

IN THE SUPREME COURT OF IOWA

NO. 19-1285

KENNETH LEE DOSS,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WARREN COUNTY
THE HONORABLE RICHARD B. CLOGG

IOWA BOARD OF PAROLE'S AMICUS CURIAE BRIEF

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IDENTITY AND INTEREST OF THE AMICUS

The Iowa Board of Parole [IBOP] is an agency of the State of Iowa that “shall direct, control, and supervise the administration of the system of paroles” within the state. Iowa Code § 906.3 (2020) (Duties of Parole Board); *see* Iowa Code §§ 17A.2(1) (defining “agency” to mean “each board, commission, department, officer or other administrative office or unit of the state”); *see generally* Iowa Code chs. 904A (Board of Parole); 906 (Paroles and Work Release); 908 (Violations of Parole and Probation). Among the duties delegated to the Chairperson of the IBOP is the “development of rules, policies, and procedures, subject to the approval of the board, in cooperation with the department of corrections, pertaining to the supervision of executive clemency, parole, and work release.” Iowa Code § 904A.4A(5). Persons like Appellant Doss who are serving special sentences imposed pursuant to Iowa Code chapter 903B are 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 or work release.” *See* Iowa Code §§ 903B.1; 903B.2. The IBOP therefore has an interest in confirming that the terms and conditions it and supervising judicial district department of correctional services personnel place upon parolees comport with applicable constitutional safeguards.

STATEMENT REQUIRED BY IOWA R. APP. P. 6.906(4)(d)

The IBOP, being an agency of the State of Iowa, is represented in this matter by the Office of the Attorney General as is the Appellee State of Iowa. *See* Iowa Code § 13.2(1)(a). No other person contributed money to fund the preparation or submission of the brief.

ARGUMENT

I. THE IOWA BOARD OF PAROLE MAY CONSTITUTIONALLY IMPOSE ANY CONDITION UPON PAROLE SUPERVISION THAT REASONABLY RELATES TO A PAROLEE’S OFFENSE OR OTHER IDENTIFIABLE NEED.

Doss seeks reversal of his special sentence revocation and release from prison in part by contesting the legality of the conditions governing his special sentence parole. Although free of prison walls at the time he was a special sentence parolee, Doss nonetheless remained subject to corrections supervision. As this Court has acknowledged:

When granting parole, the board of parole does not grant an inmate the absolute liberty to which every citizen is entitled, but only . . . the conditional liberty properly dependent on observance of special parole restrictions. “Conditional” liberty means that in order to remain in the community instead of being re-incarcerated, the parolee must comply with both standard conditions of parole required of all parolees, and special conditions imposed depending on the needs of that particular case.

State v. King, 867 N.W.2d 106, 121 (Iowa 2015) (internal citations and quotations omitted). Reasonable infringement upon otherwise protected

liberties is acceptable if taken in furtherance of the rehabilitation of parolees and maintaining public safety. *King*, 867 N.W.2d at 121 (“The supervision component of parole necessarily involves intrusion by government into the lives of parolees as they assimilate back into society.”). The IBOP agrees with the Court that the goals and purposes of parole would be difficult, if not impossible, to accomplish without accommodating such intrusions. *King*, 867 N.W.2d at 122. Similarly, within the context of probation a condition of release will not be questioned if there is a sufficient nexus between the ordered condition and a problem or need identified with an offender so as to promote either the rehabilitation of that offender or the protection of the community. *State v. Valin*, 724 N.W.2d 440, 446-47 (Iowa 2006).

While cases addressing the legality of court ordered probation terms may provide some insight into the bounds of conditions that can be imposed on parolees, the differences between parole and probation should not be ignored in the Court’s final analysis. This Court has previously recognized that probation is distinguishable from parole. “[A] basic difference between ‘probation’ and ‘parole’ in that probation relates to judicial action taken before the prison door is closed, whereas parole relates to executive or administrative action taken after the door has been closed on a convict. *State v. Wright*, 202 N.W.2d 72, 76 (Iowa 1972). Thus, legitimate reasons may exist to treat

probationers and parolees differently. *See Mills v. State*, 308 N.W.2d 65, 67 (Iowa 1981).

