IN THE COURT OF APPEALS OF IOWA

No. 2-543 / 11-1526
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RACHEL SUZANNE MEEKS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

Rachel Meeks appeals the sentence imposed upon her plea of guilty to first-degree theft. **JUDGMENT OF CONVICTION AFFIRMED, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.**

Jack E. Dusthimer, Davenport, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Grant Wilson, Legal Intern, Michael J. Walton, County Attorney, and Melisa Zaehringer and Kelly Cunningham, Assistant County Attorneys, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DANILSON, J.

Rachel Meeks appeals from the sentence imposed upon her plea of guilty to first-degree theft. She requests resentencing "due to prosecutorial violations of the plea agreement." Because the prosecutor effectively failed to "recommend against incarceration" and failed to stand mute in respect to the entry of a deferred judgment, we vacate the sentence and remand the case for resentencing.

I. Background Facts and Proceedings.

Rachel Meeks, while employed as a bookkeeper for Two Docs Chiropractic, wrote checks to herself in excess of $10,000; financial records, however, indicated the checks were made as payment for office equipment. As a result, Meeks was charged with first-degree theft and forgery.

On June 27, 2011, Meeks entered into a plea agreement in which she would plead guilty to the theft charge; the forgery charge would be dismissed; and the State "will recommend against incarceration of the defendant, recognizing that the court may grant a deferred judgment or place the defendant on probation."[1] On July 6, 2011, the district court accepted her guilty plea, but deferred accepting or rejecting the plea agreement for completion of a presentencing investigation (PSI) report. Judgment was not entered on the plea.

The PSI report was prepared, which indicated Meeks was eligible for deferred judgment. The author found Meeks "a very good candidate for deferred judgment, given her background and future career aspirations."

[1] The State's agreement was conditioned upon the defendant making restitution in the amount of $2561.67.

At the August 25, 2011 sentencing hearing, Meeks' attorney informed the court that "in the event that [Meeks] ends up with a felony conviction that she will no longer have the chiropractic license" and without the license, she would not be able to make payments on the $50,000 loan Dr. Troy Newmyer had agreed to take out to finance her starting a chiropractic business. Meeks' attorney argued for deferred judgment "so she can continue to be responsible."

Dr. Newmyer, one of the chiropractors of Two Docs Chiropractic, made a statement to the court of the financial difficulties Meeks' conduct had on the business, his professional life, and his finances. He stated that while Meeks was working for them as a bookkeeper, and because they trusted her and wanted to assist her in starting her chiropractic practice, he and his partner had paid for Meeks to take a part of her national board examinations and had given her a bonus. Newmyer also stated he had agreed to act as her preceptor (allowing her to practice under his license and supervision) and had taken out a $50,000 loan for her to set up her business, not knowing that she was stealing from them. He stated his trust in others was damaged; his professional license was being investigated because Meeks adjusted patients without his supervision; and his business and finances were suffering due to the investigation. He asked that the court not impose a prison term. But he also asked that the court not grant a deferred judgment because Meeks "committed these crimes, and so much more, and to date has had little or no consequence for her actions."

The following then occurred.

> The Court: Well, Doctor, you realize if I don't give her a deferred judgment, the likelihood of getting that $50,000 loan paid back is pretty slim.

> Dr. Newmyer: I understand that.
> The Court: And you would be responsible for that.
> Dr. Newmyer: Yes, I understand.
> The Court: You're willing to assume that responsibility?
> Dr. Newmyer: Yes.

The prosecutor then stated:

> Your Honor, given those circumstances, the State would recommend against incarceration. So essentially the State is recommending that the defendant be committed to the Director of Adult Corrections for an indeterminate term not to exceed 10 years. The State will recommend the suspension of that sentence with the requirement that she be placed on probation for five years.

Meeks counsel objected that the statement "is contrary to the terms and conditions of the Rule 2.10 plea agreement." The prosecutor argued it was "not contrary. It's acknowledging the various variables." The able trial court responded:

> Well, it does indicate that the State recognized that the Court may grant a deferred judgment or place the defendant on probation. From what you're saying, you're resisting the deferred judgment, so I'm not sure that violates it or not, but you might be treading on thin ice here.

