

**IN THE COURT OF APPEALS OF IOWA**

No. 7-908 / 07-0455  
Filed December 12, 2007

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**CORY ARDEN HURSEY,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Fayette County, John Bauercamper (plea) and Bruce B. Zager (sentencing), Judges.

Cory Hursey appeals his sentence following his plea of guilty for third-degree sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, W. Wayne Saur, County Attorney, and Nathan Lein, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

**ZIMMER, J.**

Cory Hursey appeals from the judgment and sentence imposed following his plea of guilty to third-degree sexual abuse in violation of Iowa Code section 709.4(2)(c)(4) (2005). He contends his trial counsel was ineffective because he failed to challenge the State's breach of the parties' plea agreement. We affirm the sentence and preserve his claim for possible postconviction relief proceedings.

In September 2006 the State charged Hursey with third-degree sexual abuse, a class C forcible felony, in violation of sections 709.1(1)(2), 709.1A, and 709.4. The State alleged that on July 19 or 20, 2006, nineteen-year-old Hursey performed a sex act with an intoxicated fourteen-year-old girl at a house party. Hursey pled not guilty. Subsequently, plea discussions took place, and the parties agreed that Hursey would be allowed to plead guilty to third-degree sexual abuse as a non-forcible felony in violation of section 709.4(2)(c)(4). See Iowa Code § 702.11(2)(c) (sexual abuse based on age difference statute is not a forcible felony).

On December 14, 2006, Hursey's counsel filed a written plea agreement signed by himself and Hursey, but not signed by the prosecutor.<sup>1</sup> The written plea outlined the terms of the plea agreement, which called for the State to recommend a suspended ten-year sentence, a suspended \$1000 fine, supervised probation for two to five years, and placement on the sex offender registry. The written plea indicated the State reserved the right to request

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<sup>1</sup> The plea agreement was mailed to the prosecutor on December 13, 2006, five days prior to the plea hearing.

residential facility placement, and Hursey reserved the right to request a deferred judgment. On December 18 Hursey appeared in open court and formally entered a guilty plea to sexual abuse in the third degree, as a non-forcible felony. The district court accepted his plea.

In March 2007 Hursey appeared for sentencing before a different judge. The judge, after briefly referring to the written plea agreement, the plea acceptance on December 18, and the presentence investigation report, asked for the State's sentencing recommendation. The prosecutor did not recommend a ten-year suspended prison sentence as provided in the written agreement. Rather, he stated, in part:

I would recommend, your honor, that whatever the court's [sentencing] decision, if it's more restrictive than either a deferred judgment or straight street probation, that the defendant be held in the Fayette County Jail until appropriate disposition could be held, if the court elects for him to go to the R[esidential] F[acility] or something more restrictive. . . .

Hursey's counsel did not object to the State's recommendation.

The court denied Hursey's request for a deferred sentence, sentenced Hursey to an indeterminate term of ten years in prison, but then suspended the sentence. The court also suspended the \$1000 fine, imposed two to five years of supervised probation, and required Hursey to register as a sex offender.

Hursey appeals. He contends the State did not recommend a suspended sentence as envisioned by the plea agreement and asks us to find that his trial counsel rendered ineffective assistance by failing to object to the State's alleged breach of the plea agreement. He asks that his sentence be vacated and the case be remanded for sentencing, or that his claim be preserved for

postconviction proceedings if the record is deemed insufficient to address his claim. The State contends the record before us is inadequate to address Hursey's claim of ineffective assistance of counsel and asks that the claim be preserved for possible postconviction proceedings.

Counsel's failure to object when the State breaches a plea agreement may be ineffective assistance of counsel. *State v. Horness*, 600 N.W.2d 294, 300-01 (Iowa 1999). We review claims of ineffective assistance de novo. *Id.* at 297. To prevail on a claim of ineffective assistance, Hursey must establish as a matter of law that counsel failed to perform an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 2064, L. Ed. 2d 674, 693 (1984); *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). Generally, we preserve claims of ineffective assistance to allow full development of the facts surrounding counsel's conduct. *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006). This is because postconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance. *Id.*

In this case, the parties' plea discussions are not part of the record. The prosecutor did not sign the written plea agreement, and the record does not make clear whether the written plea accurately reflects the prosecutor's understanding of his sentencing recommendation obligation. In addition, no record has been made regarding why defense counsel did not object to an apparent breach of the written plea agreement, and it is certainly possible that defense counsel may have had strategic reasons for not objecting to the

recommendation the State actually made.<sup>2</sup> Postconviction proceedings will allow a record to be made about the plea discussions, the parties' understanding of the plea agreement, and the conduct of counsel at sentencing. Finally, we believe both the prosecutor and defense counsel should have an opportunity to explain their conduct before either is found to have performed inadequately or acted unprofessionally.

Because we conclude the record is inadequate to address Hursey's claim of ineffective assistance of counsel, we affirm his conviction and preserve his claim for possible postconviction relief proceedings.

**AFFIRMED.**

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<sup>2</sup> For example, defendant's counsel may have had objective knowledge of the judge's sentencing decisions in similar cases or a subjective belief that the judge was going to impose a suspended sentence despite the State's recommendation.