IN THE COURT OF APPEALS OF IOWA

No. 9-372 / 08-0682
Filed June 17, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JACK LEONARD HAYS,
Defendant-Appellant.

Appeal from the Iowa District Court for Washington County, Lucy J. Gamon, District Associate Judge.

Defendant appeals following his written plea of guilty to violation of registration requirements for sex offenders. **VACATED AND REMANDED.**

Jack Hays, Des Moines, appellant pro se.

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Barbara A. Edmondson, County Attorney, and Julie Degen, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Jack Hays appeals following his written plea of guilty to violation of registration requirements for sex offenders, an aggravated misdemeanor. We vacate and remand because the plea lacks a factual basis.

I. Background Facts and Proceedings

On January 10, 2008, a complaint and affidavit was filed with the district court. On January 16, 2008, Hays was charged by trial information with the crime of violation of registration requirements for sex offenders in violation of Iowa Code sections 692A.1(5),[1] 692A.2,[2] 692A.2A(2) & (3),[3] and 692A.7[4] (2007)

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[1] **692A.1 Definitions.**

As used in this chapter and unless the context otherwise requires:

. . . .

5. "Criminal offense against a minor" means any of the following criminal offenses or conduct: . . . .

[2] **692A.2 Persons required to register.**

1. A person who has been convicted of a criminal offense against a minor, an aggravated offense, sexual exploitation, an other relevant offense, or a sexually violent offense in this state or in another state, or in a federal, military, tribal, or foreign court, or a person required to register in another state under the state's sex offender registry, shall register as provided in this chapter. A person required to register under this chapter shall, upon a first conviction, register for a period of ten years commencing as follows:

a. From the date of placement on probation.

b. From the date of release on parole or work release.

c. From the date of release as a juvenile from foster care or residential treatment.

d. From the date of any other release from custody.

[3] **692A.2A. Residency restrictions--child care facilities and schools**

1. For purposes of this section, "person" means a person who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor.

2. A person shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility.

3. A person who resides within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school, or a child care facility, commits an aggravated misdemeanor.

by residing within 2000 feet of a public school. The complaint and affidavit asserted that when Hays was released from Iowa State Penitentiary he had given one address to prison officials; that Hays and Tanya Toomer had two children together; that Toomer had "allowed Hays to reside at her residence," which was not the address Hays had given prison officials; that Toomer's residence was 734 feet from a school; and that Hays was aware of the location of the school. The minutes of testimony, among numerous other witnesses, indicated Gordon Miller would testify in part that Hays "was a registered sex offender in Iowa from May 18, 1998, to present—excluding any time that Mr. Hays would have been incarcerated—from a conviction out of Polk County for sexual abuse third degree" and that "Hays was discharged from prison on 12/29/07 and was required to be registered." The minutes of testimony also indicated that Toomer would testify consistent with the statements attributed to her.

On February 21, 2008, Hays entered into a written plea of guilty, which states in part:

> 5. I understand that in order to establish my guilt of the crime(s) charged, the State would have to prove beyond a reasonable doubt all of the following elements: That in Washington County, Iowa, on or about January 2, 2008, I did the following I slept at a house that was located at [address] and said house was less than 2000 feet away from the real property of Ainsworth Elementary School.
> 6. I hearby **waive formal arraignment, waive time to plead, waive time for sentencing, waive all objections, and plead**

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[4] **692A.7. Failure to comply--penalty**
1. A person required to register under this chapter who violates any requirements specified under sections 692A.2, 692A.3, and 692A.4 commits an aggravated misdemeanor for a first offense . . . .

> **guilty** to the charge of Violation of a Sex Offender Registry Residency Restriction, in violation of Code of Iowa Section(s) 692A.2A(2), I acknowledge receipt of a true copy of the Information and of this Plea of Guilty.
>
> . . . .
>
> 10. I admit to the actions described in paragraph 5, and I know that by the execution of this Plea of Guilty I admit that I did commit the crime(s) to which I plead guilty, and that I may lose my liberty because of it.

The written plea indicated that Hays was satisfied with the services of his attorney and that he had been advised of his constitutional and statutory rights; he acknowledged that to challenge the plea he had to file a motion in arrest of judgment at least five days before the court imposed sentence and then waived that right and asked that sentence be imposed immediately.

