IN THE COURT OF APPEALS OF IOWA

No. 3-062 / 12-0893
Filed March 13, 2013

TODD WESLEY FRIDOLFSON,
Applicant-Appellant,
vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Pocahontas County, Kirk L. Wilke, Judge.

Todd Fridolfson appeals following the denial of his application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Kyle Mendenhall, student intern, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Ann Beneke, County Attorney, and Charles Gunderson, Assistant County Attorney, for appellee State.

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

DOYLE, J.

Todd Fridolfson appeals following the denial of his application for postconviction relief. He contends the State failed to make the sentencing recommendation as agreed in the parties' plea agreement, and his various attorneys were ineffective in failing to previously raise that issue. He also contends the district court imposed an illegal sentence. We affirm.

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

On November 16, 2009, Todd Fridolfson was charged by trial information with operating while intoxicated (OWI), third offense, as a habitual offender. As to the habitual offender enhancement, the trial information stated that Fridolfson had "at least twice before been convicted of a felony in a court of the State of Georgia of the United States." Attached to the trial information were minutes of testimony which stated, among other things, that Georgia representatives[1] would testify that Fridolfson was convicted and sentenced in Georgia for the crimes of (1) driving under the influence and homicide by vehicle first-degree, a felony, which occurred on October 16, 1987; (2) driving under the influence and habitual violator, a felony, which occurred on April 9, 1993; (3) driving under the influence, which occurred on February 7, 2008; and (4) driving under the influence, which occurred on July 11, 2008. The first additional minutes of testimony lists the April 9, 1993, February 7, 2008, and July 11, 2008 Georgia offenses.

[1] The minutes stated representatives from either the offices of the Clerk of Court, District Attorney, or Sheriff in either Woodbine or Brunswick, Georgia, would testify as to the information concerning Fridolfson's past Georgia felony convictions.

At some point, the State and Fridolfson entered into a plea agreement. A plea hearing was held on March 16, 2010. There, the State's prosecutor informed the court:

> [T]he plea agreement is that [Fridolfson] will plead guilty to both [c]ounts I and II and that the State's recommendation will be probation and will recommend the minimum [thirty] days for the amount of time [Fridolfson] is to serve and that he be sentenced the full term of the [fifteen] years, but then that would be suspended and he be placed on probation. Minimum fine, and this would be contingent on between now and sentencing, that [Fridolfson] did not consume or possess any alcoholic beverages or illegal drugs, did not commit any violations of the law between now and the time of sentencing and conditioned that [Fridolfson] does not fail to cooperate with the [p]resentence [i]nvestigation by the [p]robation [p]arole [o]fficer and also conditioned that he shows up for his sentencing at the time and date and place that we set for sentencing today.

Fridolfson advised the court that the prosecutor correctly stated the terms of their agreement.

The court then conducted a colloquy with Fridolfson. The court advised Fridolfson the State had alleged he was convicted of two felonies prior to November 9, 2009. The court explained the first felony alleged by the State was that Fridolfson was "convicted of the crime of homicide by vehicle, first-degree, and the offense occurred on October 16 of 1987, in . . . Camden County, Georgia . . . ." The court asked Fridolfson if he was in fact convicted of this crime, and Fridolfson responded: "Yes, sir." Fridolfson admitted he received a sentence on that conviction of fifteen years, and he was required to serve it or a portion of the sentence. There was some confusion as to what the correct case number was in that case because the October 16, 1987 incident spawned two criminal charges. In addition to the homicide by vehicle conviction, Fridolfson

was also convicted of driving under the influence. Fridolfson indicated that one of the case numbers, either 1987CR75 or 1987CR7503, was his conviction for homicide by vehicle.

The court then questioned Fridolfson about the second felony, driving under the influence and habitual violator that was alleged to have occurred on April 9, 1993. The court asked Fridolfson, concerning the other alleged felony, whether he was "convicted, sir, in Criminal No. 1993CR504 in Camden County Superior Court, Camden County, Georgia, of driving under the influence as a habitual violator." Fridolfson responded: "Yes, sir." Fridolfson stated that conviction was a felony and that his sentence for that conviction was for five years.

