IN THE COURT OF APPEALS OF IOWA

No. 6-495 / 05-1651
Filed August 9, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BARBARA JEAN THORNDYKE,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

Defendant appeals following a guilty plea to and judgment and sentence for one count of forgery in violation of Iowa Code section 715A.2 (2005), asserting her trial counsel was ineffective. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, William E. Davis, County Attorney, and Amy K. Devine and Rob Cusack, Assistant County Attorneys, for appellee.

Considered by Sackett, C.J., and Vogel and Zimmer, JJ.

ZIMMER, J.

Barbara Jean Thorndyke appeals following a guilty plea to and judgment and sentence for forgery in violation of Iowa Code section 715A.2 (2005). She asserts her trial counsel was ineffective. Upon our de novo review, *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999), we affirm her judgment and sentence.

I. Background Facts and Proceedings.

Thorndyke was charged with three counts of forgery. Thorndyke and the State entered into a plea agreement conditioned upon acceptance by the district court. *See* Iowa R. Crim. P. 2.10. Pursuant to the memorandum of plea agreement, which was signed by both Thorndyke and the State, the State agreed to dismiss two of the forgery counts and recommend against incarceration in exchange for Thorndyke entering a plea of guilty to the remaining forgery count and providing truthful testimony regarding a codefendant. The memorandum also included a "Special Conditions" provision, which provided in relevant part:

> Should the Defendant . . . fail to cooperate with Correctional Services in preparing the P.S.I. [(Presentence Investigation Report)], . . . the State may withdraw any recommendation previously made. If the defendant fails to cooperate with Correctional Services in preparing the P.S.I. . . . 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 [her] guilty plea.

During plea proceedings held on August 26, 2005, the district court established a factual basis for and the voluntary nature of Thorndyke's guilty plea to one count of forgery. The court accepted Thorndyke's guilty plea, ordered the Iowa Department of Correctional Services to prepare a P.S.I., and scheduled

sentencing for September 29. The court deferred acceptance or rejection of the plea agreement until the sentencing hearing.

The presentence investigator made an appointment to meet with Thorndyke on September 9 for the purpose of gathering information that was needed for the P.S.I. Thorndyke failed to appear for the appointment, and she did not call to reschedule. Thorndyke also failed to show up for appointments with the presentence investigator on September 13 and 19.[1]

A few hours before the P.S.I. was filed on September 26, Thorndyke appeared at the correctional services office with a partially completed personal information form and provided the investigator with a limited amount of family dynamics history. The investigator included this information in the report, as well as some minimal employment history Thorndyke had provided by phone. The report included information indicating that Thorndyke had failed to keep three successive appointments with the presentence investigator.

At the September 29 sentencing hearing, the State dismissed the second and third forgery counts. The court, however, determined that Thorndyke had voided the plea agreement by failing to cooperate with correctional services in preparation of the P.S.I. The court stated:

> [T]his plea agreement is void because of her failure to cooperate. In other words, . . . I'm not going to allow her to withdraw her plea because she voided the agreement. The State may make any recommendation at this time it wishes based on the failure to cooperate of the Defendant unless she can tell me why she didn't appear that would be some type of legal excuse for not appearing.

[1] Thorndyke did return messages left by the investigator following the first two missed appointments.

Thorndyke responded, "I don't really have a good reason, and I don't want to make an excuse for you. I forgot." She explained she had missed appointments because she was absent minded, but admitted she had been able to remember and attend twenty-seven straight weeks of batterers' education classes. She did not contradict or deny the statements in the P.S.I.

After again noting the plea agreement was voided by Thorndyke's lack of cooperation, the court sought a sentencing recommendation from the State. The State recommended incarceration. The district court imposed a five-year indeterminate term of incarceration and declined to suspend the sentence.

II. Merits.

On appeal, Thorndyke alleges her trial counsel was ineffective in failing to (1) object to the court's reliance on incompetent and incomplete hearsay evidence in deciding to reject the plea agreement, (2) request specific performance of the plea agreement, and (3) move to withdraw her guilty plea. To establish her claims of ineffective assistance, Thorndyke must prove both that her attorney's performance fell below "an objective standard of reasonableness," and "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Before we can address whether Thorndyke has met her burden, however, we find it necessary to clarify what occurred at the sentencing hearing.

