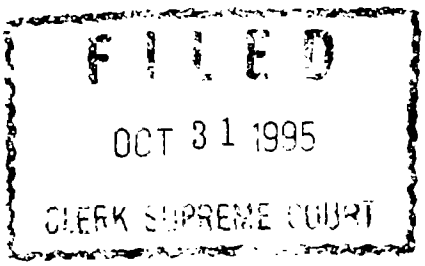
IN THE COURT OF APPEALS OF IOWA

No 5-382 / 94-1116



STATE OF IOWA,

Appellee.

vs.

KENNETH ALAN HACK,

Appellant.

Appeal from the Iowa District Court for Grundy County, Jon Fister, Judge.

Hack appeals his conviction, following a guilty plea, for lascivious acts with a child. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds Lapointe, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Don Kliebenstein, County Attorney, and Todd Greer, Assistant County Attorney, for appellee.

Considered en banc.

HUITINK, J.

Kenneth Alan Hack appeals his conviction, following a guilty plea, for lascivious acts with a child in violation of Iowa Code section 709.8. We affirm his conviction and preserve his claim of ineffective assistance of counsel for postconviction review.

Hack was originally charged with sexual abuse in the third degree. The trial information alleged Hack, "on or about December 11 through December 24, 1992" sexually abused "a person aged fourteen to fifteen." This charge was subsequently amended to lascivious acts with a child on or about December 11 through December 24, 1992.

The district court accepted Hack's guilty plea after a brief plea colloquy that included the following:

> THE COURT: Are you satisfied that if the witnesses on the trial information were believed that you would in fact be guilty of this offense?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. And I can rely on the trial information to establish a factual basis for this offense as charged, Mr. Metcalf?
>
> MR. METCALF (defendant's attorney): Yes. Yes, your honor.

The plea-taking record also includes the following exchange:

> THE COURT: Now in the ordinary case you would have up to 45 days or within five days of sentencing to file what's called a motion in arrest of judgment to set aside or attack the plea that has just been entered here if you believe it is not correct. But if you proceed to immediate sentencing you'll be waiving that along with all these other

matters that we've talked about. Are you still willing to proceed with immediate sentencing?

THE DEFENDANT: Yes, sir, I am.

No motion in arrest of judgment was filed or otherwise asserted by or on Hack's behalf. Hack was sentenced to a term not to exceed five years as provided in the plea agreement.

On appeal Hack claims he was denied effective assistance of counsel. He cites his counsel's failure to file a motion in arrest of judgment challenging the adequacy of the earlier described guilty plea proceedings. Hack contends his victim was not a child at the time of this offense and accordingly there was no factual basis supporting his plea to lascivious acts with a child.

The State concedes Hack's victim was not a child as defined by Iowa Code section 702.5 because she was not under fourteen years of age in December 1992. The State, however, argues that a sufficient factual basis exists by virtue of the minutes of testimony which refer to similar events occurring in 1991 prior to the victim's fourteenth birthday.

Hack concedes Iowa Rule of Criminal Procedure 23(3)(2) precludes a challenge to the adequacy of his guilty plea because of his failure to file a motion in arrest of judgment. We therefore may not consider Hack's complaints regarding his plea unless his failure to raise them in district court resulted from ineffective assistance of counsel *State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982).

Generally, ineffective assistance of counsel claims are preserved for postconviction proceedings to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). We depart from this preference only if the record is adequate to evaluate appellant's claims. *Schoelerman*, 315 N.W.2d at 71.

We are unable to determine from this record whether Hack's guilty plea was inclusive of events occurring prior to 1991. If it was, counsel may well have made a strategic choice to waive the applicable statute of limitations in exchange for an opportunity to plead to a lesser offense. We conclude there is an inadequate record for us to adjudicate Hack's ineffective assistance of counsel claim. Counsel should have the opportunity to explain whether his conduct was a matter of oversight or whether he sought to preserve a favorable plea agreement for his client.

Hack's conviction is therefore affirmed. His ineffective assistance of counsel claim is preserved for postconviction relief proceedings.

AFFIRMED.

All judges concur except Hayden, J., who dissents.

HAYDEN, J. (dissenting)

Defendant pled guilty to lascivious acts with a child. The elements of this offense include the victim is a child. Iowa Code § 709.8 (1993). A child is defined as any person under the age of fourteen years Iowa Code § 702.5 (1993).

At trial the discussion about a factual basis involved the court reviewing the elements of the crime of lascivious acts with a child and then asking the defendant if he was satisfied if the witnesses on the trial information were believed, he would be guilty of the offense. Defendant answered "yes." The trial information and minutes allege the victim, S.D., was fourteen years old at time of the alleged acts in question, December of 1992, and her birth date was January 22, 1978.

Clearly, S.D. was not a child as defined by statute at the time of the alleged events. Defendant could not be guilty of the crime of lascivious acts with a child. There was no factual basis established in the record for that offense.

I would reverse and vacate defendant's plea of guilty to the crime of lascivious acts with a child in violation of Iowa Code section 709.8 (1993). Defendant may be guilty of some crime, but not this one.

I would hold on the record made at the plea proceeding the facts failed to show defendant violated the statute under the amended charge to which he attempted to plead guilty. The judgment of conviction should be reversed and the original charge of sexual abuse in the third degree in violation of Iowa Code section 709.4(2)(c)(1)(3)(4) reinstated. *See State v. Saunders*, 309 N.W.2d 144, 146 (Iowa App. 1981).