IN THE COURT OF APPEALS OF IOWA

No. 9-558 / 98-0129
Filed December 13, 1999

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LARRY E. FIELDS,
Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, Sandra J. Holien, Judge.

Larry E. Fields appeals his sentence after pleading guilty to operating while intoxicated, third offense, in violation of Iowa Code section 321J.2. Fields contends that (1) the trial court abused its discretion in proceeding with sentencing, knowing that the proposed sentence in the parties' plea agreement could not have been granted; (2) he was denied effective assistance of counsel by permitting sentencing to proceed without requesting a hearing on potential withdrawal of the guilty plea once it was determined that the bargained-for sentence could not be imposed; and (3) the prosecutor breached his ethical duty when he, upon learning that the bargained-for sentence could not be imposed, failed to take curative action. **AFFIRMED.**

Kermit L. Dunahoo, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, James DeTaeye, County Attorney, Jennifer Webster and Paul Crawford, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, J.J.

SACKETT, C.J.

Defendant appeals from his sentence on a conviction by guilty plea of operating a motor vehicle while intoxicated, third offense, in violation of Iowa Code section 321J.2. We affirm.

On February 20, 1998, defendant entered a guilty plea to the charge of operating a motor vehicle while intoxicated, third offense. A plea agreement had been made in which the state agreed (1) to recommend placement of defendant in the OWI offenders program and (2) to dismiss a companion simple misdemeanor in exchange for a guilty plea. At the plea hearing the judge informed defendant of the maximum punishment which could be imposed for the offense. The judge then told defendant she was not bound by the sentencing recommendation or any recommendation made by defendant's attorney or the presentence investigator. The judge then said, "So do you understand that by offering this plea of guilty today, you are in fact subjecting yourself to the possible imposition of the maximum sentence provided for by Iowa law?" Defendant responded he understood this. The court found there was a factual basis and accepted it.

Defendant was sentenced on March 18, 1998. A presentence investigation report and an addendum were completed by the second judicial district department of correctional services. The report was made available to defendant's attorney, defendant and the court prior to the sentencing hearing. Defendant's attorney told the court that she and defendant had an opportunity to review the documents and had no

corrections or modifications. Defendant's attorney stated she had no objections to the court's use of these documents during the course of sentencing. At the sentencing hearing the prosecutor stated the presentence investigator said in his report that according to department of corrections criteria, the defendant did not qualify for the OWI offenders program because ten years had not passed since the discharge of defendant from a forcible felony offense.[1]

The prosecutor stated he had spoken to the presentence investigator who told him that, but for that criteria, he would recommend the OWI offenders program for defendant. The prosecutor added that he thought it would benefit defendant to place him in the OWI offenders program since defendant needed long-term counseling and the initiation of a recovery program. The prosecutor then asked the court to not apply the department of corrections criteria and place defendant in the OWI offenders program.

Defendant's attorney joined in the recommendation of the state. She also related that the presentence investigator had indicated to her that he would have recommended that defendant be placed in an OWI offenders program but for the criteria. The counselor told defendant's attorney that he placed defendant on a list for placement at the B.G. Clark facility and requested that he be left on the list in the event that he would be sentenced to that program.

[1]The sole reason why defendant did not fit the continuum was that his parole was revoked for a 1985 robbery conviction so that he was not discharged from this forcible felony until 1989.

Defendant's attorney also stated she personally spoke with the placement officer at Oakdale concerning the department of corrections criteria. The officer told her a court order could override any of the criteria in the continuum. In other words, if the court rejected the recommendation of the department, the persons at Oakdale who classify people would order placement in an OWI offenders program.

After the recommendations of the parties the judge asked the prosecutor, defense counsel and defendant if they knew of any reason why judgment and sentence should not now be pronounced. They all responded in the negative.

The court ordered that defendant be remanded to the custody of the director of the department of corrections for purposes of determination of appropriate placement in the OWI continuum for an indeterminate term not to exceed five years.

The judge explained her decision was based on an evaluation of defendant's treatment situation by the Mid-Eastern Counsel on Chemical Abuse, where defendant had recently been placed. The evaluation found that defendant was at high risk for a relapse and a long-term treatment program was recommended. This recommendation was echoed in the presentence investigation report. The judge agreed with the findings of the report that defendant was inappropriate for placement in one of the OWI offender residential facilities and with the presentence investigator's recommendation defendant be committed directly to the Iowa Medical and Classification Center at Oakdale for further assessment and placement.

Defendant first contends the district court abused its discretion by proceeding with sentencing, or by at least informing defendant that he was pleading without any agreement, after it became apparent that the "enticement to plead guilty" was based on a mistake of law. Defendant claims since he did not qualify for the OWI offenders program pursuant to department of corrections criteria, the terms of the plea agreement were statutorily impossible to obtain and the options for sentencing were limited to a five-year prison term. Defendant further asserts that the trial court committed reversible error (1) in failing to expose the plea agreement as a "red herring" because the sentence bargained for could not be imposed, and (2) by failing to determine defendant fully understood and knowingly wanted to proceed to sentencing.

