IN THE COURT OF APPEALS OF IOWA

No. 1-593 / 10-0490
Filed August 24, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROSS IAN RIVER CASHEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Delaware County, Lawrence H. Fautsch (plea proceedings) and George L. Stigler (sentencing), Judges.

Ross Cashen appeals from the judgment and sentence entered following his guilty plea to lascivious acts with a minor. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, Virginia Barchman, Former Assistant Attorney General, and John Bernau, County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

Ross Cashen appeals from the judgment and sentence entered following his guilty plea to lascivious acts with a minor, in violation of Iowa Code § 709.8(2) (2001). Cashen argues his counsel was ineffective for failing to file a motion in arrest of judgment because there was no factual basis to support his guilty plea. Upon our review, we find there was a factual basis to support Cashen's guilty plea. We therefore conclude counsel was not ineffective for failing to file a timely motion in arrest of judgment following Cashen's guilty plea to lascivious acts with a child. However, we preserve Cashen's claim that he was not allowed an adequate amount of time to examine the evidence against him for a possible postconviction relief proceeding. We affirm his conviction and sentence.

I. Background Facts and Proceedings.

Ross Cashen was charged by trial information on May 12, 2008, with second-degree sexual abuse of his half-sister, C.C.O., in violation of Iowa Code sections 709.1 and 709.3(2). The charges arose from incidents that occurred in May 2001 and June 2001, when C.C.O. was eleven years old and Cashen was twenty years old. In 2007, C.C.O. informed police Cashen had sexually assaulted her on multiple occasions in 2001. The minutes of evidence provided she would testify Cashen "fondled her, he penetrated her vagina with his fingers and penis and he attempted to force sexual intercourse on her, but he was unable to get his penis into her vagina completely, so he humped her leg and he climaxed on her thigh." The minutes of evidence also provided C.C.O. would testify Cashen performed oral sex on her.

On June 9, 2008, Cashen entered a plea of not guilty. He waived his right to a trial within one year. Cashen later entered a plea agreement with the State, allowing him to plead guilty to either section 709.8(1) or 709.8(2), both class "D" felonies under the 2001 Iowa Code. On October 21, 2009, Cashen entered a plea of guilty to the charge of lascivious acts with a child in violation of section 709.8(2). The district court specifically informed Cashen of his constitutional rights, the elements of lascivious acts with a minor, the consequences of his plea, and the factual basis in support of the plea. The district court instructed Cashen on his right to file a motion in arrest of judgment. On February 5, 2010, Cashen filed a motion to withdraw his guilty plea. It was denied on February 8, 2010, as untimely filed. On March 8, 2010, Cashen was sentenced to an indeterminate prison term not to exceed five years. Cashen appeals.

II. Scope and Standard of Review.

To directly challenge a guilty plea, a defendant must have filed a motion in arrest of judgment contesting the plea. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001); *see* Iowa R. Crim. P. 2.24(3). An exception is allowed if the failure to preserve error is a result of ineffective assistance of counsel. *State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005). Our review of ineffective assistance of counsel claims is de novo. *Id.* "Although ineffective assistance of counsel claims are generally preserved for postconviction relief actions, we will consider the claim on its merits on direct appeal when an adequate record exists." *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008).

The record before us details the minutes of evidence, as well as the plea hearing and sentencing transcripts. The State clearly expressed the details of

the plea agreement and allowed Cashen to select whether he would plead guilty to Iowa Code section 709.8(1) or 709.8(2), provided that he "completely state the acts that he committed." We find the record sufficient to review Cashen's ineffective-assistance-of-counsel claim on direct appeal.

III. Analysis.

To demonstrate ineffective assistance of counsel, Cashen must prove by a preponderance of the evidence: (1) his counsel failed to perform an essential duty and (2) prejudice resulted from that failure. *Id.* at 214-15. To prove a failure to perform an essential duty, Cashen must show defense counsel's actions were outside the normal range of competency. *State v. Barnes*, 791 N.W.2d 817, 823 (Iowa 2010). Cashen must overcome the presumption that counsel's actions were reasonable under the circumstances. *State v. Horness*, 600 N.W.2d 294, 298 (Iowa 1999).

Central to Cashen's claim that defense counsel provided ineffective assistance is his argument that there was no factual basis for his guilty plea to lascivious acts with a child, pursuant to section 709.8(2). That section provides:

> It is unlawful for any person eighteen years of age or older to perform any of the following acts with a child with or without the child's consent unless married to each other, for the purpose of arousing or satisfying the sexual desires of either of them:
>
> . . . .
>
> (2) Permit or cause a child to fondle or touch the person's genitals or pubes.

