IN THE COURT OF APPEALS OF IOWA

No. 9-464 / 09-0256
Filed July 22, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SEAN EDWARD KRIER,
Defendant-Appellant.

Appeal from the Iowa District Court for Louisa County, William L. Dowell, Judge.

Sean Krier appeals from the special sentence imposed upon his conviction of third-degree sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, and David L. Matthews, County Attorney, for appellee.

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

MAHAN, P.J.

Sean Krier appeals from the special sentence imposed upon his conviction of third-degree sexual abuse. He contends his counsel was ineffective for failing to argue that imposition of the special sentence was unconstitutional. We affirm.

I. Background Facts and Proceedings.

At a plea proceeding it was established that Krier, age twenty-six, had sexual intercourse numerous times with P.J.H., age fourteen, resulting in her becoming pregnant with twins. He pleaded guilty to sexual abuse in the third degree, which is a class "C" felony punishable by a term of imprisonment not to exceed ten years. The district court imposed an indeterminate sentence not to exceed ten years, suspended the sentence, and placed Krier on probation. Pursuant to Iowa Code section 903B.1 (2007), the court also imposed a special sentence of life-time supervision as if on parole, 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]

[1] Iowa Code 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

On appeal, Krier contends trial counsel was ineffective in failing to assert section 903B.1 violates the federal and state constitutional provisions regarding cruel and unusual punishment, the separation of powers, equal protection of the laws, and procedural and substantive due process.

II. Scope of Review.

This court reviews challenges to the constitutionality of a statute de novo. *State v. Wade*, 757 N.W.2d 618, 624 (Iowa 2008). Statutes are cloaked with a strong presumption of constitutionality. *Id*. The challenger must prove the unconstitutionality beyond a reasonable doubt. *Id*.

III. Constitutional Challenges to Section 903B.1.

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).

A. Equal Protection and Separation of Powers.

The Iowa Supreme Court recently decided *State v. Wade*, 757 N.W.2d 618 (Iowa 2008), in which the same equal protection and separation of powers claims were examined and rejected in the context of Iowa Code section 903B.2. *See Wade,* 757 N.W.2d at 624, 627. We find *Wade* controlling as to the equal protection and separation of powers claims in the present case, and thus, those claims must fail. *See id.*

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

B. Cruel and Unusual Punishment.

Krier contends his counsel was ineffective for failing to argue that section 903B.1 is unconstitutional because it imposes cruel and unusual punishment in violation of the United States Constitution. *See* U.S. Const. amend. VIII.

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 Krier'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 Krier 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 issues Krier 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 that counsel failed to perform an essential duty, we will then proceed to determine whether Krier was prejudiced by such a failure. *Id*.

> Although counsel is not required to predict changes in the law, counsel must exercise reasonable diligence in deciding whether an issue is worth raising. In accord with these principles, we have held that counsel has no duty to raise an issue that has no merit.

State v. Dudley, ___ N.W.2d ___, ____ (Iowa 2009). To prove prejudice resulted, a defendant must show there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001).

Because counsel has no duty to raise a meritless issue, we will first determine whether Krier's cruel and unusual punishment claim has any validity. *See Dudley*, ___ N.W.2d at ___. "If his constitutional challenge[ ] [is] meritorious, we will then consider whether reasonably competent counsel would have raised [this] issue[ ] and, if so, whether [Krier] was prejudiced by his counsel's failure to do so." *Id*.

The United States Constitution forbids cruel and unusual punishment. U.S. Const. amend. VIII; *see Wade*, 757 N.W.2d at 623 (stating the Eighth Amendment is applicable to the states through the Fourteenth Amendment). This protection stems from the principle "that punishment for [a] crime should be graduated and proportioned to [the] offense." *Wade*, 757 N.W.2d at 623 (alterations in original). "Punishment may be considered cruel and unusual because it is so excessively severe that it is disproportionate to the offense charged." *Id*. (citations omitted).

> Generally, a sentence that falls within the parameters of a statutorily prescribed penalty does not constitute cruel and unusual punishment. Only extreme sentences that are "grossly disproportionate" to the crime conceivably violate the Eighth Amendment.

> Substantial deference is afforded the legislature in setting the penalty for crimes. Notwithstanding, it is within the court's power to determine whether the term of imprisonment imposed is grossly disproportionate to the crime charged. If it is not, no further analysis is necessary.

State v. Cronkhite, 613 N.W.2d 664, 669 (Iowa 2000) (citations omitted).

Krier was convicted of third-degree sexual abuse, which is a class "C" felony punishable by a term of imprisonment not to exceed ten years. *See* Iowa Code §§ 709.4(2)(c)(4) and last unnumbered paragraph, 902.9(4). Pursuant to Iowa Code section 903B.1, Krier is subject to a life-time special sentence. If he violates the terms of his parole, he might have his parole revoked and be required to serve no more than two years upon any first revocation and no more than five years on any second or subsequent revocation. *Id*. § 903B.1. Krier contends the special sentence is in itself cruel and unusual punishment. Our analysis begins with a threshold test that measures the harshness of the penalty against the gravity of the offense. *Wade*, 757 N.W.2d at 623.[2] This is an objective analysis completed without considering the individualized circumstances of the defendant or the victim in the present case. *Id.* at 624.

