

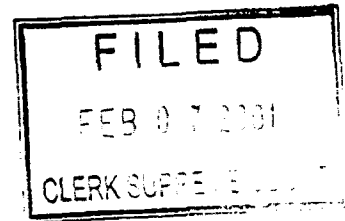
IN THE COURT OF APPEALS OF IOWA

No. 0-793 / 99-2047
Filed February 7, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID HOWARD LANG,
Defendant-Appellant.



Appeal from the Iowa District Court for Woodbury County, Robert C. Clem,
Judge.

Defendant appeals from the judgment and sentence entered upon his guilty plea to possession of more than five grams of methamphetamine with intent to deliver, second offense, in violation of Iowa Code sections 124.401(1)(b)(7) (1999) and 124.411. He contends (1) the district court abused its discretion in holding that he violated his cooperative plea agreement with the State, and (2) his trial counsel was ineffective. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell, Assistant Attorney
General, Thomas J. Mullin, County Attorney, and James J. Katcher, Assistant
County Attorney, for appellee.

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

SACKETT, C.J.

Appellant-Defendant, David Howard Lang, was arrested during the alleged sale of methamphetamine to a confidential informant. He pled guilty pursuant to a plea bargain to possession of more than five grams of methamphetamine with intent to deliver, as a second offense, in violation of Iowa Code sections 124.401(1)(b)(7) (1999) and 124.411. Defendant now challenges the plea proceedings. We affirm.

Defendant originally was charged with violation of Iowa Code 124.401(b)(7) and with possession of more than seven grams of a controlled substance without a tax stamp attached in violation of Iowa Code sections 453B.1 and 453B.12. As a part of the plea bargain the tax stamp charge was dropped but the possession charge was elevated to a second offense. A cooperation agreement that was a part of the plea agreement provided that defendant would cooperate with law enforcement agencies, and with the United States attorneys and Woodbury county attorneys. He was to be in daily contact with law enforcement and be available for interviews and debriefing with any of the authorities on their request. The question of whether defendant complied with the agreement was to be determined by the prosecuting attorney.

Defendant entered his guilty plea on August 13, 1999. Defendant had been incarcerated since his arrest and the State at the time of his plea recommended a modification of defendant's bond. Defendant was released from custody on signing an unsecured appearance bond of \$32,500. Defendant's sentencing was set for nine o'clock a.m. on October 22, 1999.

On September 21, 1999, on the State's application the court set a hearing for October 1, 1999 at three o'clock in the afternoon for the purpose of reconsidering the conditions of defendant's release. Defendant did not appear at the hearing, and a warrant was issued for his arrest. Defendant also failed to appear on October 22 for sentencing, and again a warrant was issued for his arrest. On November 10, 1999, the court reset sentencing for December 2, 1999.

On November 22, 1999, defendant then in jail, requested copies of his file from the public defender. Defendant himself then prepared a motion asking (1) for a new lawyer, (2) to withdraw his guilty plea, (3) to suppress evidence, (4) and to appoint an investigator. Defendant asked for certain documents and for a continuance of his case to allow preparation time. The motion was received by the court on November 29, 1999.

On December 2, 1999, the State dismissed the drug tax stamp violation advancing it was done pursuant to the plea agreement. At the December 2, 1999 hearing defendant testified in support of his motion. He claimed his name had been in the paper three times and nobody wanted to work with him. Defendant further testified he told agents that he had some information that a thousand pounds of methamphetamine was coming from California to Omaha, from Omaha to Sioux City, and from Sioux City to Sioux Falls. He said he was willing to give up the people involved in that or those transactions. He said he was only told his plea agreement would be withdrawn and he would go back to jail.

The prosecutor told the court that defendant told the officers he couldn't

do anything. He further said that defendant failed to provide any details about the alleged methamphetamine coming in so that it could be found. The prosecutor further said he had consulted with the drug task force and found the defendant had failed to satisfy the terms of the plea agreement.

