

**IN THE COURT OF APPEALS OF IOWA**

No. 2-546 / 11-1669  
Filed August 8, 2012

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

**vs.**

**SAUL MORENO JR.,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Robert A. Hutchison,  
Judge.

Saul Moreno appeals from the judgment and sentence entered following  
his guilty plea to lascivious acts with a child. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant  
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant  
Attorney General, John Sarcone, County Attorney, and Jeffrey Noble, Assistant  
County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

**BOWER, J.**

Saul Moreno appeals from the judgment and sentence entered following his guilty plea to lascivious acts with a child. He contends the district court abused its discretion by considering his lack of remorse as a sentencing factor and by failing to state on the record its reasons for the sentence given. He also contends his trial counsel was ineffective in failing to advise him to assert his constitutional right against self-incrimination at sentencing.

We find the district court acted within its discretion in sentencing Moreno. The court adequately stated its reasons for the sentence on the record, including Moreno's lack of remorse. We also reject his ineffective-assistance-of-counsel claim because Moreno cannot show he was prejudiced by counsel's alleged breach of duty.

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

On December 8, 2010, Moreno engaged in intercourse with a thirteen-year-old girl. When her parents discovered her journal, which contained details of the encounter, they contacted the police. Moreno was arrested, and on February 25, 2011, the State filed a trial information charging him with third-degree sexual abuse.

On April 14, 2011, Moreno pleaded guilty to lascivious acts with a child, a class C felony, in violation of Iowa Code section 709.8(1) (2011). A partial sentencing hearing was held on June 3, 2011. Victim impact statements were read to the court, including an allegation by the victim's father that Moreno had stated on the Internet that he would not go to jail for the crime and, if he did, his

girlfriend would make the victim “pay.” The hearing was continued to allow the State time to access Moreno’s social media accounts to review the alleged statements.

On August 18, 2011, Moreno filed a motion asking to withdraw his guilty plea and requesting new counsel. New counsel was appointed, and the sentencing hearing was rescheduled for September 21, 2011. At that hearing, messages from Moreno’s Facebook account were admitted. In them, Moreno asks a female friend to get the victim “fucked up, daily if possible” and states he wants to see the victim “all bruised up in court.”

The district court sentenced Moreno to a term of imprisonment not to exceed ten years. He was assessed a fine, surcharge, victim restitution, court costs, and attorney fees. Moreno was also ordered to submit a DNA sample, register as a sex offender, complete any recommended sex offender treatment, abide by the residency restrictions for sex offenders, and to refrain from contact with the victim for five years.

Moreno filed a timely notice of appeal.

## ***II. Sentencing.***

Moreno contends the district court abused its discretion in sentencing him in two respects. He first claims the court improperly considered a lack of remorse as a sentencing factor. He also claims the court failed to state on the record its reasons for the sentence imposed.

A defendant’s sentence is ordinarily within the trial court’s discretion. *State v. Knight*, 701 N.W.2d 83, 85 (Iowa 2005). However, reliance on an

impermissible sentencing factor is an abuse of discretion and requires resentencing. *Id.* In determining the proper sentence, a court must consider which sentence or combination of sentences “will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others.” *Id.* at 86. Some pertinent factors include the defendant’s character, propensity to reoffend, and chances for reform. *Id.* at 86-87.

In sentencing Moreno, the district court stated:

I have reviewed the Presentence Investigation Report. I’ve considered the defendant’s age, his prior record of convictions and deferments, his employment circumstances, his mental health and substance abuse history, his family circumstances, the nature of the offense that was committed here, and the harm to the victim. I have no reason to believe there was any weapon or force involved in this offense. As I have indicated, I don’t believe the victim was capable of giving consent—the defendant’s financial circumstances, the defendant’s need for rehabilitation and his potential for that, and the necessity for protecting the community from further offenses by the defendant, and the other factors that are set forth in the Presentence Investigation Report.

I would further note that in my view, Mr. Moreno has not ever expressed any remorse for what has happened here. His only sorrow is that he’s fallen foul to the legal system, and that does not bode well for him now or in the future.

The court then pronounced the sentence, adding, “And that really goes to my comment about you failing to express any remorse, or, in my view, accept responsibility for what happened here.”

Moreno first argues the court abused its discretion in sentencing him based on his lack of remorse or failure to accept responsibility for his crime. Our supreme court has held “a defendant’s lack of remorse is highly pertinent to evaluating his need for rehabilitation and his likelihood of reoffending.” *Id.* at 88.

Therefore, the court may consider this factor in making a sentencing decision.