Iowa Code section 903B.1 imposes a special sentence upon the conviction of a class "C" felony or greater sex offense. "[S]ex offenses are considered particularly heinous crimes. . . ." *People v. Dash*, 104 P.3d 286, 293 (Colo. Ct. App. 2004). Victims of this offense suffer from devastating effects,

[2] *See also Solem v. Helm*, 463 U.S. 277, 292, 103 S. Ct. 3001, 3011, 77 L. Ed. 2d 637, 650 (1983) (stating a court should consider gravity of offense, harshness of penalty, sentences imposed on other criminals in the same jurisdiction, and sentences imposed for commission of the same crime in other jurisdictions); *State v. Musser,* 721 N.W.2d 734, 749 (Iowa 2006) (discussing that the *Solem* proportionality test is only used only in the rare case where "a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality")

including physical and psychological harm, and sex offenders have a "frightening and high" risk of recidivism. *See 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)); *State v. Seering*, 701 N.W.2d 655, 665 (Iowa 2005).

Further, the offender is sentenced to parole supervision and only if the terms of parole are violated might any additional imprisonment occur. Iowa Code § 903B.1; *Wade*, 757 N.W.2d at 624. "[S]ex offenders present a continuing danger to the public and [ ] a program providing for lifetime treatment and supervision of sex offenders is necessary for the safety, health, and welfare of the state." *Dash*, 104 P.3d at 293; *see also Wade*, 757 N.W.2d at 624 (holding that imposition of a ten-year special sentence for misdemeanor and class "D" felony sex offenses, with provisions for revocation of release identical to those in section 903B.1, does not constitute imposition of cruel and unusual punishment). We also note the State's citations to numerous other states with similar special sentences. *See, e.g.*, Wis. Stat. § 939.615 (2009) (providing that a sex offender may be sentenced to lifetime supervision); *see also United States v. Moriarty*, 429 F.3d 1012, 1025 (11th Cir. 2005) ("[W]e conclude that that a lifetime term of supervised release is not grossly disproportionate to his child pornography offenses under 18 U.S.C. § 2552A, and his Eighth Amendment claim therefore fails."). We conclude Iowa Code section 903B.1 (2007) is not grossly disproportionate to the gravity of the offenses to which it applies and its imposition does not constitute cruel and unusual punishment.

Next, Krier argues that even if the special sentence itself is not cruel and unusual punishment, the requirement that he register with the state's sex

offender registry, *see* Iowa Code § 692A.2(1), and the residency restrictions applicable to sex offenders, *see id.* § 692A.2A, together with the special sentence cumulatively results in cruel and unusual punishment. However, the registration and residency requirements are not "punishment." *See State v. Willard*, 756 N.W.2d 207, 212 (Iowa 2008) (stating that "being subject to the residency restrictions [of Iowa Code section 692A.2A] is not punishment"); *State v. Pickens*, 558 N.W.2d 396, 399-400 (Iowa 1997) (holding that the registration requirement of Iowa Code section 692A.2(1) is remedial and not punitive). Because they are not punitive, their imposition together with the special sentence does not add to the "punishment" imposed. Again, we find no violation of the prohibition against cruel and unusual punishment.

C. Due Process.

Krier next challenges section 903B.1 on both procedural and substantive due process grounds. *See* U.S. Const. amend. XIV; Iowa Const. art. I, § 9.[3] First, we examine Krier's procedural due process claims. "A person is entitled to procedural due process when state action threatens to deprive the person of a protected liberty interest." *Seering*, 701 N.W.2d at 665. Protected liberty interests have their source in the United States Constitution and "include such things as freedom from bodily restraint, the right to contract, the right to marry and raise children, and the right to worship according to the dictates of a person's

[3] The Due Process Clauses of the United States and Iowa Constitutions are nearly identical in scope, import, and purpose. *State v. Hernandez-Lopez*, 639 N.W.2d 226, 237 (Iowa 2002). Krier does not argue that we should utilize a different analysis under the Iowa Constitution. Therefore, our discussion of his due-process argument applies to both his federal and state claims. *Dudley*, ___ N.W.2d at ___ (using the same analysis to interpret the Due Process Clauses of the United States and Iowa Constitutions because neither party suggested the Iowa provision should be interpreted differently than its federal counterpart).

conscience." *Willard*, 756 N.W.2d at 214. "We consider the type of process due and determine whether the procedures provided in the statute adequately comply with the process requirements." *State v. Hernandez-Lopez*, 639 N.W.2d 226, 240 (Iowa 2002).

