

IN THE COURT OF APPEALS OF IOWA

No. 7-711 / 07-0317
Filed October 24, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DOUGLAS WAYNE NOBLE,
Defendant-Appellant.

Appeal from the Iowa District Court for Henry County, Cynthia H. Danielson, Judge.

Defendant appeals his sentence after he pled guilty to manufacture of methamphetamine. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and James G. Tomka, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, and Darin Stater, County Attorney.

Considered by Huitink, P.J., and Vogel and Baker, JJ.

VOGEL, J.

Douglas Noble appeals his sentence imposed for manufacture of methamphetamine. Noble asserts an ineffective-assistance-of-counsel claim, alleging that the State failed to follow the plea agreement and his counsel failed to object. We affirm.

We review claims of ineffective assistance of counsel de novo. *State v. Carter*, 602 N.W.2d 818, 820 (Iowa 1999). In order to prevail on an ineffective-assistance-of-counsel claim, a defendant must prove two elements: (1) that counsel failed to perform an essential duty, and (2) that prejudice resulted from the failure. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). If the defendant fails to prove either element by a preponderance of the evidence, we will affirm. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). “Although these claims are typically preserved for postconviction relief actions, we will address such claims on direct appeal when the record is sufficient to permit a ruling.” *State v. Nitchev*, 720 N.W.2d 547, 553 (Iowa 2006) (internal quotations and citations omitted). We conclude that the record is sufficient to address Noble’s claim of ineffective assistance of counsel.

Noble was charged with manufacture of methamphetamine in violation of Iowa Code section 124.401(1)(b)(7) (2005). A defendant sentenced for violating this section is required to serve a mandatory minimum sentence before being eligible for parole. Iowa Code § 124.413. In this case, because it was Noble’s first conviction under this particular section and it was a methamphetamine offense, the sentencing court only had discretion to reduce the mandatory

minimum sentence by a third if the court found mitigating circumstances and the defendant pled guilty. Iowa Code § 901.10.

The County Attorney proposed a plea agreement to Noble, which was evidenced by a letter dated August 23, 2006. The letter stated in part:

Prosecuting attorney will recommend that the following sentence be imposed.

Imprisonment: 25 years, subject to mandatory minimum sentence under section 124.413, without penalty enhancements as second or subsequent offense under 124.411.

Fine: \$5,000, plus applicable surcharges.

The letter did not specify a waiver of one-third of the mandatory minimum sentence. After agreeing to the County Attorney's proposal, Noble pled guilty.

Noble argues that the State agreed not to *resist* a one-third reduction in the mandatory minimum sentence, but then failed to follow this agreement during the sentencing proceeding. During the plea proceeding, the following record was made:

THE COURT: Would you state the agreement for the record?

. . .

MR BERES [defense counsel]: The state has agreed to the following . . . [a] 25-year sentence with one-third mandatory minimum. In addition to that, they've agreed not to resist a reduction of the mandatory minimum sentence of one-third which is available when the defendant pleads guilty and there are mitigating circumstances shown So what we would be taking is 25-year sentence with a one-third mandatory minimum, and at the time of sentence we will be requesting that one-third of the one-third mandatory be waived, and the State has indicated that they wouldn't resist that if Mr. Noble pleads guilty and if he enters a drug treatment program. So I think that's our plea agreement. Oh, there is one other matter, and that is the State has agreed that they wouldn't resist Mr. Noble remaining out on pretrial release pending sentencing.

THE COURT: Mr. Stater, [for the State] is that an accurate statement of the plea agreement?

MR STATER: It is, Your Honor. To clarify, I'm not resisting his request to remain out pending sentencing. I think it will better allow us to effectuate the plea agreement if he can go get the drug evaluation and enter treatment. He has been out since July. I don't think he is a flight risk.

The court proceeded to receive Noble's guilty plea, incorporating into the plea colloquy:

This involves a drug charge and as such involves a 180-day revocation of your driving privilege, a mandatory requirement that you serve one-third of your sentence before you are paroled or eligible for parole. Mr. Beres has been discussing that in terms of your plea agreement There is an additional potential fine of a minimum \$5,000 up to a maximum \$100,000 fine as well. Now, is that your understanding of all the penalties that could be imposed by this Court?

Noble: Yes.

After a presentence investigation was completed, Noble was sentenced.

The record of the sentencing proceeding included the following:

MR STATER: Your Honor, I have had the opportunity to review the presentence investigation. It does include the plea proposal dated August 23, 2006 from the Henry County Attorney's Office, which recommended imprisonment of 25 years subject to mandatory minimum sentence. I note that the PSI concurs with that recommendation. I would just confirm our recommendation today as set forth in that plea proposal.

