

**IN THE COURT OF APPEALS OF IOWA**

No. 3-1059 / 13-0342  
Filed December 5, 2013

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**RICHARD DUSTIN SCOTT BLANCHARD,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Delaware County, Thomas A. Bitter (guilty plea) and Michael J. Shubatt (sentencing), Judges.

Richard Blanchard appeals from judgment and sentences entered upon his guilty pleas to two counts of lascivious acts with a child and one count of third-degree sexual abuse. **JUDGMENT AND SENTENCES VACATED, AND CASE REMANDED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, and John W. Bernau, County Attorney, for appellee.

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

**DANILSON, J.**

Richard Blanchard appeals from judgment and sentences entered upon his guilty pleas to two counts of lascivious acts with a child and one count of third-degree sexual abuse. Because the complaining witness was fourteen years of age, the record shows as a matter of law that the defendant did not commit the crime of lascivious acts with a child. Plea counsel breached an essential duty in allowing Blanchard to enter the guilty pleas to lascivious acts with a child. We invalidate the entire plea agreement by vacating all of his convictions and remand to the district court.

**I. Background Facts and Proceedings.**

The minutes of evidence indicate H.P., age fourteen, told a police officer that on July 29, 2012, Richard Blanchard sucked on her breast, leaving a hickey; bit her breast, leaving a mark; and penetrated her vagina with his finger. H.P. also informed the officer that on July 30, Blanchard penetrated her vagina with his finger, performed oral sex on her, and then engaged in sexual intercourse with her. When questioned, Blanchard stated things “went too far” with H.P. He admitted sucking on her breast and placing his finger in her vagina, and the next day having sex with her. He stated she consented after “he pressed the issue several times.”

Blanchard, age twenty-four, was charged with two counts of sexual abuse in the third degree, in violation of Iowa Code section 709.4(2)(c)(4) (2011), and two counts of lascivious acts with a child, in violation of section 709.8—all class “C” felonies.

Blanchard pleaded guilty to one count of third-degree sexual abuse and two counts of class “D” lascivious acts with a child, and agreed to consecutive sentences being imposed on the two lascivious acts convictions. In exchange, the State agreed to dismiss the other third-degree sexual abuse count and make no recommendation when the defendant argued for a deferred judgment on the third-degree sexual abuse count.

On appeal, Blanchard contends plea counsel was ineffective in allowing him to plead guilty without a factual basis. He also contends the sentencing court considered improper factors. Because we vacate the convictions and remand, we need not address Blanchard’s sentencing challenge.

## **II. Scope and Standards of Review.**

We review claims of ineffective assistance of counsel de novo. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). To establish an ineffective-assistance-of-counsel claim, a defendant must show by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *Id.*

## **III. Discussion.**

The law requires that a factual basis for a defendant’s plea be disclosed in the record. *State v. Ortiz*, 789 N.W.2d 761, 767 (Iowa 2010). The standard for a sufficient factual basis is only “that the facts support the crime, ‘not necessarily that the defendant is guilty.’” *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001) (citation omitted); see also *Ortiz*, 789 N.W.2d at 768 (“[T]he record does not need to show the totality of evidence necessary to support a guilty conviction, but it

need only demonstrate facts that support the offense.”). “[U]nder no circumstances may a conviction upon [a] plea of guilty stand if it appears that the facts of the charge do not state a violation of the statute under which the charge is made.” *State v. Mitchell*, 650 N.W.2d 619, 620 (Iowa 2002); see also *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

For purposes of criminal law and procedure, a “child” is “any person *under* the age of fourteen years.” Iowa Code § 702.5 (emphasis added); *State v. Graves*, 491 N.W.2d 780, 781 (Iowa 1992). H.P. was fourteen years of age at the time of the alleged offenses. As a matter of law, there is no factual basis for Blanchard’s plea of guilty to two counts of lascivious acts with a child.

“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.” *State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005). The State agrees trial counsel breached an essential duty in failing to challenge the existence of a factual basis to support the defendant’s plea of guilty to two counts of lascivious acts with a child.

We must next determine the proper remedy. Blanchard seeks a remand for dismissal of the two lascivious acts with a child charges and challenges the sentence imposed upon his third-degree sexual abuse conviction. The State, however, argues the entire case should be remanded for further proceedings rather than simply remanded for dismissal. We agree.

In *Schminkey*, the court concluded that when a guilty plea has no factual basis in the record, two possible remedies exist:

Where the record establishes that the defendant was charged with the wrong crime, we have vacated the judgment of conviction and sentence and remanded for dismissal of the charge. Where, however, it is possible that a factual basis could be shown, it is more appropriate merely to vacate the sentence and remand for further proceedings to give the State an opportunity to establish a factual basis.

597 N.W.2d at 792 (citations omitted).

In *Mitchell*, the court addressed a situation similar to the case presented here—a defendant entered a plea of guilty to a crime where no factual basis could be established.<sup>1</sup> The court determined the proper remedy was to “vacate the judgment of conviction and sentence and remand for dismissal of the charge.” *Mitchell*, 650 N.W.2d at 621. However, “[b]ecause this disposition invalidates a plea bargain involving the dismissal of another charge, we order that the State may, if it desires, reinstate that charge *ab initio*.” *Id.*; see also *State v. Straw*, 709 N.W.2d 128, 140 (Iowa 2006) (stating that where the record establishes that the defendant was charged with the wrong crime, “we have vacated the judgment of conviction and sentence and remanded for dismissal of the charge” and we “allow the State to reinstate a charge dismissed in contemplation of a valid plea or re-indict the defendant under a code section supportable by the available evidence”); *State v. Allen*, 708 N.W.2d 361, 369 (Iowa 2006) (noting the proper remedy when counsel fails to perform an essential duty by not challenging a plea for lack of a factual basis when the plea is a result of a plea bargain is to invalidate the entire plea bargain and remand the case to

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<sup>1</sup> Ollie Mitchell Jr. pled guilty to conveying contraband to a person confined in an “correctional institution,” but the other person was confined in a county jail, which is a “detention facility” and not a “correctional institution.” See *Mitchell*, 650 N.W.2d at 620.

the district court), *cited with approval in State v. Finney*, 834 N.W.2d 46, 60 n.4 (Iowa 2013) (“In *Allen*, we held that the record before the district court demonstrated the defendant, as a matter of law, did not commit the crime for which she was charged. In this situation, we ordered the conviction vacated and remanded the case back to the district court to begin anew.”).

Blanchard pled guilty to third-degree sexual abuse and two counts of lascivious acts with a child as a result of a plea bargain dismissing another count of third-degree sexual abuse. We invalidate the entire plea agreement by vacating all convictions and remand. “On remand, the State may reinstate any charges dismissed in contemplation of a valid plea bargain, if it so desires, and file any additional charges supportable by the available evidence.” *Allen*, 708 N.W.2d at 369; *see also State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996) (allowing the State to reinstate a charge dismissed as part of a plea bargain or recharge the defendant “under a code section supportable by the available evidence”).

**JUDGMENT AND SENTENCES VACATED, AND CASE REMANDED.**