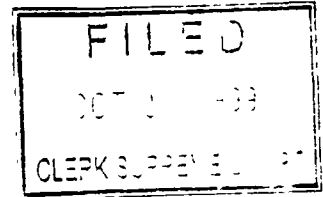


IN THE COURT OF APPEALS OF IOWA

No. 1999-254 (9-484) / 98-1304
Filed October 27, 1999



**STATE OF IOWA,
Plaintiff-Appellee,**

vs.

**MICHAEL DALE WILSON,
Defendant-Appellant.**

Appeal from the Iowa District Court for Dallas County, Gary G. Kimes, District Judge.

On appeal from his convictions of two counts of lascivious acts with a child, the defendant argues his trial counsel was ineffective in allowing him to plead guilty to charges which were barred by the statute of limitations. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Wayne M. Reisetter, County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, J.J.

000476

SACKETT, C.J.

Defendant-Appellant Michael Dale Wilson appeals from conviction of two counts of lascivious acts with a child in violation of Iowa Code 709.8 (1991).¹ The convictions came after the defendant pled guilty to the two charges. Defendant contends his attorney was not effective in allowing him to plead guilty to the charges because at the time of his plea the statute of limitations had run on each charge. We affirm.

Defendant was charged by trial information on July 31, 1997, with two counts of lascivious acts with a child.² The information recited that during the months of May and June of 1990 the defendant touched a person less than twelve years old. The information was amended on January 20, 1998, to allege the events occurred in the summer of 1991.

Defendant pled guilty on April 10, 1998. One plea was an Alford plea. In pleading guilty the defendant admitted he engaged in some sort of sexual contact with the child in the summer of 1991. He testified that he touched the child genitals or pubes without her consent

¹. 709.8 Lascivious acts with a child. It is unlawful for any person eighteen years of age or older to perform any of the following acts with a child with or without the child's consent unless married to each other, for the purpose of arousing or satisfying the sexual desires of either of them:

1. Fondle or touch the pubes or genitals of a child.
2. Permit or cause a child to fondle or touch the person's genitals or pubes.
3. Solicit a child to engage in a sex act.
4. Inflict pain or discomfort upon a child or permit a child to inflict pain or discomfort on the person.

². The typed information also showed Count I as sexual abuse in the second degree, a class B felony. However before it was filed or after the sexual abuse was crossed out and replaced with lascivious acts, a class D felony. There also had been typed a III count for indecent contact with a child, an aggravated misdemeanor. This had been crossed out before or after the trial information was filed.

and with the purpose of arousing himself sexually. The defendant said he knew the victim was about eight years old at the time and he was twenty-four years old.

The district court accepted the plea and defendant was sentenced for a period of not more than five years on each count, consecutively served, not to exceed ten years.

Defendant contends trial counsel was ineffective because the statute of limitation on lascivious acts with a child is three years. The state admits the statute had run on the two counts of lascivious acts with a child.

The state contends, however, there is no merit to defendant's claim because he was originally charged with sexual abuse in the second degree committed on a person under the age of eighteen years. The statute on this charge does not run until five years after the victim becomes eighteen. The state advances the victim was not eighteen at the time the charge was filed and consequently the statute of limitation had not yet run on this charge.

The state advances that the defendant's attorney had a strategic reason for allowing the defendant to plead to the two counts of lascivious acts with a child even though the statute was tolled on that crime. The state contends that if defendant were convicted of sexual abuse in the second degree, which is a class B felony punishable by imprisonment of up to twenty-five years, he would have been required to serve up to eighty-five percent of that time. See Iowa Code 709.3, 902.9(1) (1997) and 903A.2 (1997). The state also contends it dismissed an indecent contact with a child charge after defendant's plea which also was to his benefit.

The state contrasts the sentence under lascivious acts, which is five years, with the sentence he could have served had he been convicted on the other charges.

The defendant contends, and we agree and the state appears to concede if he had been convicted of sexual abuse in the second degree he would not have been subject to the provisions of Iowa Code 902.12, as this section was enacted by 96 Acts, chapter 1151.3, and was not signed into effect until April 23, 1996, after the time of the alleged offenses.

The defendant further alleges that the state incorrectly argues defendant was benefited by the dismissal of the charge of an indecent contact with a child. The defendant contends indecent contact with a child is an aggravated misdemeanor, see Iowa Code 709.12, and subject to a three-year statute of limitations, so it too was time barred. Defendant is correct on this allegation also.

Our review of ineffective assistance of counsel claims is under a *de novo* standard. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998); *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998).

To prevail on a claim of ineffective assistance of counsel a defendant must prove his or her counsel failed in an essential duty and that prejudice resulted. *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). Defendant has the burden to show his counsel was ineffective by a preponderance of the evidence. *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency. *Meier v. State*, 337

N.W.2d 204, 206 (Iowa 1983). Miscalculated tactics or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991). The defendant must overcome a strong presumption of counsel's competence.

To establish prejudice defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997), *Gering v. State*, 382 N.W.2d 151, 153-154 (Iowa 1986). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the defendant's trial. *Id* at 154. The ultimate concern is with the fundamental fairness of the proceeding whose result is being challenged. *Collins v. State* 588 N.W.2d 399, 402 (Iowa 1998).

A guilty plea waives all defenses or objections which were not intrinsic to the plea itself. *State v. Everett*, 372 N.W.2d 235, 237 (Iowa 1985). A guilty plea waives all defenses except that the information or indictment charges no offense and the right to challenge the plea itself. *See State v. Kobrock*, 213 N.W.2d 481, 483 (Iowa 1973), *State v. Burtlow*, 210 N.W.2d 438, 439 (Iowa 1973). Consequently in pleading guilty the defendant lost the right to wage a statute of limitation challenge against the charges. Had the challenge been made the charges would have been dismissed because the statute of limitation had run.

The question then becomes whether trial counsel had a strategic reason for allowing defendant to plead to two charges on which the statute of limitation had run. The state urges

defendant's trial attorney did because the defendant sufficiently benefits from entering the plea and having other charges dismissed.

We are not able on this record to determine this issue. We affirm, reserving to defendant the right to bring the challenge in a post conviction proceeding.

AFFIRMED.