Any argument that persons serving a special sentence are somehow different from other parolees in regard to the terms and conditions that may be placed upon their release also lack merit. The Iowa Code unambiguously commands that a person shall commence a special sentence “under supervision as if on parole or work release.” Iowa Code §§ 903B.1, 903B.2. “The board of parole shall determine whether the person should be released on parole or placed in a work release program.” *Id.* “[T]he terms and conditions of the special sentence, including violations, shall be subject to the same set of procedures . . . and rules . . . for persons on parole or work release.” *Id.* Thus, like it would for any other person on parole, the IBOP reasonably imposed terms and conditions upon Doss’ release. Any parolee, including persons serving a special sentence, who violate those terms and conditions face a return to prison – as did Doss.

A section 903B special sentence is not a sentencing enhancement or alternative within the discretion of a sentencing court or tier of fact to impose.

Here the legislature simply extended Iowa’s parole supervision scheme to require additional supervision for sex offenders consistent with the state’s objective of protecting citizens from sex crimes. The sentence is automatic. To the extent there are consequences from a parole violation, such decisions are executive or administrative decisions and no judicial function is

involved. The consequences of a parole violation under Section [903B.1] do not involve sentencing functions and therefore the statute does not violate the separation-of-powers doctrine.

State v. Wade, 757 N.W.2d 618, 628 (Iowa 2008).

Doss admitted at his plea hearing that he touched the pubes of a thirteen-year-old second cousin in the middle of the night while she slept in her bed; and that he did so for purposes of arousing his sexual desires. (PCR Exhibit 4 at pp. 11-12 (Plea Transcript); Amended Trial information; App. 5). The sentencing court consequently ordered Doss to complete sex offender treatment “until maximum benefits are achieved.” (PCR Exhibit 6 at p. 2 (Judgment Entry); App. 45). The IBOP implemented this charge by conditioning Doss’ continued special sentenced release on his participation in any treatment required by the judicial district department of correctional services; and specifically that he “shall complete sex offender treatment and sex offender aftercare program” unless otherwise ordered by his supervising parole officer. (See PCR Exhibit 1 at p. 2 (Parole Agreement – Conditions 40, 40a; App. 23). The judicial district department of correctional services had Doss sign a “Sex Offender Treatment Program Rules & Conditions Contract” governing his subsequent participation in SOTP and SOTP aftercare. (See PCR Exhibit 2 (SOTP Contract); App. 25-26).

In the present case, the conditions limiting Doss' access to the internet, prohibiting possession of pornography, and regulating his interactions with minors all address attributes of his criminal offense and continuing risk behaviors. Limiting group activities and allowing for scrutiny of other social relationships and activities further serves the legitimate purpose of minimizing opportunities for Doss to identify and groom new victims for illicit sexual activity. Doss' continued pattern of engaging in high risk sexual behaviors and his failure to fully implement the treatment programming ordered by the sentencing court justified the continued application of these terms. As an earlier postconviction court noted in rejecting a nearly identical challenge Doss made to the same parole revocation at issue in this case: "In light of the original crime for which [Doss] now finds himself subject to parole supervision, the violations discovered in the cell phone search raise significant concerns as to whether [Doss] has benefited from the counseling and treatment provided in the context of the SOTP." 10/5/2017 Ruling on Application for Post-conviction Relief, *Doss v. State*, Jasper County No. PCCV120397 at p. 6.¹

¹ Doss' appeal of this prior adverse ruling was dismissed due to his failure to comply with appellate rule. See 5/8/2018 Order, *Doss v. State*, Supreme Court No. 17-1648. Though arguably applicable, *res judicata* and Iowa Code section 822.8's prohibition on successive and duplicate

