

**IN THE COURT OF APPEALS OF IOWA**

No. 7-903 / 07-0258  
Filed December 28, 2007

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

**vs.**

**MARK RANDALL TOVAR,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Mark Randall Tovar appeals the lifetime parole provision of his sentence for sexual abuse in the third degree. **RESENTENCE VACATED AND REMANDED FOR REINSTATEMENT OF ORIGINAL SENTENCE.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

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

**MAHAN, J.**

Mark Randall Tovar appeals the lifetime parole provision of his sentence for sexual abuse in the third degree. He argues that resentencing him to lifetime parole under Iowa Code section 903B.1 (Supp. 2005) was an illegal sentence and was also a violation of the Constitution's prohibition of ex post facto laws and that his trial counsel was ineffective in failing to object. We vacate Tovar's resentencing and remand to the district court for reinstatement of the original sentence.

**I. Background Facts and Proceedings**

On August 4, 2006, Tovar pled guilty to one count of third-degree sexual abuse and one count of lascivious acts with a child. The amended trial information alleged that the acts occurred between June 1, 2005, and August 27, 2005. The charges were brought after Tovar's girlfriend, Sara, reported to the police on August 27, 2005, that she believed Tovar had sexually assaulted her seven-year-old daughter, K.C. Sara stated that she had found Tovar and K.C. in the bathroom together with the door shut. She thought it was strange and asked K.C. what happened in the bathroom. At the time, K.C. denied that anything inappropriate had happened. However, on August 27, 2005, K.C. told Sara that Tovar had her touch and run her hands up and down his penis while she was in the bathroom with him.

The exact date of the incident was not definitively established. Sara told the police on August 27, 2005, that she caught Tovar and K.C. in the bathroom together about one to one-and-one-half months ago. On that same date, after Tovar was questioned, he signed a statement denying any wrongdoing and

indicating that he was in the bathroom with K.C. about one to two months ago running bath water for K.C. when Sara walked in. In the victim's interview at St. Luke's Hospital she indicated the incident happened before she started second grade.

After entering an *Alford* plea<sup>1</sup> on August 4, 2006, Tovar was sentenced to a period not to exceed ten years for sexual abuse in the third degree and not to exceed five years for lascivious acts with a child. On August 21, 2006, the department of corrections sent a letter to Judge Bauch asking if Tovar should have also been sentenced to a special life sentence of parole for the sex abuse charge in accordance with section 903B.1. The State then filed a motion for resentencing asserting the special sentence was mandatory. Tovar resisted. He argued that he entered his plea with the understanding that he would only be sentenced to the prison term, and not lifetime parole. However, he declined to withdraw his guilty plea. Tovar also argued that the resentencing was placing him in double jeopardy but did not argue the law was an illegal *ex post facto* law at the resentencing hearing. The district court resentenced Tovar to add the lifetime parole provision in accordance with section 903B.1. Tovar appeals.

## **II. Standard of Review**

We review a claim that a district court has imposed an illegal sentence for errors at law. *State v. Freeman*, 705 N.W.2d 286, 287 (Iowa 2005). Normal error preservation requirements do not apply to void, illegal, or procedurally

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<sup>1</sup> An *Alford* plea allows a defendant to voluntarily and intelligently plead guilty even if he is unwilling or unable to admit his participation in the acts constituting the crime. *North Carolina v. Alford*, 400 U.S. 25, 32-38, 91 S. Ct. 160, 164-68, 27 L. Ed. 2d 162, 168-72 (1970).

defective sentences. *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994).

### III. Merits

Iowa Code section 903B.1 provides that:

A person convicted of a class “C” felony or greater offense under chapter 709, or a class “C” felony under section 728.12, shall also be sentenced, in addition to any other punishment provided by law, to a special sentence committing the person into the custody of the director of the Iowa department of corrections for the rest of the person’s life, with eligibility for parole as provided in chapter 906.

Because sexual abuse in the third degree is a class “C” felony, the district court is required to impose a lifetime parole sentence on third-degree sex abuse offenders. Iowa Code §§ 709.4, 903B.1. The statute, however, did not go into effect until July 1, 2005. Before this time, imposition of lifetime parole was discretionary. Iowa Code § 903B.1(3) (2005).

Tovar argues that his sentence to lifetime parole pursuant to Iowa Code section 903B.1 (Supp. 2005) was an illegal sentence because his crime may have been committed before the effective date of the statute. An illegal sentence is one not authorized by statute and is void. *State v. Gordon*, 732 N.W.2d 41, 43 (Iowa 2007). Since the statute imposing the mandatory lifetime parole was not effective until July 1, 2005, it cannot be used as a sentence for criminal acts committed before July 1, 2005. The only question in this case is whether Tovar committed sexual abuse before or after July 1, 2005. If the act was committed before July 1, 2005, the sentencing enhancement cannot be applied. But if the act was committed after July 1, 2005, the district court imposed a legal sentence on Tovar and it should stand. The parties agree to this much.

The State argues that, although Tovar pled guilty to one count of sex abuse that occurred between June 1, 2005, and August 27, 2005, it is more likely, in examining the minutes of testimony, that Tovar committed the crime after July 1, 2005. There is no way to determine the exact date on which Tovar committed this criminal act. The State did not prove and the district court did not make a finding as to the exact date the offense was committed. The State does not allege Tovar committed multiple acts of sex abuse within the dates specified in the trial information. It is apparent from the minutes of testimony that the only act which the State sought to prove was the abuse taking place in the bathroom of K.C.'s home. It is clear that the witnesses are unsure of the exact date this act took place. The time that has passed since this incident will only make memories less clear.

We will not attempt to guess the date on which this criminal act was committed. See *State v. Pilcher*, 242 N.W.2d 348, 354-55 (Iowa 1976) (refusing to guess which sodomy crime defendant was found guilty of when the verdict did not specify therefore reversing the verdict on the grounds that one of the sodomy crimes was unconstitutional). We normally resolve doubts in statutory construction in favor of the defendant. See *State v. Gonzalez*, 718 N.W.2d 304, 308 (Iowa 2006); *Pilcher*, 242 N.W.2d at 354-55. We will do the same here. Because it was neither proven that Tovar committed the act after July 1, 2005, nor did he specifically plead guilty to committing the act after July 1, 2005, the mandatory sentencing enhancement required by section 903B.1 cannot legally be imposed upon him. We vacate the district court's resentencing order

imposing the lifetime parole and remand to the district court for reinstatement of the original sentencing order of August 4, 2005.

Tovar also claims his trial counsel was ineffective. In order to prevail on an ineffective assistance of counsel claim Tovar must show that (1) his trial counsel failed to perform an essential duty and (2) that he was prejudiced as a result of counsel's failure. *State v. Stallings*, 658 N.W.2d 106, 108-09 (Iowa 2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). If counsel was ineffective, the only prejudice suffered by Tovar was that he was sentenced to lifetime parole. Our holding today, vacating that portion of his sentence, resolves this problem. Once the sentence is vacated, Tovar will have suffered no prejudice and his ineffective assistance of counsel claim cannot stand.

**RESENTENCE VACATED AND REMANDED FOR REINSTATEMENT  
OF ORIGINAL SENTENCE.**