IN THE COURT OF APPEALS OF IOWA

No. 9-482 / 08-1512
Filed July 22, 2009

KENNETH LEE DOSS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Warren County, Paul R. Huscher, Judge.

Appeal from the district court's denial of postconviction relief. **AFFIRMED.**

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

Kenneth Doss, Mount Pleasant, appellant pro se.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, and Bryan Tingle, County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

Kenneth Doss appeals from the district court's denial of his application for postconviction relief. He contends postconviction counsel was ineffective by not asserting that trial counsel was ineffective for failing to challenge the constitutionality of Iowa Code section 903B.1 (Supp. 2005). In his pro se brief, he appears to contend there was insufficient evidence and his lawyer coerced him into pleading guilty even though he wanted to go to trial. We affirm.

I. Background Facts and Proceedings.

In 2005, Doss was charged by trial information with sexual abuse in the third degree, lascivious acts with a child, and indecent contact with a child. Pursuant to a plea agreement, he pled guilty in 2007 to lascivious acts with a child, a class C felony, and the State dismissed the other charges. The court imposed a fine, sentenced Doss to an indeterminate term of incarceration not to exceed ten years, but suspended the sentence, and imposed the special sentence of lifetime parole pursuant to Iowa Code section 903B.1 to begin at the completion of his probation. Later that year, the court found Doss violated his probation, revoked the probation, and imposed the earlier suspended prison sentence.

In 2008 Doss filed an application for postconviction relief, alleging his probation was revoked without sufficient evidence of a violation, there was newly-discovered evidence the complaining witness had lied, and his trial counsel was ineffective in advising him to plead guilty without adequately investigating and without challenging the admissibility of Doss's incriminating statements to police.

The State moved for summary judgment. Following an unreported hearing, the court found no genuine issue of material fact, no error in the criminal proceedings, no default of counsel, and no basis for postconviction relief. After noting that Doss pled guilty, filed no motion in arrest of judgment, was sentenced, and filed no appeal, the court determined that "[p]rocedurally, claims he might have had were waived." The court granted the State's motion for summary judgment and dismissed Doss's application for postconviction relief.

II. Scope and Standards of Review.

We review the dismissal of an application for postconviction relief to correct errors at law. Iowa R. App. P. 6.4; *Brown v. State*, 589 N.W.2d 273, 274 (Iowa Ct. App. 1998). Those claims alleging constitutional violations, such as ineffective assistance of counsel, are reviewed de novo. *State v. Decker*, 744 N.W.2d 346, 354 (Iowa 2008).

We review challenges to the constitutionality of a statute de novo. *State v. Wade*, 757 N.W.2d 618, 622 (Iowa 2008). Statutes are cloaked with a presumption of constitutionality. *State v. Musser*, 721 N.W.2d 734, 741 (Iowa 2006); *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005). To overcome this presumption, Doss must demonstrate that section 903B.1 is unconstitutional beyond a reasonable doubt, which requires him to refute "every reasonable basis upon which the statute could be found to be constitutional." *Seering*, 701 N.W.2d at 661 (citations omitted).

III. Merits.

Pro Se Claims. Doss's pro se brief is basically in the form of a letter to the court. It lacks a statement of issues for review, any citation to authority, any statement how error was preserved, or any other compliance with the rules of appellate procedure. We conclude any issues raised in Doss's pro se brief are not preserved for our review, are waived for failure to cite authority, or are otherwise not properly before this court. *See* Iowa R. App. P. 6.14(1)(*c*) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue."); *State v. Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002) (noting we will only review an issue raised on appeal if it was presented to and ruled on by the district court). In addition, Iowa Rule of Appellate Procedure 6.14(1)(*e*) requires that each division of a party's brief begin with a discussion of the applicable scope of review and an identification of how error was preserved, with citation to the place in the record where the issue was raised and decided. It has long been the rule that procedural rules apply equally to parties who are represented by counsel and to those who are not. Pro se parties receive no deferential treatment. *See Hays v. Hays*, 612 N.W.2d 817, 819 (Iowa Ct. App. 2000). Although this rule may seem harsh to a pro se litigant, it is justified by the notion that appellate judges must not be cast in the role of advocates for a party who fails to comply with court rules and inadequately presents an appeal.

