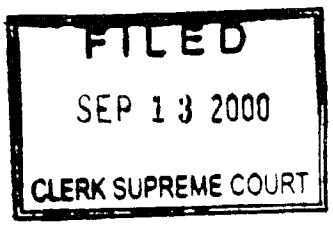
IN THE COURT OF APPEALS OF IOWA

No. 0-484 / 99-1500
Filed September 13, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANIEL WILLIAM HOWARD,
Defendant-Appellant.



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

Daniel Howard appeals from the district court's judgment and sentence entered upon his conviction of assault causing bodily injury. **CONVICTION AFFIRMED; SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.**

James L. Beres of Letz, Sween & Beres, P.C., Eldora, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, and Richard N. Dunn, County Attorney, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

VAITHESWARAN, J.

Daniel William Howard appeals his conviction and sentence for assault. He contends the State breached a plea agreement and his trial attorney provided ineffective assistance in failing to object to the breach. We agree with both contentions and accordingly vacate Howard's sentence and remand for resentencing before a different judge.

I. Background Facts and Proceedings

The State charged Howard with two counts of assault after he struck two employees at the Eldora Training School.[1] Howard entered a written guilty plea which recited the following plea offer by the State: "In exchange for the Defendant's plea of guilty to Count One, the County Attorney will dismiss Count Two and recommend a suspended sentence at time of sentencing." At the plea proceedings, the district court confirmed with Howard that he signed the plea agreement, then confirmed with the prosecutor and defense counsel that the agreement as set forth in the written plea was still the plea agreement. Specifically, the court engaged in the following discussion with counsel for the State and for defendant:

> THE COURT: Mr. Howard, the plea agreement is set out in Paragraph No. 5, and that indicates that the State in return for your plea to one count, is going to recommend some suspending of the sentence at the time of your sentencing. Is that still the plea agreement, Mr. [defense counsel]?
> [DEFENSE COUNSEL]: Yes, it is.
> THE COURT: Mr.[prosecutor], is that still the plea agreement?
> [PROSECUTOR]: Yes.

At sentencing, the court asked the prosecutor for the State's recommendation. He responded,

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[1] Howard was seventeen at the time, but agreed to waive juvenile court jurisdiction.

Your Honor, the State wants to first clarify the plea agreement so there is no misunderstanding. The plea agreement on this case was codified in a letter to defense counsel's partner, on June 11th, 1999. The second paragraph of the letter sets forth that we would ask for a PSI to be done and that we will follow the recommendation at the time of sentencing. I will also dismiss Count 1 of the Trial Information. That is what we intend on doing.

The plea agreement, as set forth in my letter, is --that is different than what appears in the guilty plea filed by the Defendant in his Entry of Guilty Plea. On page 2, Numbered Paragraph 5, it indicates that the State will recommend a suspended sentence at the time of sentencing.

I spoke with [defense counsel] yesterday and clarified the plea agreement, and it is my understanding that he agrees that the plea agreement is correct as set forth in my letter, and I want to clarify that for the Court.

So, in accordance with the plea agreement, we do ask the Court to follow the recommendations in the Presentence Investigation Report. We believe it is appropriate.

One year in jail is somewhat unusual for an assault, but we believe in this case it is very much appropriate. This Defendant has a long history at his young age of assaulting individuals, especially individuals that are in a position of authority. To provide a deterrent for him and a deterrent to others, we believe that one year in the Hardin County Jail is an appropriate place for him to reside for the next year.

So, we believe that the evaluation, resources section of the PSI, is appropriate. And we certainly realize that substance abuse treatment and some of these matters that he needs to tend to cannot necessarily be done in jail. However, the report also says that one--there is no indication that he could complete a term of probation. Extensive aggressive and assaultive behavior makes him a danger to the community. So we believe that society is much better off having him in jail for a year than to certainly risk reoffending by the Defendant while he receives any of these treatments.

So we ask the Court to follow the PSI; sentence the Defendant to 365 days in jail. Thank you.

Defense counsel did not object to the State's characterization of the plea agreement. The district court adopted the State's recommendation and sentenced Howard to a jail term of 365 days. This appeal followed.

II. Ineffective Assistance of Counsel

Howard contends his attorney provided ineffective assistance in failing to object to the State's "clarified" plea agreement. Although a party is generally required to object to preserve error, we have noted an exception to this error preservation rule where counsel rendered ineffective assistance. *State v. Rubino*, 602 N.W.2d 558, 563 (Iowa 1999).

While we generally preserve ineffective assistance of counsel claims for postconviction relief proceedings, we may consider such claims on direct appeal where the record is adequate. *Id.* The State contends we cannot determine on this record "whether the State's clarification of the plea agreement constituted a breach of the plea agreement or an accurate report of what was agreed upon by the parties." We disagree. The plea agreement was reduced to writing and confirmed by the court. Under these circumstances, we deem the record adequate for review on direct appeal. *See State v. Homess*, 600 N.W.2d 294, 298 (Iowa 1999). We review this constitutional claim de novo. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999).

Under well established principles governing ineffective assistance of counsel claims, we must determine whether: (1) counsel breached an essential duty and (2) prejudice resulted. *State v. Arne*, 579 N.W.2d 326, 330 (Iowa 1998). The first element requires an applicant to overcome a strong presumption of counsel's competence and establish counsel's conduct was outside the normal range of competency. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). In the guilty plea context, the second element requires an applicant to show there is a

reasonable probability that, but for counsel's errors, the applicant would have insisted on going to trial rather than choosing to plead guilty. *Id.* at 541.

This case is virtually identical to *Horness*, 600 N.W.2d at 299-300. The Iowa Supreme Court held in *Horness* that the State breached a plea agreement by failing to inform the court it supported its earlier promise regarding sentencing. The court further held defense counsel breached an essential duty by failing to object to the breach, reasoning "no possible advantage could flow to the defendant from counsel's failure to point out the State's noncompliance." *Horness,* 600 N.W.2d at 300. Finally, the court held counsel's breach prejudiced the defendant because, had an objection been lodged, "the court would have allowed the defendant to withdraw his guilty pleas, or would have scheduled a new sentencing hearing at which time the prosecutor could make the promised recommendation." *Id.* at 301.

We can find no reasoned basis for distinguishing this case from *Horness.* As in *Horness*, the State's plea agreement was committed to writing. Therefore, there was no ambiguity as to what the State offered Howard. As in *Horness,* the court confirmed the substance of the plea agreement with the parties. Indeed, the prosecutor expressly acknowledged he agreed to recommend a suspended sentence. As in *Horness*, the prosecutor subsequently disavowed his earlier agreement to recommend a suspended sentence. In fact, in this case, he did not just decline to recommend a suspension of the sentence but affirmatively urged the court to impose the maximum jail time allowed.

For these reasons, we conclude: (1) the State breached its plea agreement; (2) trial counsel breached an essential duty by failing to object to the

breach; and (3) trial counsel's breach prejudiced Howard. Accordingly, we further conclude trial counsel rendered ineffective assistance. We affirm Howard's conviction but vacate his sentence and remand for resentencing before a different judge.

CONVICTION AFFIRMED; SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.