IN THE COURT OF APPEALS OF IOWA

No. 9-440 / 08-1449
Filed July 22, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLES RUSSELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Lee (South) County, William L. Dowell, Judge.

Charles Russell appeals from the special sentence imposed upon his convictions of third-degree sexual abuse and kidnapping. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Michael P. Short, County Attorney, and Bruce C. McDonald, Assistant County Attorney, for appellee.

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

MAHAN, P.J.

Charles Russell appeals from the imposition of a special sentence pursuant to Iowa Code section 903B.1 (2007). He contends his counsel was ineffective for failing to argue that imposition of the special sentence violated his substantive due process rights. We affirm.

I. Background Facts and Proceedings.

At a plea proceeding, Russell pleaded guilty to sexual abuse in the third degree, in violation of Iowa Code sections 709.1(3) and 709.4(2)(b), and kidnapping in the third degree, in violation of sections 710.1(3) and 710.4, both of which are class "C" felonies punishable by a term of imprisonment not to exceed ten years. The district court imposed consecutive sentences and imposed a special sentence pursuant to Iowa Code sections 903B.1 (life-time special sentence for class "C" felony), whereby if he violates the terms of his parole he will be sentenced to additional imprisonment for a term not to exceed two years for a first offense and not to exceed five years for a second offense.[1] On appeal,

[1] Section 903B provides:

> 1. A person convicted of a class "C" felony or greater offense under chapter 709, or a class "C" felony under 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 the rest of the person's life, 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 chapter 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

Russell contends trial counsel was ineffective in failing to assert section 903B.1 violates the federal and state constitutional provisions regarding substantive due process.[2]

II. Ineffective Assistance of Counsel.

Claims of ineffective assistance of counsel have their basis in the Sixth Amendment to the United States Constitution, and we therefore conduct a de novo review. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008).

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 Russell'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 issues now asserted and, if so, whether Russell 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

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> revocation. A special sentence shall be considered a category "A" sentence for purposes of calculating earned time under section 903A.2.

[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. *State v. Dudley*, ___ N.W.2d ___, ___ (Iowa 2009).

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 issues Russell claims his counsel should have raised. *Id*. If there is merit to the issues, we must then decide whether counsel's action fell outside the normal range of competency expected of criminal defense attorneys. *Id*. If we conclude counsel failed to perform an essential duty, we will then proceed to determine whether Russell was prejudiced by such a failure. *Id*.

Russell contends section 903B.1 violates his right of substantive due process. In *State v. Wade*, 757 N.W.2d 618, 623-28 (Iowa 2008), our supreme court rejected various constitutional challenges to Iowa section 903B.2 (ten-year special sentence), finding that section 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.[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, *Seering*, 701 N.W.2d at 661, and to overcome the presumption, "[t]he challenger is required to refute all reasonable bases upon

[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.

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 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).

Russell is challenging the imposition of extended parole following incarceration. He claims section 903B.1 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."); *see also Lyon v. State*, 404 N.W.2d 580, 583 (Iowa Ct. App. 1987) (noting that "[o]nce a valid conviction has been entered, the defendant has been constitutionally deprived of his liberty to be conditionally released"). Consequently, we reject Russell's claim that section 903B.1 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.[4] We find there is a reasonable fit between the State's interest in protecting its citizens from sex crimes and the special sentence imposed pursuant to section 903B.1.

Because there is a rational basis for a special sentence imposed pursuant to Iowa Code section 903B.1, we find there is no merit to Russell's claim that the provision violates his substantive due process rights. Russell's trial counsel was not ineffective in failing to raise an issue that has no merit. *Westeen*, 591

[4] Russell argues that "the assumption that the risk of recidivism posed by sex offenders is frightening and high is unwarranted," citing 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. 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).

N.W.2d at 207. Consequently, Russell's claim of ineffective assistance of counsel fails, and we therefore affirm his sentence.

AFFIRMED.