

IN THE COURT OF APPEALS OF IOWA

No. 3-332 / 11-0460
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TONY EUGENE BONER,
Defendant-Appellant.

Appeal from the Iowa District Court for Taylor County, John D. Lloyd,
Judge.

Defendant appeals the district court decision denying his motion to correct
an illegal sentence. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney
General, and Clinton L. Spurrier, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Bower, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MAHAN, S.J.**I. Background Facts & Proceedings.**

Tony Boner was charged with sexual abuse in the third degree, in violation of Iowa Code section 709.4(1) (2009), a class “C” felony. The State alleged Boner accosted a woman who was jogging and engaged in a sex act with her against her will.

The State filed a motion seeking to amend the trial information to assert Boner should be subject to sentencing enhancements under sections 901A.2(3)¹ and 902.14(1)². The State asserted the current charge should be considered a second offense because Boner had been convicted in 1991 of first-degree sexual abuse in Missouri, in violation of Missouri Revised Statutes section 556.100 (1990).

The district court held a hearing on the motion to amend on December 22, 2010. Boner argued the Missouri statute did not substantially correspond to relevant Iowa statutes. The court ruled the State could amend the trial information to include the enhancements under sections 901A.2(3) and 902.14(1).

The State then offered Boner a plea deal whereby he would plead guilty to third-degree sexual abuse, with the enhancement under section 901A.2(3), and the State would dismiss the allegation that he was also subject to an

¹ Under section 901A.2(3), a person convicted of a sexually predatory offense, who has a prior conviction for a sexually predatory offense, is sentenced to twice the maximum sentence for the offense, or twenty-five years, whichever is greater.

² Under section 902.14(1), a second or subsequent offense of second-degree sexual abuse, third-degree sexual abuse, or lascivious acts with a child may be sentenced as a class “A” felony. A defendant convicted of a class “A” felony is subject to imprisonment for the rest of the defendant’s life. Iowa Code § 902.1.

enhancement under section 902.14(1). Boner entered a guilty plea on the record. He admitted to a factual basis for the plea in the guilty plea proceedings. The district court accepted his guilty plea to third-degree sexual abuse, with the enhancement under section 901A.2(3). Boner was sentenced to a term of imprisonment not to exceed twenty-five years.

On October 7, 2010, Boner filed a pro se motion to correct an illegal sentence, claiming the enhancement in section 901A.2(3) had been improperly imposed in his case. A hearing on his motion was held. The district court entered a written ruling denying the motion to correct an illegal sentence. Boner now appeals the district court decision denying his motion to correct an illegal sentence.

II. Motion to Correct Illegal Sentence.

Section 901A.2(3) provides:

[A] person convicted of a sexually predatory offense which is a felony, who has a prior conviction for a sexually predatory offense, shall be sentenced to and shall serve twice the maximum period of incarceration for the offense, or twenty-five years, whichever is greater, notwithstanding any other provision of the Code to the contrary.

The term “sexually predatory offense,” includes any serious or aggravated misdemeanor or felony that is a violation of any provision of chapter 709. Iowa Code § 901A.1(1)(a). A “sexually predatory offense” includes, “An offense under prior law of this state or an offense committed in another jurisdiction which would constitute an equivalent offense” under section 901A.1(1). Iowa Code § 901A.1(1)(f); *State v. Harrington*, 608 N.W.2d 440, 441 (Iowa 2000) (citing statute).

Boner claims his conviction in Missouri was not for an equivalent offense to any offenses under Iowa Code chapter 709. He asserts because the Iowa and Missouri statutes are different, the enhancement in section 901A.2(3) should not apply.

A defendant may challenge an illegal sentence at any time. Iowa R. Crim. P. 2.24(4)(a); *State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009). We review a district court's ruling on a motion to correct an illegal sentence for the correction of errors at law. *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001).

Under section 901A.2(3), "[a] person convicted of a sexually predatory offense who is subject to sentence enhancement because of a prior sexually predatory offense, . . . is subject to a much harsher mandatory prison term of twenty-five years." *Bruegger*, 773 N.W.2d at 867. "The term 'sexually predatory offense' further includes sexual offenses which, if committed in another jurisdiction, would constitute an equivalent offense to those covered under Iowa law." *Id.*

Boner was convicted of violating Missouri Revised Statutes section 566.100, which provided at that time:

1. A person commits the crime of sexual abuse in the first degree if:

(1) He subjects another person to whom he is not married to sexual contact without that person's consent by the use of forcible compulsion; or

(2) He subjects another person who is less than twelve years old to sexual contact.

2. Sexual abuse in the first degree is a class D felony unless in the course thereof the actor inflicts serious physical harm on any person, displays a deadly weapon in a threatening manner, or the offense is committed as part of a ritual or ceremony, in which cases the crime is a class C felony.

Boner's conviction involved sexual contact with another person without that person's consent by the use of forcible compulsion. The term "forcible compulsion" is defined in Missouri as either "(a) Physical force that overcomes reasonable resistance; or (b) A threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of such person or another person." Mo. Rev. Stat. § 556.061(12).

In Iowa, the relevant definition of sexual abuse is a sex act which is performed "by force or against the will of the other." Iowa Code § 709.1(1). It is not necessary in Iowa to establish physical resistance to show that an act of sexual abuse was committed by force or against the will of the person. *Id.* § 709.5. Boner asserts the Missouri statute is not substantially equivalent to Iowa statutes regarding sexual abuse because Iowa law does not include the concepts of forcible compulsion or reasonable resistance.³

We find although the statutory terms of "forcible compulsion" and "by force or against the will" are not exactly the same, they embody the same concepts to prohibit sexual contact with a person by force. We conclude the Missouri statute is an "equivalent offense" to sexual abuse in chapter 709.

We conclude the district court did not err in denying Boner's motion to correct an illegal sentence. Boner was properly sentenced under section 901A.2(3).

³ We note "Missouri law does not require a sexual assault victim to offer physical resistance if she submits through fear of personal violence." *State v. French*, 308 S.W.3d 266, 273 (Mo. Ct. App. 2010). "Nor does Missouri law 'require or expect the utmost resistance to sexual assault when it appears that such resistance would be futile or would provoke more serious injury.'" *Id.* (citation omitted).

III. Ineffective Assistance of Counsel.

Boner also contends he received ineffective assistance because his defense counsel permitted him to plead guilty to an enhanced charge when there was no factual basis to support the enhanced charge, resulting in an illegal sentence. However, he does not make any specific arguments on this issue so it is not clear exactly what he is claiming. Also, he does not cite any authorities. “Failure to cite authority in support of an issue may be deemed waiver of that issue.” Iowa R. App. P. 6.903(2)(g)(3). We conclude Boner has waived this issue and we do not further address it.

We affirm the district court decision denying defendant’s motion to correct an illegal sentence.

AFFIRMED.