THE COURT: All right. Mr. Beres?

MR BERES: Your Honor, we would ask that the Court impose the sentence that is required for a class B felony and suspend any fine. Of course, there is a one-third mandatory minimum on this sentence if Mr. Noble is committed to prison. We are asking the court to waive one-third of that mandatory minimum *fine* for the following mitigating circumstances: [several reasons listed] . . . [then summarizing]. That may also be a mitigating circumstance that would warrant waiving one-third of the mandatory minimum.

...

THE COURT: Mr. Stater, does the State have any response to the request for a waiver of one-third of the mandatory minimum *fine*?

MR STATER: Your Honor, on behalf of the State I must resist the defendant's request based upon the nature and seriousness of this offense, as well as his arrest history as stated in the PSI.

THE COURT: And, Mr. Beres, let me make sure that I correctly understand. The request is that the Court waive one-third of the mandatory minimum *fine* under --

MR BERES: No. If I said that, I misspoke, but I meant to request a waiver of one-third the mandatory minimum sentence of incarceration We're asking that the first one-third be waived for mitigating circumstances.

[The Court made no further comment nor did the State respond to defense counsel's corrected statement]

THE COURT: The Court has reviewed the court file, including the presentence investigation *and the plea agreement* contained in there, and in reaching a decision regarding sentencing, the Court has considered, [several reasons listed] The presentence investigation also notes, however, that while on pretrial release Mr. Noble continually smoked marijuana, he lied to his probation officer, he did not make his ADDS appointments, although he – apparently he did immediately prior to sentencing follow through on that requirement by reporting on January 18, 2007. He was also arrested on two additional charges while released on this matter. For those reasons the Court finds that the necessity for protecting the community from further offenses by Mr. Noble outweighs his need for rehabilitation or his potential for rehabilitation at this time. *The Court also notes that the State has recommended, as shown in the plea agreement*, that Mr. Noble be sentenced to the penalties required by law for a class B felony under Section 124.401(1)(b)(7), and the Department of Corrections has confirmed that recommendation. The defendant, however, is requesting that he be allowed a waiver of one-third of the mandatory minimum sentence of incarceration pursuant to Code Section 901.10 of the Code of Iowa. (emphasis added).

...

THE COURT: The Court is specifically finding at this time that . . . based upon your pretrial failure to comply with the terms and conditions of pretrial release, the Court is going to deny your request for a waiver of one-third mandatory minimum on this sentence.

The plea colloquy could have been clearer as to the exact agreement between the State and Noble. However, the August 23 letter was referenced by the State and the Court as the “plea agreement” during the sentencing hearing and was incorporated into the PSI. The written plea agreement required the State to *recommend* a prison sentence of twenty-five years and a fine of \$5,000, but clearly did not include an agreement as to a waiver of one-third of the mandatory minimum sentence. During the plea colloquy, defense counsel stated that the State would not *resist* Noble’s request that the court waive one-third of the mandatory minimum sentence. During the sentencing colloquy the State did recommend the written plea agreement, but did not respond to Noble’s request that the court waive one-third of the mandatory minimum sentence.

Even if we were to find a breach of the plea agreement and a duty of Noble’s counsel to object to such breach, we would affirm as we find no prejudice to Noble on this record. *Cf. State v. Horness*, 600 N.W.2d 294, 299-300 (Iowa 1999) (vacating sentence after finding the State clearly breached the plea agreement and resulting prejudice). The sentencing court thoroughly reviewed and incorporated the relevant sentencing factors into the sentencing colloquy. *See State v. Goodson*, 503 N.W.2d 395, 398 (Iowa 1993) (discussing that the court owes a duty to the public, as well as to the defendant, in determining the correct sentence); *State v. Morrison*, 323 N.W.2d 254, 256-57 (Iowa 1982) (discussing that a sentencing decision must be made on an individual basis with

the court considering the relevant factors which are unique to that individual and circumstances); *State v. Hildenbrand*, 280 N.W.2d 393, 396 (Iowa 1979) (discussing that the sentencing court should consider “all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant’s age, character and propensities and chances of his reform”). Therefore, regardless of Noble’s defense counsel’s failure to object to a possible breach by the State of a plea agreement, we cannot conclude the court, after carefully weighing all the relevant factors, would have waived one-third of the mandatory minimum sentence.

AFFIRMED.