

IN THE COURT OF APPEALS OF IOWA

No. 6-620 / 05-1714
Filed September 7, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LAURA HOOVER,
Defendant-Appellant.

Appeal from the Iowa District Court for Bremer County, John S. Mackey (plea proceedings), Paul W. Riffel (motion in arrest of judgment), and Stephen P. Carroll (sentencing), Judges.

A defendant appeals following guilty plea, judgment, and sentence for sexual abuse in the third degree. **AFFIRMED.**

Laura M. Langenwalter, Waterloo, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, and Kasey E. Wadding, County Attorney, for appellee.

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

ZIMMER, J.

Laura Hoover appeals following guilty plea, judgment, and sentence for the offense of sexual abuse in the third degree, in violation of Iowa Code sections 709.1 and 709.4(2)(c)(4) (1999). She alleges the first attorney who represented her was ineffective for allowing her to enter a guilty plea for which there was no factual basis and for failing to file a timely motion in arrest of judgment. We affirm Hoover's judgment and sentence.

I. Background Facts and Proceedings.

The State filed a five-count trial information, supported by detailed minutes of testimony, that alleged Hoover had perpetrated multiple acts of sexual abuse upon a minor, John Doe, between 1993 and 2000. In pertinent part, Count V alleged Hoover had committed sexual abuse in the third degree by engaging in sex acts with Doe during the period from April 1999 through April 2000, while Doe was fourteen or fifteen years of age and Hoover was four or more years older than Doe. The minutes alleged that during this time Hoover required Doe to engage in sexual intercourse and mouth-to-breast contact.

Hoover and the State entered into a plea agreement. The agreement called for Hoover to plead guilty to Count V of the trial information, with the understanding that the State would dismiss the remaining charges and recommend a deferred judgment.

Hoover appeared before the district court on October 18, 2004, with her attorney, David Roth, to enter her plea of guilty. During the plea hearing Hoover confirmed she understood the elements of Count V, that the State would have to prove all of the elements beyond a reasonable doubt, and that she was willing to

admit to committing those elements. Hoover then admitted she had engaged in a sex act with Doe as alleged in Count V. She also confirmed that she had “review[ed] the minutes of testimony attached to the trial information pertaining to this count with Mr. Roth.” The court inquired if Hoover had “any dispute with any of the statements of the witnesses as they pertain to this count.” Following consultation with attorney Roth, Hoover stated her agreement with the “substantial . . . statements and testimony” relevant to Count V.

Finally, the court asked counsel if they knew of any reason why it should not accept Hoover’s plea. Attorney Roth responded in the negative. The prosecutor stated:

[C]onsidering the age of this case, your Honor, . . . I just want to make sure that the . . . plea is adequate and not that I’m having a great deal of doubt but we talked about a sex act and the admission to the minutes of testimony, and I want to make sure that Ms. Hoover understands that a sex act is, you know, hand to genital contact, penis to vagina contact, mouth to genitalia contact and those are the kinds of sexual acts that we’re talking about here.

Hoover confirmed that she understood this was the type of contact contemplated by the term “sex act,” and responded in the affirmative to the court’s inquiry regarding whether she was “admitting that that is the type of contact which occurred in connection with this charge”

The court accepted Hoover’s guilty plea to Count V, advised Hoover of her right to challenge her guilty plea by filing a motion in arrest of judgment within forty-five days, and scheduled a date for sentencing. The record reveals the sentencing hearing was continued several times due to delays in the preparation of the presentence investigation report. Sentencing was eventually rescheduled for June 20, 2005. On May 16, 2005, attorney Laura Langenwalter entered her

appearance on behalf of Hoover. On June 17, Langenwalter filed a motion to continue sentencing and a motion in arrest of judgment.¹ The motion in arrest of judgment alleged there was no factual basis for Hoover's guilty plea, in part because the record made during the plea proceeding did not adequately define a "sex act" as one that "must be 'sexual' in nature."

Hoover's sentencing was continued, and the motion in arrest of judgment was heard during an August 29, 2005 hearing. Hoover was allowed to testify to her understanding at the time the plea was entered. She claimed she did not understand the contact she was admitting to "had to be sexual in nature," and if she had known that fact she would not have admitted to the contact.

