

IN THE COURT OF APPEALS OF IOWA

No. 9-415 / 08-0537
Filed July 2, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEREMY FRANK JENKINS,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Gary L. McMinimee, Judge.

Jeremy Frank Jenkins appeals from the special sentence imposed upon his conviction of assault with intent to commit sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson and Laura Roan, Assistant Attorneys General, and Timothy N. Schott, County Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

MAHAN, P.J.

Jeremy Frank Jenkins appeals from the special sentence imposed upon his conviction of assault with intent to commit sexual abuse. We affirm.

I. Background Proceedings. Jeremy Frank Jenkins was convicted of kidnapping in the third degree and assault with intent to commit sexual abuse following a jury trial. He admitted to having two prior felonies and was thus sentenced as a habitual offender on the kidnapping conviction, receiving a term of incarceration not to exceed fifteen years. He received a two-year term for the assault with intent to commit sexual abuse conviction and a ten-year special sentence pursuant to Iowa Code section 903B.2 (Supp. 2005).¹ Jenkins now appeals, contending his trial counsel was ineffective in failing to challenge the constitutionality of section 903B.2.

II. Ineffective Assistance of Counsel. Claims of ineffective assistance of counsel have their basis in the Sixth Amendment to the United States

¹ Iowa Code section 903B.2 provides as follows:

A person convicted of a misdemeanor or a class “D” felony under chapter 709, section 726.2, or section 728.12 shall also be sentenced, in addition to any other punishment provided by law, to a special sentence committing the person into the custody of the director of the Iowa department of corrections for a period of ten years, with eligibility for parole as provided in chapter 906. The special sentence imposed under this section shall commence upon completion of the sentence imposed under any applicable criminal sentencing provisions for the underlying criminal offense and the person shall begin the sentence under supervision as if on parole. The person shall be placed on the corrections continuum in chapter 901B, and the terms and conditions of the special sentence, including violations, shall be subject to the same set of procedures set out in chapters 901B, 905, 906, and 908, and rules adopted under those chapters for persons on parole. The revocation of release shall not be for a period greater than two years upon any first revocation, and five years upon any second or subsequent revocation. A special sentence shall be considered a category “A” sentence for purposes of calculating earned time under section 903A.2.

Constitution, and we therefore conduct a de novo review. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008).

Jenkins contends trial counsel was ineffective in failing to assert that section 903B.2 violates his right of substantive due process.² To establish a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* A defendant's failure to prove either element is fatal to the claim. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003). Ordinarily, we preserve ineffective-assistance claims for postconviction proceedings. See *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). However, we find the record adequate to address Jenkins's ineffective-assistance-of-counsel claims on direct appeal. See *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999).

Our task is to determine whether defense counsel breached an essential duty by failing to raise the issue and, if so, whether Jenkins was prejudiced by the failure. *Maxwell*, 743 N.W.2d at 195. We start with a presumption that counsel acted competently. *Westeen*, 591 N.W.2d at 210. In general, trial counsel is not incompetent in failing to pursue an issue that is without merit. See *id.* at 207. Thus, our first step is to consider whether there is any merit to the issue Jenkins claims his counsel should have raised. *Id.* If there is merit to this issue, we must then decide whether counsel's action fell outside the normal

² U.S. Const. amend. XIV; Iowa Const. art. I, § 9. The due process clauses of the United States and Iowa Constitutions are nearly identical in scope, import, and purpose. See *State v. Hernandez-Lopez*, 639 N.W.2d 226, 237 (Iowa 2002). Where neither party contends the Iowa Constitution should be treated differently than its federal counterpart, we use the same analysis for both statutes. *State v. Dudley*, ___ N.W.2d ___, ___ (Iowa 2009). In this case, Jenkins does not suggest we should utilize a different analysis under the Iowa Constitution, and therefore, our discussion of his due process argument applies to both his federal and state claims.

range of competency expected of criminal defense attorneys. *Id.* If we conclude that counsel failed to perform an essential duty, we will then proceed to determine whether Jenkins was prejudiced by such a failure. *Id.*

Our supreme court has recently ruled upon various constitutional challenges to section 903B.2. See *State v. Wade*, 757 N.W.2d 618, 623-28 (Iowa 2008) (finding section 903B.2 does not constitute cruel and unusual punishment and does not violate the Equal Protection Clause or the separation-of-powers doctrine). However, it has not yet addressed a substantive due process challenge to that section.³

Substantive due process “prevents the government from interfering with rights implicit in the concept of ordered liberty.” *State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005) (citations omitted). In evaluating any statutory challenge, “we must remember that statutes are cloaked with a presumption of constitutionality.” *State v. Gonzalez*, 718 N.W.2d 304, 307 (Iowa 2006); *Seering*, 701 N.W.2d at 661. The challenger must prove the unconstitutionality beyond a reasonable doubt and to overcome the presumption, “[t]he challenger is required to refute all reasonable bases upon which the statute could be declared constitutional.” *Gonzalez*, 718 N.W.2d at 307.

