

IN THE COURT OF APPEALS OF IOWA

No. 7-665 / 07-0493
Filed October 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LUIS FLORES, a/k/a
LUIS FLORES CRUZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Franklin County, Peter B. Newell,
District Associate Judge.

Defendant appeals his guilty plea and sentence for indecent exposure.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney
General, and Brent Symens, County Attorney, for appellee.

Considered by Miller, P.J., and Vaitheswaran, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ROBINSON, S.J.**I. Background Facts & Proceedings**

Luis Flores Cruz was initially charged with assault with intent to commit sexual abuse. A plea agreement was reached and the State amended the charge to indecent exposure, in violation of Iowa Code section 709.9 (2005). In exchange for defendant's guilty plea, the State agreed to recommend that he receive a jail sentence of 180 days, with all but seven days suspended, pay a fine of \$250, and be placed on probation for one or two years. Defendant submitted a written guilty plea to the indecent exposure charge. The court was not bound by the agreement.

During the sentencing hearing, defense counsel asked the court to disregard the recommendations section of the presentence investigation report (PSI) due to the preparer's statement, "a jail sentence should be imposed in this case to send a message to the defendant and the community that this behavior will not be tolerated." Defense counsel argued the statement was racist because it really meant a message should be sent to the "Hispanic" community.

The State, as agreed, recommended a 180-day jail term, all but seven to be suspended, and a \$250 fine. It was pointed out, however, that section 903B.2 (Supp. 2005) mandated a probationary period of ten years. The following exchange then occurred:

THE COURT: And do you wish to address any of the other issues raised by [defense counsel]?

PROSECUTOR: We would just ask that the Recommendations Section be considered and the Court take counsel's comments into consideration for the appropriate weight of those recommendations.

Defense counsel then stated, “Mr. Flores Cruz joins in the recommendations of the State regarding the 180-day jail sentence, with all but seven days suspended. A \$250 fine, plus surcharge and costs.” Defense counsel agreed with the State that section 903B.2 required a probationary period beyond that originally contemplated by the parties.

The district court stated the PSI recommendation did not appear to be racially motivated, and the challenged statement only meant sexually-related crimes would not be tolerated by the community at large. The court noted the serious nature of the offense, and followed the recommendation in the PSI. It sentenced defendant to a jail sentence of 180 days, imposed a fine of \$250, required defendant to register as a sex offender, and imposed the special sentencing provisions of section 903B.2. Defendant now appeals his guilty plea and sentence, claiming he received ineffective assistance of counsel.

II. Standard of Review

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). Absent evidence to the contrary, we assume that the attorney’s conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

III. Merits

Defendant contends he received ineffective assistance of counsel because defense counsel failed to object to the prosecutor's statement, "[w]e would just ask that the Recommendations Section be considered." Defendant points out the recommendation section of the PSI proposed a 180-day jail sentence. He asserts that by this statement, the prosecutor was recommending a harsher sentence than that which the State had agreed to recommend as part of the plea agreement. Defendant asserts counsel should have objected to the State's breach of the plea agreement.

We determine defendant has not shown the State breached the plea agreement. The State made the recommendation that was part of the plea agreement. The sentencing transcript shows defense counsel argued the entire recommendation section of the PSI should be disregarded for reasons wholly unsupported in the record. The prosecutor's response, which was invited by the court, merely rebutted defense counsel's allegations in a respectful and understated manner. The prosecutor never asserted the State was giving the same recommendation as the PSI. The prosecutor's statement does not rise to the level found objectionable in *State v. Horness*, 600 N.W.2d 294, 299-300 (Iowa 1999) (finding prosecutor breached a plea agreement by making statements in support of the more severe punishment recommended in a PSI).

We determine defendant has failed to show defense counsel breached an essential duty, and consequently, he has failed to show he received ineffective

assistance of counsel. We affirm defendant's guilty plea and sentence.

AFFIRMED.

Vaitheswaran, J., concurs; Miller, P.J., specially concurs

MILLER, J. (concurring specially)

Flores's claim of ineffective assistance of counsel might be viewed as involving not only the question of what the prosecutor meant by the statement in question, but also perhaps the question of what the court understood the prosecutor to mean. Under such circumstances the claim arguably should be preserved for a possible postconviction proceeding. However, both the defendant and the State agree the present record is adequate to resolve the claim in this direct appeal. I therefore concur, believing we have correctly resolved the issue the parties agree we should address and decide.