

**IN THE COURT OF APPEALS OF IOWA**

No. 8-071 / 07-0793  
Filed March 26, 2008

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

**vs.**

**RITCHIE LEE LATHROP,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Poweshiek County, Daniel Morrison, Judge.

Ritchie Lee Lathrop appeals from his conviction and sentence for third-degree sexual abuse. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Michael W. Mahaffey, County Attorney, and Rebecca L. Petig, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Zimmer and Miller, JJ.

**ZIMMER, J.**

Ritchie Lee Lathrop appeals from his conviction and sentence for third-degree sexual abuse in violation of Iowa Code sections 709.4(1) and 709.4(2)(c)(4) (2005). Lathrop contends the trial court erred in denying his motion for new trial. He also contends his counsel was ineffective in several respects. Finally, Lathrop argues the district court abused its discretion in ordering him to have no contact with any person under the age of eighteen without the permission of his supervising officer as a condition of his probation. We affirm Lathrop's conviction and preserve his ineffective-assistance-of-counsel claims for possible postconviction relief proceedings.

***I. Background Facts and Proceedings.***

Lathrop was born on May 2, 1978, and was twenty-seven years old when he met fifteen-year-old C.W. in March 2005. Lathrop and C.W. met when C.W. was outside playing with her niece and Lathrop was in a neighboring yard. Lathrop asked C.W. for her phone number. C.W. told Lathrop if he wanted her phone number bad enough, he could "get it for himself." Lathrop obtained her phone number and called her later that day. Soon after Lathrop called C.W., the two began dating. While dating, they spent every weekend, as well as a couple of nights during the week, together.

Eventually, Lathrop and C.W. began a sexual relationship. C.W. was not certain when she first had sex with Lathrop but estimated that it was not long after they began dating in the spring of 2005. Lathrop asked C.W. not to tell anyone they were having sex. He told C.W. that he did not want to end up like his brother who was on the sex offender registry.

On March 25, 2005, C.W. visited Planned Parenthood.<sup>1</sup> After she obtained birth control pills, she and Lathrop began having sex “at least every other weekend, if not more.” Lathrop gave C.W. a “promise ring” in the summer of 2005. He told her the ring meant, “You’re mine.” Their relationship ended in July 2006, when C.W. broke up with Lathrop.

On December 1, 2006, the State charged Lathrop with third-degree sexual abuse. Following a jury trial which commenced on February 14, 2007, Lathrop was convicted of third-degree sexual abuse in violation of Iowa Code section 709.4(2)(c)(4).<sup>2</sup>

Following replacement of trial counsel, Lathrop filed a motion in arrest of judgment and a motion for new trial on March 9, 2007. The district court considered the motions during Lathrop’s sentencing hearing held on April 23, 2007, and denied both motions. The court sentenced Lathrop to a term of imprisonment not to exceed ten years, but then suspended the sentence and placed him on probation for three years. Additionally, the court notified Lathrop of his duty to register as a sex offender, ordered him to pay a registration fee and civil penalty, and submit a DNA profile. The court also imposed an additional term of lifetime parole pursuant to Iowa Code section 903B.1.

Lathrop appeals.

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<sup>1</sup> At trial, C.W. testified that by the time she went to Planned Parenthood she had already started a sexual relationship with Lathrop.

<sup>2</sup> Iowa Code section 709.4(2)(c)(4) provides that a person commits third-degree sexual abuse when the person performs a sex act under any of the following conditions:

2. The act is between persons who are not at the time cohabitating as husband and wife and if any of the following are true:
  - c. The other person is fourteen or fifteen years of age and any of the following are true:
    - (4) The person is four or more years older than the other person.

