

IN THE COURT OF APPEALS OF IOWA

No. 6-950 / 05-2135
Filed March 14, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LESTER LEROY HOFFMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Warren County, Sherman W. Phipps (plea) and Dale B. Hagen (sentencing), Judges.

Defendant appeals his sentence for the charges of burglary in the third degree and manufacture of marijuana. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Patricia Reynolds, Acting State Appellate Defender, and Martha Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Gary Kendell, County Attorney, and Douglas Eichholz, Assistant County Attorney, for appellee.

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

SACKETT, C.J.

Defendant, Lester Leroy Hoffman, appeals his sentence for the charges of burglary in the third degree in violation of Iowa Code sections 713.1 and 713.6A(1) (2005), and manufacture of marijuana in violation of section 124.401(1)(d). He contends (1) the district court abused its discretion in sentencing him to two consecutive five-year terms and for failing to state reasons for the imposition of consecutive sentences and (2) his counsel was ineffective for failing to object to the sentencing court's rejection of the plea agreement.

I. Background Facts and Proceedings

Hoffman was charged with burglary in the third degree, manufacture of marijuana, and failure to affix a drug tax stamp. On October 17, 2005, Hoffman entered pleas of guilty to the burglary charge and the manufacturing charge pursuant to a plea agreement. As part of the agreement the State recommended concurrent suspended sentences and three years of supervised probation. The district court informed Hoffman that any plea agreements which may have been made were not binding on the court, and the sentencing judge would decide at a later time whether to be bound by the agreement. The judge found the guilty plea was knowingly and voluntarily made, but withheld acceptance of the plea pending receipt of the presentence investigation report.

On December 12, 2005, Hoffman appeared for sentencing. The court declined to adopt the plea agreement. The court noted Hoffman had a long criminal history and a history of alcohol and substance abuse. The judge questioned Hoffman about his current drug and alcohol use and Hoffman

indicated he had used alcohol two days prior to the sentencing and methamphetamine a couple of days prior to being arrested. The court stated:

I can't go along with the recommendations for probation either going to Fort Des Moines or street probation. Street probation is completely out of the question. This man uses drugs and alcohol and is going to continue to use drugs and alcohol. He is going to fail probation as sure as can be. There is no way he is going to make it. I'm not going to give him Fort Des Moines because I think it would be a waste of his time and a waste of taxpayers' time. He would go to the Fort Des Moines he would take up bed space for somebody that could use it and make—take better advantage of it.

It is not going to do him any good to go to Fort Des Moines if he doesn't have an attitude that says he is going to quit using drugs. He doesn't want to. He says he does, but he is only saying that because he is standing here facing prison.

The court then sentenced Hoffman to an indeterminate five-year sentence on each of the two charges. After the court advised Hoffman of his right to appeal the judge announced, "I didn't mention it, but these two sentences shall run consecutive."

In its written judgment entry, the court determined the sentence was "consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant."

II. Standard of Review.

We review a sentence imposed by the district court that does not fall outside the statutory limits for abuse of discretion. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). To establish the sentencing court abused its discretion regarding the reasons for sentences, a defendant must show the court acted "on grounds clearly untenable or to an extent clearly unreasonable." *State v. Oliver*, 588 N.W.2d 412, 414 (Iowa 1998).

III. Analysis

Sentence. The district court is required to state on the record its reasons for selecting a particular sentence in a criminal case. Iowa R. Crim. P. 2.33(3)(d). The court must also provide reasons regarding why consecutive sentences are warranted in the particular case. *State v. Jacobs*, 607 N.W.2d 679, 690 (Iowa 2000).

The district court provided sufficient reasons to support its decision to impose a term of incarceration rather than giving a suspended sentence and probation. It cited Hoffman's continued use of drugs and alcohol and the court's concern that because of it Hoffman would fail probation. However, the court failed to provide any reasons for its decision at the close of the hearing to impose consecutive sentences. In *Jacobs*, 607 N.W.2d at 690, the court vacated the defendant's sentences and remanded for resentencing where the court had provided sufficient reasons to impose a term of incarceration rather than a suspended sentence but failed to provide reasons for its decision to impose consecutive sentences. In *State v. Harrington*, 349 N.W.2d 758, 763 (Iowa 1984), the court also vacated defendant's sentence and remanded where the court failed to state reasons why two mandatory sentences were set to run consecutively. This is not to say, however, that the reason given by a judge for consecutive sentences cannot be the same reason given for rejecting probation, among other things. See *State v. Jacobs*, 644 N.W.2d 695, 700 (Iowa 2001). But unlike *Jacobs*, 644 N.W.2d at 700, here the judge gave no reason for the consecutive sentences. We vacate Hoffman's sentence and remand for resentencing.

Ineffective Assistance of Counsel. Hoffman also contends his trial counsel was ineffective by failing to object to the sentencing court's rejection of the plea agreement without giving the defendant the opportunity to withdraw his guilty pleas.

Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). "We will resolve the claim on direct appeal . . . when the record adequately presents the issue." *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994).

Hoffman contends the court did not follow Iowa R. Crim. P. 2.10(4) which requires:

If, at the time the plea of guilty is tendered, the court refuses to be bound by or rejects the plea agreement, the court shall inform the parties of this fact, afford the defendant the opportunity to then withdraw defendant's plea, and advise the defendant that if persistence in a guilty plea continues, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement. If the defendant persists in the guilty plea and it is accepted by the court, the defendant shall not have a right subsequently to withdraw the plea except upon a showing that withdrawal is necessary to correct a manifest injustice.

If there is a breach of the plea agreement, the defendant's trial counsel clearly had a duty to object because only by objecting can counsel ensure that the defendant received the benefit of the agreement. *State v. Horness*, 600 N.W.2d 294, 301 (Iowa 1999). Moreover, no possible advantage could flow to the defendant from counsel's failure to point out the State's noncompliance. *Id.* Defense counsel's failure in this regard simply cannot be attributed to improvident trial strategy or misguided tactics. *Id.* Furthermore, a defendant is prejudiced

when he or she pleads guilty to a crime in reliance on a promise by the State that is later not performed. *Id.*

Here, there was no written plea agreement. The agreement was, however, entered on the record at the plea hearing. There were no statements made by the State or defense counsel about the plea being conditioned on acceptance by the court. Before accepting the guilty plea, the court asked Hoffman if he understood that any plea agreements which may have been made are not binding on the court, and the sentencing court would later decide whether it wanted to be bound and it would fix the actual penalty. Hoffman answered in the affirmative, indicating he understood the agreement was not binding on the court. The plea agreement was not violated and Hoffman's attorney had no basis to object that it was. Hoffman has failed to show his trial counsel was ineffective.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.