

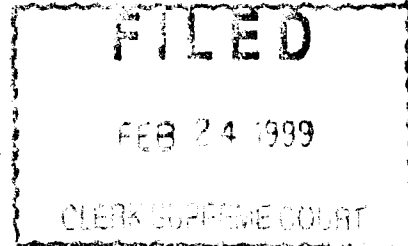
**IN THE COURT OF APPEALS OF IOWA**

No. 9-039 / 98-981  
Filed February 24, 1999

**STATE OF IOWA,**  
Appellee,

vs.

**ROBERT HORNESS,**  
Appellant.



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Appeal from the Iowa District Court for Hardin County, Peter B. Newell,  
District Associate Judge.

On appeal from his convictions for operating a vehicle while intoxicated,  
second offense, and child endangerment, Robert Horness claims his trial counsel was  
ineffective in failing to object to his claim that the State breached the plea agreement.

**AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant  
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney  
General, and Rick Dunn, County Attorney, for appellee.

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

**VOGEL, J.**

On appeal from his convictions for operating a vehicle while intoxicated, second offense, and child endangerment, Robert Horness claims his trial counsel was ineffective in failing to object to his claim the State breached the plea agreement. We find no such breach and therefore affirm.

**Background facts.** Horness was arrested on December 14, 1997, after being pulled over for speeding. Four children were passengers in the car; the two younger children, aged two and three, were not properly secured in a car seat or safety belt. Horness was ultimately charged with driving under suspension, operating while intoxicated, second offense, and child endangerment.

On April 21, 1998, the State dismissed the DUS charge, and Horness pled guilty to the remaining charges pursuant to a plea agreement. Horness was sentenced to an indeterminate term of two years for each conviction, with the sentences to run concurrently. Horness was also fined \$1,500 for the OWI conviction, and \$500 for the child endangerment conviction; the latter fine was suspended. Horness now appeals.

**Ineffective assistance.** Horness claims his counsel was ineffective for failing to object to the State's alleged breach of the plea agreement.

To prevail on a claim of ineffective assistance of counsel, the burden rests with the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987); *State v. Palmer*, 569 N.W.2d 614, 617 (Iowa App. 1997).

Our standard of review is de novo. See *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997); *State v. Havemann*, 516 N.W.2d 26, 28 (Iowa App. 1994).

The written plea agreement provided as follows:

The State will dismiss the Driving Under Suspension. The State will recommend 7 days in jail and a \$1,500 fine on the OWI 2nd and 48 hours and a \$500 fine on the Child Endangerment, as well as surcharge, court costs and attorney fees.

At sentencing, the prosecutor stated:

Your Honor, the State had indicated to the Defendant's prior counsel that we would recommend, with the plea of guilty . . . . On the OWI, 2nd charge, seven days in jail, \$750 [sic]; and a \$500 fine, 48 hours in jail on the Child Endangerment charge.

However, we had an alternative recommendation, if you go along with the recommendation of the PSI. The Defendant's understanding is set forth in her [sic] guilty plea; State dismissing the Driving Under Suspension charge, which we do at this time. The State will recommend seven days in jail and \$1,500 on the OWI, 2nd; 48 hours and \$500 fine. We believe that is correct.

We would note for the Court that the recommendation of the PSI is different than that, based on the Defendant's long history with criminal offenses, but we do believe that we are abiding by our plea agreement.

There was not any injury here. I think the facts speak for itself. Driving drunk, you have kids in the car and they're not buckled up, that you are putting those children in danger, and fortunately there was not an accident. But the law is clear that if you drive drunk and you have kids in the car and you don't have them bucked up -- apparently he was speeding in addition to drinking and driving -- so he was a risk on the road and he was a risk to himself, to other drivers, and to these small, helpless children.

So we would ask the Court to issue the appropriate sentence.

After this somewhat enigmatic speech, Horness's counsel asked what recommendation the State was actually making. The court echoed defense counsel's apparent confusion. The prosecutor then stated:

Your Honor, the State has set forth its recommendation. . . .

The State will dismiss the Driving Under Suspension, which we did. The State will recommend seven days in jail and a \$1,500 fine on the OWI, 2nd, and a \$500 fine on the Child Endangerment, and that is what we have done. I think the State is well within its right for the -- for the State to tell the Court to issue an appropriate sentence.

We have made our recommendation. The Court has the PSI. And the Defendant will make a recommendation and the Court will issue an appropriate sentence. We do believe that we have complied with our plea agreement.

We find the State's editorial comments about the nature of the crime and reference to the PSI were vague. They did not directly violate the plea agreement, although the comments could be construed as being somewhat contrary to the spirit of the plea agreement. Such comments are to be discouraged. *See* ABA Standards for Criminal Justice §3-6.1 commentary at 3-94 (2nd ed. 1986) (“[O]nce guilt is determined, it is important that prosecutors maintain an attitude of fairness and objectivity.”). We find no breach of duty as Horness's counsel made an inquiry to clarify the exact recommendation of the State for the court, and the State verified the correct agreement.

As we determined Horness's counsel did not fail to perform an essential duty, we find no ineffective assistance of counsel and hereby affirm his convictions and sentences.

**AFFIRMED.**