In order to determine what process is due, we balance three factors: (1) the private interest that will be affected by government action; (2) the risk of an erroneous deprivation of this interest by the current procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest in the regulation, including the burdens imposed by additional or different procedures. *Seering*, 701 N.W.2d at 665; *Hernandez-Lopez*, 639 N.W.2d at 241. "At the very least, procedural due process requires notice and opportunity to be heard in a proceeding that is adequate to safeguard the right for which the constitutional protection is invoked." *Seering*, 701 N.W.2d at 665-66 (citations omitted). However, a particular procedure does not violate due process just because another method may seem fairer or wiser. *Id*. at 666.

Krier pleaded guilty, and following a sentencing hearing the section 903B.1 sentence was imposed. He does not assert a procedural due process claim stemming from the imposition of the section 903B.1 sentence. Rather, he claims that if he violates the rules of parole and his release is revoked, the statute contemplates additional proceedings that are not specified. The State argues that because Krier has not violated any terms of his extended parole, this issue is not ripe for review, and even if it were ripe, "section 903B.1 specifically affords the defendant the procedural safeguards contained in Iowa Code

chapters 901B, 905, 906, and 908, as well as rules adopted under those chapters for persons on parole."

"A case is ripe for adjudication when it presents an actual, present controversy, as opposed to one that is merely hypothetical or speculative." *Wade*, 757 N.W.2d at 627; *State v. Bullock*, 638 N.W.2d 728, 734 (Iowa 2002). The basic rationale for the ripeness doctrine is "to protect [administrative] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Bullock*, 638 N.W.2d at 734 (citations omitted). This rationale is especially applicable in the present case because "[t]o the extent there are consequences extending from a parole violation, such decisions are executive or administrative decisions." *Wade*, 757 N.W.2d at 628. Because Krier's argument is based upon a possible future violation of parole and consequences from that violation, we conclude this issue is not ripe. *See id*. at 627-28 (holding that a constitutional challenge to Iowa Code section 903B.2 that was based upon future parole violations was not ripe).

Krier also contends section 903B.1 violates his right of substantive due process. This constitutional challenge was not addressed in *Wade*. *See id*. at 622-23 (noting Wade waived a substantive due process challenge).

Substantive due process "prevents the government from interfering with rights implicit in the concept of ordered liberty." *Seering*, 701 N.W.2d at 662 (citations omitted). In a substantive due process examination, first we determine the "nature of the individual right involved." *Id.* 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).

Krier does not indicate whether he believes a strict scrutiny or a rational basis analysis applies, but argues this "preventative detention" violates the "fundamental concept of liberty." The State responds that the section 903B.1 special sentence does not violate a fundamental right.

A person convicted of a crime that subjects the person to imprisonment has no fundamental liberty interest in freedom from extended supervision. *See 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.

Id. Section 903B.1 commits a convicted person into the custody of the director of the Iowa Department of Corrections, where "the person shall begin the sentence under supervision as if on parole." "Any additional imprisonment will be realized only if [the convicted person] violates the terms of . . . parole." *Wade*, 757 N.W.2d at 624. Additionally, "[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 271-72, 114 S. Ct. 807, 812, 127 L. Ed. 2d 114, 122 (1994). The matter involved here, the asserted right of a person convicted of and imprisoned for a crime to be free from parole supervision by the state, is different in kind than the privacy and liberty interests noted in *Albright*. *See People v. Oglethorpe*, 87 P.3d 129, 134 (Colo. Ct. App. 2004) (discussing a substantive due process challenge to Colorado Sex Offender Lifetime Supervision Act of 1998, which requires imposition of indefinite sentence upon sex offender, and rejecting a strict scrutiny analysis because "[a]n adult offender has no fundamental liberty interest in freedom from incarceration"). We agree with the State that a rational basis analysis applies here.

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." *Hernandez-Lopez*, 639 N.W.2d at 238. 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). 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 Iowa Code section 903B.1.

Krier argues that section 903B.1 violates due process because the "special sentence of lifetime supervision constitutes punishment for crimes not committed." This argument is misplaced. Iowa Code section 903B.1 clearly states that a person convicted of third-degree sexual abuse, "shall also be sentenced, in addition to any other punishment provided by law, to a special sentence . . . ." Krier is not being punished "for crimes not committed," but rather for third degree sexual abuse.

Krier also argues the "special sentence authorizes new terms of imprisonment for . . . conduct which would not be deemed criminal for others." Similar to Krier's procedural-due-process claim, this argument is based upon a possible future violation of parole and the potential consequences of such a violation, including the potential for new terms of imprisonment. This issue is not ripe for our review. *See Wade*, 757 N.W.2d at 628 (holding that a constitutional challenge to Iowa Code section 903B.2 that was based upon future parole violations was not ripe). We conclude that Iowa Code section 903B.1 does not violate the due process clauses of the United States and Iowa Constitutions.

IV. Conclusion.

Iowa Code section 903B.1 does not violate the United States or Iowa Constitutions as claimed. Krier's ineffective-assistance-of-counsel claims based on the failure to assert the constitutional challenges are thus without merit. We affirm the sentence imposed by the district court.

AFFIRMED.