Discretion is abused in sentencing when exercised on grounds or reasons that are clearly untenable or to an extent clearly unreasonable. *State v. Melk*, 543 N.W.2d 297, 302 (Iowa App. 1995).

Iowa Code section 321J.2(2)(c) provides:

> [A] person convicted of a third or subsequent offense *may* be committed to the custody of the director of the department of corrections, who shall assign the person to a facility pursuant to section 904.513 *or the offender may be committed to treatment in the community under the provisions of 907.6."*

Iowa Code section 907.6 states:

> Probationers are subject to the conditions established by the judicial district department of correctional services *subject to the approval of the court, and any additional reasonable conditions which the court,* or district department *may impose* to promote rehabilitation of the defendant or protection of the community. . .

According to Iowa Code section 321J.2(2)(c), the sentencing judge had an option of either sentencing defendant to the custody of the director of the department of corrections or for treatment in the community. Thus, it is clear that the district court was not mandated by statute, as claimed by defendant, to sentence defendant to the custody of the director of the department of corrections. In addition, although persons sentenced under section 907.6 are subject to the conditions of the judicial district department of correctional services, these conditions are also subject to the approval of the district court, who also may impose any reasonable conditions to promote a defendant's rehabilitation and the protection of the community. Therefore, the district court, by sentencing defendant pursuant to section 907.6, could have overridden the department's recommendation and sentenced defendant to an OWI offenders program.

Iowa Code section 904.513 refers to the assignment of OWI violators to treatment facilities and provides as follows:

> 1. The department of corrections, in cooperation with the judicial district departments of correctional services, shall establish in each judicial district a continuum of programming for the supervision and treatment of offenders convicted of violating chapter 321J *who are sentenced to the custody of the director.* The continuum shall include a range of sanctioning options that include, but are not limited to, prisons and residential facilities. The department of corrections shall develop standardized criteria for the assignment of offenders pursuant to this chapter.
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> 3. The department shall adopt rules for the implementation of this section. . . . The rules shall also include . . . criteria for the evaluation of offenders . . .

Under Iowa Code sections 321J.2(2)(c) and 907.6, once a person is sentenced to the custody of the director of the department of corrections, the department will then assign the person to a facility in accordance with standardized evaluation criteria. Therefore, the criteria developed by the department of corrections, which made defendant in this case ineligible for an OWI offenders program, was only applicable because the district court sentenced him to the custody of the director of the department of corrections.

During the guilty plea hearing the judge went over the minimum and maximum sentences for the offense and the terms of the plea agreement. After doing so, she stated (1) she was not bound by the sentencing recommendation of the state that defendant be placed in an OWI offenders treatment program (2) nor was she bound by the recommendation of defendant's attorney or the presentence investigator. The judge also told defendant by offering to plead guilty he was subjecting himself to the possible imposition of the maximum sentences provided for by Iowa law. Defendant indicated to the court that he understood all of this.

At sentencing, the district court judge gave the parties an opportunity to object to or modify the presentence investigation report. Defendant's attorney and the prosecutor had the chance to make arguments about why they believed defendan should be placed in the OWI offenders program. When the sentence was pronounce the judge gave detailed reasons for her decision. She explained she agreed with recommendation in the presentence investigation report that defendant wa

appropriate for placement in one of the OWI offender residential facilities and should be committed directly to the Iowa Medical and Classification Center at Oakdale, Iowa, for further assessment and placement. The judge made it clear this was because the evaluation by the Mid-Eastern Council on chemical abuse found that he was at high risk for a relapse and that a long-term treatment program was recommended. Further, she indicated that recommendation was echoed in the presentence investigation report.

Thus, there is no indication in the record, contrary to defendant's allegations otherwise, that it was ever apparent the bargained-for sentence could not be imposed. Instead, the judge made her decision to sentence defendant to the custody of the director of the department of corrections because she agreed with the recommendation contained in the presentence investigation report. Prior to sentencing, defendant knew the judge was not bound by any of the sentencing recommendations and that by entering a guilty plea he had exposed himself to the maximum penalty for this offense. The district court acted reasonably in making its sentencing decision and was fair to defendant during the guilty plea and sentencing process. The district court did not abuse its discretion.

Defendant next contends his trial counsel performed incompetently in permitting sentencing to proceed without requesting a hearing on withdrawing defendant's guilty plea once it was determined the bargained-for sentence could not be imposed. Defendant claims his attorney's advice was outside the range of

competence demanded of attorneys in criminal cases because she failed to inform him of the only possible available sentence and thus, there was no potential advantage for him to accept the plea bargain.

Defendant also asserts that due to being misinformed by his attorney he opted to accept a plea agreement under the wrongful assumption he might be sentenced to an OWI offenders treatment program rather than prison. Defendant further advances that had his attorney correctly advised him regarding the impact of his decision, there is reason to believe that he would not have agreed to the plea.