## ***II. Discussion.***

### ***A. Ineffective Assistance of Counsel Claims.***

We review claims of ineffective assistance de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984). To prevail on a claim of ineffective assistance, Lathrop must establish as a matter of law that counsel failed to perform an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 2064, L. Ed. 2d 674, 693 (1984); *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). Generally, we preserve claims of ineffective assistance to allow full development of the facts surrounding counsel's conduct. *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006). This is because postconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance. *Id.*

#### **1. Motion for New Trial - Exhibit B.**

On appeal, Lathrop contends the district court erred in denying his motion for new trial. In the motion, Lathrop claimed that the jury mistakenly received Exhibit B, a report from C.W.'s interview with the Child Protection Center (CPC), without the exhibit being properly redacted. At the hearing on the motion, Lathrop's substitute counsel explained that the allegations within the motion for new trial were based on Lathrop's assertion that his original trial counsel rendered ineffective assistance in failing to redact portions of the exhibit. The district court denied the motion for new trial, and stated that there was a "better setting" for Lathrop's claims of ineffective assistance of counsel. The State asserts that Lathrop's argument that the jury mistakenly received Exhibit B

without the exhibit being properly redacted should be raised as an ineffective-assistance-of-counsel claim on appeal. We agree and address it as such.

Lathrop claims his trial counsel breached an essential duty in his handling of Exhibit B and in failing to redact prejudicial other bad acts information from it, and that this breach resulted in prejudice to him. The State points out that trial counsel used this exhibit to cross-examine C.W. and asserts trial counsel could have planned, as a matter of strategy, to allow disclosure of C.W.'s other allegations against Lathrop in order to cross-examine her about their accuracy.

We conclude the record is inadequate to address Lathrop's ineffective-assistance-of-counsel claim regarding counsel's failure to redact portions of the exhibit. Therefore, we preserve this claim for possible postconviction relief proceedings.

## **2. Imposition of Iowa Code section 903B.1.**

Lathrop contends his substitute counsel, who was present at sentencing, rendered ineffective assistance of counsel when he failed to challenge the imposition of an additional term of lifetime parole.

In its sentencing order, the district court stated:

In addition to the sentence just imposed, you are also committed to the custody of the director of the Iowa Department of Corrections for the rest of your life, pursuant to Section 903B.1, Code of Iowa, with eligibility for parole as provided in Chapter 906. The special sentence shall commence upon completion of the sentence imposed for the underlying criminal offense, and the defendant shall begin the sentence under supervision as if on parole.

Lathrop was sentenced after the jury found him guilty of third-degree sexual abuse as charged in the amended trial information, which charged Lathrop with having sex with C.W. between the months of June and September

2005. During the sentencing hearing, Lathrop's counsel agreed that the special sentence of section 903B.1 applied. Iowa Code section 903B.1, which became effective on July 1, 2005, provides:

A person convicted of a class "C" felony or greater offense under chapter 709, or a class "C" felony under section 728.12, shall be sentenced, in addition to any other punishment provided by law, 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.

Lathrop now asserts that based upon the jury's verdict and the marshaling instruction, which instructed the jury that it could find Lathrop guilty if he committed a sex act with C.W. "during the months of June through September 2005," his counsel should have argued that the imposition of section 903B.1 violated the ex post facto clause.

The ex post facto clause only applies to statutes intended to punish, rather than statutes establishing civil proceedings. *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 1146-47, 155 L. Ed. 2d 164, 176 (2003); *see also Schreiber v. State*, 666 N.W.2d 127, 128-29 (Iowa 2003) (holding the ex post facto clause is violated when a statute makes more burdensome the punishment for a crime after its commission). Our supreme court has not yet determined whether Iowa Code section 903B.1 is "punishment," and the court has previously held that counsel is not required to know what the law will become in the future to provide effective assistance of counsel. *Snethen v. State*, 308 N.W.2d 11, 16 (Iowa 1981). In addition, it is not clear from the record that Lathrop was sentenced for acts which occurred prior to July 2005.

In order to allow full development of the facts surrounding counsel's failure to challenge the imposition of Iowa Code section 903B.1, we preserve Lathrop's ineffective-assistance-of-counsel claim for possible postconviction relief proceedings.

### **3. Sufficiency of the Evidence.**

Lathrop further contends that his trial counsel was ineffective because he failed to challenge the sufficiency of the evidence. He also claims his substitute counsel was ineffective for failing to argue trial counsel's ineffectiveness. Lathrop claims that the evidence at trial was insufficient because the State did not prove he and C.W. "were not living as husband and wife at the time the sex acts occurred."

