IN THE COURT OF APPEALS OF IOWA

No. 3-028 / 12-0974
Filed February 27, 2013

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DAVID THEODORE PAPPAS,

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

David Pappas appeals following his guilty plea to delivery of a controlled substance, contending the State breached its agreement to recommend a lesser sentence. **AFFIRMED**.

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, John Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee.

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

DOYLE, J.

David Pappas appeals following his guilty plea to delivery of a controlled substance, contending the State breached its agreement to recommend a lesser sentence. We affirm his conviction and preserve the claim of ineffective assistance of counsel for possible postconviction proceedings.

***I. Background Facts and Proceedings*.**

According to a preliminary complaint filed in October 2011, David Pappas delivered approximately two grams of methamphetamine to a confidential informant on September 9, 2010. Shortly thereafter, Pappas agreed to work with law enforcement. To that end, Pappas, Urbandale Detective Matt Flattery, and Polk County assistant prosecutor Stephanie Cox entered into a cooperation agreement entitled "Memorandum of Understanding" ("the agreement"). The agreement states, in relevant parts:

> 4. The Defendant agrees to cooperate with law enforcement officials in a manner specified above for the period of time beginning this date, December 3, 2010 until February 3, 2011, renewable by a specific written agreement by the parties."

Additionally, the agreement provides:

> 6. The Defendant shall execute a written admission of criminal activity concerning the charges encompassed in the above-captioned criminal numbers. At the conclusion of the period of cooperation, the Defendant shall enter a plea of guilty to the charge of Delivery of a Controlled Substance, a Class C felony, in violation of Iowa Code section 124.401(1)(c)(6) [(2009)].
>
> 7. Should the Defendant fully and satisfactorily comply with the terms and conditions of this agreement, *as determined by the Polk County Attorney in connection with the participating law enforcement officers*, and if the County Attorney determines that the Defendant has provided substantial assistance in the investigation or prosecution of *one or more targeted individuals who have committed criminal offenses*, the Polk County Attorney's Office, *in its sole discretion*, and the defendant will agree, will

> recommend a ten year prison sentence with a mandatory one-third, $1000 fine plus 35% surcharge and court costs, $10 DARE fee, $125 law enforcement fee, 180 day driver's license revocation.
>
> 8. If, at the conclusion of the above-named period of cooperation, the Defendant has provided no information or has made no action resulting in a prosecuteable case(s), as defined in this agreement,[[1]] the Defendant will receive no benefit from the State. Unsuccessful attempts by the Defendant to assist law enforcement officers will not result in leniency from the State. In other words, if the Defendant does his/her best and tries to help in investigations, but is unsuccessful, he/she will not get credit for his failed attempts.
>
> . . . .
>
> 10. It is agreed and understood between the parties that if it becomes apparent for whatever reason or from whatever source, that the Defendant has not fully cooperated as required by this agreement, the agreement shall become null and void and there shall be no leniency granted regarding any pending charge or criminal investigation involving the Defendant. The State shall immediately file all possible criminal charges against the Defendant involving violations of all State and/or Federal laws. In addition, if applicable, the State promises to prosecute the Defendant for perjury
>
> . . . .
>
> 12. It is further agreed and understood between the parties that *there are no additional conditions to this agreement beyond those listed in this document*.

(Emphasis added.)

In November 2011, the State filed its trial information charging Pappas with delivery of a controlled substance, in violation of section 124.401(1)(c)(6) (2011) as a class "C" felony. The minutes of testimony attached thereto stated Detective Flattery would testify Pappas agreed to cooperate with law enforcement and had entered into the agreement. Further, he would testify that

---

[1] The agreement provides "prosecutable cases" may include "purchases of narcotics and/or dangerous drugs from investigated individuals" and "providing information which results or may result in the execution of a search warrant resulting in obtaining evidence which, in the opinion of the Polk County Attorney, is sufficient to charge the investigated individual(s) with a felony offense." The term "prosecutable cases" is not otherwise defined in the agreement.

on October 13, 2011, he requested an arrest warrant for Pappas "who had not been in contact with him for approximately the last four weeks." Additionally, he would testify he was unable to locate Pappas and Pappas "was in breach of his agreement." A copy of the agreement was attached to the minutes.