In response, the prosecutor noted "a number of different variables" and stated, "for these reasons, I think this case is extremely tragic, and the State believes that she should be granted probation, but not a deferred judgment. The court addressed Meeks:

> Well, Ms. Meeks, I've looked at your presentence investigation. The theft of these monies was basically theft of money based on your position of trust by the employer, and that reflects poorly on your professional ability in regard to chiropractic. The only reason I was considering a deferred judgment was because of the $50,000 loan which was indicated. Since the doctor indicated that he understands that he would possibly be responsible for that loan if you do not continue to pay it, the Court feels that based on your lengthy time that you took this money, and especially since you were in a position of trust as a bookkeeper, the

> deferred judgment is inappropriate, and the Court considers that factor as indicating that period of probation is warranted with a felony conviction.

The court entered thereafter judgment, sentenced Meeks to a term not to exceed five years, suspended the sentence, and placed her on probation. Meeks now appeals.

II. Scope and Standard of Review.

This appeal revolves around the factual question of whether the prosecutor breached the plea agreement. The parties do not agree on our scope of review. Meeks argues we view the prosecutor's conduct de novo, citing standards of fair play. *See State v. Kuchenreuther*, 218 N.W.2d 621, 624 (Iowa 1974); *see also State v. Aschan*, 366 N.W.2d 912, 915 (Iowa 1985) (reviewing de novo whether termination of defendant from pretrial diversion program without adequate cause "violated standard of fundamental fairness and fair play" and hypothesizing, but not deciding, the due process clause is the basis for the standard). The State contends that if this question is properly preserved at all,[2] our review is for errors at law. *See State v. King*, 576 N.W.2d 369, 370 (Iowa 1998). We find the State to have the stronger argument.[3]

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[2] The State argues that defense counsel's limited objection at the sentencing hearing was without a ruling by the district court and therefore the question is not properly before us. *See State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008) (noting appellate court will "only review an issue raised on appeal if it was first presented to and ruled on by the district court"). We reject this contention because the district court did consider the objection stating, "From what you're saying, you're resisting the deferred judgment, so I'm not sure that violates it or not, but you might be treading on thin ice here."

[3] Not only is *King* the more recent precedent, but the parties in *Aschan* addressed the issue on constitutional grounds, which we review de novo, *see Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012), and the supreme court thus reviewed the issue as a constitutional claim, without deciding the basis for the fair play standard. *See Aschan*, 366 N.W.2d at 915. However here, Meeks has not asserted a violation of constitutional rights.

III. Analysis.

We are guided by prior cases discussing a prosecutor's compliance with a plea agreement. In *State v. Horness*, 600 N.W.2d 294, 298-99 (Iowa 1999), the court rejected the State's arguments that the county attorney did not breach the plea agreement because: (1) "the prosecutor explicitly referred to the plea agreement, and made the recommendation set forth in that written agreement"; (2) the prosecutor did not recommend that the sentencing court follow the presentence investigator's recommendation of incarceration; and (3) "[t]he plea agreement did not include any provision regarding the prosecutor's silence at sentencing." The court concluded:

> To the contrary, the county attorney undercut the benefit of the State's promised sentencing recommendations by referring twice to the "alternative recommendation" of the PSI and detailing the circumstances of the defendant's offenses in such a way as to support the PSI recommendation. One hearing the county attorney's comments would at best be ambivalent with respect to which recommendation met with the State's approval—the recommendation it promised to make in the plea agreement or the recommendation made by the presentence investigator. At worst, the county attorney appeared to make an official recommendation in compliance with the plea agreement and an alternative recommendation, the PSI recommendation, that the prosecutor considered as more appropriate given the circumstances of the offenses.
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> The State's promise to make a sentencing recommendation is of little value to the defendant if such a promise did not carry with it the implicit obligation to refrain from suggesting more severe sentencing alternatives.

Horness, 600 N.W.2d at 299.

