# STATE OF IOWA, Plaintiff-Appellee, vs. MICHELLE LYNNE RISIUS, Defendant-Appellant.

2016 | Cited 0 times | Court of Appeals of Iowa | August 31, 2016

IN THE COURT OF APPEALS OF IOWA

No. 15-1365 Filed August 31, 2016

STATE OF IOWA, Plaintiff-Appellee,

vs.

MICHELLE LYNNE RISIUS, Defendant-Appellant.

---

Appeal from the Iowa District Court for Hardin County, Paul B. Ahlers, District Associate Judge.

A defendant appeals her sentence following her guilty plea to possession of a controlled substance. AFFIRMED.

Kimberly A. Voss-Orr of Law Office of Kimberly A. Voss-Orr, Ames, for appellant.

Thomas J. Miller, Attorney General, and Tyler J. Buller, Assistant Attorney General, for appellee.

Considered by Vogel, P.J., McDonald, J., and Scott, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2015). SCOTT, Senior Judge.

Michelle Risius appeals following her guilty plea to possession of a controlled substance methamphetamine in violation of Iowa Code section

125.401(5) (2015). As part of the plea agreement, the parties presented a joint recommendation that Risius, in exchange for her guilty plea, would receive a deferred judgment and one year of probation. The agreement was not made binding on the court. Ultimately, the court rejected the sentencing recommendation, imposed judgment, sentenced Risius to thirty days in jail with all but four days suspended, and placed Risius on probation for a year subject to certain restrictions. On appeal, Risius claims her counsel was ineffective in failing to object to the breach of the plea agreement. She also claims the court abused its discretion by imposing, rather than deferring, judgment and sentence. Finally, she claims the court abused its discretion when it imposed certain probation conditions restricting her ability to be present in locations where drugs or alcohol are present.

I. Motion to Dismiss.

After the case was transferred to this court, the State moved to dismiss the appeal her sentence moot. See Rarey v. State, 616 N.W.2d 531, 532 (Iowa 2000). Risius resisted the motion to dismiss, asserting the appeal is not moot despite the discharge of her sentence because, if we rule in her favor and remand for resentencing, she could receive a deferred judgment rather than a conviction. The deferred judgment could then be expunged from her record upon the successful completion of probation, which would benefit her in the future. n action is moot if it no longer presents a justiciable controversy

because the issues involved have become academic or nonexistent. A case is

moot when judgment, if rendered, will have no practical legal effect upon the

existing controversy. State v. Wilson, 234 N.W.2d 140, 141 (Iowa 1975). We

agree with Risius that the first two claims on appeal are not moot in light of the

sentencing option of a deferred judgment, if we agree with her challenges to her

conditions on her probation is moot because any relief this court could offer on

probation. claim on appeal, but we deny the motion to dismiss with respect to the first two

claims, which we will now address.

II. Ineffective Assistance of Counsel Breach of Plea Agreement.

In her first claim on appeal, Risius contends her attorney rendered

ineffective assistance by failing to object plea

agreement at the time of sentencing. Ineffective-assistance claims are reviewed

de novo because the claims implicate the counsel. State v. Perkins, 875 N.W.2d 190, 192 (Iowa Ct. App. 2015). To prove

counsel was ineffective, Risius must prove by a preponderance of the evidence

both that counsel failed to perform an essential duty and that this failure resulted

in prejudice. See State v. Bearse, 748 N.W.2d 211, 214 15 (Iowa 2008).

Because counsel could not be considered ineffective

assistance if the State did not breach the plea agreement, our analysis turns on

whether the State breached the agreement at sentencing. See State v. Lopez, 872 N.W.2d 159, 169 (Iowa 2015) (noting defense counsel has a duty to object to

appeal turns on whether the prosecutor breached the agreement). If counsel

fails to object to a breach of the plea agreement at sentencing, prejudice is

presumed. Id. at 170.

The plea agreement was for a joint sentencing recommendation of a

deferred judgment plus the applicable fines, surcharges, and costs. At

sentencing, the court asked the State to present its evidence, arguments, or

recommendations. The prosecutor stated:

Thank you, Your Honor. The recommendation of the State is that the defendant receive a deferred judgment today for the charge of possession of methamphetamine. Additionally, as part of the plea agreement with the defense, the State did agree to request a dismissal of the related drug paraphernalia charge, a simple misdemeanor charge, and the defendant agreed to pay the court costs on that.

