IN THE COURT OF APPEALS OF IOWA

No. 1-958 / 10-0383
Filed January 19, 2012

MARVIN HALSTEAD,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Defendant appeals the district court's dismissal of his application for postconviction relief. **AFFIRMED.**

Donald L. Williams, Des Moines, for appellant.

Marvin Halstead, Coralville, pro se.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan M. Horvat, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., Eisenhauer, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

EISENHAUER, J.

In November 2006, Marvin Halstead pled guilty to four counts of third-degree sexual abuse and one count of child endangerment. Halstead was sentenced in accordance with his plea agreement. In 2008, Halstead filed an application for postconviction relief. After hearing, the district court dismissed the application in January 2010.

On appeal, Halstead first raises issues addressed by the district court. Because we agree with the district court's reasoning, its conclusions under the facts presented, and its application of the law, we affirm those issues pursuant to Iowa Rule of Appellate Procedure 6.1203(*a*), (*d*).

Second, Halstead now asserts pro se claims of double jeopardy and failure to merge offenses. We may correct an illegal sentence at any time. *State v. Bruegger*, 773 N.W.2d 862, 871-72 (Iowa 2009).

Halstead argues his multiple convictions constitute double jeopardy because his acts were committed within one hour and were "a continuous action." We find no merit to this claim. Halstead's four distinct and separate physical acts of sexual abuse constitute four separate crimes and may each be punished separately. *See State v. Constable*, 505 N.W.2d 473, 478 (Iowa 1993) (finding no double jeopardy when "by engaging in five distinct and separate sex acts, [defendant] committed five counts of sexual abuse"). Likewise, his child endangerment conviction is a separate crime and may be punished separately. *See* Iowa Code §§ 726.6(1)(a), .6(6).

In analyzing Halstead's merger claim under Iowa Code section 701.9 (2005), we recognize, "The lesser offense is necessarily included in the greater

offense if it is impossible to commit the greater offense without also committing the lesser offense." *Constable*, 505 N.W.2d at 475. Here, no count of sexual abuse should have merged into any other count of sexual abuse because the sex acts were distinct. *See id*. at 478.

Further, Halstead was charged with the "by force or against the will of the victim" and/or the "age of the child victim" alternatives of third-degree sexual abuse. *See* Iowa Code §§ 709.1, .4(1), .4(2)(b). "If the greater offense is defined alternatively and the State charges both alternatives, the test for included offenses must be applied to each alternative." *State v. Hickman*, 623 N.W.2d 847, 851 (Iowa 2001). Applying this test, we conclude the third-degree sexual abuse and the child endangerment offenses do not merge. *See* Iowa Code §§ 726.6(1)(a), .6(6). Accordingly, Halstead's merger claim is without merit.

AFFIRMED.