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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

306

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
WESLEY TODD MOFFETT,	)	8-346 87-983
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County (No. 33965), Richard Strickler, Judge.

Defendant appeals from sentencing after his conviction of two counts of third-degree sexual abuse. **AFFIRMED.**

Philip F. Miller and Jon Schuster, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General; Julie Ann Halligan, Assistant Attorney General; and Scott Rosenberg, Assistant Polk County Attorney, for plaintiff-appellee.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

HABHAB, J. 307

The defendant, Wesley Todd Moffett, appeals his conviction on two counts of sexual abuse in the third degree. He was sentenced to two consecutive terms of ten years. He argues the district court erred in sentencing him consecutively because the criminal activity arose out of the same transaction and occurrence. We disagree and, accordingly, affirm.

On November 4, 1986, the defendant sexually assaulted a nine-year-old child, the daughter of his girlfriend. The assault took place in the early morning hours. According to the minutes of testimony to which the defendant stipulated, he forced himself upon the child using a knife, committed sexual intercourse vaginally and anally, and stuffed a sock in the child's mouth to prevent her from crying out.

Mr. Moffett was originally charged with sexual abuse in the second degree. If convicted of that charge, a Class B felony, he would have been sentenced to an indeterminate term of no more than twenty-five years. Iowa Code §§ 709.3, 902.9(1) (1985). He entered a not guilty plea.

Under an agreement reached between Mr. Moffett and the county attorney, the prosecution amended the trial information from sexual abuse in the second degree to two counts of sexual abuse in the third degree. Mr. Moffett agreed to withdraw his former plea of not guilty to sexual

abuse in the second degree and stipulate for purposes of trial to the minutes of testimony as to the amended charges.

A bench trial was held on May 1, 1987.

Our review is on errors assigned. Iowa R. App. P. 4. The decision of the trial court will be upheld if supported by substantial evidence. Iowa R. App. P. 14(f)(1). However, when the defendant is alleging error involving a constitutional right, we make an independent evaluation of the totality of the circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

I. It is clear from the record that an agreement was reached between the State and the defendant which resulted in a mutual change in the positions of the parties. In the presence of the court, the following plea bargain agreement was reached:

> MR. ROSENBERG [assistant county attorney]: May it please the Court. Your Honor, this is the case of State of Iowa vs. Wesley Todd Moffett, Criminal Number 33965. Your Honor, at this time it's the State's understanding that the defendant wishes to withdraw his former plea of not guilty to sexual abuse in the second degree and to plead guilty to two counts of sexual abuse in the third degree in violation of Section 701.9 and 701.4 of the Code of Iowa.
>
> As part of the plea negotiations in this case it is the State's understanding that the defendant will plead guilty to the two charges and a presentence investigation will be done in this matter and sentencing will be set at some future date. (emphasis added)

THE COURT: Mr. Miller, is it my understanding that there will be a plea of guilty or are you going to stipulate to the minutes?

MR. MILLER [defense counsel]: We're going to stipulate to the minutes, Your Honor.

THE COURT: Well, originally the trial information charges sex abuse in the second degree. That was filed on January 15th of this year, and you are filing an amended trial information this date Mr. Rosenberg?

MR. ROSENBERG: Yes, I am, Your Honor.

THE COURT: That's in two counts; Count I and Count II both claiming sexual abuse in the third degree. Do you have a copy of the trial information?

MR. MILLER: Yes. We will state that he's charged in his true and correct name there. We'd waive any formal arraignment on that.

The defendant has read that, and I have explained to him in some depth and detail that he is waiving his right to a jury trial here and we're stipulating to the minutes; that the State's witnesses, if called, would testify as they have set forth the testimony in the minutes of the original charge and that the -- part of the plea bargain here is that they would file this amended Count I and Count II and the original charge would be dismissed as well as the domestic abuse and assault charge also.

(Emphasis added.)

II. The defendant argues that separate occurrences of vaginal penetration and anal penetration "during the course of one factual transaction or sex act" constitutes one violation of the sex abuse statute, not two separate violations. The State counters his argument by asserting Mr. Moffett waived his right to complain to consecutive sentencing.

