

**IN THE COURT OF APPEALS OF IOWA**

No. 8-725 / 08-0230  
Filed September 17, 2008

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

**vs.**

**WILLIAM JAMES HOPKINS,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Story County, Timothy J. Finn,  
Judge.

Defendant appeals from his judgment and sentence entered after he pled guilty to homicide by vehicle and leaving the scene of an accident contending his trial counsel was ineffective for failing to object to the prosecutor's breach of the plea agreement. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellee.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Tomas Rodriguez, Legal Intern, Stephen Holmes, County Attorney, and Timothy Meals, Assistant County Attorney, for appellant.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

**SACKETT, C.J.**

Will Hopkins appeals from a judgment and sentence entered after he pled guilty to homicide by vehicle, in violation of Iowa Code section 707.6A(1) (2007), and leaving the scene of a personal injury accident, in violation of sections 321.261(1) and 321.261(4). He contends that he received ineffective assistance of counsel because his attorney failed to object to the prosecutor's violation of the plea agreement. We affirm in part, reverse in part, and remand.

Pursuant to a written plea agreement Hopkins pled guilty to the two charges above. The plea agreement provided that the State would, (1) dismiss two remaining counts against Hopkins, (2) recommend sentences of twenty-five years on the homicide by vehicle count and five years on the leaving the scene of an accident count, and (3) recommend that Hopkins's sentences on the two charges run concurrently as should a sentence he was waiting for in Boone County on a charge of driving while barred.

The court, in accepting Hopkins's plea, told him that the sentencing judge had no option of granting him probation on either charge and would determine Hopkins's prison terms with the sentence being twenty-five years for the homicide by vehicle and five years for leaving the scene. The court also told Hopkins the sentencing judge would determine whether the sentences would run consecutively or concurrently.

At sentencing the only undecided issue before the district court was whether the sentences run consecutively or concurrently. The State had agreed to recommend they run concurrently. When the judge asked the prosecutor for a recommendation he stated:

Your honor, on September 14, 2007, the Defendant drove drunk and killed Jill Sigler as she was walking home from a convenience store just a few blocks from her house. After he drove and killed her, he left the scene, leaving her body in the street for her neighbors to find.

Your Honor, *the Defendant's among the worst of the worst in drunk drivers in Story County, or the State of Iowa for that matter.* He's got six prior Operating While Intoxicated convictions, including three felony convictions for Operating While Intoxicated, Third Offense. He's been put on probation multiple times. He's been sent to prison multiple times. He's been fined thousands of dollars, and he's lost his license for years at a time. At the time of this incident, in fact, he was awaiting sentence in Boone County on a charge of Driving While Barred [for] which he faced a two year prison sentence. He was only four days away from that sentencing.

*Will Hopkins is among the worst of the worst when it comes to drunk drivers because nothing has stopped him from driving drunk.* The one and only mitigating factor in this case is that the Defendant pled guilty relatively quickly and spared Jill Sigler's family from the prolonged process that a jury trial would entail. We cannot erase what happened to Jill and lessen the loss her death has brought to her family and friends; and I believe the victim impact statements speak for themselves. The best we can do is mete some justice out for the crimes he committed and try once again to protect the community from further offenses by him.

*The charges the Defendant has pled guilty to carry serious mandatory penalties and we ask the Court to impose them.*

(emphasis supplied). The prosecutor then repeated the recommendations for sentencing made at the plea proceeding, including the recommendation that the three offenses run concurrently. The district court ordered the sentences to run consecutively stating that, "I disagree with the request of the attorneys here that they run concurrent."

Hopkins contends his attorney was ineffective in failing to object to the prosecutor's statement. He contends the prosecutor's statements supported imposition of the maximum sentence though a prison sentence was not an issue as imprisonment was mandatory. He argues that in violation of the plea agreement, the prosecutor made a scorching argument for the stiffest possible

sentence and while he reverted back to the recommendation of a concurrent sentence, it was merely a technical compliance and did not comply with the spirit of the plea agreement. The State argues the prosecutor was allowed to present the sentencing court with information relevant to the question of the sentence and that the offer of the defendant's criminal history is not a recommendation. The State further argues that after recommending prison sentences the prosecutor immediately recommended they be served concurrently, and by this statement, the prosecutor expressed the State's support for the plea agreement. The State contends the statements Hopkins challenges did not contradict the State's approval of or support for concurrent prison sentences.

