IN THE COURT OF APPEALS OF IOWA

No. 2-628 / 11-1265
Filed September 6, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JULIUS NATHANIEL TURNER,
Defendant-Appellant.

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

A defendant appeals from his convictions and sentences for two counts of second-degree sex abuse and one count of third-degree sex abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Julius Turner, Fort Madison, appellant pro se.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Patrick Jennings, County Attorney, and Drew Bockenstedt and Mark Campbell, Assistant County Attorneys, for appellee.

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

VOGEL, P.J.

Defendant Julius Nathaniel Turner appeals his convictions and sentences following a jury's verdicts finding him guilty of two counts of second-degree sex abuse (subsequent offense) in violation of Iowa Code sections 709.3(2) and 902.14 (2007-2009), and one count of third-degree sex abuse (subsequent offense) in violation of Iowa Code sections 709.4(2)(b), 709.4(2)(c)(4), and 902.14. Turner was sentenced to life in prison without the possibility of parole for each count with the sentences to run concurrently. He appeals arguing his trial counsel was ineffective denying his constitutionally guaranteed right to a fair trial and that his sentence was illegal as cruel and unusual punishment. We affirm his convictions and sentence but preserve his ineffectiveness claims for possible post-conviction proceedings.

I. Background facts and proceedings

The jury could have found the following facts: Turner and Meri Turner were married with seven children of their own, plus several other children from previous relationships. Of this troop of children and pertinent to this case, there are three young daughters: D.T., born in 1995; T.T., born in 1998; and K.T., born in 1999.

In early March 2011 Turner and Meri were having marital problems. After an allegation of infidelity surfaced, Meri confronted Turner at his job. Meri then returned to her home and packed Turner's belongings into a garbage bag and set them outside. Later, Meri picked D.T. up from school. When she informed D.T. that Turner's belongings were placed outside the house, D.T. told Meri that Turner had been "messing with her, hurting her." D.T was taken to a counselor

yet that afternoon. The counselor instructed Meri to speak to her other children separately to determine if anything had happened to them. Meri did so and T.T. and K.T. both reported inappropriate contact with Turner. The following day, March 9, 2011, K.T. and T.T. were brought to the same counselor D.T. had visited. The three girls were also interviewed at the Child Advocacy Center on March 15, 2011.

Department of Human Services (DHS) caseworker Leann Steinhauer was assigned to investigate these allegations. Steinhauer made a police report, and began working with Detective Mike Simons of the Sioux City Police Department to investigate the allegations against Turner. On April 4, 2011, Detective Simons called Steinhauer and told her he had time for them to interview Turner. Detective Simons, wearing plain clothes, picked Steinhauer up in an unmarked police car. The two went to Turner's parents' residence where they were greeted at the door by Turner's father. Detective Simons asked Turner if he would be willing to come to the police station to answer some questions; Turner was agreeable. Turner did not have a driver's license, so he rode with Detective Simons and Steinhauer in the unmarked police car, with Steinhauer driving. Turner sat with no handcuffs on in the front seat and Detective Simons sat in the middle of the back seat.

Upon arrival at the police station, they went to an interview room. Steinhauer interviewed Turner first, with Detective Simons popping in briefly to give Turner a water bottle. The interview was video-taped. After a discussion of Turner's previous conviction of a sex offense Steinhauer said, "Okay. So the new allegations are sex abuse in regards to your children, some of them. And so

[Simons] will be talking to you about those, too. . . . So basically what I'm here to figure out what's going on, and to see how I can help your kids and you." In this interview, Turner admitted to touching all three girls inappropriately by putting his hands down their pants as well as performing oral sex on them. Steinhauer interviewed Turner for thirty-seven minutes. Steinhauer finished her interview by telling Turner, "Let me see what's keeping [Simons]. I thought he'd bust in here, but he's going to talk to you too, and we'll go from there." When asked what would happen next, Steinhauer then told Turner, "I'm a social worker, not the police officer . . . as far as the police, I don't know, that's more [Simons]."

Detective Simons entered the interview room just shy of two minutes after Steinhauer left. After taking down some preliminary information, Detective Simons said, "I got involved with this with DHS also, Okay? What my job is just to gather the facts. . . I'm no different than DHS, other than I gather the facts and I give it to the county attorney, Okay?" Detective Simons continued, "Well, the only difference between me and DHS is I want to get a little more in depth and ask you some more questions, all right? I appreciate how nice you cooperated with DHS. Did you answer all of her questions?"

Turner was then read his Miranda rights. After a lengthy discussion of Turner's past, Turner says he hurt his kids and began talking about the incidents, but it was not for another few moments until he admitted to touching the girls' vaginas and performing oral sex. After Turner was told he was going to be arrested, Detective Simons asks if there was anything else Turner would like to discuss. Turner brought up a point he had discussed with Steinhauer in her interview, that a "spirit" residing in the basement of his home threatens one of the

children. Detective Simons responded by saying "The DHS officer was telling me about that. . . ." Turner was arrested at the end of the interview.

