

IN THE COURT OF APPEALS OF IOWA

No. 9-113 / 08-1043
Filed April 8, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLES RAY MONTES,
Defendant-Appellant.

Appeal from the Iowa District Court for Delaware County, Alan L. Pearson
and Margaret L. Lingreen, Judges.

Charles Ray Montes appeals the sentence imposed by the district court
following his guilty plea to burglary in the third degree. **AFFIRMED.**

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

Charles Montes, Oakdale, pro se.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, and John W. Bernau, County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Doyle, JJ.

MILLER, J.

Charles Ray Montes appeals the sentence imposed by the district court following his guilty plea to burglary in the third degree. He claims his trial counsel was ineffective for changing the sentencing recommendation without explaining the consequences and for failing to object to the prosecutor's breach of the plea agreement. We affirm his sentence and preserve one of his ineffective assistance claims for a possible postconviction proceeding.

The minutes of evidence reflect that around 8:00 p.m. on September 8, 2007, Montes and two other men jumped into a vehicle occupied by K.L. and C.P. and physically assaulted K.L. causing him injury. The State charged Montes with burglary in the second degree. A later amended and substituted trial information charged Montes with burglary in the first degree.

On January 14, 2008, Montes pled guilty to the lesser included offense of burglary in the third degree, in violation of sections 713.1 and 713.6A (2007). In exchange for Montes's guilty plea the State agreed to recommend a suspended sentence with up to five years probation. At the plea proceeding the district court advised Montes of the maximum penalties and that his current parole on other charges could be revoked and he could be sent to prison on those charges based on the plea. The court also noted it was not bound by the plea agreement and was free to sentence Montes to any penalty permitted by law following its review of the presentence investigation report (PSI). It then accepted Montes's guilty plea as being voluntarily and intelligently entered and having a factual basis.

Montes's PSI reflects that he has an extensive criminal history, including 2001 convictions for first-degree criminal mischief and burglary in Linn County and burglary in Benton County, for which he was on parole at the time of the crime at issue here. Montes had served some prison time, as well as time on parole and work release in those cases. The presentence investigator noted Montes's serious alcohol and drug abuse problems, and recommended prison time on the present offense.

At a May 12, 2008 sentencing hearing the prosecutor noted that the agreement was to recommend a five-year suspended sentence, but stated he understood that Montes now wanted to be sentenced to imprisonment on the current charge to run concurrently with time to be served on prior sentences so he would not have probation time remaining after discharge of his prison sentences. Defense counsel then explained to the court that Montes previously sought a suspended sentence with the understanding his pre-existing parole would not be revoked, but because Montes's parole had been revoked between the plea and sentencing and he was back in prison, Montes was now requesting the court impose the five-year prison term to run concurrently with his other prison time. Counsel requested that Montes be credited with all time served on this matter back to September 12, 2007.

The court then addressed Montes personally to ensure he wanted to change his request concerning sentencing as his attorney had explained, and Montes answered in the affirmative. Montes also informed the court that he was now serving concurrent time on the convictions out of Benton and Linn counties.

The court entered judgment and sentenced Montes to a term of incarceration for a period of no more than five years, to run concurrently with the sentences imposed in the Linn and Benton county cases. The court also suspended the minimum fine and ordered credit for time served in this case from September 12, 2007. The court noted the PSI recommendation, Montes's criminal history, the nature of the offense, and the recommendations of the parties as reasons for the sentence.

Montes appeals his sentence, claiming his attorney was ineffective for changing the sentencing recommendation and for failing to object to the prosecutor's breach of the plea agreement.

We review claims of ineffective assistance of counsel de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005). To prove counsel was ineffective the defendant must show that counsel breached an essential duty and that prejudice resulted from counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Griffin*, 691 N.W.2d 734, 736-37 (Iowa 2005).

While we often preserve ineffective assistance of counsel claims for postconviction proceedings, we consider such claims on direct appeal if the record is sufficient. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). The record in this case is sufficient to address one of Montes's claims.

We first address Montes's claim that his attorney was ineffective for failing to object to the prosecutor's breach of the plea agreement.

Violations of plea agreements adversely impact the integrity of the prosecutorial office and the entire judicial system. Further, because

a plea agreement requires a defendant to waive fundamental rights, we are compelled to hold prosecutors and courts to the most meticulous standards of both promise and performance. For all those reasons, violations of either the terms or the spirit of the agreement require reversal of the conviction or vacation of the sentence.

State v. Bearnse, 748 N.W.2d 211, 215 (Iowa 2008) (internal citations and quotations omitted). When the State breaches a plea agreement, defense counsel ordinarily has a clear duty to object because only by objecting can counsel ensure that the defendant receives the benefit of the agreement, and no possible advantage can flow to the defendant from counsel's failure to point out the State's noncompliance. *State v. Bergmann*, 600 N.W.2d 311, 315 (Iowa 1999); *State v. Horness*, 600 N.W.2d 294, 300 (Iowa 1999). Consequently, when a defendant is sentenced by the court at a hearing tainted by the prosecutor's improper recommendations the defendant is prejudiced by counsel's failure to perform an essential duty. *Horness*, 600 N.W.2d at 301.

We find no breach by the prosecutor of the terms or the spirit of the plea agreement. The record clearly establishes that the prosecutor was ready and willing to make the original, agreed-upon recommendation for a suspended sentence with probation. However, the prosecutor had apparently been informed that Montes wished to request imprisonment in light of his changed circumstances since the plea hearing, namely the revocation of his parole in the other criminal cases and the fact he was now in prison, and stated he would not object to such a request if that was in fact what Montes wanted. Defense counsel then informed the court that Montes in fact was now requesting imprisonment on the current charge, to run concurrently with the sentences

Montes was already serving. Montes expressly agreed with his attorney's statements concerning what Montes was requesting.

We conclude that the prosecutor informing the court of his understanding of Montes's sentencing request and accepting that request did not constitute any breach of the plea agreement. Thus, Montes's attorney was not ineffective for not objecting to the prosecutor's alleged breach of the plea agreement because such objection would have been without merit. See *Bearse*, 748 N.W.2d at 215 ("Counsel cannot fail to perform an essential duty by merely failing to make a meritless objection.").

Montes also claims his attorney was ineffective in changing the sentencing recommendation from the initial plea agreement without properly explaining the consequences of the change. He contends his agreement to change his sentencing recommendation was not an informed decision.

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) (citing *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997)). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). "[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle*, 652 N.W.2d at 203.

There is nothing in the record concerning the specifics of the conversations Montes presumably had with his attorney concerning changing their sentencing recommendation and any resulting consequences. Thus, it is not possible to decide this claim of ineffective assistance on the record before us. Furthermore, Montes's attorney has not been given an opportunity to explain his actions and the trial court has not considered and ruled on the ineffectiveness claim. Under these circumstances, we pass on this issue of ineffective assistance in this direct appeal and preserve it for a possible postconviction proceeding. See *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

Based on our de novo review, and for the reasons set forth above, we conclude the prosecutor did not breach the plea agreement and thus Montes's attorney was not ineffective for failing to object on this ground because such objection would have been without merit. The record before us is insufficient to address Montes's claim that his attorney was ineffective for failing to fully inform him regarding the consequences of changing his sentencing recommendation. Accordingly, we preserve this specified claim of ineffective assistance for a possible postconviction proceeding. Montes's sentence is affirmed.

AFFIRMED.