In a substantive due process examination, first we determine the “nature of the individual right involved.” *Seering*, 701 N.W.2d at 662. If a fundamental right is involved, we apply a strict scrutiny analysis. See *State v. Groves*, 742 N.W.2d 90, 92 (Iowa 2007) (“Strict scrutiny requires us to determine whether the

³ Wade initially raised a substantive due process challenge to section 903B.2, but waived the argument on appeal. *Wade*, 757 N.W.2d at 622-23.

statute is narrowly tailored to serve a compelling state interest.”). “Only fundamental rights and liberties which are deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty qualify for such protection.” *Seering*, 701 N.W.2d at 664 (internal quotations and citations omitted). On the other hand, if a fundamental right is not involved, we apply a rational basis analysis. *Id.* at 665.

Our supreme court has stated:

It is ultimately our duty to ensure that claims that constitutional rights have been violated are properly considered. This duty arises in part from our related duty to avoid constitutional questions not necessary to the resolution of an appeal. Both these considerations create a general requirement that claims involving fundamental rights *must identify the claimed right with accuracy and specificity* so that our analysis proceeds on appropriate grounds. In the absence of a sufficient presentation of a claimed right, we have not hesitated in the past to reconsider and realign a party’s arguments to properly address the true constitutional question presented.

Id. at 663 (emphasis added) (citations omitted).

Pursuant to section 903B.2, Jenkins is subject to a ten-year special sentence upon completion of his two-year term for assault with intent to commit sexual abuse. “The person shall begin the sentence under supervision as if on parole.” Iowa Code § 903B.2. Jenkins is challenging the imposition of extended parole following incarceration. He claims section 903B.2 infringes upon his “fundamental right to liberty, privacy, and freedom from governmental restraint.” The State responds by asserting the interest at hand is “whether the defendant has a fundamental right to be free from punishment following entry of conviction.”

[P]arolees are on the “continuum” of state-imposed punishments. On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more

akin to imprisonment than probation is to imprisonment. As this Court has pointed out, parole is an established variation on imprisonment of convicted criminals. . . . The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abides by certain rules during the balance of the sentence. In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements.

Samson v. California, 547 U.S. 843, 850, 126 S. Ct. 2193, 2198, 165 L. Ed. 2d 250, 258 (2006) (internal quotations and citations omitted). A parolee has no fundamental liberty interest in freedom from extended supervision. *Meachum v. Fano*, 427 U.S. 215, 224, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976) (“[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.”). Consequently, we reject Jenkins’s claim that section 903B.2 impinges upon a fundamental right. *Cf. People v. Oglethorpe*, 87 P.3d 129, 134 (Colo. Ct. App. 2003) (rejecting strict scrutiny for substantive due process challenge to Colorado Sex Offender Lifetime Supervision Act of 1998, which requires imposition of indefinite sentence upon sex offender because “[a]n adult offender has no fundamental liberty interest in freedom from incarceration”).

We conclude the limited privacy and liberty interests at issue are entitled to only rational basis review. A rational basis standard requires us to consider whether there is “a reasonable fit between the government interest and the means utilized to advance that interest.” *State v. Hernandez-Lopez*, 639 N.W.2d 226, 237 (Iowa 2002). As discussed by our supreme court, “[t]he State has a

strong interest in protecting its citizens from sex crimes.” *Wade*, 757 N.W.2d at 625. Victims of sex crimes suffer from devastating effects, including physical and psychological harm. *See id.* at 626 (discussing that the devastating effects of sex crimes on victims provide a rational basis for classifying sex offenders differently). Furthermore, “[t]he risk of recidivism posed by sex offenders is ‘frightening and high.’” *Wade*, 757 N.W.2d at 626 (quoting *Smith v. Doe*, 538 U.S. 84, 103, 123 S. Ct. 1140, 1153, 155 L. Ed. 2d 164, 184 (2003)); *Seering*, 701 N.W.2d at 665.

Jenkins argues that “the assumption that the risk of recidivism posed by sex offenders is frightening and high is unwarranted.”⁴ Yet, he acknowledges that sex offenders are more likely than non-sex offenders to be rearrested for a sex offense. As one court has stated, “The legislature’s assumptions about recidivism may be erroneous, but they are arguably correct and that is sufficient on a rational basis review to protect the legislative choice from constitutional challenge.” *State v. Radke*, 657 N.W.2d 66, 75 n.38 (Wis. 2003). We find there is a reasonable fit between the State’s interest in protecting its citizens from sex crimes and the extended supervision required under section 903B.2.

Because there is a rational basis for the special sentence imposed pursuant to Iowa Code section 903B.2, we find there is no merit to Jenkins’s claim that the provision violates his substantive due process rights. Jenkins’s trial counsel was not ineffective in failing to raise an issue that is without merit.

⁴ Jenkins cites a report from the Bureau of Justice Statistics that concludes that sex offenders are less likely than non-sex offenders to be rearrested for any offense. However, Jenkins acknowledges that sex offenders are more likely than non-sex offenders to be rearrested for a sex offense.

Consequently, Jenkins's claim of ineffective assistance of counsel fails, and we therefore affirm his sentence.

AFFIRMED.