**IN THE COURT OF APPEALS OF IOWA**

No. 3-551 / 12-1826
Filed August 7, 2013

**JIMMY CROUCH,**
Petitioner-Appellant,

**vs.**

**STATE OF IOWA,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Polk County, Mary Pat Gunderson, Judge.

Jimmy Crouch appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, and William A. Hill, Assistant Attorney General, for appellee.

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

**MULLINS, J.**

Jimmy Crouch appeals the district court's denial of his application for postconviction relief. Crouch contends the district court erred in concluding the application of Iowa Code section 905.11 (2011), which was enacted after Crouch's conviction and sentencing, does not impose a harsher penalty for his offense in violation of the Federal and state Ex Post Facto Clauses. For the reasons stated below, we affirm the decision of the district court.

## I. BACKGROUND FACTS AND PROCEEDINGS.

Jimmy Crouch was charged by trial information with first-degree kidnapping and attempted murder for acts taking place on or about July 21, 1996. Crouch pleaded guilty to the lesser included offense of second-degree kidnapping and attempted murder and was sentenced to two concurrent twenty-five-year terms. The kidnapping offense was subject to Iowa Code section 902.12, which at the time required that Crouch serve one hundred percent of the maximum term of the twenty-five-year sentence. *See* Iowa Code § 902.12 (1997).[1]

During Crouch's incarceration, the legislature enacted Iowa Code section 905.11. *See* 2003 Iowa Acts ch. 156, § 15. This provision requires that any person serving a sentence under section 902.12 with a maximum term greater than ten years must reside in a correctional residential facility for a minimum of one year in the event he or she is released on parole or work release. Iowa

[1] The legislature did not add attempted murder to the list of felonies subject to section 902.12 until 1998, after Crouch had been convicted and sentenced for the offenses at issue here. *See* 1998 Iowa Acts, ch. 1007, § 1. Thus, Crouch's sentence for attempted murder is not subject to the requirements of section 902.12.

Code § 905.11 (2011); *see also id.* § 906.4(2)(a) ("A person on parole or work release who is serving a sentence under section 902.12 shall begin parole or work release in a residential facility operated by a judicial district department of correctional services."). The same legislation amended section 902.12 to reduce the mandatory minimum sentence requirement from one hundred percent to seventy percent of the maximum term and to provide for the possibility of parole or work release after that time. 2003 Iowa Acts ch. 156, §§ 11, 12.

Crouch filed an application for postconviction relief on June 21, 2011, claiming the residential facility placement requirement of section 905.11 violates the federal and state constitutional prohibitions against the application of laws ex post facto. The district court denied the application on the ground that the operation of section 905.11 did not increase the severity of Crouch's sentence but merely altered the method of his release from incarceration. Crouch now appeals from that ruling.

## II. SCOPE AND STANDARD OF REVIEW.

Generally, our review of postconviction relief proceedings is for correction of errors at law. *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002). However, where an applicant for postconviction relief raises constitutional claims, we review those claims "in light of the totality of the circumstances and the record upon which the postconviction court's ruling was made." *Dykstra v. Iowa Dist. Ct.*, 783 N.W.2d 473, 477 (Iowa 2010). "This is the functional equivalent of de novo review." *Id.*

## III. DISCUSSION.

Both the Federal and Iowa Constitutions contain Ex Post Facto Clauses that operate as a limitation on state legislative power. *See* U.S. Const. art. I, § 10, cl. 1; Iowa Const. art. 1, § 21. Generally, these provisions prohibit the passage of any law "'which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed.'" *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169–70 (1925)). It is the second of these possibilities—a law that increases (i.e., "makes more burdensome") the punishment for an offense after the fact—that Crouch claims results from the application of Iowa Code section 905.11 to his sentence.