Thereafter, there was some confusion on Fridolfson's part. Fridolfson attempted to explain that his habitual violator felony occurred sometime prior to October 1987, but the charge had somehow

> got lost, shuffled up and they lost it and when I got the vehicle homicide charge I went and I did some time and they brought me out of Georgia Dept. of Corrections and brought that charge up while I was still incarcerated, they found it, so they wanted to go ahead and get it done with so that's when they brought it up.

Fridolfson claimed April 9, 1993, was the sentencing date, not the occurrence date, for the habitual violator conviction. However, Fridolfson's attorney noted his papers indicated the disposition date of that conviction was February 28, 1994, and Fridolfson later indicated he received a five-year consecutive sentence on his habitual violator charge and that charge was in 1993. Fridolfson admitted that both felony convictions were prior to November 9, 2009.

Thereafter, the court accepted Fridolfson's guilty plea, finding Fridolfson voluntarily entered into his guilty plea, he fully understood his rights and the consequences of his plea, and a factual basis existed for his guilty plea. After the court set a date for sentencing, the court discussed the issue of bail with the parties. The court stated:

> I gather from reading the file that there was a hearing set for March 1st that you did not appear for and the judge at that time forfeited bail and set a hearing on whether judgment would be entered on that bail for March 30th. It's now my understanding that the State . . . wishes to . . . vacate that order of forfeiture.

The prosecutor responded: "Yes, Your Honor, and also I believe [Fridolfson] knows if he doesn't show up, it's almost certain that the court would not go by any recommendation I might have or that I can change my recommendation, so [he's] got a high incentive to show up."

A sentencing hearing was held on April 12, 2010. After the State was asked what the State's recommendation in the case was, the prosecutor stated:

> First of all, Your Honor, there's two clarifications on the plea taking that I want to be entered of record. At the plea taking for the prior crimes in 1987, we said the date was October 16, 1987[,] [a]nd later . . . discovered that was the date of sentencing, so the actual date of the crime was . . . January 13, 1987. All the other particulars, including the case numbers, coincide correctly.
>
> The two crimes were driving under the influence and homicide by vehicle, first-degree, a felony. That's the first clarification.
>
> Second clarification is the day after plea taking, my mind did not recall whether or not we point-blank said that my recommendation would not be binding on the court during the negotiations for the plea taking that day. I knew that it had, so I called [Fridolfson's attorney, who was at the plea hearing,] and he said, yes, [Fridolfson] did know that any recommendation was not binding on the court. So I just wanted to make sure we have record on this now, rather than having it come up later with the question.

> The State recommends probation and [Fridolfson] be sentenced to the director for the [fifteen] years with probation and be ordered to serve the minimum.

Thereafter, the following exchange occurred:

> THE COURT: Mr. Fridolfson, were you advised at the time you entered your plea of guilty that you could be sentenced up to [fifteen] years in this case?
>
> [FRIDOLFSON]: Yes, sir.
>
> THE COURT: All right. Okay. All right. What is your recommendation? [Fifteen] years with probation?
>
> [THE PROSECUTOR]: Yes, Your Honor, with a minimum of [thirty] days. I have a proposed judgment entry prepared for that and also an alternate proposed judgment entry. I have given defense an email several days ago and I'll present the alternative to the court now.
>
> . . . .
>
> THE COURT: All right. And Mr. Fridolfson, do you wish to say anything with regard to mitigation of your sentence?
>
> [FRIDOLFSON]: Yes, sir. I have an alcohol problem and I would like to have some time to take care of that.
>
> . . . .
>
> THE COURT: Okay. All right. Well, I'm just looking at the [pre-sentence investigation report (PSI)]. The PSI, of course, recommends incarceration. But I'm looking at this: I asked when did you realize you had a drinking problem and alcohol problem. According to your PSI, you've got eight separate convictions for OWI, one vehicular homicide involving drinking while driving. That is you killed somebody when you were driving under the influence of alcohol; correct?
>
> [FRIDOLFSON]: Yes, sir.
>
> THE COURT: All right. So this is the eighth time, not the third, but the eighth time.
>
> In addition to that, you've had a host of other, you know, involvement: Driving while license under suspension, you were placed on parole several times, your parole was revoked. And this is particular[ly] interesting, after you were arrested for [OWI] . . . , you have been charged with driving while your license was suspended and also possession of cocaine; correct, that's down in Georgia?
>
> [FRIDOLFSON]: Yes, sir.
>
> THE COURT: Are those charges still pending down there[?]
>
> [FRIDOLFSON]: Yes, sir.
>
> THE COURT: Well, I have to say this on the record. I am absolutely dumbfounded—absolutely shocked that the State of