When the record is read as a whole, it is clear to us that the defendant agreed to the amending of the trial information charging him with the two counts of sexual abuse in the third degree, agreed to the stipulation of the minutes of testimony as the evidence in his case, and agreed to the possibility of concurrent or consecutive sentences in the event of a finding of guilt; all in exchange for the removal of the charge of sexual abuse in the second degree, the elimination of the risk of an indeterminate sentence of not more than twenty-five years, agreement by the State to make no recommendation when it came time to sentence, and the dismissal of a domestic abuse and assault charge. The defendant was fully aware of the possible ramifications of his agreement with the State and so stated on the record.[1] In this respect, the

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1. Implicit in the plea bargaining process, is the element of negotiation and agreement thereto: "Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after trial. * * * While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'--and permissible--'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'" Chaffin v. Stynchcombe, supra, at 31, 36 L.Ed.2d 714, 93 S.Ct. 1977. Bordenkircher v. Hayes, 434 U.S. 357, 363-64, 98 S.Ct. 663, 668 , 54 L.Ed.2d 604, 611 (1977).

following appears in the record:

> MR. MILLER (defense counsel): I did indicate that you'd be entering an order and you would be ordering a presentence and the sentencing date would be set later, and I also indicated to him that on each of these counts there's ten years maximum possible and that the Court could run them concurrent or the Court could you know, run them consecutive too.
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> THE COURT: Do you understand that, Mr. Moffett?
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> DEFENDANT: Yes, sir.
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> THE COURT: In other words, the Court now will read the minutes and make its decision, and if there is a finding of guilt, there will be a presentence investigation report, and there will be a date of sentencing and on the date of sentencing the Court would have the option of pronouncing a sentence of ten years on each count. The court would have an option of making those ten-year sentences run concurrent, at the same time, or the Court would have the option of making those two ten-year sentences run back to back, consecutively. Do you understand that?
>
> DEFENDANT: Yes, sir.
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> THE COURT: Anything further:
>
> MR. MILLER: Nope.

(Emphasis added.)

III. While not stating as such, the defendant argues he received multiple punishments for the same offense. We

do not reach that issue because of the defendant's waiver.[2]

Constitutional protection against double jeopardy is distinguishable from double punishment. State v. Birkestrand, 239 N.W.2d 353, 362-63 (Iowa 1976). Rights flow from the fifth amendment. Id. at 363.

> . . . [J]eopardy attaches when the jury is sworn, or upon acceptance of a tendered guilty plea, and former jeopardy should be asserted at the earliest opportunity, usually before trial . . . . On the other hand, double punishment usually attaches after return of a guilty verdict or acceptance of a guilty plea for the same offense upon which sentence has been previously entered.

Id. Double jeopardy and double punishment are personal privileges and can be waived. Id. But see State v. Gilroy, 199 N.W.2d 63, 68 (Iowa 1982) (issue of waiver not raised).

IV. During the above-noted colloquy between the court, the defendant, and his attorney, Mr. Moffett could have asserted his objection to the possibility of being punished twice for what he considered to be the same offense. Instead, he clearly, intelligently, and voluntarily waived this specific privilege.

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2. However, in determining whether a single act constitutes multiple offenses, the test to be applied is whether each statutory provision allegedly violated requires a proof of fact that the other does not. 21 Am. Jur. 2d, Criminal Law, § 279. We note the statute involved here is phrased in the alternative and not in the conjunctive. Likewise, the trial court stated separate findings of fact as they related to vaginal intercourse and as they related to anal intercourse. See State v. Kaufman, 265 N.W.2d 610, 618 (Iowa 1978) (wording in information prevented court from sentencing defendant for two separate violations).

V. Mr. Moffett finally asserts the trial court abused its discretion in sentencing an alcoholic to consecutive terms and failing to set forth specific reasons for imposing a consecutive sentence. He states no argument for this assertion and does not cite any authority. This argument is therefore waived. Iowa R. App. P. 14(a)(3).

AFFIRMED.