**IN THE COURT OF APPEALS OF IOWA**

No. 6-740 / 05-1910
Filed November 30, 2006

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

**vs.**

**STEVEN DOUGLAS AYLSWORTH,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager, Judge.

Defendant appeals from his conviction for two counts of second-degree sexual abuse and one count of lascivious acts with a child. **CONVICTIONS AFFIRMED; SENTENCE VACATED IN PART; REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and James Katcher, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

**MAHAN, J.**

Steven Aylsworth appeals from his conviction, following a jury trial, for two counts of second-degree sexual abuse and one count of lascivious acts with a child, in violation of Iowa Code sections 709.1, 709.3(2), and 709.8 (2003).

**I. Background Facts and Proceedings**

In August 2004 Aylsworth and S.F., an eight-year-old girl who lived across the street and played with the daughters of Aylsworth's fiancée, drove to the house of Aylsworth's mother to deliver items for a garage sale. No one else was home when they arrived. According to S.F., while they were in the house, Aylsworth pulled down S.F.'s shorts and underwear, kissed her vagina and touched her vagina with his hand, while telling her that he liked her smile. Aylsworth pulled down his own pants and underwear and made S.F. touch his penis. S.F. later told her mother what had happened, and she contacted the police.

Officer Randy Weber contacted Aylsworth on August 26 and advised him of his *Miranda* rights. Aylsworth agreed to waive his rights and answer questions. He admitted that he and S.F. were at his mother's house alone, but denied anything improper occurred. At one point during the interview, Aylsworth began to cry and told Weber he should just send him to prison. Aylsworth agreed to take a polygraph examination. The examination took place on October 2, 2004. At the end of the examination, Aylsworth completed a written statement, admitting to touching S.F.'s vagina.

Aylsworth was arrested and charged with two counts of second-degree sexual abuse and one count of lascivious acts with a child. A few days before trial, Aylsworth's trial counsel filed a motion in limine, asking the court to exclude Aylsworth's written statement and any reference to it pursuant to Iowa Rule of Evidence 5.403.

The morning of trial, trial counsel argued Aylsworth's written statement should be excluded because it had been altered. The district court denied Aylsworth's motion in limine, but indicated it would allow Aylsworth "to make whatever record you need to make" on the issue before admitting the written statement at trial. As the trial progressed, Aylsworth's trial counsel challenged the admissibility of the written statement on the ground it was not voluntary. The court indicated trial counsel should have raised the motion in a pretrial motion to suppress, but agreed to allow offers of proof before ruling on the admissibility of the statement. After listening to the relevant testimony, the court ruled Aylsworth's written statement was voluntary and admitted it into evidence.

The jury found Aylsworth guilty as charged. Aylsworth's trial counsel withdrew. New trial counsel filed a motion for new trial, arguing in pertinent part that Aylsworth had been denied effective assistance of counsel by his previous counsel's failure to file a timely motion to suppress evidence of Aylsworth's written statement on the theory that it was involuntary. After hearing additional testimony from Aylsworth, the district court denied the motion and proceeded to sentence Aylsworth to twenty-five years' imprisonment on each second-degree sexual abuse conviction, and to five years' imprisonment on the lascivious acts

with a child conviction, all to be served concurrently. The court sentenced Aylsworth to an additional ten years' parole on the lascivious acts conviction.

Aylsworth appeals, arguing (1) he was denied effective assistance of trial counsel due to counsel's failure to file a motion to suppress his written confession and related statements and (2) the district court imposed an illegal sentence when it ordered him to serve ten years' parole. Additional facts will be presented as they relate to the issues Aylsworth raises on appeal.

**II. Ineffective Assistance of Counsel**

Aylsworth argues his trial counsel was ineffective for failing to file a motion to suppress his statements, written and oral, made during the October 2, 2004 interview. He contends the statements were obtained as a result of custodial interrogation without the benefit of *Miranda*[1] warnings. Alternatively, Aylsworth argues that even if *Miranda* warnings were not required, the statements were obtained involuntarily, in violation of his due process rights.

We review claims of ineffective assistance of counsel de novo. *State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005).[2] To establish a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). Failure to

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] Any failure by Aylsworth to raise an ineffective-assistance-of-counsel claim in district court does not bar him from raising it here. *See State v. Ondayog*, __ N.W.2d __, __ (Iowa 2006) ("Ineffective-assistance-of-counsel claims are not bound by traditional preservation-of-error rules.").

demonstrate either element is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

We generally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings "to afford the defendant an evidentiary hearing and thereby permit development of a more complete record." *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). However, we will resolve such claims on direct appeal "where the record is adequate to determine as a matter of law that the defendant will be unable to establish one or both of the elements of his ineffective-assistance claim." *Id.* Under such circumstances, we affirm the defendant's conviction without preserving the ineffective-assistance claims. *Id.* We can resolve Aylsworth's ineffective-assistance-of-counsel claims on direct appeal because we conclude he cannot prevail on either claim as a matter of law.

