

IN THE COURT OF APPEALS OF IOWA

No. 7-032 / 06-0840

Filed April 25, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PHILIP BRIAN COOPER,
Defendant-Appellant.

Appeal from the Iowa District Court for Clarke County, Gregory A. Hulse and David L. Christensen, Judges.

Philip Cooper appeals his sentence following his plea of guilty to driving while intoxicated, third offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, and Ronald Wheeler, County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

Philip Cooper appeals his sentence following his plea of guilty to driving while intoxicated (OWI), third offense, in violation of Iowa Code section 321J.2 (2005). He contends the State breached a plea agreement and his trial attorney was ineffective for failing to object to the breach. We affirm the sentence and preserve Cooper's claim of ineffective assistance of counsel for possible postconviction proceedings.

On October 2, 2005, Cooper was stopped by police on Interstate 35 in Clarke County. His blood alcohol level was above the legal limit. Cooper was charged with driving while intoxicated, third offense. Cooper pled guilty to the charge. A plea agreement was reached but not reduced to writing. At the plea hearing the prosecutor told the court a presentence investigation would be ordered and then dictated the agreement in the record:

[T]he State's agreement is that the State will recommend that the defendant be sentenced to an indeterminate term not to exceed five years, that that term be suspended, all but 30 days be suspended, and the defendant be placed on formal and supervised probation, that the defendant pay the mandatory minimum fine of \$2500 plus applicable surcharges, court costs, and court-appointed attorney fees.

In addition . . . it is the State's agreement that should the defendant complete inpatient substance abuse treatment, that the State will recommend that the defendant receive credit towards the mandatory 30-day jail time for the inpatient treatment.

Defense counsel indicated the plea agreement was stated correctly. The court advised the defendant that the sentencing recommendations were not binding upon the court and the sentencing court would make its own decision as to what was appropriate. Then after engaging Cooper in a colloquy, the court accepted his guilty plea. Cooper argues the plea agreement spelled out at the

time of his plea was a two-part agreement and that the agreement to his completing inpatient substance treatment only applied to his receiving credit towards the thirty-day jail time.

At the sentencing hearing before a different judge when asked for the State's position, the prosecutor stated:

at the time of the guilty plea, the State's agreement with respect to sentencing was that the State would agree to recommend an indeterminate term of incarceration not to exceed five years, that that term would be suspended – all but 30 days of that term would be suspended and the defendant would be given credit for inpatient treatment for that 30 days. That agreement was conditioned upon the defendant successfully completing that inpatient treatment program.

The State has been informed by the defendant's counsel that the defendant did not successfully complete that inpatient treatment program. Therefore, the State is requesting the Court sentence the defendant to – pursuant to the PSI, to an indeterminate term not to exceed five years and the defendant to be placed in the OWI continuum program when the space becomes available and that the defendant be sentenced to the minimum fine of \$2500.

Defense counsel said he was not resisting the State's recommendation and pointed out Cooper had enrolled in outpatient treatment and also requested that he be placed in the OWI continuum program as soon as possible.

The court sentenced Cooper to an indeterminate period of five years with placement in the OWI continuum program as recommended by the presentence investigation report in addition to a fine of \$2500 and applicable surcharges. Cooper appeals.

Cooper contends the State did not correctly state the agreement and his trial counsel should have objected to the State's failure to advise the second judge of the initial agreement. The State advances that the record before us does not clearly indicate whether the entire agreement was conditioned upon

Cooper's completion of inpatient substance abuse treatment, which he failed to do, and that we should preserve Cooper's claim of ineffective assistance of counsel for possible postconviction proceedings.

Because Cooper's trial counsel did not object to the prosecutor's statement of the plea agreement at the sentencing hearing, in order to reach the issue on appeal he must establish his trial counsel was ineffective for failing to object to the breach of the agreement. *State v. Horness*, 600 N.W.2d 294, 297 (Iowa 1999). We review claims of ineffective assistance de novo. *Id.* To prevail on a claim of ineffective assistance, Cooper must establish as a matter of law that counsel failed to perform an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 2064, L. Ed. 2d 674, 693 (1984); *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). Counsel's failure to object when the State breaches a plea agreement may be ineffective assistance of counsel. *Horness*, 600 N.W.2d at 300-01.

Generally, when a defendant raises claims of ineffective assistance on direct appeal we preserve the claims for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996). However, we will resolve the claim on direct appeal where the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998).

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. *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427, 433 (1971);

Horness, 600 N.W.2d at 294 or 298. There is more at stake than just the liberty of defendant. *Id.* At stake is the honor of the government and the public's confidence in the fair and efficient administration of justice, and the efficient administration of justice. *See id.*

The prosecutor dictated in the record a different agreement at the time of sentencing than she dictated at the time of the plea. We are inclined to agree with Cooper that the agreement dictated into the record by the prosecutor at the time of his plea made only credit toward the jail time conditional on defendant's completing substance abuse treatment. If the State breached the agreement then Cooper's attorney had an obligation to object, for only by objecting could he ensure that Cooper received the benefit of the agreement. *Id.* However, we cannot decide on this record whether Cooper's attorney might have had a reason for remaining silent, which issue is best reached in possible postconviction proceedings.

We affirm Cooper's sentence and preserve his claim of ineffective assistance of counsel for possible postconviction proceedings.

AFFIRMED.