Iowa would recommend probation in this case. That just—it just baffles me.

This isn't a case of giving you a break, Mr. Fridolfson. You've been given break after break after break. You're going to kill somebody else and I'm not going to allow that to happen.

The sentence of the court is going to be [Fridolfson] is to be placed in incarceration for an indeterminate term not to exceed [fifteen] years. In addition—

[THE PROSECUTOR]: Your honor, the proposed order is the two-page order.

. . . .

You have two copies of the proposed order. The two-page order is the one for going to prison.

THE COURT: I'll take care of my own order. Thank you. . . .

. . . .

THE COURT: Anything else, gentlemen?

[FRIDOLFSON]: Can I say something, sir? I understand I've been given several chances, being picked up eight different times or whatever.

THE COURT: Convicted.

[FRIDOLFSON]: Yes, sir, I understand that. What I have a hard time dealing with is I've paid my price to them charges. I have, sir.

THE COURT: You are a danger to society, Mr. Fridolfson. You are an absolute danger to society. You have killed somebody while driving under the influence of alcohol.

[FRIDOLFSON]: And I lost my father the same way.

THE COURT: So what? That's too bad. I read that [in] the PSI. That gives you the right to go out and kill somebody else?

[FRIDOLFSON]: No, sir, it does not.

THE COURT: It seems we ought to be throwing you a crime title.

[FRIDOLFSON]: I'm not crying. I wanted to state my mind.

THE COURT: You state your mind. The fact of the matter is I looked at your record. Like I said before, I'm absolutely shocked this gentleman over here recommended probation in this case.

This is the worst OWI scenario that I've seen in [eighteen] years as a district judge and I cannot believe that anybody would even consider a probation.

[FRIDOLFSON]: Sir, if you've been a judge for [eighteen] years—

THE COURT: Yes, I have.

[FRIDOLFSON]: —Then it's not [the prosecutor's] fault that I've—that I've gotten.

THE COURT: It's [the prosecutor's] fault that he would come in here and recommend probation and that's it. Thank you.

We affirmed Fridolfson's conviction and fifteen-year sentence on direct appeal. *See State v*. *Fridolfson*, No. 10-0798, 2011 WL 1137017 (Iowa Ct. App. Mar. 30, 2011). Fridolfson now appeals the denial of his application for postconviction relief (PCR).

***II. Discussion*.**

For the first time on appeal, Fridolfson asserts the State failed to make the sentencing recommendation as agreed in the parties' plea agreement, and his various attorneys were ineffective in failing to previously raise that issue. Ordinarily, issues not raised in the trial court cannot be raised on appeal, but appellate review is not precluded if failure to preserve error results from a denial of effective assistance of counsel. *State v. Tobin*, 333 N.W.2d 842, 844 (Iowa 1983). Fridolfson also contends, also for the first time on appeal, the district court imposed an illegal sentence. A defendant is permitted to challenge an illegal sentence at any time. *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010). We address his arguments in turn.

