IN THE COURT OF APPEALS OF IOWA

No. 7-914 / 07-0802
Filed June 25, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CURTIS LEE JENSEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Curtis Lee Jensen appeals from the judgment and sentence entered upon his plea of guilty to enticing away a minor. **REVERSED AND REMANDED WITH INSTRUCTIONS.**

Paul Rosenberg of Paul Rosenberg & Associates, Des Moines, for appellant.

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

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

MAHAN, J.

Curtis Lee Jensen was charged with one count of enticing away a minor in violation of Iowa Code section 710.10(2) (2005). The charge stemmed from a sting operation set up by the Cedar Falls Police Department where Jensen communicated with an undercover police officer who was posing online as a fifteen-year-old-girl. During this conversation, Jensen activated a web camera and exposed himself by masturbating to the assumed girl and then arranged to meet her at a Wal-Mart store in Cedar Falls. When Jensen arrived at the store, he was arrested and charged with the aforementioned crime.

Iowa Code section 710.10 makes it illegal for adults to solicit sexual contact with a minor or a person reasonably believed to be a minor. It states, in pertinent part:

> 2. A person commits a class "D" felony when, without authority and with the intent to commit an illegal act upon a minor under the age of sixteen, the person entices away a minor under the age of sixteen, or entices away a person reasonably believed to be under the age of sixteen.
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> 3. A person commits an aggravated misdemeanor when, without authority and with the intent to commit an illegal act upon a minor under the age of sixteen, the person *attempts to* entice away a minor under the age of sixteen, or *attempts to* entice away a person reasonably believed to be under the age of sixteen.

(Emphasis added.)

With the assistance of counsel, Jensen pled guilty to section 710.10(2), the class "D" felony alternative. In doing so, Jensen admitted (1) that he had Internet communications with a girl that he believed to be under the age of sixteen, (2) he made arrangements to meet this person in Cedar Falls for the purpose of sexual intercourse, and (3) he was present in Cedar Falls at the date

specified in the arrangements. The court accepted his plea and found him guilty of the charged offense. Jensen did not file a motion in arrest of judgment.

On appeal, Jensen challenges his conviction and sentence in the context of an ineffective assistance of counsel claim by contending the record does not establish a factual basis for his conviction. The standards required to prevail on a claim of ineffective assistance of counsel are well established. Jensen must prove that his "counsel failed to perform an essential duty," and that he "was prejudiced by counsel's error." *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). When a defendant claims trial counsel was ineffective for permitting a guilty plea to a charge not supported by a factual basis, our review is de novo. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001).

It is axiomatic that a trial court may not accept a guilty plea without first determining that the plea has a factual basis. *Id.* at 581. "Where a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty anyway, counsel has failed to perform an essential duty [and] [p]rejudice in such a case is inherent." *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999) (citations omitted). Therefore, if we find there was no factual basis for the conviction under the class "D" felony alternative listed above, we must find that Jensen's trial counsel was ineffective for allowing him to plead guilty to this charge and for failing to file a motion in arrest of judgment. *Brooks*, 555 N.W.2d at 448.

Jensen claims there was no factual basis for his conviction under the class "D" felony alternative because "no enticement occurred, or, even, could have occurred." In essence, he claims he attempted to entice away a person he

reasonably believed to be under the age of sixteen, but because the female officer posing as an underage girl was only attempting to have him arrested, he did not actually entice her away. Jensen requests "that this case be remanded for further plea proceedings and entry of judgment on the criminal offense of Attempted Enticing Away of a Minor in violation of Iowa Code § 710.10(3)."

In light of the recent decision in *State v. Hansen*, ___ N.W.2d ___, ___ (Iowa 2008), where our supreme court considered the same argument in a similar attack on section 710.10(2) and reversed the defendant's conviction,[1] we find there was no factual basis for Jensen's conviction for the class "D" felony alternative of section 710.10. Accordingly, we reverse his conviction and remand for further plea proceedings. *See Brooks*, 555 N.W.2d at 448.

REVERSED AND REMANDED WITH INSTRUCTIONS.

[1] In that case, Hansen was convicted of the same felony offense by a trial to the court after he was arrested under an identical sting operation carried out by the Cedar Falls Police Department. *Hansen*, ___ N.W.2d at ___. On appeal, Hansen argued there were insufficient facts to support his conviction under the felony alternative because he did not successfully "entice away" either a minor or a person reasonably believed to be a minor. *Id.* at ___. The supreme court agreed, stating: "We doubt any of the Cedar Falls police officers were 'enticed away' from their offices to the Wal-mart store because of Hansen's blandishments." *Id.* at ___. The court reversed Hansen's conviction and remanded with instructions to enter a verdict of guilty for the aggravated misdemeanor alternative—attempted enticement. *Id.* at ___.