**INEFFECTIVE ASSISTANCE OF COUNSEL.** We review ineffective assistance of counsel claims de novo. *State v. Carter*, 602 N.W.2d 818, 820 (Iowa 1999). To establish a claim of ineffective assistance of counsel, Hopkins has the burden to prove: (1) counsel failed in an essential duty, and (2) prejudice resulted therefrom. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001); *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). In proving the first prong, Hopkins faces a strong presumption the performance of counsel falls within a wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995). We will not second guess reasonable trial strategy. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). The second prong is satisfied if a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Davis v. State*, 520 N.W.2d 319, 321 (Iowa Ct. App. 1994).

An ineffective assistance of counsel claim may be disposed of if the applicant fails to prove either prong. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999). Both of the elements must be established by a preponderance of the evidence. *State v. Hischke*, 639 N.W.2d 6, 8 (Iowa 2002). Ordinarily, we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow for full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). However, we will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). We deem the record in this case adequate to decide the issues raised on direct appeal.

The State's promise to recommend a specific sentence requires the prosecutor to present the recommended sentences with his or her approval, to commend the sentences to the court, and to otherwise indicate to the court that the recommended sentences are supported by the State and worthy of the court's acceptance. *State v. Horness*, 600 N.W.2d 294, 299 (Iowa 1999). A prosecutor's "formal recitation of a possible sentence" does not satisfy the obligation to "make a recommendation" of a particular sentence; the recommendation must be "expressed with some degree of advocacy." *Id.* (citing *United States v. Brown*, 500 F.2d 375, 377 (4th Cir. 1974)). In *Horness*, the court noted that if a prosecutor keeps in mind his or her duty to assure that a fair and informed judgment is made on the sentence during plea negotiations, then he or she should have no problem in truly recommending the negotiated sentence to the court. *Id.* The State's promise to make a sentencing recommendation

carries with it the implicit obligation to refrain from suggesting more severe sentencing alternatives. *State v Bearse*, 748 NW.2d 211, 216 (Iowa 2008).

The focal issue is whether the prosecutor complied with the terms and the spirit of the agreement, (1) in his calling Hopkins the worst of the worst, (2) in relating a disparaging assessment of Hopkins's crime to the court, (3) in relating the charges the defendant pled to carry serious mandatory penalties and asking the court to impose them, and (4) in saying only that he recommended concurrent sentences without advocating that his recommendation be granted.

Violations of either the terms or the spirit of a plea agreement require reversal of the conviction or vacation of the sentence. *Horness*, 600 N.W.2d at 298. Because a plea agreement requires a defendant to waive fundamental rights, prosecutors are held to the most meticulous standards of both promise and performance in bringing plea agreements to the court. *Id.*

Whether the prosecutor violated the terms of the agreement where he asked the court to impose the mandatory penalties we need not decide. We believe that the prosecutor violated the spirit of the agreement in those remarks and in others. The prosecutor made disparaging remarks about Hopkins and related a disparaging assessment of his offense. See *id.* at 300 (noting that in *Stubbs. v. State*, 114 Nev. 1412, 1415, 972 P.2d 834, 845 (1998), the Nevada court considered in finding a prosecutor violated an agreement, the fact that after stating the required recommendation, the prosecutor related a disparaging assessment of the defendant's offense to the court). Looking at the prosecutor's remarks in total, we find no indication of any hint of advocacy of the agreement's recommendation that the sentences be served concurrently. A fundamental

component of plea bargaining is the prosecutor's obligation to comply with a promise to make a sentencing recommendation by doing more than simply informing the court of the promise the State has made. *Bearse*, 748 N.W.2d at 215-216.

When the State breached the spirit of the agreement Hopkins's attorney had a duty to object. See *Horness*, 600 N.W.2d at 300 (finding counsel failed to perform an essential duty by not objecting when the State breached the plea agreement in its recommendation at sentencing). Consequently, we conclude Hopkins's trial attorney failed to perform an essential duty and Hopkins has shown that he was prejudiced by counsel's breach.

A defendant is prejudiced when he pleads guilty to a crime in reliance on a promise by the State that is later not performed. *Id.* at 300. He need not show that but for this breach he would have received another sentence. *Id.* He must simply show that the outcome of the proceeding would have been different. *Id.* at 300-01. Had the objection been made it would have alerted the court to the prosecutor's breach of the spirit of the plea agreement. *Id.* at 301. Defendant would have been allowed to withdraw his guilty pleas, or the court would have scheduled a new sentencing hearing at which time the prosecutor could make the promised recommendations. *Id.* The outcome of the defendant's sentencing proceeding was different, however, because defense counsel did not make the necessary objection. See *id.* Consequently, the defendant was sentenced by the court at a hearing tainted by the prosecutor's improper comments. Defendant has established the required prejudice by his counsel's breach. See *id.*

We affirm the twenty-five and five year sentences. We reverse only that part of the sentence that provided for consecutive sentences and remand for a hearing before a different judge to determine whether the three sentences should run concurrently or consecutively.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**