

IN THE COURT OF APPEALS OF IOWA

No. 8-875 / 07-2053
Filed February 4, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY DAVID CLAFFY,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Sylvia A. Lewis,
District Associate Judge.

Anthony David Claffy appeals his conviction and sentence to the
aggravated misdemeanor of indecent contact with a child. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant
Attorney General, Janet M. Lyness, County Attorney, and Anne Lahey, Assistant
County Attorney, for appellee.

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

VOGEL, P.J.

Anthony David Claffy pled guilty and was convicted of indecent contact with a child, an aggravated misdemeanor under Iowa Code sections 709.12(2) and 702.5 (2007). He was sentenced under Iowa Code sections 903.1 to serve 180 days in jail with credit for time served.¹ Claffy was also given a special ten-year sentence under section 903B.2, ordered to participate in the sex offender treatment program, and required to register as a sex offender. On direct appeal, Claffy claims his counsel was ineffective (1) for failing to file a motion in arrest of judgment, contending there was no factual basis to support his guilty plea; (2) for moving the court to set aside the order for a competency evaluation; and (3) for failing to request a pre-sentence investigation report. Further, he argues that the district court erred in imposing the section 903B.2 special sentence, claiming it violated the state and federal constitutions.

I. Background Facts and Proceedings

Claffy, a twenty-eight year old male was present in the women's restroom at the Iowa City Recreation Center when C.M., a nine-year-old girl, entered. The two had never met, but Claffy approached C.M., hugged her and rubbed her buttocks. She proceeded to go into a restroom stall and close the door. Claffy crawled under the stall door and stared at C.M. as she sat on the toilet. Another woman then entered the restroom which prompted Claffy to crawl out from C.M.'s stall, using the woman's leg for support. C.M. then left the restroom and reported the incident.

¹ The 180-day sentence was fully discharged prior to the plea proceedings and sentencing.

Claffy was charged with indecent contact with a child. He filed a notice of defense of diminished capacity. He was later diagnosed with schizophrenia by psychologist, Dr. Dan L. Rogers, who opined that Claffy's behavior at the time of the incident was consistent with a hypoglycemic episode. Based on this diagnosis, Claffy's attorney, Tom Woods, filed an application seeking to have Claffy undergo a "more detailed psychiatric evaluation" to determine whether he was competent to stand trial. Disagreeing with counsel's application, Claffy requested a new attorney. Lars Anderson was then appointed to represent Claffy.

At a subsequent hearing, Claffy testified that he was completely competent and fit to stand trial, able to assist in his defense, and anxious to have the trial begin, after having spent eight months in jail. The court found otherwise and ordered the more complete psychiatric evaluation be conducted at the Iowa Medical Classification facility. Prior to the ordered evaluation, Dr. Frank Gersh, a clinical psychologist, evaluated Claffy at the Johnson County jail and deemed him fit to stand trial. Presented with this second evaluation, the district court granted Claffy's motion to set aside the previous order for psychiatric evaluation at the Iowa Medical Classification facility. On October 4, 2007, Claffy signed a plea agreement in which he pled guilty as charged to indecent contact with a child. He appeals his conviction, raising issues of ineffective assistance of counsel, and appeals his sentence on constitutional grounds.

II. Standard of Review

Our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In order to succeed on a claim of ineffective assistance of counsel, Claffy

must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Ordinarily, we do not decide ineffective-assistance-of-counsel claims on direct appeal. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). We prefer to reserve such questions for postconviction proceedings so the defendant's trial counsel can defend against the charge. *Id.* However, we depart from this preference in cases where the record is adequate to evaluate the appellant's claim. *Id.*

III. Guilty Plea

Claffy argues that there was no factual basis supporting his guilty plea and therefore counsel was ineffective for failing to file a motion in arrest of judgment to challenge the adequacy of the plea. Iowa R. Crim. P. 2.24(3)(a). Before accepting a guilty plea, the district court must establish on the record a factual basis for the plea. Iowa R. Crim. P. 2.8(2)(b). If the defendant enters a guilty plea and the record fails to disclose a factual basis, defense counsel fails to provide effective assistance. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). To support a factual basis for a guilty plea, the record includes the minutes of testimony and statements made by the defendant and prosecutor at the guilty plea proceeding; this record, as a whole, must disclose facts to satisfy elements of the crime. *Id.*