The district court denied the defendant's claims his attorney was ineffective and refused to allow defendant to withdraw his plea. At the sentencing hearing the defendant argued again that he did not breach the cooperative agreement. The plea agreement had provided the State would recommend defendant's sentence with cooperation should be an indeterminate period of incarceration not to exceed twenty-five years. The prosecutor recommended a seventy-five year term. The district court sentenced defendant to fifty years in prison.

Defendant first contends the district court abused its discretion in finding that he breached the cooperation agreement. Our review is for abuse of discretion. *State v. Foy*, 574 N.W.2d 337, 339 (Iowa 1998); *State v. Blum*, 560 N.W.2d 7, 9 (Iowa 1997).

If a prosecutor breaches a plea agreement, the remedy is either specific performance of the agreement or withdrawal of the guilty plea. *State v. Hinnners*, 471 N.W.2d 841, 845 (Iowa 1991). Once the court has accepted a plea based on a plea agreement, the State may not unilaterally withdraw from the agreement without providing some basis for its action or affording some sort of due process. *State v. Barker*, 476 N.W.2d 624, 628 (Iowa App.1991).

However, performance of a plea agreement must be mutual. See *State v. Aschan*, 366 N.W.2d 912, 917 (Iowa 1985). If a defendant fails to uphold his or

her end of the agreement, the State has no obligation to provide the defendant the anticipated benefits of the bargain. *State v. Hovind*, 431 N.W.2d 366, 368 (Iowa 1988); *Aschan*, 366 N.W.2d at 917. If defendant violated the agreement he has no right to withdraw his guilty plea. *Foy*, 574 N.W. 2d at 340. The burden is on the State to show the defendant failed to live up to his end of the bargain. See *Barker*, 476 N.W.2d at 628.

The State dismissed the tax stamp charge even though it was not dismissed until after the defendant filed his pro se motion to withdraw the plea and resisted defendant's attempt to withdraw his plea.

The record supports a finding the defendant did not comply with the plea agreement. He failed to appear for a scheduled bond review hearing or the originally scheduled sentencing hearing. He was only brought to court after he was arrested and incarcerated on the basis of a warrant issued when he failed to appear.

The prosecutor testified he had checked with the drug task force and defendant had done little or nothing as provided for in the agreement. Rather, defendant told them he could do nothing. Defendant's testimony as to the events further supports the prosecutor's representations. The district court did not abuse its discretion in determining the defendant breached the agreement. We affirm on this issue.

Defendant contends the State violated the plea agreement in recommending defendant be incarcerated for the maximum period and that his trial attorney was not effective when he failed to object to the recommendation.

We review de novo defendant's claim his attorney was ineffective in failing

to object to the State's recommended sentence. See *Collins v. State*, 588 N.W.2d 399, 401 (Iowa 1998). To establish a claim of ineffective assistance of counsel, defendant must prove by a preponderance of the evidence both that his attorney failed to perform an essential duty and that prejudice resulted. See *State v. Williams*, 574 N.W.2d 293, 300 (Iowa 1998). While claims of ineffective assistance of counsel are ordinarily preserved for postconviction relief, we consider them on direct appeal if the record is clear, and plausible trial strategy and tactical considerations do not explain counsel's actions. See *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998).

Defendant cannot prevail on this claim unless he first proves the State breached the parties' plea agreement. *State v. Carrillo*, 597 N.W.2d 497, 500 (Iowa 1999). We have determined that the defendant did breach the agreement. Defendant's claim for relief on this issue is denied.

Defendant, as a subtopic to his contention he received ineffective representation of counsel in the district court, advances a series of questions asking that they be preserved for postconviction proceedings. He does not allege how his attorney at the district court level was ineffective in regard to the questions raised. We deny this request.

Defendant filed a pro se proof brief advancing a series of claims. The issues were not preserved for review and we do not address them.

AFFIRMED.