

IN THE COURT OF APPEALS OF IOWA

No. 8-055 / 06-1599
Filed March 26, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PAUL (MICHELLE) EUGENE BAUGH,
Defendant-Appellant.

Appeal from the Iowa District Court for Davis County, Dan F. Morrison,
Senior Judge.

Defendant appeals the sentences imposed for convictions on two counts
of sexual abuse in the third degree. **SENTENCE VACATED IN PART AND
REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson,
Assistant Appellate Defender, for appellant.

Paul (Michelle) Baugh, Mitchellville, pro se.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, and Rick L. Lynch, County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller, J., and Brown, S.J.*

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

BROWN, S.J.**I. Background Facts & Proceedings**

Paul (Michelle) Baugh was convicted of two counts of sexual abuse in the third degree, in violation of Iowa Code section 709.4(2)(c) (2001).¹ After a bench trial the district court found Baugh had sexually abused T.D. when he was fifteen years old. Baugh was then fifty-one or fifty-two years old. T.D. lived with Baugh, and Baugh became his legal guardian.²

At the sentencing hearing the prosecutor read a victim impact statement from T.D.'s parents. Lynn, the mother of T.D.'s girlfriend, gave a victim impact statement. Also, T.D.'s girlfriend, Amy, read T.D.'s victim impact statement. The district court sentenced Baugh to a term of imprisonment not to exceed ten years on each count, to be served consecutively. In addition, the court imposed the special lifetime parole provisions of section 903B.1 (Supp. 2005). Baugh now appeals these sentences.

II. Lifetime Parole

Baugh claims ineffective assistance due to defense counsel's failure to object to the imposition of the provisions of section 903B.1 in this case. We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State*

¹ Paul Baugh is defendant's legal name. Baugh testified to self-identifying as a woman and preferring the name Michelle.

² Baugh was the uncle of T.D.'s step-mother. T.D.'s father and step-mother sent T.D. to live with Baugh because they believed Iowa would provide a safer environment for him than their home in California.

v. Shanahan, 712 N.W.2d 121, 136 (Iowa 2006). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

Section 903B.1 provides that under certain circumstances, in addition to the regular sentence under chapter 709, a person will be sentenced "to a special sentence committing the person into the custody of the director of the Iowa department of corrections for the rest of the person's life, with eligibility for parole as provided in chapter 906." Section 903B.1 went into effect on July 1, 2005. Baugh was found guilty of conduct which occurred between December 1, 2000, and November 30, 2001.

The ex post facto clauses of the federal and Iowa constitutions "forbid the application of a new punitive measure to conduct already committed." *State v. Corwin*, 616 N.W.2d 600, 601 (Iowa 2000). Ex post facto clauses are "violated when a statute makes more burdensome the punishment for a crime after its commission." *Id.* The ex post facto prohibitions apply only to criminal penalties. *State v. Seering*, 701 N.W.2d 655, 667 (Iowa 2005).

We then must consider whether the legislature intended the statute to be punitive in nature. *Id.* Punitive statutes serve not only a remedial purpose, but accomplish the goals of retribution and deterrence. *Corwin*, 616 N.W.2d at 602. The United States Supreme Court has noted, "parole is an established variation on imprisonment of convicted criminals." *Samson v. California*, 547 U.S. 843, ___, 126 S. Ct. 2193, 2198, 165 L. Ed. 2d 250, 258 (2006) (citation omitted).

Also, “parolees are on the ‘continuum’ of state-imposed punishments.” *Id.* at ____, 126 S. Ct. at 2198, 165 L. Ed. 2d at 258. We conclude section 903B.1 is punitive in nature. Therefore, imposition of the provisions of section 903B.1 under the facts of this case would violate the ex post facto clauses of the federal and Iowa constitutions. We note that in its appellate brief the State has agreed with this conclusion.

We determine that portion of Baugh’s sentence which committed Baugh to lifetime parole under section 903B.1 should be vacated and we remand for entry of a corrected judgment entry.

III. Victim Impact Statements

A. Baugh claims ineffective assistance due to counsel’s failure to object to Lynn’s victim impact statement. Section 915.21(1)(b) (2001) permits a victim to present a victim impact statement at a defendant’s sentencing hearing. The term “victim” means a person who suffered physical, emotional or financial harm as a result of the defendant’s actions. Iowa Code § 915.10(3). If the victim is under the age of eighteen at the time of the offense, the victim’s immediate family members are also included within the definition of “victim.” *Id.*

It is clear Lynn, the mother of T.D’s girlfriend, was not a victim within the meaning of section 915.10(3), and therefore, she should not have been permitted to present a victim impact statement at the sentencing hearing. The record would support a finding defense counsel failed to perform an essential duty by failing to object to Lynn’s victim impact statement. See *State v. Tesch*, 704 N.W.2d 440, 452-53 (Iowa 2005).

Baugh, however, still needs to show prejudice as a result of the improper victim impact statement. See *id.* at 453-54. A defendant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 453 (citation omitted). A victim impact statement may be considered prejudicial if it reveals facts to a judge that would not otherwise be known. *State v. Matheson*, 684 N.W.2d 243, 245 (Iowa 2004). However, even if an improperly received victim impact statement is hostile and bitter, it is not considered prejudicial if it does not contain the type of information which would not otherwise be available to a judge. *State v. Sumpter*, 438 N.W.2d 6, 9 (Iowa 1989).

Baugh states, “While the impact statement does not provide additional factual information about the crime itself, it certainly provides additional information of the significant emotional impact of the offense.” This is not the type of statement which is considered prejudicial, “such as allegations of unproven crimes or other facts outside the record. See *id.* Baugh also highlights a statement, “You were able to make the other boys in your life do as you said. You were able to keep them for your toys.” This seems to be part of a statement that Baugh was controlling, not that he had sexually abused others.

We conclude that although Lynn’s victim impact statement should not have been considered, it was not prejudicial. We determine Baugh has not shown ineffective assistance on this ground.

B. In a pro se brief, Baugh asserts defense counsel should have objected to Amy reading T.D.’s victim impact statement. Baugh alleges the

statement read by Amy was actually composed by her, and not by T.D. Baugh claims Amy was not a victim under section 915.10(3), and should not have been permitted to give a statement.

There is no information in the record to support Baugh's allegation that the statement read by Amy was not written by T.D. The prosecutor stated, "[Amy] has in her hand a copy of a statement that [T.D.], the victim in this matter, that just was faxed to the law center, and I handed it to her and she's decided to read the report from [T.D.]." It is clear Amy did not bring the statement to the sentencing hearing, but rather it was given to her by the prosecutor. The statement was written in the first-person from the viewpoint of T.D. T.D. was the victim of the crime, and he was entitled to give a victim impact statement.

We conclude Baugh has failed to show ineffective assistance of counsel due to failure to object to the victim impact statement of T.D.

We affirm Baugh's convictions and sentences, but vacate that portion of the sentence which imposed lifetime parole under section 903B.1. We remand for a new judgment entry.

SENTENCE VACATED IN PART AND REMANDED FOR RESENTENCING.