We review claims of ineffective assistance of counsel de novo. *State v. Allison,* 576 N.W.2d 371, 373 (Iowa 1998). To prevail on a claim of ineffective assistance of counsel, a defendant must prove his or her counsel failed in an essential duty and that prejudice resulted. *State v. Phillips,* 580 N.W.2d 748, 754 (Iowa 1998). Defendant has the burden to show his counsel was ineffective by a preponderance of the evidence. *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). In doing so, defendant must overcome the strong presumption that his attorney's actions were reasonable under the circumstances. *State v. Shumpert,* 554 N.W.2d 250, 254 (Iowa 1996). The ultimate test is whether under the entire record and totality of the circumstances, counsel's performance was within the normal range of competency. *Meier v. State,* 337 N.W.2d 204, 206 (Iowa 1983).

To establish prejudice defendant must show there is a reasonable probability that, but for counsel's nonprofessional errors, the result of the proceeding would have

been different. *State v. Bugley,* 562 N.W.2d 173, 178 (Iowa 1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the defendant's trial. *Gering v. State,* 382 N.W.2d 151, 154 (Iowa 1997). The ultimate concern is with the fundamental fairness of the proceeding whose result is being challenged. *Collins v. State,* 588 N.W.2d 399, 402 (Iowa 1998).

Defendant's attorney's performance was within the normal range of competency. She did not misinform defendant about the law relating to the plea agreement since the district court judge did have options which included sentencing defendant to an OWI offenders program.

Defendant's attorney also did not fail to perform any essential duties. She reviewed that presentence investigation report that was the basis for the judge's decision. Defendant also had the chance to review this report. Defendant's attorney talked with the presentence investigator who had told her that but for the department criterion, he would recommend defendant to the OWI offenders program and had placed defendant on a list for one of those programs in the event that he was sentenced to that program. Defendant's attorney spoke with the placement officer at Oakdale who assured her defendant would be placed in an OWI offenders program if it were ordered by the court. Defendant's attorney told the court that MECCA, where defendant had previously been committed for inpatient treatment, recommended defendant be placed in a halfway house, and she argued this recommendation was for something that would simulate the OWI offenders treatment

program. Defendant's attorney further argued her recommendation was based on defendant never having had the benefit of going through the OWI offender treatment program.

Defendant also alleges the prosecutor reneged on the plea agreement and violated the fair play standard with the Due Process Clause of the Fourteenth Amendment by continuing with the sentencing after he determined the plea arrangement could not be granted. Defendant cites *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971) in support of his position.

In *Santobello*, the prosecutor agreed to allow defendant to plea to a lesser included offense and to not make a recommendation during sentencing. The sentencing was handled by a different prosecutor who, ignorant of the agreement, did make a recommendation. The judge sentenced defendant according to the second prosecutor's recommendation. The court found that the breach of the agreement was inadvertent, and trial judge stated the recommendation of the prosecutor did not influence his decision. The court nevertheless found the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises in the negotiation of pleas of guilty would best be served by remanding the case for further consideration. *Santobello*, 404 U.S. at 262, 92 S. Ct. at 499, 30 L. Ed. 2d at 433. The court reasoned the plea must be voluntary and knowing, and if it was induced by promises, the essence of those promises must in some way be known. *Id.*

The present case differs from *Santobello* in two critical respects. Here, the prosecutor did not renege on the plea agreement. At the guilty plea hearing, the prosecutor stated the state "will be recommending placement in the OWI offender program". At sentencing the prosecutor requested the court not follow the department of corrections criteria which disqualified defendant from placement in the OWI offenders program. He asked the court to place defendant in this program. He advocated this was for the benefit of defendant because it would meet his need for long-term counseling and initiation of a recovery program. Therefore, we find no violations of the fair play standard of the Due Process Clause by the prosecutor.

In addition, the terms of the plea agreement were not omitted as they were in *Santobello.* Here the recommendations that were agreed to in the plea bargain were pronounced by the prosecutor, defendant's attorney and the court.

Defendant also alleges that the prosecutor violated his ethical duties under DR-103 and EC-7-13 of the Iowa Code of Professional Responsibility in failing to take curative actions after learning the plea offer was not legally possible to perform. We find no merit in this contention, since implementation of the terms of the plea bargain were a possibility.

Finally, defendant contends that both defense counsel and the prosecutor failed to perform their duty to point out deficiencies in the plea process and to ensure that the guilty plea record shows that the plea is intelligent, voluntary and accurate, citing *State v. Findley,* 239 N.W.2d 852 (Iowa 1976).

In *Findley,* the duty of the court to address the defendant personally before accepting a plea of guilty in order to determine whether he understands the charge made, is aware of the penal consequences of the plea and that it is voluntarily entered was discussed. In this regard, the court commented that the prosecutor, as an officer of the court and as a representative of the public, has a responsibility to ensure, as far as he or she is capable, that the proceedings are legally adequate. The court went on to say that defense counsel had a comparable duty to ensure that the record shows the plea of his client is intelligent, voluntary and accurate. *Findley,* 239 N.W.2d at 855. The prosecutor and defense counsel in the instant case did not fail to perform their duty in this regard, as there were no legal defects in the proceedings.

AFFIRMED.