

IN THE COURT OF APPEALS OF IOWA

No. 7-230 / 06-0916

Filed May 9, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GREGORY ALLEN BEARSE,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire
and C.H. Pelton, Judges.

Defendant-appellant appeals from his conviction and sentence for sexual
abuse in the third degree following a guilty plea. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney
General, William E. Davis, County Attorney, and Joseph A. Grubisich and Robert
Weinberg, Assistant County Attorneys, for appellee.

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

EISENHAUER, J.

Defendant-appellant Greagory Allen Bearse appeals from his conviction and sentence for sexual abuse in the third degree following a guilty plea, contending trial counsel was ineffective for failing to: (1) object to the prosecutor's breach of the plea agreement and (2) file a motion in arrest of judgement.

BACKGROUND FACTS AND PROCEEDINGS.

The facts of this case are undisputed. Defendant Bearse, a thirty-seven-year-old man, had an on-going sexual relationship with a fourteen-year-old girl. When the trial information was filed on November 16, 2005, the girl was pregnant with Bearse's child. On May 10, 2006, Bearse pled guilty as charged. On May 24, 2006, judgment was entered and Bearse was sentenced to a prison term not to exceed ten years. Bearse appeals upon receiving this sentence. He claims the State breached the plea agreement by failing to recommend probation, and counsel was ineffective for failing to object to this breach. He further claims his plea was not made voluntarily and knowingly, and that counsel was ineffective for failing to file a motion in arrest of judgement on that ground.

STANDARD OF REVIEW.

We review claims of ineffective assistance of counsel de novo. *State v. McBride*, 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). To succeed with a claim of ineffective assistance of counsel, a defendant typically must prove the following two elements: (1) counsel failed to perform an essential duty, and (2) defendant was prejudiced by counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). There is an assumption

that counsel's performance is competent. *Id.* 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. The defendant must show that his counsel performed below the standard demanded of a reasonably competent attorney. *Id.* 466 U.S. at 687-8, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. To show prejudice, the defendant must show that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. Ineffectiveness claims raised on direct appeal are ordinarily preserved 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).

ANALYSIS.

Prosecutor's Breach of Plea Agreement. The record is adequate for us to decide this issue on direct appeal. Bearse was originally represented by Tom Preacher who negotiated a plea agreement with the State. Preacher later withdrew and this agreement was never finalized. Maria Pauly substituted as Bearse's counsel. She negotiated with the State, and reached another plea agreement. Pursuant to this agreement, Bearse would plead guilty to sexual abuse in the third degree, and the State would "recommend against incarceration of Defendant, recognizing that the court may grant a deferred judgment or place Defendant on probation." The agreement further stated that the court's acceptance of this plea agreement was not a condition of Bearse's plea. The second plea agreement was filed and in effect when the plea hearing was held.

The existence of two plea agreements caused some confusion at the sentencing hearing. A different prosecutor than the one from the plea

proceeding appeared for the State at the sentencing hearing. When the court asked what sentence the State recommended, the prosecutor stated, “The State concurs in the recommendation of the presentence investigation report,¹ Your Honor, for incarceration.” The sentencing judge immediately pointed out this recommendation was inconsistent with the plea agreement. At this time, Pauly, Bearse’s counsel, clarified with the court, “[T]he plea agreement that we entered into was: that [Bearse] may get probation and/or a deferred judgment.” She later explained that the existence of the prior agreement might have caused the confusion. Upon hearing this explanation, the sentencing judge stated, “I see. Okay.” The prosecutor then stated, “Your Honor, the Court is not bound by the plea agreement. The State is, so we’ll – we’ll – we’ll abide by the plea agreement. The Court has the presentence investigation report.” This statement gave rise to Bearse’s first claim. Bearse argues that this statement does not amount to a recommendation opposing incarceration. By referring to the presentence investigation report (PSI), Bearse argues, the prosecutor was clearly recommending incarceration in violation of the plea agreement; therefore, counsel breached an essential duty for failing to object to this statement.

We do not find the record indicates counsel was ineffective. First, we do not find the State breached the plea agreement. The prosecutor, due to his misunderstanding with regard to which agreement was in effect, recommended a sentence inconsistent with the plea agreement. This was not an intentional noncompliance. After Pauly clarified the situation, the prosecutor admitted his confusion and stated twice that if the State had recommended probation, he

¹ The Department of Correctional Services had completed a presentence investigation report before the plea hearing was held, and the report recommended incarceration.

would abide by it. This case is distinguishable from *State v. Horness*, 600 N.W.2d 294, 296 (Iowa 1999). In *Horness*, the prosecutor not only referred to the recommendation in the PSI as an alternative recommendation, he also detailed the circumstances of the defendant's offenses in such a way as to support the PSI recommendation. *Id.* In the present case, although the prosecutor referred to the PSI, he did not incorporate this report as part of his recommendation. Neither did he suggest that the sentence recommended by the PSI was more appropriate. We conclude the State complied with the spirit of the plea agreement, and counsel had no duty to object.

Second, we do not find the proceedings would have been different even if the State had never referred to the PSI. After announcing the sentence, the sentencing judge explained the reasons for his decision. He emphasized the significant age difference between Bearse and the victim, an adult's duty to stop improper sexual contacts, and the importance of protecting children from sexual abuse. He also stated there was some punishment for Bearse's lack of remorse and the need of deterrence. It is clear the sentencing judge believed imprisonment was more appropriate than probation under the circumstances. We conclude the proceedings would not have been different even if the State had never mentioned the recommendation made in the PSI. Bearse was therefore not prejudiced.

Counsel's Failure to File Motion in Arrest of Judgement. A new section of the Iowa Code, 903B.1, effective July 1, 2005, provides that a person convicted of a class "C" felony or greater under Iowa Code Chapter 709 shall be sentenced to a special sentence committing the person into the custody of the

director of the Iowa Department of Corrections for the rest of the person's life, in addition to any other punishment. Barse claims that this law applies to him, but he was never informed of this provision and therefore his guilty plea was not made voluntarily and knowingly and his attorney was ineffective for failing to file a motion in arrest of judgement.

The record on this issue is inadequate regarding counsel's conduct. We note the sentencing order makes no reference to Chapter 903B. We therefore preserve the issue for postconviction relief.

AFFIRMED.