In *King*, the court stated:

> Compliance with plea agreements is mandated by "our time-honored fair play norm and accepted professional standards." Violations or casual withdrawals of these agreements after detrimental reliance by the defendant are intolerable and adversely

> impact the integrity of the prosecutorial office and the entire judicial system.
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> In this case, the State agreed to remain silent at sentencing. It is clear from a review of the record that the prosecutor breached that agreement, and error was preserved by defense counsel's objections.

576 N.W.2d at 370 (citations omitted).

And in *State v. Bearse*, 748 N.W.2d 211, 216-17 (Iowa 2008), the court observed:

> We have said "[t]he State's promise to make a sentencing recommendation . . . [carries] with it the implicit obligation to refrain from suggesting more severe sentencing alternatives." *State v. Horness,* 600 N.W.2d 294, 299 (Iowa 1999) (recognizing the plea agreement "is of little value to the defendant" if the State is allowed to recommend alternative sentences); *see also State v. Birge,* 638 N.W.2d 529, 536 (2002) (finding breach of a plea agreement cannot be cured by prosecutor's offer to withdraw improper remarks, even in case where district court affirmatively stated it was not influenced by the improper comments). Not only did the State in this case mistakenly recommend incarceration at the outset, but it clearly suggested incarceration should be imposed by referring to the presentence investigation report (which recommended incarceration) and reminding the court that it was not bound by the plea agreement. The State clearly breached the plea agreement by suggesting more severe punishment than it was obligated to recommend.
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> The argument by the State that it ultimately complied with the plea agreement ignores our previous jurisprudence requiring the prosecutor to do more than merely inform the court of the promise made by the State. *Horness,* 600 N.W.2d at 299. The agreement in this case required a *recommendation* against incarceration. . . . The prosecutor did not present the recommended sentence with his approval or commend a sentence to the court other than incarceration, such as probation. Consequently, the State failed to fulfill the promise under the plea agreement to recommend against incarceration.

Here, Meeks argues the prosecutor violated the "spirit" of the plea agreement and asks for remand for resentencing before another judge. *See King*, 576 N.W.2d at 371 ("If a prosecutor breaches the plea agreement, the

remedy is either specific performance or withdrawal of the guilty plea."). The State contends the prosecutor did not breach the agreement, stating "the State would recommend against incarceration." But we note the very next comment by the prosecutor was, "So essentially the State is recommending that the defendant be committed to the Director of Adult Corrections for an indeterminate term not to exceed 10 years." Although the prosecutor subsequently recommended probation via a suspended sentence, the prosecutor also stated that Meeks should not be granted a deferred judgment. The plea agreement required to the prosecutor to acknowledge the court's authority to grant a deferred judgment, not resist the entry of a deferred judgment. Thus, the State's recommendation is at best "ambivalent." *See Horness*, 600 N.W.2d at 299.

> While proper use of plea agreements is essential to the efficient administration of justice, improper use of the agreements threatens the liberty of the criminally accused as well as the honor of the government and public confidence in the fair administration of justice. 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.
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> 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 to the defendant with respect to sentencing. The State must actually fulfill the promise. Where the State has promised to "recommend" a particular sentence, we have looked to the common definition of the word "recommend" and required the prosecutor to present the recommended sentence with his or her approval, to commend the sentence to the court, and to otherwise indicate to the court that the recommended sentence is supported by the State and worthy of the court's acceptance. . . .

> The record in this case not only demonstrates noncompliance with the express terms of the plea agreement, but also with the spirit of the plea agreement.

Bearse, 748 N.W.2d at 215-16 (internal quotation marks and citations omitted). Similiarly, the record in this case demonstrates noncompliance with the terms and spirit of the plea agreement; we conclude Meeks is entitled to specific performance of the plea agreement.

IV. Remedy.

Meeks' conviction is affirmed and her sentence is vacated. We remand for resentencing before a different district court judge at which the prosecutor will recommend against incarceration and acknowledge the court's authority to grant a deferred judgment or place the defendant on probation, without resisting the entry of a deferred judgment.

JUDGMENT OF CONVICTION AFFIRMED, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.