On March 26, 2012, Pappas entered a guilty plea to delivery of a controlled substance as a class "C" felony, and he admitted that he was a second or subsequent offender within the meaning of Iowa Code section 124.411. At the plea hearing, the prosecutor advised the court that Pappas was pleading guilty to that charge. The prosecutor further stated: "At the time of sentencing the parties are free to argue," and she requested the court set sentencing at a later time. No objection or mention was made regarding the agreement by either party.

The court conducted a colloquy with Pappas, and it explained to Pappas:

> [T]he lawyers will be given an opportunity to argue at time of sentencing what your applicable sentence will be. As I've told you, the range of those recommendations is somewhat limited because the only option for the court is incarceration, but the lawyers will have a chance to recommend what they believe your sentence ought to be from anywhere from the ten years applicable to the [thirty] years on the enhancement.
>
> The court's not bound by any of those recommendations. The court will impose what it believes to be an appropriate sentence for you after it has reviewed all of the available information, including information that will be prepared in the presentence investigation report that will come out in the next few weeks. So what that means is that you have to decide today whether you want to plead guilty without knowing what your actual sentence will be with the possibility that the court may impose the maximum sentence for this offense, which would be an indeterminate period of incarceration, a mandatory incarceration of up to thirty years with a minimum of one-third of that sentence to be served before you're eligible for parole and a fine that could reach as high as $150,000.

Pappas stated he understood the court's explanation. Pappas acknowledged that no threats or promises were made to induce him to plead guilty and that no one predicted or guaranteed to him what his actual sentence would be. He stated he fully understood that the court was not bound by any recommendations or agreements between counsels regarding his sentence. No discussion was had, nor was any objection made on the record regarding the agreement between Pappas and the State.

That day, the court entered its order accepting Pappas's guilty plea, ordering a presentence investigation report, and setting the date for sentencing. Additionally, the order stated: "At sentencing the parties are expected to argue for the following: argue term of incarceration." There is no mention of the agreement in the court's order.

The sentencing hearing was held on May 8, 2012. After a brief introduction, the prosecutor stated:

> I understand that [Pappas] may have evidence that they wish the court to consider with regard to the appropriate sentence. This is a situation that requires mandatory prison in the term ranging from ten years to thirty years with a mandatory one-third. The State would ask to be heard merely with regard to argument as to the appropriate disposition.

Immediately thereafter, Pappas's trial counsel called Officer Flattery to testify. Officer Flattery testified that after Pappas sold a confidential informant methamphetamine, he met with Pappas and discussed the possibility of what Pappas's options were at that time, including working in concert with law enforcement in the attempt to procure other cases of illegal activity. Pappas agreed to cooperate with law enforcement and signed the agreement, a waiver of

speedy indictment and speedy trial, and an admission of involvement in criminal activity. Officer Flattery testified Pappas performed five controlled buys for one case that resulted in an arrest of two individuals. He testified that those individuals ended up pleading guilty to a criminal offense, and he acknowledged the two individuals also had federal warrants out for their arrest.

As to whether or not Pappas met his end of the bargain, Officer Flattery testified Pappas was an unsuccessful informant. He testified that at the time "we signed Mr. Pappas up he agreed to perform, I guess, complete three cases. And I guess it did not matter at the time if we arrested four people for one case. He was going to complete three cases." He essentially testified that Pappas had only made one case with two co-defendants. He also testified Pappas was required to contact him daily but Pappas had stopped calling him altogether, and he went probably two months without speaking to Pappas. However, he acknowledged that Pappas stayed in contact with him during the term of the agreement, and he further testified he believed "we actually had an extension signed by Mr. Pappas or we planned on it but like I said, I lost contact with him." He also admitted the loss of contact occurred six to seven months after the agreement expired.