Iowa Code § 709.8(2). "If an attorney allows a defendant to plead guilty to an offense for which there is no factual basis and to waive the right to file a motion in arrest of judgment, the attorney breaches an essential duty." *Philo*, 697 N.W.2d at 485.

Cashen contends defense counsel should have filed a motion in arrest of judgment because there was no factual basis to support the finding he caused C.C.O. to touch his genitals for the purpose of satisfying his sexual desires. Here, the record reflects only two sources to discern a factual basis for Cashen's plea: (1) the court's inquiry with the defendant, and (2) the minutes of testimony.[1] The record is only required to show facts that support the offense; it does not need to demonstrate the totality of evidence necessary for a guilty conviction. *Id.*

A. Factual Basis. In this case, the factual basis for Cashen's guilty plea is supported by the minutes of evidence, along with Cashen's admission to his acts at the plea hearing. We acknowledge that during the plea colloquy, the court asked Cashen if the witnesses listed in the minutes of testimony would come "into court and said those things under oath, would they be telling the truth as they relate to the charge of lascivious acts with a child . . . ?"[2] To this question, Cashen answered, "No." However, after Cashen and his attorney visited outside the courtroom, the following colloquy occurred:

> DEFENSE COUNSEL: Your Honor, I explained to my client outside the courtroom that the Court is required if the Court is to take my client's plea of guilty to make a finding of fact as to the charge to which he is pleading, and I explained to him specifically again what the charge was under 709.8(2) and explained to him what I thought the Court was asking for was there enough facts contained within the minutes of evidence to support a plea of guilty to that charge.
>
> THE COURT: Or to—support a finding of guilty by a jury to that charge, yes.

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[1] *See State v. Ortiz*, 789 N.W.2d 761, 768 (Iowa 2010) (observing that a factual basis can be discerned from four sources: (1) inquiry of the defendant, (2) inquiry of the prosecutor, (3) examination of the presentence report, and (4) minutes of evidence).

[2] The minutes of evidence provided that C.C.O. would testify to the sexual abuse she sustained. Other accounts in the minutes of evidence support the victim's depiction of what occurred in 2001.

> CASHEN: Yes.
>
> THE COURT: If this matter came on for trial, do you think that the State could prove beyond a reasonable doubt that you did commit the crime of lascivious acts with a child between the months of May and—or during the months of May and June 2001 in Delaware County in that you did perform the following act with C.C.O. with or without her consent for the purpose of arousing or satisfying the sexual desires of either of them, that being permit or cause that child to fondle or touch your genitals or pubes? Do you think that the State could prove that beyond a reasonable doubt at trial?
>
> CASHEN: I don't know. I can't predict that so—
>
> THE COURT: Did you during those months, in fact, permit or cause that child to fondle or touch your genitals or pubes?
>
> CASHEN: Say that again.
>
> THE COURT: Did you, in fact, permit or cause that child to fondle or touch your genitals or pubes?
>
> CASHEN: That's what I'm pleading guilty to.
>
> THE COURT: That's what you've just pled guilty to, yes.
>
> CASHEN: Yes.
>
> THE COURT: All right. The defendant is advised that he would be required to make any applicable victim restitution. Do either counsel know of any reason why this plea should not be accepted?
>
> STATE: No.
>
> DEFENSE COUNSEL: No, your honor.

We first note the prosecutor and defense counsel have a duty to point out deficiencies in the plea proceedings and neither raised a concern about the factual basis in this case. *State v. Williams*, 224 N.W.2d 17, 19 (Iowa 1974). Although the cold transcript might suggest some ambiguity in Cashen's responses, clearly the trial judge, prosecutor, and defense counsel were all of the opinion that Cashen's affirmative responses were in response to whether he "permitted or caused the child to fondle or touch his genitals or pubes."[3] Accordingly, we decline to read into the cold transcript that Cashen's assent at the end of the colloquy was intended in some other manner.

[3] We also observe that an untimely motion to withdraw the plea was filed by Cashen's attorney, but the motion did not allege a lack of a factual basis for the plea.

B. Meaning of Touch. Cashen also argues that while the minutes of evidence support that he touched C.C.O., there is no evidence he caused her to touch his genitals. We disagree. Iowa law does not limit a "touch" to occur only with one's hands. The word "touch" is defined, among other things, as "1a. to bring a bodily part briefly into contact with so as to feel . . . , b. to perceive or experience through the tactile sense." *Webster's Third New International Dictionary* 2415 (1993); *State v. Pearson*, 514 N.W.2d 452, 458 (Iowa 1994) (Snell, J., dissenting) (quoting this Webster's definition); *see also State v. Constable*, 505 N.W.2d 473, 479 (Iowa 1993) (observing that defendant "touched" between the victim's legs with his tongue). Indeed, the evidence supports that Cashen caused C.C.O.'s genitals and leg to come into contact with and to touch his genitals and mouth.

