

IN THE COURT OF APPEALS OF IOWA

No. 1-571 / 10-1396
Filed August 10, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARYANN LANEICE GATEWOOD,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Maryann Gatewood appeals from the sentence entered as a result of her guilty plea to conspiracy to deliver a controlled substance. **SENTENCE VACATED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephan K. Bayens, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

Maryann Gatewood appeals from the sentence entered as a result of her guilty plea to conspiracy to deliver a controlled substance. Iowa Code § 124.401(1)(c)(3) (2009). Gatewood argues her trial counsel was ineffective by failing to object to the State's sentencing recommendation, which deviated from the plea agreement. Upon our review, we find counsel rendered ineffective assistance by failing to object to the State's deviation from the plea agreement. We therefore affirm Gatewood's conviction, but we vacate her sentence and remand for resentencing.

I. Background Facts and Proceedings.

On December 7, 2009, Gatewood was charged by trial information in Counts I and II with two counts of possession of a controlled substance (crack cocaine) with intent to deliver; in Count III with failure to affix a drug tax stamp; in Count IV with possession of a controlled substance (hydrocodone); and in Count V with possession of a controlled substance (marijuana). Gatewood and the State reached a plea agreement. On March 3, 2010, Gatewood entered a plea of guilty to the lesser-included charge of conspiracy to deliver a controlled substance in Count II, a class C felony. Iowa Code § 124.401(1)(c)(3). In exchange, the State agreed to dismiss Counts I, III, IV, and V and to recommend a deferred judgment at sentencing. The district court order confirmed the expected outcome: "The parties will jointly recommend a deferred judgment so long as the defendant complies with all terms of any release to include substance abuse treatment and has no further arrests pending sentencing." On March 5, 2010, Gatewood wrote a letter to the court attempting to withdraw her guilty plea.

The State regarded Gatewood's letter as a motion in arrest of judgment and filed a resistance on March 17. In a March 25 hearing, Gatewood withdrew her motion in arrest of judgment, and the court confirmed her guilty plea. There is no evidence that this hearing affected the plea agreement.

At the sentencing hearing on July 12, 2010, a different prosecutor appeared on behalf of the State and recommended a suspended sentence and supervised probation. Defense counsel did not object to the State's recommendation but recommended a deferred judgment and similar probationary terms. The court imposed a maximum indeterminate term of ten years with a mandatory one-third but suspended that term and put her on probation for five years with other detailed conditions. Gatewood appeals.

II. Standard of Review.

Error was not preserved because defense counsel did not object to the prosecutor's breach of the plea agreement. *State v. Horness*, 600 N.W.2d 294, 297 (Iowa 1999). The defendant must establish that her trial counsel rendered ineffective assistance to reach the merits of this issue on appeal. *Id.*; see also *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010) ("Ineffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules."). Our review of ineffective assistance of counsel claims is de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008).

III. Discussion.

We do not generally resolve claims of ineffective assistance on direct appeal. *Id.* These claims are typically better suited for postconviction relief proceedings that allow the development of a sufficient record, and permit the

accused attorney to respond to defendant's claims. *Id.* We must determine if the record is adequate to decide the claim on direct appeal or we may preserve the claim for postconviction relief proceedings. *Id.* The State argues that error must be preserved for postconviction relief because the record is insufficient to prove if Gatewood did or did not violate the plea agreement. We disagree.

The plea agreement proceedings are set forth in the record and the court entered an order reciting the plea agreement. The State fails to offer any indication of how Gatewood may or may not have violated the plea agreement and the record indicates that she completed the terms required of her in the agreement. There is no suggestion in the record that the plea agreement was revoked. We find the record sufficient to review Gatewood's ineffective assistance of counsel claim in this direct appeal. *See id.* (finding record sufficient to review direct appeal claim of ineffective assistance by counsel's failure to object to prosecutor's breach of plea agreement).

A claim of ineffective counsel requires a defendant to prove by a preponderance of the evidence (1) the attorney failed to perform an essential duty and (2) the defendant was prejudiced by that failure. *Horness*, 600 N.W.2d at 298. The claim cannot succeed if either element is lacking. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). We presume the competence of defense counsel's performance. *Horness*, 600 N.W.2d at 298. The defendant must prove that counsel's actions did not fall within a normal range of competency. *Id.*

To find a failure to perform an essential duty, we must first find the prosecutor breached the plea agreement to give rise to defense counsel's duty to object. *Id.* "Counsel cannot fail to perform an essential duty by merely failing to

make a meritless objection.” *Bearse*, 748 N.W.2d at 215. The plea deal stated that both parties would jointly recommend a deferred judgment if Gatewood complied with all terms of any release, including completing substance abuse treatment and incurring no further arrests pending sentencing. Gatewood attended substance abuse treatment and completed the program prior to sentencing without any further arrests. We acknowledge Gatewood had some difficulties in the substance abuse program, but she was not terminated from the program and was discharged from the program with maximum benefits received. The recitation of the plea agreement during the plea proceedings and the court’s order reciting the plea agreement did not delineate any required level of success in the substance abuse program, other than completing it. Because the prosecutor recommended a suspended sentence with probation rather than a deferred judgment, the recommendation was inconsistent with the plea agreement.

After concluding the prosecutor breached the plea agreement, we must find defense counsel failed to perform an essential duty by not objecting to the prosecutor’s recommendation. Our supreme court has observed that defense counsel is always obligated to object to the breach of a plea agreement:

When the State breached the plea agreement, the defendant’s trial counsel clearly had a duty to object; only by objecting could counsel ensure that the defendant received the benefit of the agreement. Moreover, no possible advantage could flow to the defendant from counsel’s failure to point out the State’s noncompliance. Defense counsel’s failure in this regard simply cannot be attributed to improvident trial strategy or misguided tactics.

Id. at 217 (quoting *Horness*, 600 N.W.2d at 300). In this case, there is no plausible strategy or tactical considerations which would explain counsel's inaction in failing to object to the State's breach of the plea agreement. See *id.* Therefore, defense counsel's failure to object to the prosecutor's breach of the plea agreement was a failure to perform an essential duty.

Having found counsel failed to perform an essential duty, we must next determine if Gatewood was prejudiced by this failure. To demonstrate prejudice, the defendant must show a different outcome would have resulted without counsel's failure to perform an essential duty. *Horness*, 600 N.W.2d at 300-01. Our supreme court has previously acknowledged that when defense counsel fails to object to a prosecutor's noncompliance with a plea agreement, the prejudice to the defendant is inherent:

The proper objection by the defendant's attorney would have alerted the sentencing court to the prosecutor's breach of the plea agreement. In that circumstance, the court would have allowed the defendant to withdraw his guilty plea[], or would have scheduled a new sentencing hearing at which time the prosecutor could make the promised recommendations. The outcome of the defendant's sentencing proceeding was different, however, because defense counsel did not make the necessary objection.

Bearse, 748 N.W.2d at 217 (quoting *Horness*, 600 N.W.2d at 300). Here, defense counsel's breach of essential duty resulted in a different outcome of these proceedings. Gatewood was prejudiced by her counsel's failure to object to the prosecutor's breach of the plea agreement.

IV. Conclusion.

Upon our review, we conclude defense counsel failed to perform an essential duty and Gatewood was prejudiced by this failure. We affirm Gatewood's conviction, but vacate her sentence and remand for resentencing.

SENTENCE VACATED AND REMANDED.