

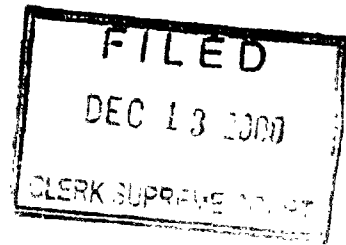
IN THE COURT OF APPEALS OF IOWA

No. 0-736 / 00-0199  
Filed December 13, 2000

STATE OF IOWA,  
Plaintiff-Appellee,

vs.

EDWIN DONTI VAN GUNDY,  
Defendant-Appellant.



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Appeal from the Iowa District Court for Polk County, D.J. Stovall (plea)  
and Robert D. Wilson (sentencing), Judges.

Defendant appeals from the judgment and sentence entered upon his  
guilty pleas to two counts of sexual abuse in the second degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson,  
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Jaki Livingston, Assistant  
County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

**MILLER, J.**

Defendant appeals from the judgment and sentence entered upon his guilty pleas to two counts of second-degree sexual abuse, in violation of Iowa Code section 709.3. He claims he received ineffective assistance because his trial counsel failed to object when the State did not fully commend the recommended sentence to the court. We affirm on appeal.

Edwin Van Gundy was charged with six counts of sexual abuse in the second degree. Pursuant to a plea agreement, he pled guilty to two counts of sexual abuse in the second degree. The State agreed to dismiss the other four counts, and to recommend concurrent sentences. The plea was not made pursuant to Iowa Rule of Criminal Procedure 9, thus, the court was not bound by the sentencing recommendation.

The sentencing hearing was held before a different judge than the judge who accepted defendant's guilty plea. The prosecutor pointed out this was not a Rule 9 plea. She recommended defendant's sentences should run concurrently. The two victims asked to have defendant serve consecutive sentences. Defendant was sentenced to a term of imprisonment, not to exceed twenty-five years on each count, to be served consecutively. Defendant appealed, claiming he received ineffective assistance because his trial counsel failed to object when the State did not fully commend the recommended sentence to the court.

We review de novo claims of ineffective assistance of counsel. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). Although claims of ineffective assistance of counsel are generally preserved for postconviction relief proceedings, we will consider such claims on direct appeal where the record is

adequate. *State v. Ceasar*, 585 N.W.2d 192, 195 (Iowa 1998). To prevail on a claim of ineffective assistance of counsel, the defendant must show his counsel failed to perform an essential duty and defendant suffered prejudice as a result of this failure. *Id.*

A violation of a plea agreement by the State adversely impacts the integrity of the entire judicial system. *State v. King*, 576 N.W.2d 369, 370 (Iowa 1998). Our supreme court has stated:

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."

*State v. Horness*, 600 N.W.2d 294, 298 (Iowa 1999) (quoting *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427, 433 (1971)).

When a prosecutor promises to recommend a specific sentence to the court, the prosecutor is required to:

present the recommended sentences with his or her approval, to commend these sentences to the court, and to otherwise indicate to the court that the recommended sentences are supported by the State and worthy of the court's acceptance.

*Id.* at 299.

In *Horness*, the prosecutor twice referred to the "alternative recommendation" of the pre-sentence investigation and supported this alternative recommendation by the way he detailed the circumstances of defendant's offenses. *Id.* The supreme court concluded the prosecutor had breached the plea agreement. *Id.* at 300. Because defense counsel failed to object, the court determined defense counsel had provided ineffective assistance and defendant had been prejudiced. *Id.* at 301.

In the present case, we find the prosecutor abided by the plea agreement.

At the start of the sentencing hearing the prosecutor stated:

It was the agreement of the parties at the time of the plea that Mr. Van Gundy would enter a plea of guilty to two of the six counts of sexual abuse in the second degree, and the State's recommendation would be that those sentences run concurrent. I would stand by that agreement.

Under questioning by the court, the two victims requested that defendant serve consecutive sentences. Defendant had sexually abused the two victims for several years while they were children, and caused one of the victims to become pregnant with his child. The victims pointed out defendant had ruined more than one life, and asked that he serve more than one sentence. After the victims had made their statements, in closing argument the prosecutor repeated the State's recommendation that the defendant receive concurrent sentences. She stated:

I would just advise the Court that -- you were not the Court that heard the plea -- that Judge Stovall made it clear that this was not a Rule 9 plea and that he would make the decision. That's the only other thing. I stand by our agreement that the State's recommendation is that the sentences should run concurrent.

The prosecutor properly recommended concurrent sentences, as required by the plea agreement. The prosecutor did not mention consecutive sentences. The victims' statements were made in response to questioning by the court, not the prosecutor. Defendant has failed to show he received ineffective assistance of counsel. We affirm the decision of the district court.

**AFFIRMED.**