The court confirmed with Risius that she agreed to pay the costs associated with

the dismissed charges, criminal history, which included several driving-while-barred or driving-while-

suspended offenses. The court then confirmed with defense counsel the

prosecutor had accurately recited of the plea agreement, which defense counsel confirmed.

On appeal Risius claims the prosecutor breached the agreement by

merely reciting the agreement without making any real recommendation or

advocating in favor of the agreement. While the prosecutor used the word

, sentence with her approval, to commend the sentence, or to indicate the sente See Bearse, 748 N.W.2d at 216.

We conclude the State did not breach the terms of the plea agreement.

Unlike the prosecutor in Bearse, here the prosecutor did not in any way

encourage the court to adopt a harsher sentence. See id Not only did the

State in this case mistakenly recommend incarceration at the outset, but it clearly

suggested incarceration should be imposed by referring to the presentence

investigation report (which recommended incarceration) and reminding the court

that it was not bound by the plea agreement. here also did not

express any implicit or explicit material reservation about the sentence it was

recommending or suggest alternative sentences. See State v. Horness, 600

The prosecutor also breached the plea

agreement by informing the court of an alternative recommendation and making

statements implying that the alternative recommendation was more worthy of

acceptance. Nor did the State undermine its recommended sentence by

soliciting unfavorable victim impact statements or introducing unfavorable

evidence. See Lopez make an

end run around an agreed sentencing recommendation of probation by soliciting

a victim-impact effectively undermine[] the

s sentencing recommendation by using the photos in a manner suggesting

a more onerous sentence [i]s warranted

There is no indication that, as part of the plea agreement, the State

reasons

why the recommended sentence should be adopted. See United States v. Benchimol It may well be that the Government in a

particul make a particular

recommendation to the court, and it may be that the Government in a particular

case might agree to explain to the court s

making a particular recommendation. But respondent does not contend, nor did

the Court of Appeals find, that the Government had in fact undertaken to do

either of these things here. for to recommend a deferred judgment and nothing the prosecutor said or did,

explicitly or implicitly, undermined the plea agreement. There was therefore no

-

assistance claim fails. See State v. Brubaker, 805 N.W.2d 164, 171 (Iowa 2011)

We will not find counsel incompetent for failing to pursue a meritless issue.

III. Abuse of Discretion.

Risius also contends the court abused its discretion in not granting a

deferred judgment on her age. The

youthful lapse in judgment, the court went on to say that, a drug an

illegal drug of any type, this type on any type of charge, but on a charge like this. So I hope that this

has been an experience that will cause you to rethink what you are doing with

people have lapses in judgment that are worthy of a deferred judgment. Risius claims the court ignored the fact that older people can also have lapses in

judgment and they also have more at stake in terms of career, family, and status

in the community. Risius also points out her criminal history has no drug- or

alcohol-related charges.

We review the district court

discretion. See State v. Seats, 865 N.W.2d 545, 552 (Iowa 2015) (noting the

standard of review pertinent matters in determining a proper sentence, including the nature of the

State v. Thacker, 862 N.W.2d 402, 405

(Iowa 2015) (citation omitted). While the court must state its reasons for

impos terse and succinct statement may be sufficient, so

l s statement does not prevent review of the

exercise of the trial court's sentencing discretion. Id. at 408 (citation omitted).

While the district court did focus on Risius age, it also considered other

factors:

Okay. Ms. Risius, my goals with respect to sentencing are to provide for your rehabilitation and the protection of the community. In trying to achieve those goals, to the extent these details have been made known to me, I have taken into account your age, your employment circumstances, your family background, your prior criminal history, the nature of the offense and facts and circumstances surrounding it, and the recommendations of the parties. I have also considered your request for a deferred judgment. In considering that request, I again consider all the factors I just mentioned with the goals of rehabilitation and the protection of the community. I realize that your criminal history consists of driving offenses, but they do include two aggravated misdemeanors. The court considered a number of factors, not just not required to specifically acknowledge each claim of mitigation urged by a

defendant. State v. Boltz, 542 N.W.2d 9, 11 (Iowa Ct. App. 1995). We discern

AFFIRMED.