As a threshold condition to the operation of the Ex Post Facto Clause, a law must be criminal or penal in nature—i.e., punitive. *State v. Lathrop*, 781 N.W.2d 288, 295 (Iowa 2010); *see also State v. Corwin*, 616 N.W.2d 600, 601 (Iowa 2000) (noting that "[p]urely civil penalties" are not subject to ex post facto prohibitions). If the legislative aim is deemed criminal or penal, the constitutional prohibition against ex post facto laws is implicated. *Lathrop*, 781 N.W.2d at 255. Two elements must then be present for the law to violate the constitutional provision. *Holm v. Iowa Dist. Ct.*, 767 N.W.2d 409, 415 (Iowa 2009) (citing *Weaver v. Graham*, 450 U.S. 24, 30–31 (1981)). First, the law must be

retrospective in its application. *Id.* Second, it must be "more onerous than the law in effect on the date of the offense." *Id.*

**A. Punitive Nature or Effect of Statute.**

The question of whether a statute is punitive is one of legislative intent. *Lathrop*, 781 N.W.2d at 295. "If the legislature intended the statute to impose criminal punishment, this intent controls, so the law is considered to be punitive in nature." *Formaro v. Polk County*, 773 N.W.2d 834, 843 (Iowa 2009). We ask "whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation." *De Veau v. Braisted*, 363 U.S. 144, 160 (1960). To help elucidate unclear legislative intent, we may look to the factors articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963).[2] *State v. Pickens*, 558 N.W.2d 396, 398–99 (Iowa 1997).

The bill enacting section 905.11 into law is entitled "Crimes, Sentencing, and Procedure—Miscellaneous Revisions." 2003 Iowa Acts ch. 156. The bill's preamble describes it as "an act relating to criminal sentencing and procedure . . . by changing the parole and work release eligibility of a person

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[2] The list of factors in its entirety consists of the following:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

*Mendoza-Martinez*, 372 U.S. at 168–69.

serving [a sentence under Iowa Code section 902.12], repealing certain determinate sentences, and providing a penalty." *Id.*; *cf. Lathrop*, 781 N.W.2d at 295 (noting the use of "sentencing," "sentence," and "penalties" in statutory titles and summary of contents). Our supreme court has recognized references to "sentence" to reflect an understanding of "the *punishment* imposed on a criminal wrongdoer." *Lathrop*, 781 N.W.2d at 295 (emphasis added).

In addition to the inferences to be drawn from these textual designations, a reading of section 905.11 in light of other statutory provisions regarding criminal corrections reveals a legislative intent to impose punishment on certain offenders by committing them to a residential facility. Section 901B.1 delineates the various points on the "corrections continuum" used to impose intermediate criminal sanctions on offenders. Iowa Code § 901B.1. The continuum ranges from level one (including fines, community service, and mandatory mediation) to level five (incarceration in prison or in jail for thirty days or more). *Id.* Placement in a residential facility falls under level three, denoted "quasi-incarceration sanctions." *Id.* § 901B.1(1)(c). The legislature's designation of residential facility placement as a sanction akin to incarceration reveals its understanding of such placement as a significantly punitive correctional method. *See Mendoza-Martinez*, 372 U.S. at 168 (urging consideration of whether a sanction "has historically been regarded as a punishment").

The punitive nature of placement in a residential facility is further evidenced by the statutory scheme for sentencing credits. Such credits—whether for earned time, jail time, or periods of probation—reduce the length of

an offender's sentence, that is, the extent of an offender's punishment. *See Lathrop*, 781 N.W.2d at 295 (noting that "sentence" traditionally denotes criminal punishment). The type of criminal sanctions to which the legislature has chosen to apply these credits is indicative of its understanding of those sanctions as forms of punishment. In *Anderson v. State*, our supreme court interpreted Iowa Code section 907.3(3), which then provided that a person committed to an alternate jail facility or correctional residential facility under a suspended sentence would receive credit for the time served in such a facility in the event his or her probation was revoked. *Anderson v. State*, 801 N.W.2d 1, 4 (Iowa 2011); *see also* Iowa Code § 907.3(3) ("A person so committed who has probation revoked shall be given credit for such time served."). The court held this provision applicable to an offender who, before revocation, was on probation subject to home monitoring and electronic supervision. *Anderson*, 801 N.W.2d at 9.