**A. *Miranda***

"The requirements of *Miranda* are not triggered 'unless there is both custody and interrogation.'" *State v. Turner*, 630 N.W.2d 601, 607 (Iowa 2001) (quoting *State v. Davis*, 446 N.W.2d 785, 788 (Iowa 1989)).[3] The critical issue in the case before us is whether Aylsworth was in custody at the time of the polygraph examination on October 2, 2004.

[3] We assume without deciding that *Miranda* warnings were required at the time of the October 2, 2004 polygraph examination, even though Aylsworth had been advised of his *Miranda* rights before an interview with Officer Weber on August 26, 2004. *See State v. Russell*, 261 N.W.2d 490, 494 (Iowa 1978) ("An accused need not be advised of his constitutional rights more than once unless the time of warning and the time of subsequent interrogation are too remote in time from one another." (citation omitted)). In addition, we assume without deciding that *Miranda* warnings were not given at the October 2, 2004 polygraph examination, even though the only evidence on this point was Aylsworth's own testimony during the hearing on his motion for new trial.

In making its custody determination, "a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *State v. Miranda*, 672 N.W.2d 753, 759 (Iowa 2003). The test is an objective one: whether a reasonable person in the defendant's position would understand himself to be in custody. *Id.* We consider four factors:

> (1) the language used to summon the individual;
> (2) the purpose, place, and manner of interrogation;
> (3) the extent to which the defendant is confronted with evidence of [his] guilt; and
> (4) whether the defendant is free to leave the place of questioning.

*Id.* (citation omitted).

Aylsworth was not "summoned"; Officer Weber asked Aylsworth to take a polygraph examination, and he agreed. Aylsworth made and then broke two appointments to take the examination, without repercussion. The October 2 appointment was scheduled on a Saturday morning at Aylsworth's request. Aylsworth drove himself to the examination, which took place in a building that housed the city hall, police department, and the library. There were very few people in the building at the time of the interview.

The polygraph examiner, Rick Dolleslager, conducted the interview in a twenty- by fourteen-foot conference room down the hall from the police department. The room was furnished with tables and chairs and may have had a window. Dolleslager was not a police officer, but an employee of the Iowa Department of Corrections who also had a private polygraph business. Officer

Weber left Dolleslager and Aylsworth alone in the conference room during the interview. Aylsworth was not restrained in any way.

During the pre-examination interview, Dolleslager discussed the allegations against Aylsworth, who denied them. After the examination, Dolleslager told Aylsworth that he knew or believed Aylsworth had done something. However, Dolleslager did not tell Aylsworth that he already had the evidence and Aylsworth simply needed to admit what he had done. When Aylsworth became upset, began to cry, and eventually admitted he touched S.F.'s vagina, Dolleslager was not accusatory, but rather "was more consoling [Aylsworth] and saying sometimes people do things wrong in their life."

After Aylsworth's admission, Dolleslager left the room and went down the hall to tell Officer Weber that Aylsworth was ready to confess. Weber returned to the room, allowed Aylsworth to compose himself, and then gave him a statement form, asking him to write down what had happened with S.F. In his written and oral statements, Aylsworth admitted touching S.F.'s vagina, but continued to deny kissing her vagina and asking her to touch his penis.

Officer Weber testified at trial that he would have arrested Aylsworth if he had refused to meet with Dolleslager or if Aylsworth had broken off the polygraph examination. However, there is nothing in the record to suggest that Aylsworth was aware of the officer's plan. "[A]n officer's unarticulated plan has no bearing on the question whether a suspect is in custody at a particular time." *State v. Smith*, 546 N.W.2d 916, 924 (Iowa 1996) (internal quotation omitted). Rather,

"the sole relevant inquiry is simply how a reasonable person in the defendant's position would have understood the situation." *Id.* (citation omitted).

