IN THE COURT OF APPEALS OF IOWA

No. 2-967/ 12-0194
Filed January 24, 2013

STEVEN HATTIG,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, John D. Ackerman (motion to dismiss) and Steven J. Andreasen (motion for summary judgment), Judges.

Steven Hattig appeals from the district court order granting summary judgment in favor of the State on his application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Patrick Jennings, County Attorney, and Mark Campbell, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

BOWER, J.

Steven Hattig appeals from the district court order granting summary judgment in favor of the State on his application for postconviction relief. Hattig argues his forty year sentence following his guilty pleas to four counts of sexual abuse in the third degree was cruel and unusual on its face and as applied to him, and the district court therefore erred in granting the State's motion for summary judgment. We affirm.

I. Background Facts and Proceedings.

In September 1999, the State filed a trial information charging Hattig with five counts of sexual abuse in the second degree, stemming from allegations that Hattig's crimes involved various acts of sexual abuse between 1988 and 1996 against three victims under the age of twelve. Hattig, born in 1980, was nineteen when the trial information was filed, but was no older than sixteen when he committed his crimes.

Hattig entered a plea agreement with the State and pleaded guilty to four counts of sexual abuse in the third degree. Pursuant to the agreement of the parties, the State would dismiss the remaining count and would recommend Hattig be sentenced to a term not to exceed ten years on each count, with the sentences to run consecutively. In December 1999, the district court sentenced Hattig to ten years imprisonment on each count to be served consecutively for a total of forty years, in accordance with the plea agreement.

In May 2010, Hattig filed a pro se application for postconviction relief. The State filed a motion to dismiss, alleging the application was untimely. In August

2010, through counsel, Hattig filed amendments to his application, alleging his counsel was ineffective and that his sentence constituted cruel and unusual punishment in violation of the Federal and State Constitutions. In September 2010, the district court granted the State's motion to dismiss the claim of ineffective assistance of counsel, but denied the motion to dismiss Hattig's claim that his sentence violated the Federal and State Constitutions.

In June 2011, the State filed a combined motion for summary judgment and statement of undisputed facts. Hattig filed a resistance to the State's motion. Following a hearing, the district court entered its ruling finding there were no disputed facts and that the State was entitled to judgment as a matter of law on the claim that Hattig's sentence violated the constitutional prohibition of cruel and unusual punishment. Hattig now appeals.

II. Scope and Standard of Review.

Because Hattig is challenging the constitutionality of his sentence, our review is de novo. *State v*. *Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009). This form of review requires our independent evaluation based on the totality of the circumstances presented by the entire record. *State v*. *Ochoa*, 792 N.W.2d 260, 264 (Iowa 2010).

III. Discussion.

The Eighth Amendment of the United States Constitution and article I, section 17 of the Iowa Constitution prohibit the imposition of cruel and unusual punishment. U.S. Const. amend. VIII; Iowa Const. art. I, § 17; *see State v*. *Bruegger*, 773 N.W.2d 862, 872, 882 (Iowa 2009). Embodied in this ban is a

"concept of proportionality" that punishment for crime should be graduated and proportioned to the offense. *Graham v*. *Florida*, 130 S. Ct. 2011, 2021 (2010). A defendant can challenge the proportionality of his sentence under a "categorical" approach, or the defendant can make a "gross proportionality" challenge to his particular sentence. *State v. Oliver*, 812 N.W.2d 636, 640 (Iowa 2012); *see Graham*, 130 S. Ct. at 2022.

In this case, Hattig alleges his sentence is cruel and unusual as applied to him. Hattig contends "[a] sentence of 40 years imposed upon a person whose crimes occurred when he was a juvenile is grossly disproportionate." This argument implicates a gross proportionality challenge, namely, a challenge "to the length of term-of-years sentences given all the circumstances in a particular case." *See Graham*, 130 S.Ct. at 2021.

"[T]he Eighth Amendment does not require strict proportionality between crime and sentence, but rather forbids only extreme sentences that are grossly disproportionate to the crime." *Harmelin v*. *Michigan*, 501 U.S. 957, 959 (1991). In determining whether a term of years is grossly disproportionate, the court "must begin by comparing the gravity of the offense and the severity of the sentence." *Graham*, 130 S. Ct. at 2022; *see Solem v*. *Helm*, 463 U.S. 277, 290–91 (1983). "'[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Graham*, 130 S.Ct. at 2022 (quoting *Harmelin*, 501 U.S. at 1005).

If the comparative analysis under steps two and three validates the initial threshold judgment that the sentence is grossly disproportionate, then the sentence is cruel and unusual. *Id*.