We find the record adequate to address this claim on direct appeal. To be convicted of indecent contact with a child under Iowa Code section 709.12(2), the factual basis needed to establish Claffy, "for the purpose of arousing or satisfying the sexual desires of either of them: . . . touched . . . the clothing covering the

immediate area of the . . . buttock . . .” of the child victim. Claffy signed a written plea agreement that stated, “I have read the Minutes of Testimony filed with the Trial Information and do not contest the accuracy of those minutes . . . I have been advised of my right to challenge this plea of guilty by filing a Motion in Arrest of Judgment” The minutes of testimony included a detailed description of the child-victim’s anticipated testimony describing Claffy’s contact with her. Although Claffy did not specifically state that he had a sexual purpose to his actions, that intent can be inferred as a defendant’s intent may be inferred from his conduct before, during and after an assault and all surrounding circumstances. *See State v Lambert*, 612 N.W.2d 810, 813 (Iowa 2000); *see also State v. Murphy*, 462 N.W.2d 715, 717 (Iowa Ct. App. 1990) (finding evidence sufficient to support jury’s verdict including sexual purpose to defendant’s conduct).

It is clear from the record that there is a factual basis supporting Claffy’s guilty plea. He entered a women’s restroom, approached and hugged a nine-year-old girl, rubbing her buttock, and then crawled under her closed restroom stall to observe her while she was sitting on the toilet. Although not admitting to, nor denying any sexual purpose to his actions, the inference can easily be made considering all of the circumstances to support the elements of the crime. Counsel was therefore not ineffective for allowing Claffy to plead guilty and for not filing a motion in arrest of judgment.

IV. Competency Evaluation

Claffy next argues that counsel was ineffective for moving the court to set aside the order for a competency evaluation. For purposes of an ineffective

assistance of counsel claim, counsel's performance is measured against the standard of a reasonably competent practitioner with the presumption that the attorney performed his duties in a competent manner. *State v. Dalton*, 674 N.W.2d 111, 119 (Iowa 2004). Ineffective assistance of counsel is more likely to be found when counsel's conduct shows a lack of diligence rather than the exercise of judgment. *Ledezma*, 626 N.W.2d at 142.

Claffy argues that based on Dr. Rogers's report, his history of diabetic mismanagement and various other problems, counsel should have concluded that he was not competent to proceed with the guilty plea. At the initial hearing on competency, counsel demonstrated that he had researched Claffy's history and presented that history to the court, stating:

Mr. Claffy observes that he is completely competent and would like to proceed to trial Obviously I've kind of been put in a difficult situation here where my client has those very understandable wishes, having been in jail as long as he has. On the other hand, I've inherited a report that was prepared prior to my appointment, which indicates that my client may not be competent to make those decisions. And so I guess we're just leaving it up to the Court now to make a determination.

Subsequent to the court ordering a full psychiatric evaluation, Dr. Gersh evaluated Claffy and contrary to Dr. Rogers's conclusions, found Claffy to be competent to stand trial. This was then presented to the court. Counsel took reasonable steps to assure that he was both following his client's wishes, as well as performing his legal duty by adhering to Dr. Gersh's assessment.² Claffy made clear that he felt he was competent, and was aware of the plea agreement

² Dr. Gersh's report also noted that Claffy had not cooperated with Dr. Rogers's earlier competency evaluation because he was upset with the behavior of his attorney. Dr. Gersh believed this could account for some of Dr. Rogers's findings.

he was signing, including a waiver of his right to file a motion in arrest of judgment. Counsel filed the motion to set aside a competency evaluation upon Claffy's insistence, coupled with Dr. Gersh's attestation of Claffy's competence. The record illustrates that counsel was diligent in his representation, following both the expert report as well as his client's wishes, and thus did not fail to perform an essential duty in his representation.

V. Presentence Investigation Report

Asserting that more information on his mental status should have been procured, Claffy also asserts that counsel was ineffective for failing to request a presentence investigation report. Iowa Code § 901.2. In light of the discussion above, including Dr. Gersh's report on Claffy's competence, we find no breach of duty.

VI. Section 903B.2

Finally, Claffy appeals the district court's ruling which imposed the ten-year special sentence under Iowa Code section 903B.2, arguing it violates his constitutional rights. Claffy asserts that (1) the special sentence of Iowa Code section 903B.2 conflicts with the sentencing provisions for an aggravated misdemeanor, found under sections 903.1(2), 903.4, 907.7, 907.11 and 906.15; (2) the special sentence constitutes cruel and unusual punishment; (3) placing a person convicted of an aggravated misdemeanor in the same classification as a Class D felon denies him equal protection; and (4) the application of Iowa Code section 903B.2 violates the separation of powers.

Our review of constitutional claims is de novo. *State v. Butler*, 505 N.W.2d 806, 807 (Iowa 1993). A case recently decided by the Iowa Supreme Court,

State v. Wade, addressed the same constitutional issues now raised by Claffy. *State v. Wade*, 757 N.W.2d 618 (Iowa 2008). Applying the holdings contained in *Wade*, we conclude Claffy's constitutional challenges to his sentence all must fail. Therefore, we affirm.

AFFIRMED.