Following the hearing, the district court denied the motion in arrest of judgment. The court noted the motion was untimely, but went on to consider and reject the defendant's claims. The court determined Hoover's admissions during the plea proceeding and the minutes of testimony indicated the plea was knowing, intelligent, and voluntary, and supported by a factual basis.

On October 17, 2005, Hoover was sentenced to an indeterminate ten-year term of incarceration, received a suspended fine, and was ordered to undergo a psychosexual evaluation and participate in recommended services. This appeal followed.

II. Discussion.

In her brief on appeal, Hoover presents the following issue for our consideration:

¹ The motion to continue alleged that, due to medical reasons, Hoover was unable to travel to Iowa from Virginia, where she now lived.

WHETHER COUNSEL FOR THE DEFENDANT WAS INEFFECTIVE IN ALLOWING HER TO ENTER A PLEA FOR WHICH THERE WAS NO FACTUAL BASIS AND FOR FAILING TO FILE A TIMELY MOTION IN ARREST OF JUDGMENT TO CORRECT THE ERROR, THEREBY CAUSING THE PLEA AGREEMENT TO BE INVALID AND NECESSITATING A REMAND TO THE DISTRICT COURT TO PROCEED UNDER THE ORIGINAL TRIAL INFORMATION.

Ineffective assistance claims require a defendant to prove by a preponderance of the evidence both that (1) trial counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Dalton*, 674 N.W.2d 111, 119 (Iowa 2004). As Hoover points out, it is well established that trial counsel will be found ineffective for allowing a defendant to enter a guilty plea to a charge for which there is no factual basis, and thereafter failing to file a motion in arrest of judgment to challenge the plea. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). In such cases prejudice will also be found, because if counsel had raised the issue the defendant could not have been convicted of the crime. *State v. Doggett*, 687 N.W.2d 97, 102 (Iowa 2004).

Here, in contrast, Hoover was able to challenge the factual basis of her guilty plea in a motion in arrest of judgment filed by her second attorney. Because the district court considered and rejected the merits of Hoover's motion, Hoover suffered no prejudice as a result of her original attorney's failure to file a timely motion in arrest of judgment. We need not, however, decide whether this claim is appropriately brought as a claim of ineffective assistance or district court error. Under either standard we, like the district court, conclude there is a factual basis for Hoover's guilty plea.

In determining whether a factual basis for the guilty plea exists, we consider the entire record before the district court during the plea proceeding, including Hoover's statements and the minutes of testimony. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). That record reveals Hoover admitted to performing a sex act on Doe in the manner charged, and agreed with the "substantial" allegations in the minutes of testimony that related to Count V. Those allegations included sexual intercourse between Hoover and Doe during the relevant period. The foregoing is sufficient to form a factual basis for Hoover's guilty plea to sexual abuse in the third degree. See Iowa Code §§ 709.1, 709.4(2)(c)(4).

Hoover nevertheless challenges the factual basis of her plea on the ground that she did not understand a "sex act" had to be "sexual in nature." Such a challenge appears to be more suited to a claim that her plea was not knowing and voluntary, rather than lacking in a factual basis. See *State v. Loye*, 670 N.W.2d 141, 151 (Iowa 2003) (requiring a defendant be conscious of the nature of a crime). Regardless, we find the contention to be without merit.

Hoover admitted to performing a sex act on Doe which, as specified by the minutes of testimony, included sexual intercourse. This act, which requires penile penetration of the vagina, is clearly sexual in nature. See *State v. Pearson*, 514 N.W.2d 452, 455 (Iowa 1994) ("The sexual nature of the contact can be determined from the type of contact and the circumstances surrounding it."). Moreover, although Hoover criticizes the prosecutor's definition of a "sex act," that definition specifically described the forms of outlined contact as "sexual acts." Cf. Iowa Code § 702.17 (defining "sex act" as "sexual contact" that

includes “penetration of the penis into the vagina”). We accordingly reject any claim Hoover’s guilty plea lacked a factual basis, or was not knowing and voluntary, because the court failed to adequately explain that a “sex act” must be “sexual in nature.”

III. Conclusion.

We have considered all of Hoover’s assertions, whether or not specifically discussed. We find the challenge to her guilty plea to be without merit. We accordingly affirm her conviction and sentence.

AFFIRMED.