The Nebraska supreme court recently addressed a similar issue in *State v. Fuller*, 779 N.W.2d 112, 116 (Neb. 2010). In that case, the defendant argued he did not commit sexual abuse on his nine-year-old stepbrother, C.F., by rubbing his penis on C.F.'s shin. *Id*. Specifically, the State was required to prove that a "touching by C.F. of the defendant's sexual or intimate parts or the clothing covering the immediate area of the defendant's sexual or intimate parts when such touching is intentionally caused by the defendant . . . for the purpose of sexual arousal or gratification of either party" had occurred. *Id*. at 114-16; *see* Neb. Rev. Stat. § 28-318 (2009).

The defendant contended no crime had occurred because (1) C.F.'s shin was the only body part of C.F. involved so the touch could not be considered "sexual contact" and (2) he did not cause C.F. to "touch" his intimate parts. *See*

Fuller, 779 N.W.2d at 115-16. The court rejected the defendant's argument, finding that the Nebraska statute did not "specify a part or parts of the victim's body that must touch the actor's sexual or intimate parts." *Id*. at 116. As the court further observed:

> We construe a "touching" in this context to be physical contact between two body parts, although for completeness, we note that the statute states that the defendant-actor may be clothed. As long as it is shown that two body parts made physical contact, and one of such parts was the sexual or intimate part of the defendant-actor, it is not necessary under § 28-318(5) to engage in an unsolvable analysis of whether at any moment the actor was "touching" the victim or whether the victim was "touching" the actor for sexual contact to have occurred. . . . Thus, when there has been physical contact between a victim and the actor's sexual or intimate part, there has been a "touching by the victim," and we reject Fuller's argument to the effect that the statute requires that the touching be initiated by an act of the victim.

Id. We find this analysis to be helpful in this case, where Cashen seeks to make an analogous argument. We agree a "touch" means "physical contact between two body parts." Accordingly, we find the physical contact between C.C.O.'s genitals and legs and Cashen's genitals and mouth constituted a touch for purposes under Iowa Code section 709.8(2).

The minutes of testimony support the following: (1) Cashen was twenty years old, and was not C.C.O.'s spouse in May 2001 and June 2001; (2) Cashen caused a child under the age of fourteen, namely, C.C.O.; (3) to touch his genitals (4) for the purpose of satisfying his sexual desires. *See* Iowa Code § 709.8(2). This cumulative evidence supports a factual basis for Cashen's guilty plea. "If a factual basis existed, counsel was not ineffective for failing to file a motion in arrest of judgment . . . ." *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Because the record in this case contains a factual basis to support a

finding that Cashen did permit or cause a child to fondle or touch his genitals or pubes, it follows that defense counsel did not breach an essential duty by allowing him to plead guilty to lascivious acts with a minor or by declining to file a motion in arrest of judgment. *See id*.

C. Prejudice. Even if we had found that Cashen's counsel failed to perform an essential duty, Cashen would still be burdened to prove that he was prejudiced by this error. *State v. Taylor*, 689 N.W.2d 116, 134 (Iowa 2004) (a defendant must establish both elements of his ineffective assistance claim to have a successful claim). Demonstrating prejudice "require[s] the party seeking relief to prove a reasonable probability of a different outcome had the breach not occurred; *i.e.*, that but for counsel's breach of duty, the party seeking relief would not have pled guilty and would have elected instead to stand trial." *State v. Carroll*, 767 N.W.2d 638, 644 (Iowa 2009). Had defense counsel filed a motion in arrest of judgment, as Cashen argues was proper, the motion would have been denied because a factual basis did exist for his guilty plea. *Brooks*, 555 N.W.2d at 448.

D. Pro se claim. Cashen contends, through a pro se brief, that defense counsel was ineffective in failing to allow him an adequate amount of time to examine the evidence against him. We find the record inadequate to address this contention, and preserve Cashen's claim for a possible postconviction relief proceeding.

IV. Conclusion.

Upon our review, we find there was a factual basis to support Cashen's guilty plea. We therefore conclude counsel was not ineffective for failing to file a

timely motion in arrest of judgment following Cashen's guilty plea to lascivious acts with a child. We preserve Cashen's claim that he was not allowed an adequate amount of time to examine the evidence against him for a possible postconviction relief proceeding. We affirm his conviction and sentence.

AFFIRMED.