[Cite as *State v. Spence*, 2009-Ohio-6386.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 09-CA-25
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-169
v.	:	
	:	(Criminal Appeal from
MICHAEL P. SPENCE	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 4th day of December, 2009.

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STEPHEN K. HALLER, Atty. Reg. #0009172, by ELIZABETH A. ELLIS, Atty. Reg. #0074332, Greene County Prosecutor's Office, 61 Greene Street, Xenia, Ohio 45385
Attorneys for Plaintiff-Appellee

ROBERT ALAN BRENNER, Atty. Reg. #0067714, Post Office Box 341021, Beavercreek, Ohio 45434-1021
Attorney for Defendant-Appellant

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BROGAN, J.

{¶ 1} Michael Spence has a long criminal history of convictions for abusing harmful intoxicants. Courts have sentenced him to treatment programs on several occasions, but Spence cannot seem to kick his huffing habit. In late 2008, he pled guilty to two more charges of abusing harmful intoxicants. Spence and the prosecutor had reached a plea agreement: in exchange for pleading guilty, the

prosecutor agreed to recommend a sentence of community control with inpatient treatment at a secure inpatient facility where Spence could get help for his addiction.

{¶ 2} At the sentencing hearing, Spence's psychiatrist testified. He told the court that Spence has what's called a "dual diagnosis," a term, according to the doctor, that describes a patient who has an underlying mental illness in addition to substance abuse, in Spence's case, schizophrenia. The doctor testified that, in his opinion, it is best to treat both conditions together at a secure inpatient facility. The prosecutor cross-examined the doctor and got the doctor to admit, among other things, that he did not know if such treatment would work for Spence, and that he could not say what the success rate for such treatment programs is. The prosecutor did not make a recommendation to the court regarding the sentence it should impose. The trial court, noting Spence's criminal history and the apparent ineffectiveness of treatment programs, rejected the idea of sending Spence to inpatient treatment, and instead sentenced him to 24 months in prison, the maximum sentence.

{¶ 3} Spence's timely appeal from the sentencing decision is now before us.[1] In it, Spence contends that the prosecutor broke his promise by failing to recommend that he be sentenced to community control with inpatient treatment. Spence also contends that defense counsel rendered ineffective assistance when counsel failed to object to the prosecutor's breach, and the trial court erred in imposing the two-year prison sentence upon him. We will address the second

[1]Along with his appeal, Spence filed a motion under Loc.App.R. 2.8(B), requesting that his case be expedited for review and determination. We granted the motion.

assignment first because it is dispositive of this appeal.

Second assignment of error

{¶ 4} "MR. SPENCE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS."

{¶ 5} Spence contends that defense counsel failed to provide effective assistance when he failed to object to the prosecutor's breach of the plea agreement. We agree.

{¶ 6} To prevail on a claim of ineffective assistance, a defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense, that is, there is a reasonable probability that but for counsel's performance, the outcome would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674. "Reasonable probability" means sufficient probability to undermine confidence in the outcome. *Strickland*, at 695.

{¶ 7} "When a prosecutor induces a defendant to plead guilty based upon certain promises, the prosecutor has a duty to keep those promises." *State v. Simpson*, 158 Ohio App.3d 441, 2004-Ohio-4690, at ¶14, citing *Santobello v. New York* (1971), 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427. Here, according to the plea agreement, "In return for Defendant's plea of guilty as charged in the indictment, the State recommends Community Control with inpatient treatment at the Nova House." Nov. 6, 2008 Petition to Enter a Plea of Guilty, ¶14. Yet the prosecutor did

not make this recommendation to the trial court at the sentencing hearing. Rather, when the court asked the prosecutor if he had anything to say before sentencing, he replied only, “The State really isn't taking a position. The State just wants the Court to have all the information and make a decision, whatever decision the Court makes, the Court determines is in [the] best interest of the public and as well as the Defendant, the State concurs with that, Your honor.” (Sentencing Transcript, p.27). Making this his sole statement, the prosecutor failed to abide by the agreement. See *State v. Quinn*, Miami App. No. 02CA54, 2003-Ohio-5743 (finding breach of a plea agreement when the prosecutor agreed to recommend concurrent sentences but said nothing at the sentencing hearing); see, also, *State v. Simpson*, 158 Ohio App.3d 441, 2004-Ohio-4690 (finding breach of a plea agreement when the prosecutor agreed to recommend the minimum sentence but was silent at the sentencing hearing).

{¶ 8} Clearly, Spence’s counsel’s performance was deficient. Spence had agreed to plead guilty on the promise the State would recommend that he receive a community control sanction. Instead, the prosecutor reneged on that agreement and made no such recommendation. Not only did the prosecutor not make the agreed-upon recommendation, he cross-examined the defense psychiatrist for the purpose of suggesting that in-patient treatment would likely not be a successful alternative to a prison sentence for Spence. At that point, Spence’s counsel had a duty to object to the prosecutor’s conduct and a duty to insist that the prosecutor carry out the terms of the plea agreement or permit his client to withdraw his plea. Counsel, however, inexplicably remained silent, breaching his duty to his client.

{¶ 9} Spence's counsel's conduct and that of the prosecutor undermines this court's confidence in the outcome of the trial court's proceedings. The Appellant's second assignment of error is Sustained. The Appellant's other two assignments are rendered moot by our resolution of Appellant's second assignment.

{¶ 10} This judgment of the trial court is Reversed and Remanded for re-sentencing before a different trial judge. See *Santobello v. New York*, supra.

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DONOVAN, P.J., and FROELICH, J., concur:

Copies mailed to:

Stephen K. Haller
Elizabeth A. Ellis
Robert Alan Brenner
Hon. J. Timothy Campbell