Ineffective Assistance of Counsel. Doss contends his postconviction counsel was ineffective for not raising the claim that trial counsel was ineffective

for not challenging the constitutionality of Iowa Code section 903B.1. He argues section 903B.1 is unconstitutional because it violates substantive due process and constitutes cruel and unusual punishment. In order to prove his postconviction counsel was ineffective, Doss must show counsel failed in an essential duty and Doss was prejudiced. *See State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006); *accord Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064-65, 2068, 80 L. Ed. 2d 674, 698 (1984). We may dispose of an ineffective-assistance-of-counsel claim if appellant fails to prove either element. *See Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008).

Counsel has no duty to raise an issue or make an objection that has no merit. *Musser*, 721 N.W.2d at 752. In order to determine whether postconviction counsel had a duty to raise a claim that trial counsel was ineffective for not challenging the constitutionality of the statute, we must examine the underlying constitutional claims to determine if they have merit. *See State v. Dudley*, ___ N.W.2d ___, ___ (Iowa 2009). "If his constitutional challenges are meritorious, we will then consider whether reasonably competent counsel would have raised these issues and, if so, whether [Doss] was prejudiced by his counsel's failure to do so." *Id*. If they lack merit, then trial counsel had no duty to raise them and postconviction counsel had no duty to challenge trial counsel's performance.

A. Substantive Due Process. 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. *Id*. "[O]nly fundamental rights and liberties [that] are deeply

rooted in this Nation's history and tradition and implicit in the concept of ordered liberty qualify for such protection." *Id.* at 664 (citations and quotations omitted); *see State v. Groves*, 742 N.W.2d 90, 93 (Iowa 2007) ("Strict scrutiny requires us to determine whether the statute is narrowly tailored to serve a compelling state interest."). If a fundamental right is not involved, we apply a rational basis analysis. *Seering*, 701 N.W.2d at 664-65.

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 incarcerated for a crime to be free from parole supervision by the state and from possible re-incarceration, is different in kind from 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 apply a rational basis standard to this claim.

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). Furthermore, "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'" *Id.* (quoting *Smith v. Doe*, 538 U.S. 84, 103, 123 S. Ct. 1140, 1153, 155 L. Ed. 2d 164, 183-84 (2003)); *Seering*, 701 N.W.2d at 665. We find 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.

Doss argues that section 903B.1 violates due process because the special sentence of lifetime supervision constitutes punishment for crimes not yet committed and intrudes upon his privacy rights. He asserts that "neither the public's antipathy or fear are sufficient reasons to deny fundamental rights, such

as the right of privacy and the right to be free of government supervision, once the law's sentence has been served." However, these arguments are 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." Doss is not being punished "for crimes not committed," but rather for third-degree sexual abuse. Furthermore, Doss's sentence has not been served; the special sentence is part of his sentence for third-degree sexual abuse that he is currently serving. We find these arguments without merit.

Finally, Doss argues the special sentence authorizes new terms of imprisonment for conduct that would not be deemed criminal for others. This argument is based on 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 based on future parole violations was not ripe).

B. Cruel and Unusual Punishment. 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).

Doss pled guilty to and was convicted of lascivious acts with a child, a class C felony punishable by a term of imprisonment not to exceed ten years. Iowa Code §§ 709.8(1), 902.9(4) (2005). Pursuant to Iowa Code section 903B.1 (Supp. 2005), Doss 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 (Supp. 2005). Doss contends the special sentence is disproportionate to the offense.

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; *see Musser*, 721 N.W.2d at 749 (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"); *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 the 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). This is an objective analysis completed without considering the individualized circumstances of the defendant or the victim in the present case. *Wade*, 757 N.W.2d 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). As noted above, victims of this offense suffer from devastating effects, 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*, 538 U.S. at 103, 123 S. Ct. at 1153, 155 L. Ed. 2d at 183-84); *Seering*, 701 N.W.2d at 665.

Further, the offender is sentenced to parole supervision and only if the terms of parole are violated might any additional incarceration be ordered. 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 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 that Iowa Code section 903B.1 (Supp. 2005) 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, Doss 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, together with the special sentence, cumulatively result in cruel and unusual punishment. *See* Iowa Code § 692A.2(1) (2005). However, the registration requirement pursuant to Iowa Code section 692A.2(1) is 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, not punitive). Because it is not punitive, its 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.

Conclusion. Having determined that Doss's constitutional challenges to section 903B.1 are without merit, we conclude trial counsel had no duty to raise the challenges and Doss was not prejudiced. Consequently, postconviction

counsel did not fail in an essential duty by not raising the same constitutional challenges or by not claiming trial counsel was ineffective for that reason.

AFFIRMED.