Lathrop was found guilty of third-degree sexual abuse in violation of Iowa Code section 709.4(2)(c)(4), which provides that "[t]he act is between persons who are not at the time cohabiting as husband and wife . . . ." Lathrop argues that while he and C.W. were not "formally married," they were cohabiting as though they were. Both Lathrop and the State point out that our court has suggested two possible interpretations of what it means to "cohabit" as husband and wife under section 709.4. *State v. Leffel*, 340 N.W.2d 787, 788 (Iowa Ct. App. 1983). One interpretation would require the defendant and the victim to be married to each other in order for the defendant to avoid a sexual abuse conviction. *Id.* The other interpretation would also permit a defendant to avoid conviction if he and the victim "cohabited as though they were married but were not in fact necessarily married." *Id.*

We conclude the record is inadequate to address the defendant's ineffective-assistance-of-counsel claim that his counsel should have argued that section 709.4(2), which refers to an exception for persons cohabitating as husband and wife, is broad enough to encompass C.W.'s relationship with Lathrop. Therefore, we preserve this claim for possible postconviction relief proceedings.

***B. Probation Condition.***

Lathrop contends that a condition of his probation is unreasonable. When sentencing Lathrop, the district court followed the presentence investigator's recommendation and ordered him to comply with "those suggested special probation conditions" specified in the presentence investigation report. Those conditions included: "Mr. Lathrop shall have no contact with anyone under the age of 18 without the permission of his supervising officer." Lathrop claims that this condition does not serve the goals of probation because there is "no indication that a restriction on communicating with all persons under the age of 18 is a reasonable means of rehabilitating the defendant or protecting the community."

Our supreme court outlined the standard of review in reviewing a condition of probation in *State v. Valin*, 724 N.W.2d 440 (Iowa 2006). The court stated that "[w]hen a defendant challenges the terms of probation, '[i]t has long been a well-settled rule that trial courts have a broad discretion in probation matters which will be interfered with only upon a finding of abuse of that discretion.'" *Id.* at 444 (citation omitted). The court explained that the "task on appeal is not to second guess the decision made by the district court, but to determine if it was

unreasonable or based on untenable grounds.” *Id.* at 445. An abuse of discretion occurs “when there is no support for the decision in the evidence.” *Id.*

Because Lathrop was placed on probation, the court could “impose any reasonable probation condition to promote rehabilitation or community protection.” Iowa Code § 907.6; *State v. Manser*, 626 N.W.2d 872, 875 (Iowa Ct. App. 2001). A “condition of probation promotes the rehabilitation of the defendant or the protection of the community when it addresses some problem or need identified with the defendant.” *Valin*, 724 N.W.2d at 446.

In this case, the record reveals that Lathrop, who was twenty-seven years old, began a relationship with a fifteen-year-old by approaching her while she was babysitting. When C.W. refused to give Lathrop her phone number, Lathrop pursued her by obtaining the phone number from another source. Soon after Lathrop and C.W. began “dating,” their relationship became sexual. Lathrop asked C.W. not to tell anyone about their sexual relationship because he did not want to end up like his brother, who was on the sex offender registry. Ultimately, Lathrop was convicted of sexually abusing a fifteen-year-old girl.

Based on the foregoing, we cannot say the district court acted unreasonably in requiring Lathrop to receive permission from his probation officer before having contact with persons under the age of eighteen.

### ***III. Conclusion.***

We conclude Lathrop’s claim that the trial court erred in denying his motion for new trial is properly raised as an ineffective-assistance-of-counsel claim. We find the record is inadequate to address Lathrop’s claims of ineffective assistance of counsel on appeal. We find the district court did not abuse its

discretion in ordering Lathrop to have no contact with any person under the age of eighteen without receiving permission from his supervising officer as a condition of probation. Accordingly, we affirm Lathrop's conviction and preserve his ineffective-assistance-of-counsel claims for possible postconviction relief proceedings.

**AFFIRMED.**