

IN THE COURT OF APPEALS OF IOWA

No. 3-713 / 12-1625
Filed October 2, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DREW CHRISTOPHER LIPOVAC,
Defendant-Appellant.

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

Defendant appeals from the judgment and sentence imposed following his
guilty plea. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams and
Martha J. Lucey, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, and Julie A. Forsyth, County Attorney, for appellee.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

BOWER, J.

Drew Lipovac appeals from the judgment and sentence imposed following his guilty plea to sexual exploitation by a school employee. He contends his attorney was ineffective in not filing a motion in arrest of judgment to challenge the factual basis for the plea. He also contends the court abused its discretion in sentencing by considering an improper factor. We affirm.

I. Background Facts and Proceedings

In early 2012 Lipovac, a third-grade teacher, was charged with one felony and two aggravated misdemeanor counts of sexual exploitation by a school employee, based on events involving two high-school students that occurred during two parties in 2011. Pursuant to a written plea agreement, Lipovac entered a guilty plea to one aggravated misdemeanor count. After questioning Lipovac to establish a factual basis, the court accepted the plea. The plea agreement provided the State would dismiss the other two counts, the State would recommend a suspended two-year prison sentence, and Lipovac was free to argue for a deferred judgment.

At sentencing, the State recommended a suspended two-year prison sentence. The presentence investigation also recommended a suspended two-year prison sentence with two years of probation. Lipovac, during allocution, and his attorney both argued for a deferred judgment. Lipovac's father testified in support of a deferred judgment. The court also received dozens of letters describing Lipovac's character and work history. The court then ruled:

Mr. Lipovac, having considered all of those factors and having considered the statements of counsel here this morning, as well as

your own statements, and the statements of the one witness that was presented, the court finds that it is appropriate and I do find you guilty of the charge of sexual exploitation by a school employee . . . as an aggravated misdemeanor. Pursuant to Iowa Code sections 902.3 and 902.9 [2011] [you are] committed to the custody of the director of the department of corrections for a period of not more than two years. I'm going to follow the recommendation of the presentence investigator in suspending that sentence and placing you on a two-year term of probation

After setting forth other details of the sentence and probation, the court stated:

For the record, I have considered the possibility of deferring this sentence, but I don't feel that that's appropriate in this case. I read through the letters of recommendation that were attached to the presentence investigation, and there were quite a number of them. As your father indicated when he testified, the opinion of the people who wrote those letters is pretty consistent. The people who have had contact with you down through the years all seem to think rather highly of you. And that could cut both ways. As I considered it, read those letters and looked at the charge and the nature of the crime you committed, I became very concerned about how intelligent and capable you are of manipulating the people around you so that you appear to be something other than what you are, and my concern is that if I were to defer this sentence so that you do not have this conviction on your record, eventually, assuming that you will successfully complete your probation—and I do assume that—it might be that much easier for you to work your way back into the situation where you could commit these types of crimes again.

You seem to be very, very capable of convincing those around you that you're a person to be trusted, whereas the facts would seem to indicate that you are not. So that's why I've rejected the possibility of a deferred sentence.

II. Scope and Standards of Review

Challenges to guilty pleas generally are reviewed for correction of errors at law. *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010). Here the claim is counsel was ineffective for allowing a defendant to enter a guilty plea without a factual basis; we review claims of ineffective assistance de novo. *State v. Velez*, 829 N.W.2d 572, 576 (Iowa 2013). To demonstrate ineffective assistance, a

defendant must prove “(1) counsel failed to perform an essential duty, and (2) prejudice resulted.” *Id.* (quoting *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012)).

Our review of challenges to sentences is for correction of error at law. *State v. Shearon*, 660 N.W.2d 52, 57 (Iowa 2003). Challenges to a sentence that falls within the statutory limits, as is the case here, are reviewed for an abuse of discretion. *State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998). An abuse of discretion occurs when the court’s sentencing decision was “exercised on grounds or for reasons that were clearly untenable or unreasonable.” *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008).

III. Merits

Ineffective Assistance. Lipovac contends his attorney was ineffective in not filing a motion in arrest of judgment to challenge the lack of a factual basis for his plea. Sexual exploitation by a school employee includes “[a]ny sexual conduct with a student for the purpose of arousing or satisfying the sexual desires of the school employee or the student. Sexual conduct includes but is not limited to the following: kissing; touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals; or a sex act.” Iowa Code § 709.15(3)(b) Lipovac does not challenge the fact he meets the definition of a “school employee” in section 709.15(1)(f), nor does he challenge the fact the victim met the definition of a “student” in 709.15(1)(g). He contends he did not violate section 709.15(3) because he was not in a teacher-student relationship with the victim. Our supreme court recently considered and rejected such an

argument in *State v. Romer*, 832 N.W.2d 169, 178 (Iowa 2013) (determining a teacher-student relationship is not required by the statute). Because there was a factual basis for Lipovac's plea, his attorney did not fail in an essential duty by not challenging the factual basis for the plea. See *State v. Soboroff*, 798 N.W.2d 1, 9 (Iowa 2011) (holding an attorney has no duty to pursue a meritless issue). Lipovac's ineffective-assistance claim fails.

Sentence. Lipovac contends the district court abused its discretion by considering an improper factor in sentencing. In general, an abuse of discretion and consideration of improper factors are separate issues when we review a sentence imposed by the district court. *State v. Grandberry*, 619 N.W.2d 399, 401 n.1 (Iowa 2000). Although Lipovac claims the district court abused its discretion in imposing sentence, the argument in his brief relates solely to the district court's consideration of what he claims is an improper factor. Whether the district court abused its discretion should not be an issue in this case. See *id.* If a court uses any improper consideration in determining a sentence, resentencing is required. *State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998).

Lipovac argues "the court's perceived disconnect between the crimes charged and the person described in the letters of recommendation submitted by Lipovac resulted in the court's dangerous leap of logic that Drew Lipovac had "manipulated" all these people for so many years." He asserts the court's conclusion was "based on no evidence." He argues that because "the record here is not sufficient to support the district court's harsh conclusions as to the

character of Lipovac,” the court “thus considered an improper sentencing factor, fueled by the worst type of speculation.”

When determining the appropriate sentence, the court should “weigh and consider all pertinent matters in determining [a] proper sentence, including the nature of the offense, the attending circumstances, defendant’s age, character and propensities and chances of his reform. The courts owe a duty to the public as much as to defendant in determining a proper sentence.” *State v. Leckington*, 713 N.W.2d 208, 216 (Iowa 2006) (citation omitted).

What Lipovac believes is the court’s consideration of an improper factor in sentencing is really his disagreement with the court’s conclusions regarding his character, propensities, and chances of reform—all of which are proper factors to consider. See *id.* The court did not consider any improper factor, but it did expressly consider pertinent matters in determining the proper sentence. We affirm.

AFFIRMED.