***A. Ineffective Assistance of Counsel*.**

We first turn to Fridolfson's claims his trial counsel was ineffective for failing to object to the State's "failure" to make the sentencing recommendation it agreed to in the parties' plea agreement, and his PCR counsel and his appellate counsel were ineffective for failing to argue his trial counsel was ineffective for that reason. Our analysis of an ineffective-assistance claim is de novo. *Everett v*. *State*, 789 N.W.2d 151, 158 (Iowa 2010). To succeed on an ineffective-assistance-of-counsel claim, a defendant must show: "(1) counsel failed to

perform an essential duty; and (2) prejudice resulted." *State v*. *Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008).

> In analyzing the first prong of the test, we presume counsel acted competently. Counsel cannot fail to perform an essential duty by merely failing to make a meritless objection. Consequently, to determine whether counsel failed to perform an essential duty in failing to object to the prosecutor's recommendation, we must first determine whether the State breached the plea agreement. If the State did not breach the plea agreement, defense counsel could not have been ineffective.

State v. *Bearse*, 748 N.W.2d 211, 215 (Iowa 2008) (internal citations omitted). Conversely, 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."); *see also 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."). "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).

Upon our de novo review, we find little merit to Fridolfson's argument the prosecutor in the case "undercut" the agreement in making other statements to the court. Here, the prosecutor recited the State's recommendation to the court

multiple times, in the terms to which the parties agreed. The comments made by the prosecutor cited by Fridolfson plainly do not support any finding the prosecutor undermined the State's recommendation.

The prosecutor's statement at the plea hearing, that Fridolfson knew "if he doesn't show up, it's almost certain that the court would not go by any recommendation I might have," is taken out of context. The statement was made after the court accepted the plea and set a date for sentencing. The statement was made after the court had moved on to a matter concerning Fridolfson's bail status. The statement was in response to the fact Fridolfson had failed to appear for another hearing. It was not a negative comment as to the State's sentencing recommendation.

The prosecutor's clarification at the sentencing hearing that Fridolfson knew at the plea hearing that the recommendation was not binding on the court was just that, a clarification for the record. It does not appear from the record that the statement was intended to undercut the recommendation.

After reciting the State's recommendation to the court for the second time, the prosecutor stated, "I have a proposed a judgment entry prepared for that and also an alternate proposed judgment entry. I have given defense an e-mail several days ago and I'll present the alternatives to the court now." The record does not reflect whether the alternative orders were handed to the court at that time. No further reference to the alternative order was made until after the court pronounced the sentence. It does not appear from the record that the providing an alternative judgment order was intended in any way as a disparagement or negative comment as to the recommendation. Rather, it appears to us that the

prosecutor's providing alternative orders was merely intended as an accommodation to the court and was not in any way a disparagement or negative comment as to the recommendation.[2]

We find the actions of the prosecutor here to be distinguishable from the actions taken by the prosecutors in *Horness* and *Bearse*, cases where the prosecutors affirmatively undercut the State's sentencing recommendations. In *Horness*, the court found the prosecutor "undercut" the State's sentencing recommendation "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 recommendations." 600 N.W.2d at 299. Here, the prosecutor commended the recommendation and said nothing to suggest a more severe sentence. In *Bearse*, the State concurred with the recommendation of the PSI for incarceration. 748 N.W.2d at 213. When informed this was inconsistent with the plea agreement, the State merely said "the court is not bound by the plea agreement . . . we'll . . . abide by the plea agreement." *Id*. The court found the prosecutor "clearly breached the plea agreement by suggesting more severe punishment than it was obligated to recommend." *Id*. at 216. Again, here the prosecutor commended the recommendation and said nothing to suggest a more severe sentence.

The fact that the prosecutor supplied the court with alternative orders did not "undercut" the sentencing recommendation. In light of the fact the court was

[2] The prosecutor had previously provided the court with proposed orders. At the plea hearing, the prosecutor provided the court with two orders; one order accepted Fridolfon's plea of guilty, ordered a presentence investigation, released Fridolfson from jail, and set the terms of his release, and the other order cancelled a bail forfeiture hearing.

not bound by any plea agreement, it appears the alternative orders were supplied to the court as an accommodation or convenience. The prosecutor did nothing to advocate for the alternative order.