The district court entered judgment that same date: Hays was ordered to pay a fine of $625, a 32% surcharge, and the costs of prosecution, and the court sentenced Hays to a term not exceeding two years, none suspended.

On March 5, 2008, Hays filed a pro se motion in arrest of judgment asserting:

> 1. After consulting the code and an attorney I have discovered I'm not guilty.
>
> 2. That the State is not holding up the plea agreement, and I was misled as to what the plea agreement would be; the State changed the plea agreement and the sentence is illegal.
>
> 3. The jail refused to provide Mental Health Services, so I had to go to Oakdale to see a doctor.

The State resisted. The district court allowed Hays's trial attorney to withdraw and appointed new counsel. Hays, again pro se, filed an amendment to his motion in arrest of judgment.

The district court held a hearing on April 3, 2008, at which Hays asked to represent himself, but accepted newly appointed counsel as standby counsel. At

the hearing Hays asserted that the written plea filed with the court did not express the parties' plea agreement. He also stated he was suffering from depression and entered the plea to obtain treatment. He provided a letter to the court from the prosecutor to his former attorney outlining the terms of the plea agreement. The letter was introduced into evidence and noted that if Hays would plead guilty to the residency violation, the State would recommend a specific sentence ("two years in prison, none suspended, $625 fine, 32% surcharge, court costs, court appointed attorney fees"); the State would recommend specified, concurrent sentences on two other pending charges of violation of a no contact order; the State would dismiss a pending domestic assault charge; the State would dismiss a pending obstruction of emergency communication charge; and the State intended to "request a five year no contact order listing both Ms. Toomer and the children's names."

In response, the prosecutor asserted that Hays had waived his right to file a motion in arrest of judgment by entry of his written plea. Nonetheless, the State contended that Hays admitted his guilt and was fully advised by his attorney, understood the maximum and minimum penalties, and admitted he had no legal defense. Further, the sentence imposed was consistent with the plea agreement as indicated by the letter, any handwritten notations on the plea occurred in the presence of the Court, the defendant, and defense counsel. The prosecutor informed the court that sentencing with respect to the no-contact order charges was still pending, as was the request that the no contact order be extended for five years. The domestic assault had not yet been dismissed, but the State intended to dismiss the charge when the no contact issue was decided.

The court denied the motion in arrest of judgment and amendment thereto stating, in part:

> I understand you have not initialed every handwritten notation on that [written plea], but it's also clear to me that you can read, that you can write, that you're a reasonably intelligent person. I don't think there's any indication that you're somehow low functioning or unable to understand written material that's put in front of you.
>
> You have offered into evidence Defendant's Exhibit A. The terms of that document are almost identical to what I see in terms of the plea agreement. I understand that you're expecting the SRIN8179 case to be dismissed. [The prosecutor] has indicated that she still intends to dismiss that case.
>
> In terms of the sentence that you received for this charge, it's — it's totally identical. . . .

Hays now appeals. Hays's appellate counsel contends the district court erred in accepting the plea where there was no factual basis for the plea, arguing that there is no evidence that Hays's past sexual offense for which he had to register was an offense against or involving a minor. Hays, pro se, additionally contends: the plea was procedurally deficient; the State violated the plea agreement; his plea was not voluntary; he is, in fact, innocent; and the law, as applied, is unconstitutional.

The State concedes that Hays's written plea makes no mention of the right to appeal or the consequences of waiving a motion in arrest of judgment and, consequently, he may challenge his guilty plea directly. *See State v. Loye*, 670 N.W.2d 141, 148 (Iowa 2003) ("The right to appeal is waived only if such a waiver is an express element of the particular agreement made by that defendant").

II. Standard of Review

Review of a lack-of-a-factual-basis challenge to a guilty plea is usually on error. *State v. Doggett*, 687 N.W.2d 97, 99 (Iowa 2004); *State v. Keene*, 629 N.W.2d 360, 363 (Iowa 2001). Constitutional issues, however, are reviewed de novo. *State v. Reed*, 618 N.W.2d 327, 331 (Iowa 2000).