On April 15, 2011, the State filed a trial information charging Turner with two counts of sexual abuse in the second degree, and one count of sexual abuse in the third degree. A jury trial commended on July 12, 2011, and Turner was found guilty of the crimes as prosecuted. Turner acknowledged his prior convictions for sexual abuse in the third degree and lascivious acts with a child, thereby enhancing these three counts to class "A" felonies as a second offender pursuant to Iowa Code section 902.14. On July 29, 2011, Turner filed a combined motion for new trial and motion in arrest of judgment, which was denied immediately prior to sentencing. Turner was sentenced to life in prison without the possibility of parole on each count with the sentences to run concurrently. Turner appeals.

II. Ineffective assistance of counsel

We review ineffective-assistance-of-counsel claims de novo. *State v. Stewart*, 691 N.W.2d 747, 750 (Iowa 2004). In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Fountain*, 786 N.W.2d 260, 262 (Iowa 2010). A claim may be resolved on either prong. *Id.* To establish prejudice, Turner must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997). If "the court determines the claim cannot be addressed on appeal, the court must preserve it for a postconviction-relief proceeding,

regardless of the court's view of the potential viability of the claim." *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

a. *Miranda* Violation

Citing due process violations of the Sixth and Fourteenth Amendments of the United States Constitution, and article one, section ten of the Iowa Constitution, Turner asserts trial counsel was ineffective for failing to move to suppress Turner's statements to the DHS worker and to the police as being in violation of his Fifth and Fourteenth Amendment rights.

Ordinarily, ineffective-assistance-of-counsel claims are best resolved by post conviction proceedings to enable a complete record to be developed and afford trial counsel an opportunity to respond to the claim. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). Only in rare cases will the trial record alone be sufficient to resolve the claim. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999).

The record is not sufficient for us to determine whether Turner was both "in custody" and "subject to interrogation," both hallmarks of the need to inform a suspect of his rights under *Miranda* prior to questioning.[1] *State v. Turner*, 630 N.W.2d 601, 607 (Iowa 2001) (citation omitted). By way of example, and without limitation, the record lacks facts as to the relationship between Steinhauer and Detective Simons. *See State v. Pearson*, 804 N.W.2d 260, 270-71 (Iowa 2011)

[1] The *Miranda* warnings protect a suspect's privilege against self-incrimination embodied in the Fifth Amendment by informing the suspect of his or her right to remain silent and right to the presence of counsel during questioning. *State v. Palmer*, 791 N.W.2d 840, 844 (Iowa 2010) (citing *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966). Any statements made by a suspect in response to a custodial interrogation are inadmissible unless there has been an adequate recitation of the *Miranda* warning and a valid waiver by the suspect of his or her rights. *Id.*

(holding status as a social worker does not insulate interrogator from *Miranda* requirements, but finding *Miranda* was not required where caseworker had an eight year history with the defendant and was operating wholly independently from the police). Moreover there was no testimony from Detective Simons as to the pre-interview conversation he had with defendant, no evidence about security and layout of the interview location, and no information about the walking distance from the police department to Turner's home. There is also no evidence as to any collaboration between Steinhauer and Detective Simons or whether Detective Simons was able to and did observe the DHS interview. This list of record deficiencies is not intended to be an exhaustive listing of the facts or factors that may ultimately be of significance in this case, but rather an illustration of the record deficiencies making the record insufficient for us to determine counsel's performance in light of the circumstances of the questioning. We preserve this issue for possible post-conviction proceedings.

b. Redaction of transcript

Turner also asserts counsel was ineffective for failing to object to the manner in which the transcript from the interviews with Detective Simons and Steinhauser was redacted for trial. Turner now claims the manner in which the redactions were done placed some of his statements out of context and misled the jury into believing he was talking about sexually abusing his daughters and not his own experience with abuse. We find the record is not sufficient before us to determine whether trial counsel breached an essential duty when he did not object to the manner in which the redactions were made, nor do we know trial counsel's strategy. "Because '[i]mprovident trial strategy, miscalculated tactics,

and mistakes in judgment do not necessarily amount to ineffective assistance of counsel,' *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992), postconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance." *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006).

With no record of counsel's trial strategy or of the unreported discussions referenced in the record, we preserve Turner's claims for a possible post conviction relief proceeding. *See State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

III. Cruel and unusual punishment

Turner next argues the district court imposed an illegal sentence when it sentenced him to life in prison without the possibility of parole for second or subsequent sexual offenses because it constitutes cruel and unusual punishment under both article I section 17 of the Iowa Constitution and the Eighth Amendment to the United States Constitution. Generally we review illegal sentences for corrections of errors at law, but to the extent the issue also implicates constitutional protections, review is de novo. *State v.* Brooks, 760 N.W.2d 197, 204 (Iowa 2009).