Considering the totality of the circumstances, we conclude Aylsworth was not in custody for purposes of *Miranda* when he made the written and oral statements at issue. Aylsworth was not formally arrested, nor was his freedom of movement restricted to the degree associated with formal arrest. A reasonable person in Aylsworth's position would not have understood himself to be in custody. Accordingly, *Miranda* warnings were not required, and Aylsworth's trial counsel was not ineffective for failing to raise a meritless claim. *See State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005) ("[T]rial counsel has no duty to raise an issue that has no merit.").

**B. Involuntariness**

The State must show by a preponderance of the evidence that a defendant's statements were voluntarily given. *State v. Countryman*, 572 N.W.2d 553, 558 (Iowa 1997). In determining voluntariness, we employ a totality-of-circumstances test: "it must appear the statements were the product of 'an essentially free and unconstrained choice, made by the defendant whose will was not overborne or whose capacity for self-determination was not critically impaired.'" *Id.* (quoting *State v. Payton*, 481 N.W.2d 325, 328 (Iowa 1992)). The relevant considerations include:

> The defendant's knowledge and waiver of his *Miranda* rights, the defendant's age, experience, prior record, level of education and intelligence, the length of time the defendant is detained and interrogated, whether physical punishment is used, including the deprivation of food or sleep, the defendant's ability to understand the questions, the defendant's physical and emotional condition

> and his reactions to the interrogation, whether any deceit or improper promises were used in gaining the admission, and any mental weakness the defendant may possess.

*State v. Morgan*, 559 N.W.2d 603, 608 (Iowa 1997) (citation omitted).

Aylsworth was thirty-five years old at the time of trial, with an eleventh grade education. He had never been arrested or charged with any crimes, with the exception of traffic offenses. There is no evidence that Aylsworth suffered from any mental illness or defect, or that he failed to understand he was a suspect. There is no evidence that he failed to understand the questions asked by Dolleslager or Officer Weber. While Aylsworth testified at the hearing on his motion for new trial that he was not given *Miranda* warnings on October 2, neither Dolleslager nor Officer Weber were ever asked about the issue. Aylsworth did receive *Miranda* warnings prior to the August 26 interview with Officer Weber.

The entire process on October 2, consisting of pre- and postexamination interviews and the polygraph examination, took approximately ninety minutes. There is no evidence Aylsworth was deprived of food or water, or subjected to physical punishment. Aylsworth claimed Dolleslager jumped up, stood over him, yelled, and threatened him, but Dolleslager denied these claims. The district court apparently found Dolleslager's testimony more credible, because it concluded Aylsworth's written statements were voluntary. Officer Weber's unarticulated plan to arrest Aylsworth if he had refused to meet with Dolleslager or had broken off the polygraph examination has no bearing on the question of whether Aylsworth's statements were "the product of an essentially free and

unconstrained choice." *Countryman*, 572 N.W.2d at 558 (internal quotation omitted).

We conclude that given the totality of the circumstances, Aylsworth's written and oral statements during the October 2 polygraph examination were voluntary and therefore admissible at trial. Accordingly, Aylsworth's trial counsel was not ineffective for failing to file a motion to suppress the statements as involuntary. *Griffin*, 691 N.W.2d at 737. To the extent Aylsworth argues posttrial counsel was ineffective for failing to raise additional arguments related to the voluntariness of the statements, these arguments are similarly without merit.

We affirm Aylsworth's convictions.

**III. Sentencing**

The district court imposed an additional ten years' parole on Aylsworth's conviction for lascivious acts with a child. Aylsworth argues the district court did not have statutory authority to impose the extended ten-year term of parole. Our review of challenges to the legality of a sentence is for correction of errors at law. *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001). An "illegal" sentence is one not authorized by statute. *Id.*

The district court apparently relied on section 903B.2 (Supp. 2005) when imposing the additional ten-year term of parole. That provision, however, was not in effect at the time the offense was allegedly committed in August 2004. *See* 2005 Iowa Acts ch. 158 § 40 (codified at Iowa Code § 903B.2 (Supp. 2005)); Iowa Code § 3.7(1) (2003) (effective date of statutes). The State concedes that the district court erred in sentencing Aylsworth to serve an additional ten-year

term of parole on the lascivious acts conviction. Accordingly, we vacate the ten-year parole portion of Aylsworth's sentence and remand to the district court for imposition of a proper term of parole pursuant to Iowa Code section 709.8 (2003).[4]

**CONVICTIONS AFFIRMED; SENTENCE VACATED IN PART; REMANDED FOR RESENTENCING.**

[4] Section 709.8 (2003) provides, in relevant part:

> A person who violates a provision of this section and who is sentenced to a term of confinement shall also be sentenced to an additional term of parole or work release not to exceed two years.