IN THE COURT OF APPEALS OF IOWA

No. 8-602 / 07-1249
Filed September 17, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN HENRY MAHOGANY,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Defendant appeals his convictions, based on his guilty pleas, to third-degree kidnapping and third-degree sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, and John Mahogany, Anamosa, pro se, 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 Vogel, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ROBINSON, S.J.

I. Background Facts & Proceedings

The minutes of testimony in this case show that Amanda lived with two roommates in Waterloo. At about 2:00 a.m. on May 26, 2005, the boyfriend of one roommate came to the home with John Mahogany. After a period of time Mahogany agreed to take Amanda to a store to buy a cold drink. Instead of driving to the store, however, Mahogany drove Amanda to a park, where he kissed her and put his hand in her pants, resulting in hand to genital contact. Amanda struggled, but could not get away.

Mahogany then drove to an alley near a school. He pulled Amanda's pants and underwear off, and attempted vaginal penetration with his penis. At this location genital to genital contact occurred. Amanda tried to put her clothes back on.

Mahogany drove to a third location, near a cemetery, where he pulled Amanda into the back seat of his vehicle. He again removed her pants and underwear. He forced her to perform oral sex, and then engaged in vaginal penetration and ejaculated. Mahogany drove Amanda back to her home, and sped away. Amanda's friends called the police, and she was taken to the hospital for a sexual assault examination. DNA evidence collected from the examination matched the DNA of Mahogany.

Mahogany was charged with kidnapping in the first degree. After four days of trial, he entered into a plea agreement with the State whereby he agreed to enter an *Alford* plea to kidnapping in the third degree, as a habitual offender, in

violation of Iowa Code sections 710.1, 710.4, and 902.8 (2005), and sexual abuse in the third degree, as a habitual offender, in violation of sections 709.4(1) and 902.8.[1] The parties agreed the minutes of testimony would provide the factual basis for the pleas. Mahogany was sentenced to a term of imprisonment not to exceed fifteen years on each offense, to be served consecutively.

Mahogany filed a pro se motion to correct an illegal sentence. He subsequently filed an amended motion, claiming that third-degree sexual abuse was a lesser included offense of third-degree kidnapping, and the sentences on the two offenses should be merged. After a hearing, the district court determined Mahogany was charged with, and committed, two separate and distinct crimes that supported separate convictions for third-degree sexual abuse and third-degree kidnapping. Mahogany appeals the district court's order denying his motion to correct an illegal sentence.

II. Standard of Review

On defendant's claims that his sentence is illegal under section 701.9, our review is for the correction of errors at law. *State v. Halliburton*, 539 N.W.2d 339, 341-42 (Iowa 1995). To the extent defendant is raising constitutional issues, our review is de novo. *Id*. at 341.

III. Merits

Mahogany claims his two convictions should be merged under section 701.9, which provides:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person

[1] *See North Carolina v. Alford*, 400 U.S. 25, 32-38, 91 S. Ct. 160, 164-68, 27 L. Ed. 2d 162, 168-72 (1970).

> is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

He also claims that the two sentences in this case violate the Double Jeopardy Clause because he is being punished twice for one offense. *See State v. Butler*, 505 N.W.2d 806, 807 (Iowa 1993) (noting the Double Jeopardy Clause protects against multiple punishments for the same offense). Section 701.9 codifies the double jeopardy protection against cumulative punishment, and therefore, the statutory and constitutional claims will be considered together.[2] *See State v. Gallup*, 500 N.W.2d 437, 445 (Iowa 1993).

The merger statute, section 701.9, does not apply when there are two separate and distinct crimes. *State v. Bundy*, 508 N.W.2d 643, 643-44 (Iowa 1993); *State v. Dittmer*, 653 N.W.2d 774, 777 (Iowa Ct. App. 2002). Whether one offense is a lesser included offense of another is irrelevant when the State files the two charges as separate offenses and proves them both. *State v. Truesdell*, 511 N.W.2d 429, 432 (Iowa Ct. App. 1993). "Where the alleged acts occur separately and constitute distinct offenses there can be no complaint that one is a lesser included offense of the other." *State v. Spilger*, 508 N.W.2d 650, 652 (Iowa 1993).

---

[2] Mahogany did not raise these issues during the sentencing hearing, and did not appeal his sentence. A sentence that is contrary to section 701.9 is void, however, and a challenge to such a sentence is not subject to the normal rules of error preservation. *State v. Hickman*, 623 N.W.2d 847, 850 (Iowa 2001). As to his constitutional claims, he asserts his failure to raise these earlier was due to ineffective assistance of counsel, and these claims are also not subject to the general rules of error preservation. *See State v. Lucas*, 323 N.W.2d 338, 232 (Iowa 1982). On appeal, we will consider defendant's statutory and constitutional claims together.

Where a defendant pleads guilty to two crimes, the record must minimally support a factual basis for two separate crimes. *State v. Walker*, 610 N.W.2d 524, 527 (Iowa 2000). An *Alford* plea is conditioned on the court's ability to find factual support for every element of the offense in the record from sources other than the defendant. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001).

Mahogany relies upon *State v. Morgan*, 559 N.W.2d 603, 611-12 (Iowa 1997) and *State v. Newman*, 326 N.W.2d 788, 793 (Iowa 1982), to support his claim that the kidnapping and sexual abuse involved one continuing event. In those cases, even though more than one incident of sexual abuse occurred, the cases were presented to the jury as a single episode. *Morgan*, 559 N.W.2d at 611-12; *Newman*, 326 N.W.2d at 793. Under these circumstances, the supreme court concluded the sexual abuse charge could not be considered a separate offense from the kidnapping charge. *Id.* at 612; *Newman*, 326 N.W.2d at 793.

Based on the specific facts of a case, however, a defendant may be convicted of both kidnapping and sexual abuse. *Newman*, 326 N.W.2d at 793. "A defendant should not be allowed to repeatedly assault his victim and fall back on the argument his conduct constitutes but one crime." *Id.* In *State v. Holderness*, 301 N.W.2d 733, 740 (Iowa 1981), the supreme court found the facts demonstrated the occurrence of two separate crimes in time and place resulting in the defendant's conviction of first-degree kidnapping and second-degree sexual abuse.

In this case, the parties agreed the minutes of testimony would be considered to form the factual basis for the plea. The evidence shows Mahogany

transported Amanda against her will to three different locations.[3] He also engaged in acts that would constitute sexual abuse at three different locations, and three different times.[4] In considering Mahogany's motion, the district court found:

> [T]here was a separate act of sexual abuse that initially occurred in the car in an area that was not secluded and would be readily visible to the public. Ultimately he drove her to a very secluded area in a cemetery that was dark and far from any inhabited buildings or houses. In the Court's view, these are two separate and distinct actions and would support a separate conviction for Sexual Abuse in the Third Degree, and the subsequent and later actions of the defendant constituted Kidnapping in the Third Degree.

We conclude the minutes of testimony provide a factual basis to support at least two distinct crimes committed at different times.

We affirm the decision of the district court denying Mahogany's motion to correct an illegal sentence.

AFFIRMED.

---

[3] Under section 710.1(3), kidnapping is defined as the confinement or removal or a person, without the authority or consent to do so, with the intent to subject the person to sexual abuse.

[4] Under section 702.17, a "sex act" may consist of hand to genital contact, mouth to genital contact, or genital to genital contact. Sexual abuse occurs when a sex act is performed by force or against the will of the other person. Iowa Code § 709.1(1).