IN THE COURT OF APPEALS OF IOWA

No. 6-023 / 05-0784
Filed July 26, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARC ANTHONY CRAIG,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Gregory D. Brandt and Cynthia Moisan (plea), and James D. Birkenholz (sentencing), Judges.

Marc Anthony Craig appeals the sentence imposed upon his convictions for assault causing bodily injury and criminal mischief in the third degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John P. Sarcone, County Attorney, and Bret Lucas, Assistant County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Hecht, JJ.

MILLER, J.

Marc Anthony Craig appeals the sentence imposed upon his convictions for assault causing bodily injury and criminal mischief in the third degree. We affirm.

The charges against the defendant arose out of an incident in which the intoxicated defendant allegedly assaulted a woman he had been dating for six months and then caused damages to her car. The State made a plea offer, stating that if the defendant would plead guilty as charged the State would recommend a deferred judgment.

The defendant, apparently not a lawyer, represented himself. He signed and filed a written waiver of jury trial and stipulation to trial on the minutes of evidence and, in a reported proceeding commenced before one judge, acknowledged he had done so. A brief discussion ensued concerning circumstances under which the court would consider a deferred judgment. Shortly thereafter, however, the court expressed its reluctance to grant a deferred judgment.

Following an off-the-record discussion the proceeding continued, but before a different judge. The second judge noted the defendant's "waiver of jury trial and stipulation to a trial on the minutes." She stated an intent to find the defendant guilty, and scheduled sentencing for a later date.

Sentencing later proceeded before a third judge. The prosecutor asked the court "to take the nature of the crime into consideration when making [its sentencing] determination." He did not recommend a deferred judgment.

The defendant asserted he had been told that "by going through those steps there was going to be a deferred judgment." The prosecutor responded that although there had been discussions about a deferred judgment the court had made it clear it would not even consider a deferred judgment until a substance abuse evaluation and a psychological evaluation were completed. The prosecutor asserted: "There certainly was never a promise of a deferred judgment made if he did complete those. Only that the deferred judgment would be considered."

The court imposed consecutive terms of imprisonment. The defendant then stated he must have misunderstood, as he "thought I was going to get a deferred."

The defendant appeals. He claims the State breached an agreement to recommend a deferred judgment, and requests that his sentence be vacated and the case remanded for a new sentencing hearing. He requests that if this court determines additional record is needed the court preserve the issue for a postconviction relief action.

Our review is for correction of errors at law. *State v. King*, 576 N.W.2d 369, 370 (Iowa 1998); *State v. Barker*, 476 N.W.2d 624, 625 (Iowa Ct. App. 1991).

The prosecutor argued in the district court that Craig was never promised a deferred judgment, but only that one would be considered. The State argues Craig did not dispute that this was the agreement and by not raising an objection during the sentencing hearing or asking to withdraw his guilty plea he has

"waived" his claim that the State breached a plea agreement. In support of its position the State cites *State v. Horness*, 600 N.W.2d 294, 297 (Iowa 1999).

We believe the issue raised by the State is more correctly characterized as one of error preservation rather than waiver. Because of the range of interests protected by our error preservation rules, on appeal we will consider whether error was preserved even if the opposing party does not raise the issue on appeal. *Top of Iowa Co-op. v. Sime Farms, Inc.*, 608 N.W.2d 454, 470 (Iowa 2000).

At the sentencing hearing the defendant twice claimed that by waiving a jury trial and stipulating to a trial on the minutes he was entitled to receive a deferred judgment. This claim was inconsistent with and contrary to the written plea offer that had been made by the State, which provided that if the defendant pled guilty as charged the State would recommend a deferred judgment. More importantly, it is inconsistent with and different than the claim the defendant makes on appeal, that the State was to recommend a deferred judgment.

"Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in the trial court." *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999). We conclude that because the defendant's claim on appeal, a right to have the State recommend a deferred judgment, is different than the claim asserted in the trial court, entitlement to a deferred judgment, he has not preserved error on his present claim.

The defendant does assert on appeal that the prosecution told him the plea offer was applicable not only to guilty pleas but also to trial on the minutes. Nothing in the record suggests that the defendant ever raised such a claim or

issue in the trial court. We therefore conclude the defendant has also not preserved error on this version of the issue he attempts to present on appeal. *See, e.g., Horness*, 600 N.W.2d at 297 (holding that by not objecting at the sentencing hearing to the prosecutor's alleged breach of a plea agreement the defendant had not preserved error on the issue).

AFFIRMED.