IN THE COURT OF APPEALS OF IOWA

No. 3-472 / 12-1557
Filed July 10, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROY ALLEN COLEMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

A defendant claims his counsel was ineffective for failing to object to the State's breach of the plea agreement. **SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.**

Christopher Kragnes of Kragnes & Associates, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, John Sarcone, County Attorney, and Celene Gogerty, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

TABOR, J.

Facing two felony counts, Roy Coleman entered an *Alford* plea[1] to a charge of dependant adult abuse, and in return the State dismissed a first-degree theft charge. On appeal, he asks us to find his counsel ineffective for not objecting to an alleged breach of the plea agreement. Because we conclude Coleman's counsel failed to perform an essential duty when he did not challenge the State's recommendation of incarceration rather than probation, we reverse the sentence and remand for resentencing in compliance with the plea agreement.

I. Backgrounds Facts and Proceedings

On February 10, 2012, the State charged Roy Coleman with theft in the first degree, in violation of Iowa Code sections 714.1 and 714.2(1) (2011), and dependant adult abuse, in violation of sections 235B.2(5)(a)(1)(c) and 235B.20(5). The State alleged Coleman took advantage of an elderly woman with dementia while acting as her caretaker by writing checks for amounts of more than $16,000 not benefitting the woman, making $23,000 in unauthorized charges on her credit card, and using her debit card on several occasions to withdraw money at a casino.

Coleman reached a plea agreement with the State. Coleman entered an *Alford* plea for dependant adult abuse in exchange for the dismissal of the theft

[1] An *Alford* plea allows a defendant to consent to the imposition of a sentence without admitting to participation in the crime. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

charge. The prosecutor appearing at the July 5, 2012 plea hearing[2] said "the agreement is for both parties to argue for probation." The prosecutor did not mention any contingency between Coleman's post-plea behavior and the sentencing recommendation. No written plea appears in the record.

The district court questioned Coleman and determined he was voluntarily and intelligently entering his guilty plea and understood the consequences. The judge made the only mention of Coleman's behavior:

> Mr. Coleman, I want to let you know what you do between now and the time set for sentencing will have an impact upon what my ultimate decision is. What I mean by that is if you get in further trouble or do[] things you shouldn't be doing, that will not look good for you at the time of sentencing.
>
> On the other hand, if you stay out of trouble, do what you're supposed to be doing, following the order that I entered today, that will look good for you when you come back for sentencing.

Coleman never challenged the validity of his plea.

On July 13, 2012, Coleman was arrested for operating while intoxicated, possession of drug paraphernalia, and a seat belt violation.

At the August 16, 2012 sentencing hearing, the State argued Coleman's plea "agreement is now null and void due to [Coleman's] new charge." The State recommended a sentence of imprisonment.

Defense counsel told the court: "We understand the State's recommendation, the recommendation contained in the presentence investigation." He then asked for a suspended sentence and probation for his client. Coleman gave a lengthy allocution at sentencing, saying he did not steal

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[2] A different assistant county attorney prepared the trial information and negotiated the plea agreement.

from the victim or "abuse her in any way." He admitted driving after he smoked marijuana but claimed he was treating "chronic pain."

The district court was not impressed with Coleman's excuses, and stated: "[T]he State's sentencing recommendation in this case is the one that's called for and recommended by the presentence investigation report and that's the sentence that I am imposing." Coleman now appeals his indeterminate five-year prison sentence.

II. Scope of Review

We review claims of ineffective assistance of counsel de novo because they arise from the Sixth Amendment. *See State v. Fannon*, 799 N.W.2d 515, 519 (Iowa 2011); *see also* Iowa Const. Art. I, Sec. 10; *State v. Vance*, 790 N.W.2d 775, 785 (Iowa 2010).

III. Analysis

Coleman argues his counsel performed ineffectively by failing to object to the State's breach of the plea agreement at the August 16, 2012 sentencing hearing. Ineffective-assistance-of-counsel claims require the defendant to demonstrate "an adequate record to allow the appellate court to address the issue." *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010); *see also* Iowa Code § 814.7(3). Because Coleman's argument rests on his counsel's failure to object at the sentencing hearing to the State's alleged breach of the plea agreement—as recited at the July 5, 2012 hearing—we are satisfied the record is adequate to decide this case on direct appeal. *See v. Fannon*, 799 N.W.2d at 520.

An ineffective-assistance claim requires proof that: "(1) [c]ounsel failed to perform an essential duty, and (2) prejudice resulted" from that failure. *State v. Bearse*, 748 N.W.2d 211, 214–15 (Iowa 2008); *accord Rompilla v. Beard*, 545 U.S. 374, 380 (2005); *Lamasters v. State*, 821 N.W.2d 856, 866 (Iowa 2012); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). Before we can determine whether defense counsel performed competently, we must determine if the State's sentencing recommendation constituted a breach of the plea agreement.

