

IN THE COURT OF APPEALS OF IOWA

No. 3-829 / 12-1716
Filed December 5, 2013

DOUGLAS KURTZ,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, John D. Ackerman, Judge.

Douglas E. Kurtz appeals the district court ruling granting the State's motion for summary judgment on his application for postconviction relief.

AFFIRMED.

Matthew R. Metzgar of Rhinehart Law, P.C., Sioux City, for appellant.

Douglas Kurtz, Rockwell City, appellant pro se.

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

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

BOWER, J.

Douglas E. Kurtz appeals the district court ruling granting the State's motion for summary judgment on his application for postconviction relief. Kurtz argues his sentence violated the Ex Post Facto Clause of the United States and Iowa Constitutions. He also argues his sentence was illegal. We find Kurtz was sentenced within the timeframe provided by the statute of limitations and there is no ex post facto violation. We also find the illegal sentence claim is moot in regards to the minimum sentence and without merit concerning the mandatory minimum fine. We affirm.

I. Background Facts and Proceedings

Douglas E. Kurtz filed his application for postconviction relief concerning a criminal case that started more than twenty-five years ago. On September 30, 1986, Kurtz was charged with sexual abuse in the second degree.¹ He was convicted by a jury and sentenced to an indeterminate term of twenty-five years. The conviction was affirmed by this court. *State v. Kurtz*, No. 87-499, 1988 WL 127285 (Iowa Ct. App. June 29, 1988). Kurtz filed his first application for postconviction relief on October 9, 1989. His application was granted, and the case was remanded for a new trial. *Kurtz v. State*, No. 89-0820, 1990 WL 1558650 (Iowa Ct. App. Aug. 30, 1990).

Kurtz entered into a plea agreement with the State on October 29, 1991. The trial information was amended to include one count of sexual abuse in the

¹ Kurtz was also charged, on August 12, 1986, with possession with intent to deliver marijuana. He was convicted on the charge and sentenced to an indeterminate term of fifteen years as a habitual offender.

third degree and one count of lascivious acts with a child. The charge of sexual abuse in the second degree was dismissed. Kurtz was sentenced to an indeterminate term of ten years on the sexual abuse in the third degree charge to run concurrent with an earlier sentence for possession with intent to deliver marijuana as a habitual offender. He was sentenced to an indeterminate term of five years on the lascivious acts charge, which was to run consecutively to the drug charge.

Kurtz filed this application for postconviction relief on April 12, 2012. He argues the trial court violated the ex post facto clause of the Iowa and United States Constitutions because the statute of limitations had expired on the sexual-abuse-in-the-third-degree and lascivious-acts-with-a-child charges. He also argues his consecutive sentence for the lascivious-acts charge is illegal because the district court failed to impose a mandatory minimum sentence and failed to impose a mandatory fine in the drug case.²

II. Standard of Review

Our review on postconviction relief is ordinarily for errors at law. *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003). When summary judgment has been granted on the application, we review the record to “determine if a genuine issue of fact exists and whether the moving party is entitled to a judgment as a matter of law.” *Bugley v State*, 596 N.W.2d 893, 895 (Iowa 1999). Alleged constitutional violations are reviewed de novo. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998).

² Kurtz’s illegal sentence arguments are presented pro se.

III. Discussion

A. Ex Post Facto Clause and Statute of Limitations

Kurtz's sexual abuse and lascivious acts charges were based upon a series of events the last of which occurred on August 18, 1986. It is from that date the statute of limitations is calculated. Between August 18, 1986, and the date Kurtz was finally sentenced, the statute of limitations was extended. At the time the crimes initially occurred, the statute of limitations was three years. Iowa Code § 802.3 (1983). In 1985 the legislature added section 802.2, which set a four-year limitations period for sex crimes against children. Iowa Code § 802.2 (1985). The legislature amended section 802.2 in 1990, extending the limitations period to six months after the child victim attains the age of eighteen. Iowa Code § 802.2 (1991). Kurtz argues the statute of limitations expired on August 18, 1990, and the extension of the limitation period in 1990 revived the cause of action against him violating the Ex Post Facto Clause of the Iowa and United States Constitutions.³

The Ex Post Facto Clause of the United States Constitution prohibits any statute that criminalizes any act which was innocent under the law when committed. U.S. Const. art. I, § 10; *Dobbert v. Florida*, 432 U.S. 282, 291 (1977). The clause does not guarantee a defendant, however, the "right to be tried, in all respects, by the law in force when the crime charged was committed." *Dobbert*,

³ Kurtz has not offered any arguments specifically to the Iowa Constitution. We review his case under the United States Constitution only.