Thorndyke premises her claims on an assumption the court rejected and/or the State withdrew from the plea agreement. However, the record demonstrates the court found the plea agreement had been voided by Thorndyke's breach of one of the special conditions listed in the memorandum,

which then freed the State from its obligation to comply with the plea agreement. If Thorndyke did void the agreement, she cannot establish her trial counsel was ineffective in the particulars alleged.

It is well established that plea agreements are mutual, and that "[i]f a 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." *State v. Foy*, 574 N.W.2d 337, 339 (Iowa 1998). If the State demonstrated that Thorndyke failed to comply with the terms of the plea agreement, then she had no right to withdraw her guilty plea or to request specific performance of the plea agreement. *Id*. at 339-40.

Thorndyke asserts the State has failed to demonstrate her noncompliance with the plea agreement because the principal evidence in this regard, the presentence investigator's statements in the P.S.I., are hearsay and thus incompetent. In support of her contention, she relies primarily on a case where we found a professional statement made by the prosecutor was insufficient to show the defendant's breach. *See State v. Barker*, 476 N.W.2d 624, 628 (Iowa Ct. App. 1991). In that case we determined the State had not met its burden because it presented "merely a bald statement, not under oath, with no apparent basis in the record . . . [and n]othing indicates the prosecutor had any personal knowledge whatsoever of [the defendant's] cooperation . . . or lack thereof." *Id*.

Here, in contrast, the court relied on statements that were contained within the P.S.I., made by the investigator assigned to complete the report, and based on his firsthand knowledge. Moreover, Thorndyke never challenged this portion of the P.S.I. Rather, she attempted to justify or explain the reported

noncompliance, implicitly confirming the accuracy of the presentence investigator's statements.

As the State points out,

> The primary function of the presentence investigation report is to provide pertinent information to aid the district court in sentencing a defendant. . . . In determining a defendant's sentence, a district court is free to consider portions of a presentence investigation report that are not challenged by the defendant.

State v. Grandberry, 619 N.W.2d 399, 402 (Iowa 2000).

The statements by the presentence investigator, contained within the P.S.I., are competent evidence of Thorndyke's level of cooperation. Those uncontradicted and implicitly confirmed statements are also sufficient to establish her violation of the plea agreement.[2] *Cf. State v. Malone*, 511 N.W.2d 423, 425 (Iowa Ct. App. 1993) (concluding State failed to demonstrate noncompliance in preparation of P.S.I. where "[t]he record is clear that [defendant] did meet with the investigator one time," and while "[l]ater, the investigator was unable to find her, . . . there is nothing in the record to show she knew she had further meetings to attend"). Accordingly, counsel had no obligation to object to the court's reliance on the P.S.I. in determining Thorndyke had violated the plea agreement, to move that Thorndyke be allowed to withdraw her guilty plea, or to request specific performance of the plea agreement. *See State v. Greene*, 592 N.W.2d

[2] We reject Thorndyke's contention, made without citation to legal authority, that the special conditions portion of the plea memorandum was so contradictory due process demands that she be allowed to withdraw her guilty plea. The memorandum fairly apprised Thorndyke that her failure to cooperate in the preparation of the P.S.I. could lead to the court's refusal to allow her to withdraw her guilty plea, and imposition of a sentence more severe than that contained in the agreement.

24, 29 (Iowa 1999) ("Counsel is not incompetent in failing to pursue a meritless issue.").

III. Conclusion.

We have considered all of Thorndyke's assertions, whether or not specifically discussed, and conclude she has failed to establish the ineffective assistance of her trial counsel. We accordingly affirm her judgment and sentence.

AFFIRMED.

Vogel, J., concurs; Sackett, C.J., concurs specially.

SACKETT, C.J. (concurring specially)

I concur.

Even if the challenged statements were hearsay defendant's own testimony was substantial evidence to support the district court's finding defendant had failed to cooperate.