*Id.*

Moreno claims there is nothing in the record to support such a finding. He cites his statement at the plea proceeding in which he stated, "I had consensual sex with [the victim] not knowing her age, and I understand that I made a poor decision, and I am willing to take the consequences." He argues the Facebook messages provided to the court were posted prior to his arrest and criminal charges and only provide a "snapshot" of his state of mind at that time. Finally, Moreno argues the court improperly drew a negative inference of lack of remorse because he did not exercise his right to allocution at the sentencing hearing.

When Moreno was questioned by law enforcement, he initially denied having sex with the victim. Instead, he claimed to be with his girlfriend and stated she would provide an alibi for him. Moreno also attempted to arrange for the victim to be physically attacked for going to the police, stating he wanted to see her "all bruised up" in court. He denied having done anything wrong and stated that while he was looking forward to the birth of his child, "thanks to a lil bitch i [sic] might be sitting at a jail cell away from him."

While Moreno accepted legal responsibility for his crime, he did not offer an apology to the victim or her family at the time of the plea proceeding or at sentencing. Instead of speaking in allocution at the sentencing hearing, his attorney minimized his culpability for the crime, stating:

[T]his young girl essentially came into Mr. Moreno's bedroom and seduced him. And he was completely unaware of her age, and, in fact, believed that she was an older teenager. And I think that

those circumstances could befall just about any 19-year-old young man and could be said that, there but for the grace of God, goes I.

Nowhere in the record is it shown that Moreno expressed any remorse for the crime he committed. The district court did not improperly rely on Moreno's lack of remorse in sentencing him.

We also find the district court adequately stated its reasons for Moreno's sentence on the record. Although our rules of criminal procedure require a sentencing judge to state the reasons for a particular sentence on the record, the reasons need not be detailed. *State v. Barnes*, 791 N.W.2d 817, 827 (Iowa 2010). However, at least a cursory explanation must be provided to allow appellate review. *Id.*

Here, the district court stated it considered the following in making its sentencing decision: Moreno's age, prior record, employment circumstances, mental health, substance abuse history, and family circumstances; the nature of the offense; the harm to the victim; Moreno's financial circumstances; the need for rehabilitation and Moreno's potential for that weighed against the necessity for protecting the community; Moreno's lack of remorse; and other factors contained in the presentence investigation report. The reasons stated by the district court were sufficient to afford review.

We find the district court acted within its discretion in sentencing Moreno. The district court heard victim impact statements from the victim herself, as well as her parents and siblings. It was clear from the statements that the victim and her entire family suffered as a result of Moreno's actions. In addition, Moreno failed to show remorse for the crime, instead expressing disbelief that he could

go to prison for the crime and asking a friend to assault the victim. Accordingly, we affirm the sentence.

### ***III. Ineffective Assistance of Counsel.***

Lastly, Moreno contends his trial counsel was ineffective in failing to advise him to assert his constitutional right against self-incrimination regarding the Facebook messages he was compelled to provide the State. He argues counsel had a duty to object to the court's order requiring him to provide the State with access to his social networking accounts. He further argues counsel had a duty to object to the introduction of his Facebook messages at the sentencing hearing. He argues that because the court relied on these messages, he was prejudiced by their admission.

We review ineffective-assistance-of-counsel claims de novo. *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006). To prove a claim of ineffective assistance of counsel, Moreno must show by a preponderance of the evidence that trial counsel failed to perform an essential duty and prejudice resulted. See *id.* at 784. If Moreno fails to prove either element of this test, his claim fails. See *id.*

We presume counsel's performance falls within a range of reasonable professional assistance. *Id.* at 785. Moreno has the burden to rebut this presumption with evidence his counsel's representation "fell below an objective standard of reasonableness. See *id.* Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Id.* at 786. We rarely address ineffective-assistance-of-

counsel claims on direct appeal, preferring to preserve these claims for postconviction relief proceedings to discern the difference between improvident trial strategy and ineffective assistance. *Id.*

In order to satisfy the prejudice element of an ineffective-assistance-of-counsel claim, a defendant must show that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 784. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome. *Id.*

Assuming, without finding, that counsel breached an essential duty, we cannot find Moreno was prejudiced. As the State notes, even if Moreno had not been ordered to provide his account information, the State could have obtained the information through testimony by the victim, who saw the messages. The State could have obtained the information by subpoenaing the records from Facebook or subpoenaing the recipient of the messages. Because Moreno cannot show he was prejudiced by any failure of counsel, we reject his claim.

**AFFIRMED.**