IN THE COURT OF APPEALS OF IOWA

No. 1999-360 (9-613) / 98-1894
Filed December 27, 1999

STATE OF IOWA,

Appellee,

vs.

RICHARD YEOMAN,

Appellant.

FILED
DEC 27 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

Richard Yeoman appeals the judgment and sentence entered upon his guilty pleas to the crimes of third-degree kidnapping and third-degree sexual abuse and assault while participating in a felony. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

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

Heard by Streit, P.J., and Vaitheswaran, J., and Hayden, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

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VAITHESWARAN, J.

"No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted." Iowa Code § 701.9 (1997). The issue here is whether assault while participating in a felony is necessarily included in third degree kidnapping. We conclude it is not, and affirm the sentences for both offenses.

Richard Yeoman entered an *Alford* plea to: (1) third degree kidnapping, in violation of Iowa Code sections 710.0 and 710.4 (1997); (2) third degree sexual abuse in violation of Iowa Code section 709.4; and (3) assault while participating in a felony, in violation of Iowa Code section 708.3. *See North Carolina v. Alford*, 400 U.S. 25, 37-38; 91 S. Ct. 160, 167-68, 27 L. Ed. 2d 162, 171-72 (1970) (upholding guilty plea containing no admission of guilt). He was sentenced to three terms totaling twenty five years, to be served consecutively.

On appeal, Yeoman contends the trial court imposed an illegal sentence in violation of Iowa Code section 701.9, by failing to merge assault while participating in a felony with third degree kidnapping. Our review is for errors of law. *State v. Perez*, 563 N.W.2d 625, 627 (Iowa 1997).

To decide whether assault while participating in a felony is necessarily included in the offense of third degree kidnapping we must determine whether a

person can commit third degree kidnapping without assaulting the victim. *See State v. Goff*, 342 N.W.2d 830, 835 (Iowa 1983). We conclude a person can.[1]

Goff held second degree kidnapping may be committed without an assault. *Id.* Yeoman contends *Goff* should not control our decision because Goff was charged with kidnapping "with intent to use such person as a shield or hostage," an element Yeoman characterizes as non-assaultive, whereas Yeoman was charged with kidnapping "with the intent to subject the person to sexual abuse," which he says reflects an assaultive intent. We reject this contention. Whatever the intent requirement, it is possible to commit the offense of third degree kidnapping without actually assaulting the victim. *Cf. State v. Daniels*, 588 N.W.2d at 684.

Because third degree kidnapping may be committed without an assault, the kidnapping offense does not necessarily include assault while participating in a felony. Accordingly, the two sentences did not merge and the trial court correctly sentenced Yeoman for both offenses.

AFFIRMED.

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[1] The State contends we need not apply a "comparison of elements" analysis because under *State v. Perez*, 563 N.W.2d at 628-29, the plain language of Iowa Code section 708.3 reflects an intent to punish a person for two offenses. Yeoman counters that *Perez* should not be read as per se requiring cumulative punishments for assault while participating in a felony and the underlying felony. We agree with Yeoman that the analysis set forth in *Perez* has not been consistently applied. *See State v. Daniels*, 588 N.W.2d 682, 684-85 (Iowa 1988); *cf. State v. Taylor*, 596 N.W.2d 55, 56-57 (Iowa 1999) (applying legal elements test without first examining plain language of statute to ascertain legislative intent). We believe the legal elements test provides a more helpful framework for analysis, given the offenses charged in this case.