After the *Anderson* decision, the legislature amended section 907.3(3) to preclude offenders under certain criminal sanctions from receiving credit for time served upon revocation of their probation. 2012 Iowa Acts ch. 1138, § 91 (codified at Iowa Code § 907.3(3) (2013)). The legislature, however, added language explicitly providing that offenders committed to residential facilities would receive credit for time served in the event of probation revocation. *See* Iowa Code § 907.3(3) ("However, a person committed to an alternate jail facility or a community correctional residential treatment facility who has probation revoked shall be given credit for time served in the facility."); *see also State v.*

*Allensworth*, 823 N.W.2d 411, 416 (Iowa 2012) (holding the revised section 907.3(3) did not afford credit for time served for an offender who was on supervised probation). The legislature's deliberate decision to afford sentencing credits for probationary periods in residential facilities indicates a view of placement in such facilities as a punitive correctional measure.

Lastly, section 905.11 "involves an affirmative disability or restraint." *Mendoza-Martinez*, 372 U.S. at 168. The statute requires certain offenders on parole or work release to spend at least one year in a residential facility, subject to the conditions and regulations placed on residents. These restrictions constitute affirmative restraints on a person's liberty, without which he or she would have considerably more physical and decision-making autonomy.

Upon our review of the relevant indicia of legislative intent, we conclude the statute imposing a minimum requirement of one year in a correctional residential facility for certain paroled offenders is punitive in nature. Thus, section 905.11 is subject to the constitutional prohibitions against the passage of ex post facto laws.

**B. Retrospective Application of Statute.**

Having determined section 905.11 to be subject to the ex post facto proscription, we next must consider whether the statute has a retrospective effect. A statutory amendment is retrospective insofar as it applies to a crime occurring before its enactment. *Holm*, 767 N.W.2d at 415. In this case the question is "whether the amended statute applies to prisoners convicted for offenses committed before the provision's effective date." *See State v. Iowa Dist.*

*Ct.*, 759 N.W.2d 793, 799 (Iowa 2009). The statute here applies to any person "who *is serving* a sentence under 902.12." Iowa Code § 905.11 (2011) (emphasis added). By its terms, then, the amended statute applies to any crime committed before its enactment in 2003. This includes the crime in the instant case, committed in 1996, and for which Crouch was sentenced in 1997. Section 905.11, therefore, is retrospective.

**C. Increase in Punishment.**

For a retrospective legislative enactment to be more onerous than the law in effect on the date of the offense and thus invoke the protection of the Ex Post Facto Clauses, it must do more than merely disadvantage an offender or affect a prisoner's opportunity to take advantage of provisions for early release. *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 506 n.3 (1995). Rather, the question is whether the enactment "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Id.* Because section 905.11 does not alter any definition of criminal conduct, we must decide whether it increases Crouch's punishment. For either of two reasons, we conclude that it does not.

First, it is speculative whether Crouch, or any other similarly situated inmate, would in fact have the punitive requirement of the statute added to his sentence. Section 905.11 applies only when an offender is released on parole or work release. The discretion whether to release an inmate on parole rests with the board of parole, "when in its opinion there is reasonable probability that the person can be released without detriment to the community or to the person." Iowa Code § 906.4(1); *see also id.* § 906.3. To run afoul of the Ex Post Facto

Clause, a legislative adjustment must present a "significant risk" of an increased penalty. *Garner v. Jones*, 529 U.S. 244, 255 (2000). This standard mandates a "rigorous analysis of the level of risk created by the change in law." *Id.* A condition precedent to the operation of the additional penalty here is Crouch's release on parole. That release is subject to numerous factors, most notably the broad discretion of the board of parole. We find the level of risk for an increased penalty here too low to implicate the Ex Post Facto Clause.

Second, because of the nature of the legislative enactment that added section 905.11, it is not possible for Crouch to receive any greater punishment by operation of the statute than that in place at the commission of the crime. The same bill that added section 905.11 and its residential facility requirement for certain parolees also reduced the mandatory minimum sentence for Crouch's crime from one hundred percent of the maximum to seventy percent of the maximum. 2003 Iowa Acts ch. 156, §§ 11, 15. The effect of the legislation in this case was to afford Crouch an opportunity for parole—albeit with a residential facility requirement—and the possibility of a lesser total term of punishment, where before he had neither. On these facts the enactment did not result in a punishment more onerous than that in effect at the time Crouch committed the crime.

Accordingly, we agree with the district court that section 905.11 does not violate the Ex Post Facto Clause of either the federal or state constitutions.

**AFFIRMED.**