Although Fridolfson may be disappointed the prosecutor did not more fervently request the court follow its recommendation, there is no question the court knew the State's recommendation; the court was outraged by it. Given the court's strong comments at the sentencing hearing, it is clear that the court understood the State's recommendation and rejected it. The State did not breach or undercut its agreement with Fridolfson, and his trial counsel and subsequent attorneys were not ineffective for failing to raise his breach argument.

B. Illegal Sentence.

Fridolfson also argues he does not qualify as a habitual offender based upon the record made at the plea hearing, and, as his argument goes, his sentence was therefore illegal. Specifically, he contends the record does not establish that his first prior felony offense, vehicular homicide, had been reduced to judgment before he committed his second prior felony offense, habitual violator. Generally we review illegal sentences for corrections of errors at law, but to the extent the issue also implicates constitutional protections, our review is de novo. *State v*. *Brooks*, 760 N.W.2d 197, 204 (Iowa 2009).

Iowa Code section 902.8 (2009) provides:

> An habitual offender is any person convicted of a class "C" or a class "D" felony, who has twice before been convicted of any felony in a court of this or any other state, or of the United States. An offense is a felony if, by the law under which the person is convicted, it is so classified at the time of the person's conviction.

> A person sentenced as an habitual offender shall not be eligible for parole until the person has served the minimum sentence of confinement of three years.

The rationale of habitual offender statutes, adopted by our supreme court,

> is to give offenders due warning by conviction, sentencing and imprisonments of the consequences of persistence in criminality, and we hold that before one may be sentenced under such statute, it must be shown that he has previously been twice convicted, twice sentenced and twice imprisoned for felony, that the commission of the second offense was subsequent to his imprisonment upon conviction for the first and that the commission of the principal offense was subsequent to his imprisonment upon conviction for the second.

State v. *Conley*, 222 N.W.2d 501, 503 (Iowa 1974) (quoting C*ooper v*. *State*, 284 N.E.2d 799, 803 (Ind. 1972)). Thus, to qualify as a habitual offender, the sequencing must evidence the offender's first felony conviction and imposition of sentence preceded the second felony offense, and that both of the prior felony convictions and impositions of sentence preceded the offender's third conviction. *See id.* Our review of the record finds that sequencing of Fridolfson's prior felonies and his current conviction for which he was charged as a habitual offender was met in this case.

Fridolfson admitted he had twice before been convicted of felonies prior to the filing of the 2009 trial information in this case. The record before us indicates the vehicular homicide conviction was for a 1987 offense. The record before us indicates the habitual violator conviction was for a 1993 offense. Although there was some confusion at the hearing, the actual case numbers in those two felony cases coincide with Fridolfson's later clarification that the habitual violator felony charge occurred in 1993, and his sentence was thereafter, but prior to 2009. Moreover, Fridolfson did not provide any credible information that contradicts

those dates as asserted by the State. Based upon the discussion at the hearings, the court's statements on the record, and Fridolfson's responses and later clarification, we find that Fridolfson's prior convictions satisfy the requirements of Iowa Code section 902.8. We therefore conclude Fridolfson sentence as a habitual offender was not illegal.

IV. Conclusion.

Because we find the State made its sentencing recommendation as agreed to by the parties in the parties' plea agreement, we conclude Fridolfson's trial counsel and subsequent attorneys were not ineffective. Additionally, we conclude Fridolfson sentence as a habitual offender was not illegal because the statements on the record evidence Fridolfson's prior convictions occurred separately and before his charged OWI third offense, as a habitual offender, satisfying the requirements of Iowa Code section 902.8. Accordingly, we affirm his conviction and sentence.

AFFIRMED.