

IN THE COURT OF APPEALS OF IOWA

No. 7-407 / 06-1519
Filed October 12, 2007

STATE OF IOWA,
Plaintiff-Appellant,

vs.

**IOWA DISTRICT COURT FOR
MARSHALL COUNTY,**
Defendant-Appellee.

Appeal from the Iowa District Court for Marshall County, William J. Pattinson, Judge.

The State sought a writ of certiorari challenging the district court's authority to remand jurisdiction to district court. **WRIT ANNULED.**

Thomas J. Miller, Attorney General, Bruce Kempkes and Mary Tabor, Assistant Attorney Generals, Jennifer Miller, County Attorney, and Susan Grimes, Assistant County Attorney, for appellant.

Mark C. Smith, State Appellate Defender, and David A. Adams, Assistant State Appellate Defender, for appellee.

Heard by Zimmer, P.J., Eisenhauer, J, and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

PER CURIAM.

The State filed a petition for a writ of certiorari contending the district court acted illegally in transferring the case of Zack, charged as a sixteen-year-old with committing a forcible felony, to juvenile court where the transfer had been denied earlier by another judge. The Supreme Court granted the writ and transferred the case to us. We annul the writ.

BACKGROUND

Zack, born October 5th of 1989, was charged by trial information on March 7, 2006, with two counts of sexual abuse in the third degree in violation of Iowa Code sections 709.1, 709.4(2)(b), and 702.17 (2005). At the time of the alleged events Zack was sixteen years old and the alleged victim of the abuse was a thirteen-year-old girl. Zack filed a motion seeking a reverse waiver to transfer jurisdiction of the case to juvenile court. The Honorable Carl D. Baker denied the motion to transfer in an order filed March 15, 2006.

On June 23, 2006, the State amended the trial information to change the first count to charge the offense of lascivious acts with a child in violation of section 709.8(3). On June 27, 2006, appearing before the Honorable Michael J. Moon, Zack entered a plea of guilty to lascivious acts with a child. The district court accepted Zack's plea and set sentencing for August 28, 2006.

Zack appeared for sentencing. The Honorable William J. Pattinson presided and after hearing evidence asked the parties if he was "locked into the denial of the reverse waiver." The sentencing was recessed to allow further research in the matter. On August 30, the assistant county attorney handling the case wrote to the judge indicating that Zack could go to the Iowa Training School

in Eldora if sent as a juvenile but not if he were prosecuted as an adult. The prosecutor noted that Zack should not have a second chance for a reverse waiver and that the charge to which he was awaiting sentencing was not a forcible felony that allows reverse waiver. The prosecutor noted that *Ethridge v. Hildreth*, 114 N.W.2d 311 (Iowa 1962) may support transfer of jurisdiction even after sentencing, but pointed out that the statutes cited in *Ethridge* no longer exist. The prosecutor noted that juvenile court jurisdiction may offer the best chance of a safe and structured treatment environment for Zack. However, the prosecutor told the judge the State was disturbed that a transfer to juvenile court would allow sex offender registration to be discretionary rather than mandatory.

The district court entered an order on August 31, 2006. The court noted that ordinarily lascivious acts with a child charges would have put Zack within the ambit of the juvenile court's original jurisdiction under section 232.8(1)(a) though Zack's plea was entered in district court. The court noted, citing *State v. Emery*, 636 N.W.2d 116, 121 (Iowa 2001), that Zack's entry of a plea in district court was a waiver of his entitlement to be treated as a juvenile and the district court had authority to accept his plea.

It became clear to the court at the sentencing hearing before judgment of conviction was entered, that there was no workable or desired result if Zack continued to be treated as an adult offender. The court noted Zack had demonstrated an inability to comply with rules of pretrial supervision, alienated himself from his parents and was not welcome in their home, and the only proposal for his existence on probation was living with his current girlfriend and her mother. The court found Zack was in need of substantial structure, noting he

had only a seventh grade education, no job, and no interest in acquiring or retaining a job.

The judge indicated that a representative of the Department of Correctional Services advised him that because of Zack's age, no local residential facility would take him as a client. The representative was not able to locate any structured program for Zack except at a private pay facility that would cost \$120 a day. The judge noted that the representative recommended the only structured setting she found which was placement in an adult prison. The judge meanwhile noted that the county attorney requested Zack be given probation. The judge indicated he was unwilling to implement either of these options and he adjourned the sentencing hearing and directed investigation of the possibility of the case being returned to juvenile court.