III. Merits

We reject Hays's contentions that the State violated the plea agreement and that Hays's plea was not voluntary. The district court made factual findings to the contrary, with which we agree.

Hays's assertion that he is "in fact innocent" because he "had his own residence" is also rejected. Iowa Code section 692A.1(8) defines one's "residence" as "*the place where a person sleeps, which may include more than one location*, and may be mobile or transitory, including a shelter or group home." (Emphasis added.) The complaint filed in this matter stated that "Toomer allowed Hays to reside with her at her residence" and in paragraph 10 of the plea, Hays states: "I admit to the actions described in paragraph 5." Paragraph 5 states that Hays "slept at a house that was located at [Toomer's address] and said house was less than 2000 feet away from the real property of Ainsworth Elementary School." The fact that Hays may have another residence does not negate the charge.

We also reject Hays's constitutional challenges. Hays asserts that the registration law is overbroad "by applying it in a way that if the appellant sleeps anywhere he is in violation of the residency law." In *Reed*, 618 N.W.2d at 331-32, our supreme court found an overbreadth challenge—which only applies to

First Amendment rights—waived because the defendant did not make a First Amendment connection:

> A statute is overbroad in violation of the Fourteenth Amendment to the Federal Constitution "'if it attempts to achieve a governmental purpose to control or prevent activities constitutionally subject to state regulation by means which sweep unnecessarily broad and thereby invade the area of protected freedoms.'" *Ryan*, 501 N.W.2d at 517 (quoting *City of Maquoketa v. Russell*, 484 N.W.2d 179, 181 (Iowa 1992)). *The overbreadth analysis is confined to an alleged violation of First Amendment rights*. *Id.* at 518.
>
> The problem with Reed's overbreadth claim is that, while he does attempt to show how Iowa Code section 706A.1(5) is overbroad, *he fails to adequately explain what First Amendment right is violated, or at the very least, to make a First Amendment connection*. For this reason, we have nothing further to review. We therefore consider Reed's overbreadth argument waived. *See id.*

(Emphasis added.) Hays has not explained what First Amendment right is violated and has waived the overbreadth argument. In addition, Hays's guilty plea waived his as applied vagueness claim. *See State v. Keene*, 629 N.W.2d 360, 364 (Iowa 2001), *State v. Robinson*, 618 N.W.2d 306, 312 (Iowa 2000).

We do, however, find merit in Hays's claim that the plea lacks a factual basis. The district court may not accept a guilty plea without first determining that the plea has a factual basis. *See* Iowa R. Crim. P. 2.8(2)(*b*); *State v. Burtlow*, 299 N.W.2d 665, 668 (Iowa 1980). In deciding whether a factual basis exists, we consider the entire record before the district court at the guilty plea hearing, including any statements made by the defendant, facts related by the prosecutor, the minutes of testimony, and the presentence report. *See id.* This record, as a whole, must disclose facts to satisfy the elements of the crime. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001).

The State concedes that the record before the district court did not disclose the age of the victim of the sexual abuse offense for which Hays was convicted in 1995 and, thus, that Hays "has been convicted of a criminal offense against a minor." Iowa Code § 692A.2(1). However, the State argues that the appropriate remedy is remand to allow the State to establish the factual basis.

> Where a guilty plea has no factual basis in the record, two possible remedies exist. Where the record establishes that the defendant was charged with the wrong crime, we have vacated the judgment of conviction and sentence and remanded for dismissal of the charge. Where, however, it is possible that a factual basis could be shown, it is more appropriate merely to vacate the sentence and remand for further proceedings to give the State an opportunity to establish a factual basis.

State v. Schminkey, 597 N.W.2d 785, 792 (Iowa 1999) (citations omitted).

We think this case falls within the latter category. There may be additional facts and circumstances that do not appear in the minutes of testimony that would support an inference that the defendant was required to register because his sexual abuse conviction involved a minor. Therefore, we vacate the sentence entered on the sex offender registry charge and remand for further proceedings at which time the State may supplement the record to establish a factual basis for the crime. If a factual basis is not shown, the defendant's plea must be set aside.

VACATED AND REMANDED.