IN THE COURT OF APPEALS OF IOWA

No. 2-999 / 12-0026
Filed January 24, 2013

WILLIE MACK KETTON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

A postconviction relief applicant contends that the mandatory minimum sentence that he received after his guilty plea to the charge of second-degree robbery violated his right to be free from cruel and unusual punishment. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ. Bower, J., takes no part.

VAITHESWARAN, J.

Twenty-two-year-old Willie Ketton entered a Waterloo fast food restaurant, brandished what turned out to be a toy gun, and left with approximately $200. He pled guilty to several crimes, including second-degree robbery, and received a prison sentence not exceeding ten years on the robbery charge. That term carried a mandatory minimum sentence of seventy percent. *See* Iowa Code § 902.12(5) (2007).

Ketton filed an application for postconviction relief, alleging the mandatory minimum sentence on the robbery conviction violated his constitutional right to be free from cruel and unusual punishment. The district court considered and rejected the argument and denied the postconviction relief application.

On appeal, Ketton reiterates that "the mandatory-minimum for a second degree robbery conviction under section 902.12(5) is cruel and unusual as-applied to [him] in this specific case." He cites the Eighth Amendment to the United States Constitution and article 1, section 17 of the Iowa Constitution.

Preliminarily, we note that Ketton's "as-applied" challenge is actually a "gross proportionality challenge." *See State v*. *Oliver*, 812 N.W.2d 636, 640 (Iowa 2012). The threshold inquiry is whether a non-juvenile offender's "sentence leads to an inference of gross disproportionality." *Id.* "This preliminary test involves a balancing of the gravity of the crime against the severity of the sentence." *Id.* at 647. While this standard has been invoked under federal as well as state constitutional analyses, the Iowa Supreme Court has stated its review under the Iowa Constitution is "more stringent." *Id.* at 650. This means that if an inference of gross disproportionality cannot be made under the Iowa

Constitution's more stringent standard, it necessarily cannot be made under the Federal Constitution. Our review is de novo. *Id.* at 639.

Ketton's sole argument in support of his contention that the sentence was too harsh in light of the offense is that he committed the robbery "using a fake, plastic handgun." The problem with his argument is that no one who experienced the robbery knew the weapon was fake. The restaurant manager stated, "The gun was not a revolver. . . . It was big, the top was longer th[a]n an ink pen. [Another witness] told me it was a nine mm semi-automatic." A restaurant employee described the gun as "possibly a silver nine mm." He stated Ketton "put the gun" to the head of another employee. Nothing in the record suggests that this employee construed Ketton's use of the "fake, plastic" gun as child's play.

Because Ketton did not satisfy the threshold requirement of establishing that the mandatory minimum robbery sentence was excessive relative to the offense, we conclude the district court appropriately denied his application for postconviction relief. *See id.* at 640.

AFFIRMED.