

**IN THE COURT OF APPEALS OF IOWA**

No. 8-365 / 07-1559  
Filed May 29, 2008

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**KERRA LIN BOOHER,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Page County, Gregory W. Steensland, Judge (guilty plea) and Charles L. Smith, III, Judge (sentencing).

A defendant appeals from her judgment and sentence for acting with others to manufacture, deliver, or possess less than five grams of methamphetamine with intent to manufacture or deliver. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Richard Davidson, County Attorney, and Anthony Almquist, Assistant County Attorney, for appellee.

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

**VAITHESWARAN, J.**

Kerra Booher appeals her judgment and sentence following entry of an *Alford* plea<sup>1</sup> to the crime of acting with others to manufacture, deliver, or possess less than five grams of methamphetamine with intent to manufacture or deliver. Iowa Code § 124.401(1)(c)(6) (2007). She argues trial counsel was ineffective in “failing to object to the prosecutor’s breach of the plea agreement in regard to the sentencing recommendation.” The State resists this argument, contending that it was Booher who breached the agreement. Additionally, the State seeks correction of a discrepancy between the district court’s oral statement of sentence and its written sentencing order.

***I. Background Proceedings***

At the plea hearing, the plea agreement was summarized as follows:

THE COURT: Would you state that agreement for the record.

MS. DANLEY: In return for the plea of guilty as charged, Your Honor, the State has agreed to recommend a deferred judgment. The State’s request is that Kerra continue with her previously—that she started voluntarily—outpatient treatment until approximately the first part of July, so that they’ve requested she comply with that and have her sentencing set in the early part of July, to which she agrees. It’s also an *Alford* plea, Your Honor.

THE COURT: So is it my understanding that the State’s willingness to not resist a deferred judgment is contingent upon successful continuation in this program, Mr. Almquist?

MR. ALMQUIST: That’s correct, Your Honor.

THE COURT: Do you understand that ma’am?

THE DEFENDANT: Yes, sir.

THE COURT: That’s not an absolute deferred. It means that if you, in the State’s opinion, do not successfully continue with this

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<sup>1</sup> An *Alford* plea is a variation of a guilty plea in which a defendant does not admit participation in the acts constituting the crime but consents to the imposition of a sentence. *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970) (holding Constitution does not bar sentence where accused is unwilling to admit guilt but is willing to waive trial and accept sentence).

treatment program, they'll come in here and ask for something much more severe than a deferred judgment. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And you understand that's part of the plea agreement?

THE DEFENDANT: Yes.

THE COURT: All right. Is it your desire to proceed with a guilty plea under those terms today?

THE DEFENDANT: Yes.

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THE COURT: It is my understanding that you wish to request a deferred judgment in this case; is that correct?

THE DEFENDANT: Yes, I do.

THE COURT: Okay. And that pursuant to the plea agreement, you wish to have sentencing scheduled for a later date to maintain compliance with your current treatment program?

THE DEFENDANT: Yes.

According to a presentence investigation report, Booher did not pursue the outpatient program referenced above. The recovery center she was to attend reported that its last contact with her was before the plea hearing and she was discharged five weeks after the hearing, with the notation "Client left." Although Booher asserted she moved to South Dakota with the permission of her pretrial release officers and her Iowa evaluator and was scheduled to begin treatment there, she had not begun that treatment at the time of the sentencing hearing. She delayed this treatment despite her acknowledgment that she needed to "maintain compliance with her current treatment program."

At the sentencing hearing, the district court rejected Booher's request for a deferred judgment. The court sentenced Booher, "to the custody of the Director, Division of Adult Corrections of the State of Iowa for a term not to exceed *two years*." (Emphasis added). The court's written sentencing order stated Booher

would be committed to the custody of the Department of Corrections “for a period not to exceed *ten (10) years*.” (Emphasis added).

## **II. Analysis**

### **A. Ineffective-Assistance-of-Counsel**

To prevail on her claim that defense counsel rendered ineffective assistance, Booher must show that counsel (1) failed to perform an essential duty, and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). As ineffective-assistance-of-counsel claims are constitutional in nature, review is de novo. *State v. Horness*, 600 N.W.2d 294, 297 (Iowa 1999).

Generally, ineffective assistance claims are preserved to allow full development of the facts surrounding counsel’s conduct. *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006). Both Booher and the State urge this court to decide her claim on direct appeal. We conclude the record is adequate to do so.

The agreement, quoted above, required Booher to “continue with her previously—that she started voluntarily—outpatient treatment until approximately the first part of July with the terms of the plea agreement.” Booher did not do so. Given her noncompliance with the agreement, the State was not obligated to provide “the anticipated benefits of that bargain.” See *State v. Hovind*, 431 N.W.2d 366, 368 (Iowa 1988) (citation omitted). As the prosecutor did not breach the agreement, “defendant’s counsel here cannot be faulted for failing to object to the prosecutor’s statements as being a breach of the plea agreement.” *Horness*, 600 N.W.2d at 298. Booher’s ineffective-assistance-of-counsel claim, therefore, fails.

***B. Legality of Sentence***

The State points to “an apparent discrepancy between the sentence orally pronounced by the court at the sentencing hearing, and the written sentencing order.” The State suggests that “If this resulted in the imposition of an illegally lenient sentence, then this Court should correct Booher’s sentence and impose the sentence required by law.”

While the sentencing transcript contains a reference to a prison term “not to exceed two years,” this reference, at worst, amounted to a slip of the tongue. Shortly before making this statement, the sentencing court correctly advised Booher that the “maximum possible punishment provided by statute for a conviction of this charge is a term of incarceration not to exceed 10 years.” See Iowa Code § 902.9(4). The written sentencing order also contained a correct statement of the sentence. For these reasons, we find no error that requires correction.

**AFFIRMED.**