A. Did the State Breach the Plea Agreement?

Coleman argues the State breached the plea agreement because the prosecutor argued for incarceration rather than probation at the sentencing hearing. Coleman relies on the terms of the agreement articulated by the assistant county attorney and defense counsel at the plea hearing.

On appeal, the State insists the assistant county attorney did not breach the agreement because the parties conditioned their bargain on Coleman's "good behavior" between the plea hearing and sentencing.[3] The State admits the condition of "good behavior" was not disclosed at the plea hearing. The State further acknowledges Iowa Rules of Criminal Procedure 2.8(2)(c) and 2.10(2) require the terms of the plea agreement to be disclosed on the record at the plea hearing. But the State asserts neither rule dictates an agreed-upon term is excised from the plea bargain by the failure to disclose it to the court. The State

[3] The State does not and could not argue under existing case law that refraining from further criminal acts before sentencing was a condition implicit in the plea agreement. *See State v. Weig*, 285 N.W.2d 19, 22 (Iowa 1979).

points to the assistant county attorney's statement at sentencing to support the additional condition of the plea agreement—omitted from the recitation at the plea hearing.

We disagree with the State's interpretation of rules 2.8(2)(c) and 2.10(2). Those rules require disclosure of the plea agreement "in open court at the time the plea is offered." Their purpose is to fully inform the court of any promises that prompted the defendant to plead guilty and thereby to ensure the defendant's plea is knowing and voluntary. The terms disclosed in open court at the time the plea is offered are the only enforceable terms of the agreement—absent some extraordinary circumstances.[4] *See Baker v. United States*, 781 F.2d 85, 90 (6th Cir. 1986) ("It is impossible for a trial judge to properly administer a plea agreement if it consists of secret terms known only to the parties.").

At the sentencing hearing, rather than objecting, Coleman's counsel said: "I understand the State's recommendation." That statement could indicate a mutual understanding that Coleman's "good behavior" was an additional condition of the plea agreement. But defense counsel's comment was not specific enough to stand as Coleman's stipulation that an essential term was omitted from the recitation of the agreement at the plea hearing.

The absence of any reference in the plea record to the State's probation recommendation being contingent on Coleman's good behavior leads us to

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[4] We do not have occasion here to decide whether the parties to a plea agreement under our state rules of criminal procedure may reach a valid "side agreement"—the terms of which are not disclosed to the court. *See Scarborough v. State*, 945 A.2d 1103, 1112 (Del. 2008) (applying contract principles to find an oral "side" agreement between the defendant and the State, supplementing a written plea agreement, was enforceable).

conclude it was not a term of the agreement. *See State v. Loye*, 670 N.W.2d 141, 149 (Iowa 2003) (rejecting State's request to remand the case for the prosecutor to introduce documents allegedly executed by the defendant as part of her plea agreement). The assistant county attorney portrayed the plea agreement as "both parties to argue for probation." Defense counsel confirmed that recitation of the agreement. The court repeated only those terms for the defendant during the plea colloquy: "Mr. Coleman, my understanding of the plea agreement is that if the court would accept a plea pursuant to North Carolina v. Alford, at the time of sentencing, the parties are going to recommend a suspended sentence and probation. Is that your understanding?" Coleman replied: "Yes." Based on that understanding, Coleman entered his *Alford* plea.

The assistant county attorney at the plea hearing noted that one of his colleagues had prepared the trial information and engaged in plea discussions with Coleman. The assistant county attorney originally handling the case appeared at the sentencing hearing. This substitution in personnel may explain a less than thorough recitation of the agreement at the plea hearing, but it does not excuse the change of course at sentencing. Because a defendant relinquishes fundamental rights when accepting a plea agreement, "a prosecutor must take care to properly carry out all obligations and promises . . . in good faith." *Bearse*, 748 N.W.2d at 215. Even if the prosecutor breached the plea agreement inadvertently, the impact of the breach is not minimized. *Santobello v. New York*, 404 U.S. 257, 262 (1971).

We conclude the State breached its duty under the plea agreement on record by using Coleman's new charges as a basis to rescind its promise to recommend a suspended sentence.

B. Did Coleman Receive Effective Assistance of Counsel?

Because the State reneged on its promised sentencing recommendation, defense counsel had a duty to respond. "'[O]nly by objecting could counsel ensure that the defendant received the benefit of the agreement.'" *Bearse*, 748 N.W.2d at 217 (quoting *State v. Horness*, 600 N.W.2d 294, 300 (Iowa 1999)).

Counsel's failure to alert the district court to the State's breach of the plea agreement deprived that court of the opportunity to remedy the error, resulting in prejudice to Coleman. *See Horness,* 600 N.W.2d at 301. Coleman therefore has demonstrated his counsel rendered ineffective assistance; there is no need to preserve the issue for a possible postconviction relief proceeding.

Accordingly, we vacate the sentence and remand for resentencing before a different district court judge. At the resentencing, the State shall abide by the plea agreement, as it was recited on the record at the plea hearing. We do not suggest what the appropriate sentence should be. *See State v. Black*, 324 N.W.2d 313, 316 (Iowa 1982).

SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.