he would have been expected to make had he truly believed it was part of the plea agreement. His statements were in keeping with the discussion of the plea agreement at the plea proceeding: Fowler's success on pretrial release would be a factor the court could consider in imposing sentence rather than a term of the plea agreement.

We conclude the prosecutor did not breach the plea agreement. It follows that Fowler's attorney had no obligation to object.

We affirm Fowler's sentences.

AFFIRMED.