After examination of this witness ended, Pappas's trial counsel stated there was no more evidence to present. No argument or objection was presented concerning the agreement, and the court proceeded to the State's recommendation regarding Pappas's sentence. The prosecutor stated:

> Your Honor, the State recommends that the court sentence Mr. Pappas to the maximum indeterminate term of [thirty] years with a mandatory one-third. I am interpreting [Pappas's trial counsel's]

> witness presentation today not to be an attempt to enforce the plea agreement but to be some sort of an attempt to influence the court that Mr. Pappas, because of the limited amount that he did perform for law enforcement, should be given some leniency by the court.
>
> In reviewing his presentence investigation report, Mr. Pappas's history is abysmal. He did have a prior possession with intent as far back as 1989 that was apparently pled to a possession that he received probation for; and OWI, '91; another possession in '96; a possession with intent to deliver in 1999 for which he received a [twenty-five]-year term; a possession third offense in 2003; and then the current charge in 2010.
>
> Mr. Pappas has been given numerous opportunities for treatment, including IRTC and the Violators' Program. He has been unsuccessful both on probation and parole and has had both probation and parole revoked in the past. He was not successful as an informant, as Officer Flattery has described. Mr. Pappas was given the opportunity that some are given to cooperate with law enforcement in an attempt to reduce the potential sentence that he faced. Mr. Pappas did make one case, as Officer Flattery has testified to.
>
> There is more to the agreement than that. That in order for him to at least get the recommendation from the State for the ten-year term and in order for us not to file the enhancement, he would have to make three prosecutable cases. That, as he said, is based not only upon the nature of the pending offense but looking at Mr. Pappas's history and looking at the people that he is able to deal or the targets that he has. Mr. Pappas was unsuccessful in that and, in our estimation, should not be given any credit for it.
>
> So for those reasons, I would ask the court triple Mr. Pappas's sentence. As I said, his last drug felony in '99 earned him a [twenty-five]-year term. That apparently did not grab his attention, and I think that he should be more harshly punished for the future offenses such as this one.

Pappas's trial counsel did not object to the State's recommendation, though he argued to the court:

> It would be our position that [Pappas] fulfilled the terms of that agreement as to what's contained in writing in that agreement. That agreement expired on February 3rd of 2011. It was never renewed. He did exactly what that agreement said. He made not only one case but with two codefendants that ended up in federal charges, and it turns out they were wanted in the past.
>
> We would ask the court, as the PSI recommends, to a ten year sentence with a mandatory one-third minimum, a [$1000] fine

> and the other applicable surcharges and court costs and consequences that apply.

When asked by the court, Pappas's trial attorney stated there was no legal cause why Pappas's sentence could not be pronounced at that time. Pappas responded "no" when asked if there was anything he would like to say to the court before the sentence was pronounced. The court then stated:

> The court has had a chance to review the presentence investigation report. As has been made clear by statements of counsel today, the only issue before the court on a contested basis is the amount of the sentence that will be imposed. The court takes no position on whether there is an enforceable agreement between Mr. Pappas and the State as otherwise represented in [the agreement]. At best, that agreement, if valid, would only form the basis for a recommendation by the State. It would not bind the court in any way regarding an appropriate disposition.
>
> Taking into account the appropriate statutory factors the court is to look at in determining an appropriate sentence, most notably the defendant's age, his extensive criminal history, the circumstances of this offense and the other factors as outlined within Iowa code Chapter 901, the court believes that [Pappas] should be incarcerated for the maximum period afforded under these charges and circumstances. The court believes that this is appropriate taking into account what appears to be a lack of interest from [Pappas's] standpoint regarding any rehabilitation. And the court believes that it is appropriate to require [Pappas] be incarcerated for as long as the Department of Corrections believes that's appropriate under their guidelines to protect the public from additional criminal activity in the future.
>
> For those reasons, Mr. Pappas, you are adjudged guilty of the crime of delivery of a controlled substance as a second or subsequent offender, in violation of Iowa Code sections 124.401(1)(c)(6) and 124.411. You will be incarcerated on that offense for a period not to exceed [thirty] years as required by Iowa Code sections 902 and 124.411.