Iowa also follows this "fact-specific" analysis in determining whether a particular defendant's penalty is grossly disproportionate to the crimes committed by that particular defendant. *See Oliver*, 812 N.W.2d at 640 (observing that Iowa has adopted a "more stringent gross-disproportionality review" than the federal standard). Our supreme court has acknowledged four general principles to guide our analysis under the initial threshold test: (1) substantial deference should be given to the penalties the legislature has established for crimes; (2) it is rare that a sentence will be so grossly disproportionate to the crime as to satisfy the threshold inquiry and warrant further review; (3) a recidivist offender is considered to be more culpable, and thus, more deserving of a longer sentence; and (4) in certain cases a unique combination of features can converge to generate a higher risk of gross disproportionality. *Id*. at 650–51.

Using these principles, we must determine whether Hattig's sentence leads to an inference of gross disproportionality under the threshold test. A sentence will more likely be found disproportionate to the crime where a defendant is "inadvertently caught by a broadly written statute." *Id*. at 651. Hattig was convicted of sexual abuse in the third degree under Iowa Code section 709.4 (2011).

> A person commits sexual abuse in the third degree when the person performs a sex act under any of the following circumstances:

> 1. The act is done by force or against the will of the other person, whether or not the other person is the person's spouse or is cohabiting with the person.
> 2. The act is between persons who are not at the time cohabiting as husband and wife and if any of the following are true:
> . . . .
> b. The other person is twelve or thirteen years of age.

Iowa Code § 709.4.

Hattig contends he "was 16 years old or younger at the time of his offenses," "a time in a person's life when they are young, impulsive, unable to thoroughly consider long-term consequences of their actions, and particularly susceptible to peer influence." Hattig alleges, "A sentence of 40 years imposed upon a person whose crimes occurred when he was a juvenile is grossly disproportionate."

Upon our review, we find Hattig's actions between 1988 and 1996 fall squarely within the parameters of the sexual abuse statute. As the district court observed, Hattig committed four separate sex acts against three different victims, and "was 15 years old or younger when he committed the acts against the first two victims (Counts 1, 2, and 3) and 16 years of age or younger when he committed the act against the third victim (Count 4)." Hattig was eight to ten years older than the three victims, and he admitted all acts were committed against the will of the victims.

The district court further observed Hattig "had a history of being sexually abused between the ages of 10 to 14" and that in general, "juvenile brains are less developed psychosocially and neurologically, and thus, juveniles are considered to be less culpable than adult offenders." The court found Hattig's

prior abuse limited his culpability and "would make him more responsive to appropriate treatment" and, thus, more likely to engage in "successful rehabilitation." However, the court further stated Hattig was "not sentenced to 40 years in prison; but rather, was sentenced to a total indeterminate term of incarceration not to exceed 40 years, with no mandatory minimum period of incarceration."

The legislature has chosen the sentencing scheme for crimes such as the crime at issue here, and "[s]ubstantial deference is afforded to the legislature in setting the penalty for crimes." *See State v. Lara*, 580 N.W.2d 783, 785 (Iowa 1998). Hattig seems to point to his age as the main factor making his sentence grossly disproportionate. However, Hattig was fifteen and sixteen years old at the time he committed these crimes, eight to ten years older than the three victims. Hattig admitted all acts were committed against the will of the victims. Hattig has not raised any evidence regarding his intelligence or emotional maturity.[1] Under these circumstances, Hattig's age by no means leads us to a conclusion that his sentence is "off the charts." *See Bruegger*, 773 N.W.2d at 886.

Considering the undisputed facts in this case in the light most favorable to Hattig, we conclude Hattig's sentence does not raise an inference of gross disproportionality to his crimes of sexual abuse in the third degree. Accordingly, Hattig cannot prevail on his individualized challenge under the cruel-and-unusual

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[1] In addition, the district court considered Hattig's alleged prior sexual abuse, acknowledging the abuse as a factor that limited Hattig's culpability, would make him more responsive to appropriate treatment, and would make him more likely to engage in successful rehabilitation.

punishment provisions of the Federal and State Constitutions.[2] We affirm the sentence entered by the district court.

AFFIRMED.

[2] Hattig also makes a categorical argument by contending his sentence is cruel and unusual "on its face." A categorical argument can be made by contending a mismatch exists "between the culpability of a class of offenders and the severity of a penalty" in cases in which the court implements the proportionality standard by "certain categorical restrictions" on the penalty. *Miller v*. *Alabama*, 132 S. Ct. 2455, 2463 (2012); *Graham*, 130 S. Ct. at 2022; *see Oliver*, 812 N.W.2d at 640 ("Under the categorical approach, the question is whether a particular *sentencing practice* violates the Eighth Amendment."). Even assuming, *arguendo*, Hattig properly raised this issue before the district court, *see Meier v*. *Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."), we are not persuaded by Hattig's contention. Because we do not find that four consecutive ten-year sentences with no mandatory minimum and with eligibility for parole for the crimes of sexual abuse in the third degree committed against three separate victims lead to an inference of gross disproportionality, we need to not engage in an intrajurisdictional and interjurisdictional analysis to determine whether the sentence is in fact grossly disproportionate. *See, e.g*., *Oliver*, 812 N.W.2d at 640.