Turner makes a "facial challenge" to his sentence, but based on our supreme court's recent opinion in *State v. Oliver*, 812 N.W.2d 636 (Iowa 2012) (filed March 30, 2012), we analyze his challenge using the "categorical challenge" approach. *Oliver*, 812 N.W.2d at 639-40, ("Following *Graham*, unlike other areas of constitutional law, the federal lexicon for Eighth Amendment no longer includes the terms 'facial challenge' and 'as-applied challenge.' Instead

the defendant must challenge his sentence under the 'categorical' approach or make a 'gross proportionality challenge to [the] particular defendant's sentence.'" (citing *Graham v. Florida*, 130 S.Ct. 2011, 2022, (2010)). Turner also, in his conclusion, claims the sentence of life in prison without parole is "grossly disproportionate in this case," implying the second mode of Eighth Amendment analysis under *Oliver*.

Turner suggests that we consider some alterations to *Graham*, under the Iowa Constitution; particularly, he suggests considering an intrajurisdictional analysis comparing section 902.14 against other conduct warranting a sentence of life without parole in Iowa. Both approaches Turner argues, "categorical" and "gross proportionality," fail as we find Turner's arguments indistinguishable from those made in *Oliver*, in which our supreme court failed to extend *Graham* under the Iowa Constitution and refused to find Iowa Code section 902.14 unconstitutional under either approach.

In rejecting the categorical approach, our supreme court held "[s]ince life without parole serves at least three legitimate goals, and is supported by a national consensus; we find the Eighth Amendment does not categorically band the imposition of life without parole for persons subject to the imposition of section 902.14." *Oliver* 812 N.W.2d at 647.[2]

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[2] Under the "categorical" approach, we "first look for evidence of a national consensus against the use of this penalty for this crime." *Oliver,* 812 N.W.2d at 645. After a thorough interjurisidictional review of sentencing laws for recidivist sex offenders our supreme court found "national consensus seems to support, rather than oppose, the imposition of harsh sentences, including life without parole, for recidivist sex offenders." *Id.* Under *Graham*, the court must also determine whether the challenged sentencing practice serves any penological goals, or whether any legitimate penological justification is by its nature disproportionate to the offense. *Id.* at 646, (citing *Graham*, 130 S.Ct. at 2028).

The reasoning in *Oliver*, also controls Turner's claim that the penalty mandated by the statute is so grossly disproportionate to the crimes he committed, that following the statute would, in his case, violate the state or United States Constitution. *Id.*[3] A defendant is free to "emphasize the specific facts of the case" in challenging his sentence. *State v. Bruegger*, 773 N.W.2d 862, 884 (Iowa 2009). The defendant in *Oliver* was convicted of sexual abuse in the third degree, a class "C" felony, enhanced from a ten-year sentence to life without parole due to a previous conviction for the non-forcible felony alternative of sexual abuse in the third degree. *Oliver,* 812 N.W.2d at 637. The specific facts of Turner's case make the holding in *Oliver* apply with even greater strength. Turner was convicted of more severe crimes than Oliver: two counts of sexual abuse in the second degree, a class "B" felony without the enhancement, and one count of sexual abuse in the third degree, a class "C" felony without the enhancement. We find that comparing the gravity of his crimes to the penalty mandated by the statute, section 902.14 does not impose an unconstitutional punishment on Turner.

IV. Pro se claims

Turner makes multiple allegations in his pro se brief, what we can surmise to include prosecutorial misconduct by eliciting perjured testimony and suppressing evidence that might exonerate Turner. He also presents information that would contradict evidence admitted at trial. While we appreciate Turner's

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[3] Our supreme court has held that the review of a criminal sentence for gross disproportionality under the Iowa Constitution should not be a "toothless review" and a more stringent review than would be available under the Federal Constitution applies. *Bruegger*, 733 N.W.2d at 883.

attempt to retell his version of the events and challenge portions of the evidence, he does not present issues on appeal that were raised to the district court. *Meier v. Senacaut*, 641 N.W.2d 532, 537 (Iowa 2002). Moreover, where a defendant fails to comply with the rules of appellate procedure, we must not "assume a partisan role and undertake the [party's] research and advocacy" and we must dismiss the appeal as to those issues. *State v. Stoen*, 596 N.W.2d 504, 507 (Iowa 1999) (quoting *Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 240 (Iowa 1974)). We therefore do not address Turner's pro se claims.

V. Conclusion

Because Turner's Eighth Amendment claim is controlled by *Oliver* and his pro se claims are not properly before us, we must affirm his convictions and sentence. Turner's ineffective assistance of counsel claims are preserved for possible postconviction proceedings.

AFFIRMED.