Pappas now appeals. He asserts the State breached the agreement when it did not make the recommendation of a more lenient sentence despite his satisfaction of the obligations stated in the agreement as written. Alternatively,

he argues his trial counsel rendered ineffective assistance for failing to preserve the breach of the agreement issue.

II. Preservation of Error.

The State first asserts Pappas failed to preserve his breach-of-the-agreement claim because the claim was not raised before and ruled upon by the district court. We agree. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012) (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)). In a case where our supreme court found a county attorney breached a plea agreement, the court observed:

> A 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 pleas, or would have scheduled a new sentencing hearing at which time the prosecutor could make the promised recommendations.

State v. Horness, 600 N.W.2d 294, 301 (Iowa 1999).

Although Pappas's attorney advised the court that Pappas had followed the terms of the agreement as written, there was no objection or challenge made to the district court that the State breached its agreement with Pappas. The court's statements at the sentencing hearing show the court was well aware of the agreement, which was mentioned in the minutes of testimony and attached to the minutes. The court specifically took no position on whether the agreement was enforceable, and thus made no rulings on whether it was breached by either

Pappas or the State. With no ruling as to whether the agreement was breached by the State, Pappas has not preserved error on this issue.

III. Ineffective Assistance of Counsel.

Recognizing the potential for lack of error preservation, Pappas alternatively argues his trial counsel was ineffective in failing to preserve his breach-of-the-agreement claim. We review claims of ineffective assistance of counsel de novo. *State v. Utter*, 803 N.W.2d 647, 651 (Iowa 2011). In order to prevail on a claim of ineffective assistance of counsel, a defendant must prove that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Fountain*, 786 N.W.2d 260, 266-67 (Iowa 2010). In general, claims of ineffective assistance of counsel are "reserved for postconviction proceedings to allow full development of the facts surrounding counsel's conduct." *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Only in rare cases will the trial record alone be sufficient to resolve the claim on direct appeal." *State v. Tate,* 710 N.W.2d 237, 240 (Iowa 2006). We prefer to reserve such claims for development of the record and to allow trial counsel to defend against the charge. *Id*. If the record is inadequate to address the claim on direct appeal, we must preserve the claim for a postconviction relief proceeding, regardless of the potential viability of the claim. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). The State does not believe this is one of those "rare cases" that would allow resolution on direct appeal and it suggests Pappas's claim be reserved for postconviction proceedings. We agree.

In cases where a prosecutor did not follow the terms of a *plea agreement*, the supreme court has found that a defendant's attorney who failed to object

breached an essential duty. *See State v. Carrillo*, 597 N.W.2d 497, 500 (Iowa 1999) (“Given that the State was required to remain silent at sentencing [pursuant to the plea agreement], it is readily apparent that Carrillo’s counsel breached an essential duty by failing to object when the State did not do so.”); *State v. Horness*, 600 N.W.2d 294, 300 (Iowa 1999) (“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.”). But here, the record does not disclose whether trial counsel reasonably believed the cooperation agreement to be binding or not. Although trial counsel did assert that Pappas fulfilled his end of the written bargain, the record does not disclose whether trial counsel had a legitimate reason for not asserting the State failed to fulfill its end of the bargain. In short, it is not readily apparent from this record that trial counsel had a duty to object.

“It is well established that ‘when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration [for the plea], such promise must be fulfilled.” *Horness*, 600 N.W.2d at 298 (citations omitted). On this record we are unable to determine if at the time Pappas pled guilty, he was relying in any significant degree on the State to recommend a more lenient sentence at sentencing. We conclude the record before us is insufficient to determine Pappas’s ineffective-assistance-of-counsel claim.

IV. Conclusion.

We affirm the conviction and preserve the claim of ineffective assistance of counsel for possible postconviction proceedings.

AFFIRMED.