423 U.S. at 293. Procedural changes, for instance, are not barred ex post facto. *Id.*

Once the statute of limitations has expired, the cause of action cannot be revived by extending the limitations period. See *State v. Schultzen*, 522 N.W.2d 833, 834–35 (Iowa 1994). When the limitations statute is extended, before the limitations period has run, there is no ex post facto violation. *Id.* at 835. As explained in *Schultzen*, the acts were not innocent when performed, the punishment remains the same, and the available defenses remain identical. *Id.* A criminal defendant has no right to use the limitations period until the period has run, so an amendment before that time is not ex post facto. *Id.*

This is such a case. The charged conduct last occurred on August 18, 1986. At that time, the limitations period was to expire on August 18, 1990. The statute was amended on July 1, 1990, and extended the limitation to six months after the child victim turned eighteen. At the time of the amendment, the limitations period had not run against Kurtz. This is not a case where the cause of action was revived, but rather the cause of action was extended. The limitations period had not yet run on the date of sentencing, and Kurtz accordingly has no ex post facto or statute of limitations claim available to him.⁴

B. Illegal Sentence

Kurtz argues his sentences should be void as they were illegally imposed. He contends the sentences were not authorized by statute in two respects. First,

⁴ The district court found Kurtz had waived his statute of limitations and ex post facto claims. Because we find the statute of limitations had not run at the time Kurtz was sentenced, we do not address waiver.

the district court failed to impose the mandatory minimum sentence of at least three-years as a habitual offender. Second, the district court failed to impose a mandatory fine of between one thousand and five thousand dollars. Iowa Code § 204.401(1)(d) (1991).

With regard to the mandatory minimum sentence, Kurtz's argument is moot. A case is moot when the issues presented have become academic or nonexistent depriving the court of a justiciable controversy. *Baker v. City of Iowa City*, 750 N.W.2d 93, 97 (Iowa 2008). If resolution of the issue would have no effect and there is nothing the court can resolve, it is moot. *Id.* Issues of sentencing may become moot in a criminal case. See *Lane v. Williams*, 455 U.S. 624, 631 (1982). Our supreme court has held that where a criminal sentence has been served and the court can do no more for a defendant, the case is moot. See *State v. Wilson*, 234 N.W.2d 140, 141 (Iowa 1975). A criminal case, however, can only be moot when it is shown there is no possibility of ongoing collateral consequences that might negatively impact the defendant. See *Lane*, 455 U.S. at 632. Kurtz has served the entirety of his habitual offender sentence. He has not claimed any collateral consequences that might result from a failure to correct his sentence. There is nothing more the court can do for him with regard to the mandatory minimum sentence, and his arguments on the issue are moot.

Kurtz also contends his sentence is illegal because the court failed to impose a mandatory minimum fine. Kurtz was found guilty of possession with intent to deliver a schedule I controlled substance, marijuana, in violation of

section 204.401(1), on July 8, 1987. The act occurred in 1986. At the time of the criminal act, section 204.401(1)(b) classified possession with intent to deliver any controlled I substance, which is not a narcotic or cocaine, as a class “D” felony. Iowa Code § 204.401(1)(b) (1985). Marijuana was a schedule I substance classified as a hallucinogenic. Iowa Code § 204.204(4)(m). As a habitual offender, section 902.9(2) imposed a maximum sentence of fifteen years, and section 902.8 imposed a minimum sentence on habitual offenders of at least three years confinement. Though section 902.9(4) allowed for a fine of up to \$7500 for class “D” felonies, it was discretionary and limited only to persons who were not habitual offenders. By 1991 the code had changed to include the language Kurtz argues required a mandatory minimum fine; however, it is the 1985 Code that was in effect at the time the crime was committed. Because there was no mandatory minimum fine at the time Kurtz committed the crime, his illegal sentence argument is without merit.

AFFIRMED.