Doss' due process rights were not violated by the IBOP's administration and enforcement of his special sentence conditions. No parole condition placed upon Doss—or any other parolee—is absolute and immutable. *All* parole conditions are subject to review, modification, and waiver by supervising parole officers and the IBOP itself. *See* Iowa Code § 906.11; 201 Iowa Admin. Code r. 45.2(2) (“Special conditions may be imposed at any time and shall only be imposed in accordance with the needs of the case as determined by the judicial district department of corrections, the department of corrections or the Iowa board of parole.”); 205 Iowa Admin. Code r. 10.3. Review of any refusal to modify conditions is appealable to the IBOP as a whole followed by the availability of Iowa Code chapter 17A judicial review. *See* 205 Iowa Admin. Code ch. 15 (Appeal of Decisions); Iowa Code § 17A.19 *Johnson v. Dep’t of Corr.*, 635 N.W.2d 487, 489 (Iowa 2001) (discussing the IBOP’s administrative appeals process). Thus, Doss had available to him a more than adequate procedural means to compel the individual review of his parole conditions that he now claims was lacking in this case.

postconviction filings were not raised as defenses in the District Court in this proceeding.

II. IOWA CODE CHAPTER 17A PROVIDES PAROLEES THEIR EXCLUSIVE MEANS TO CHALLENGE THE FACIAL VALIDITY OF THEIR PAROLE CONDITIONS.

While the Court of Appeals had reason for declining to address the issue in its ruling, *see Doss v. State*, No. 19-1285, 2020 WL 4201002 at *2 (Iowa Ct. App., July 22, 2020) (“The State’s failure to raise the issue of the district court’s authority to grant relief precludes affirmance on this alternate basis”), this Court should nevertheless clarify that Iowa Code chapter 822 postconviction relief typically is not the appropriate vehicle to contest the IBOP’s imposition and administration of parole terms and conditions. To the extent that Doss seeks to litigate the facial validity of any release condition or term that was not cited or otherwise relied upon as a basis to revoke his special sentence parole status, such claims may only be brought through Iowa Code chapter 17A judicial review of agency action upon his exhaustion of applicable administrative remedies, and not through Iowa Code chapter 822 postconviction relief. *See Benford v. State*, No. 17-1253, 2018 WL 3912118 (Iowa Ct. App. Aug. 15, 2018).

The IBOP is a state agency subject to Iowa Code chapter 17A. *Benford*, 2018 WL 3912118 at *1 (citing *Frazee v. Iowa Bd. of Parole*, 248 N.W.2d 80, 82 (Iowa 1976)). Thus, as the Court of Appeals aptly recognized in a similar case addressing review of parole conditions that “the judicial review

provisions of chapter 17A are ‘the exclusive means by which a person . . . adversely affected by’ the Board’s decisions may seek judicial review of those decisions.” *Benford*, 2018 WL 3912118 at *1 (quoting Iowa Code § 17A.19). This conclusion is only reinforced by the fact that “the mere imposition of parole conditions does not squarely qualify for any grounds for PCR.” *Benford*, 2018 WL 3912118 at *1 (citing Iowa Code § 822.2(1)).

This Court has recognized the advantages of mandating administrative review in other contexts. Allowing administrative processes to run their course can many times eliminate the need for protracted litigation as potential constitutional claims and other errors of law are identified and corrected early before the agency. *See Shell Oil Co. v. Bair*, 417 N.W.2d 425, 430 (Iowa 1987). Furthermore, mandatory exhaustion of administrative remedies would allow the agencies responsible for administering parole to directly defend the actions they have taken. “Even facial constitutional issues are more effectively presented for adjudication based upon a specific factual record” and that the appropriate place to develop such a record is before the agency entrusted with the determination of the adjudicative facts. *Shell Oil Co.*, 417 N.W.2d at 430.

In lieu of challenging the legitimacy of his release terms through appropriate administrative channels and subsequent judicial review of agency

action, Doss simply decided to ignore the terms and conditions with which he disagreed. Doss now faces the consequences of that decision.