The judge found while Zack had pled guilty to a non-forcible felony, he had not been convicted. The judge found the absence of a conviction permitted him more discretion at the sentencing. He found he was not constrained by section 232(1)(c) that would have obligated him to sentence Zack pursuant to section 902.9 which specifies penalties for various grades of felonies. While recognizing that reconsideration of a previous ruling or order is not specifically contemplated by any Iowa rule of procedure, the judge reasoned that the ability to conduct such a reconsideration has been recognized at common law. See *State v. Kirschbaum*, 491 N.W.2d 199, 200 (Iowa Ct. App. 1992) (holding that until a final judgment is entered the trial court has the power to correct any rulings or orders entered).

Finding no statutory or other impediment preventing him from doing so, the court reconsidered the March 15, 2006 order and found good cause to move the prosecution back to juvenile court. The court ordered that for purposes of resolution of the matter in juvenile court, Zack's guilty plea to lascivious acts should be considered a fait accompli referencing section 232.8(1)(c). "Notwithstanding any other provision of the Code to the contrary, the court may accept from a child a plea of guilty . . . to the offense excluded from the jurisdiction of the juvenile court under this section, in the same manner as regarding an adult." *Id.*

The court stated the remand of jurisdiction was made with the strongest recommendation that Zack be placed at the Iowa State Training School for Boys in Eldora, Iowa, until age eighteen or until maximum benefits shall have been received.

The State filed a motion to reconsider, contending Zack was not eligible for placement at the Iowa State Training School for Boys, and the only placement option available for him was placement in a residential setting. The State explained the waiting list for placement at the training school made it unlikely that space would be available for Zack in less than four months after adjudicatory and dispositional hearings are held in the juvenile court. Zack, at that point would be only six or eight months before reaching his eighteenth birthday, and it was unlikely any residential facility with a sex offender treatment program would accept him for placement. Consequently, no options available to the juvenile court would adequately address the treatment Zack needs. In response, the court denied the motion and stated there was no need for adjudication in juvenile

court as Zack's guilty plea in district court was a "done deal" and provided the basis for action on the juvenile court's part.

On September 27, 2006, the State sought a writ of certiorari and a stay of further proceedings to enforce the district court order of August 31, 2006 which remanded jurisdiction to the Iowa Juvenile Court. The Supreme Court granted the writ and stayed further proceedings to enforce the district court order.

The State contends when a sixteen-year-old charged with commission of a forcible felony enters a knowing, intelligent, and voluntary guilty plea in district court of a lesser offense, the district court at sentencing cannot rescind an earlier ruling denying a motion to transfer jurisdiction to the juvenile court for resolution and enter an order for transfer.

The State contends error was preserved by requesting probation for Zack at sentencing, moving for reconsideration of the order transferring this case to juvenile court, and filing the certiorari petition. Zack contends error was not preserved on this issue. He asserts the State did not at any time challenge the district court's action as illegal. When the district court asked the attorneys about transfer, the State's attorney made no objection, and when the assistant county attorney wrote to the judge regarding the court's authority to transfer, the attorney did not object on this basis. Finally, Zack argues the motion to reconsider advanced only that the difficulty in placing Zack in residential care made the transfer unadvisable and not that the transfer was illegal. Zack contends failure to preserve error constrains us not to address the State's issues.

STANDARD OF REVIEW AND ERROR PRESERVATION

Certiorari is an action at law; therefore, our review is for correction of errors at law, not de novo. *In re Inspection of Titan Tire*, 637 N.W.2d 135, 140 (Iowa 2001). “In a certiorari action, we may examine only the jurisdiction of the district court and the legality of its actions.” *Opat v. Ludeking*, 666 N.W.2d 597, 606 (Iowa 2003); *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998).

It is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002). It is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable. *Id.*

In *Sorci v. Iowa District Court*, 671 N.W.2d 482, 490 (Iowa 2003), the court rejected an argument that because it was an “original certiorari proceeding,” error preservation rules did not apply if the petition was granted and not resisted by the “Defendant Judge.” The court rejected the plaintiff’s theory that a party waives error preservation grounds if such grounds are not filed in a resistance and that the petition defined the issues for the court’s review. *Id.*

Iowa Rule of Appellate Procedure 6.301 requires a plaintiff to “state [in the petition for certiorari] whether the plaintiff raised the issue in district court”

Sorci, 671 N.W.2d at 490. In *Sorci*, the court said:

This requirement does not exist merely to satisfy our curiosity; rather, the requirement parallels the oft stated maxim that we will only consider issues for which error has been preserved. Certiorari review is discretionary, and we granted certiorari only on

issues presented in the district court on which the parties sought a ruling.

Id. The rule is well established that in certiorari actions we will not review questions not presented to the so-called inferior tribunal. *Lenertz v. Municipal Ct. of Davenport*, 219 N.W.2d 513, 515 (Iowa 1974).

The issue not having been raised in the district court, we do not consider it here.

WRIT ANNULLED.