III. THE COURT SHOULD REFRAIN FROM ADDRESSING DOSS' CONSTITUTIONAL CHALLENGE TO HIS PAROLE CONDITIONS BECAUSE HIS SPECIAL SENTENCE PAROLE WAS LEGALLY REVOKED FOR ALTERNATIVE REASONS.

In relevant part, Iowa Code section 908.5(1) provides that if a violation of parole is established, the administrative law judge may continue the parole with or without modification of the conditions of parole or “may revoke the parole and require the parolee to serve the sentence originally imposed.” *See also* 205 Iowa Admin. Code r. 11.4 (providing that parole may be revoked for “good cause,” which is defined to include “the violation of a condition or conditions of the parole agreement or parole plan”). Thus, under Iowa law, a parole revocation is lawful so long as one violation of parole is substantiated.

Numerous parole violations were founded against Doss in this case. Each of these violations forms an independent legal basis for revoking Doss' special sentence release. Among the founded violations was Doss' unexcused absence from SOTP group treatment. Thus, regardless of the constitutionality of other parole and SOTP requirements, no violation of Iowa Code section 822.1(1) has occurred. The IBOP's decision to revoke his special sentence parole was more than reasonable given Doss' repeated inability to comply with his requirements of supervision despite being given multiple chances to

do so. *See* 10/5/2017 Ruling on Application for Post-conviction Relief, *Doss v. State*, Jasper County No. PCCV120397 at p. 6 (“The punishment imposed, revocation of [Doss’] parole, was justified by the violations, particularly in light of the fact this was the second time [Doss’] special sentence was revoked.”).

Doss seeks to deflect this Court’s attention away from his noncompliant behavior by attacking other, non-implicated terms and conditions of his parole release and SOTP contract. While Doss may question the legitimacy of conditions limiting his participation in religious gatherings and prohibitions on unapproved counseling, neither of these conditions were cited as grounds for revoking his special sentence release. Thus, the legality of Doss’ special sentence parole revocation is in no way called into doubt by the inclusion of such terms in his release agreements. “[C]ourts have a duty to avoid constitutional questions when [the] merits of a case may be fairly decided without facing such questions.” *LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 867 (Iowa 2015).

Even so, the remedy Doss seeks—throwing out in their entirety his parole and SOTP agreements and reversing his special sentence revocation—is not appropriate. Rather, rescission of the questioned terms is the proper resolution should those terms ultimately prove illegal or unconstitutional. *Cf.*

Clark v. Miller, 503 N.W.2d 422, 425 (Iowa 1993) (“If any provision of an Act or statute or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act or statute which can be given effect without the invalid provision or application”). The Court should allow the IBOP to continue enforcement of the constitutional provisions.

Because Doss’ special sentence revocation is supported by his violation of clearly constitutional parole conditions, revocation of his release was justified and should be affirmed. The Court should accordingly decline in this case to issue an advisory opinion as to the constitutionality of all non-implicated parole conditions until all impacted parties have had a fair and full opportunity to defend their actions through an Iowa Code chapter 17A judicial review proceeding following proper exhaustion of applicable administrative remedies.

CONCLUSION

For the above-stated reasons, the Iowa Board of Parole would urge the Court to affirm the constitutionality of the Board’s actions in revoking Doss’ special sentence parole.

CERTIFICATE OF COMPLIANCE

This Brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6,903(1)(g)(1) or (2) because this Brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font size and contains 2,654 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ John R. Lundquist
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PROOF OF SERVICE

I, John R. Lundquist, hereby certify that on December 18, 2020, I, or a person acting on my behalf, did serve Iowa Board of Parole’s Amicus Brief on all other parties to this appeal by EDMS to the respective counsel for said parties.

/s/ John R. Lundquist
JOHN R. LUNDQUIST
Assistant Attorney General

CERTIFICATE OF FILING

I, John R. Lundquist, hereby certify that on December 18, 2020, I, or a person acting on my behalf, filed Iowa Board of Parole’s Amicus Brief with the Clerk of the Iowa Supreme Court by EDMS.

/s/ John R. Lundquist
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