ELECTRONICALLY FILED DEC 16, 2016 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

LAVERNE BELK,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

No. 16-0304

APPEAL FROM THE DISTRICT COURT
FOR BENTON COUNTY
HONORABLE JUDGE LARS G. ANDERSON

APPELLANT'S BRIEF

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CERTIFICATE OF SERVICE

I, John J. Bishop, hereby certify that on the 16th day of December, 2016, I served the above Appellant's Brief on the other parties of this appeal via EDMS to the following counsel for said parties:

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I, John J. Bishop, hereby certify that the attached Appellant's Brief was filed on the 16th day of December, 2016, via EDMS to the Clerk of the Supreme Court, Supreme Court of Iowa, Judicial Branch Building, 1111 E. Court St., Des Moines, IA 50319.

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ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN DISMISSING THE APPELLANT'S APPLICATION FOR POST-CONVICTION RELIEF.

Davis v. State, 345 N.W.2d 97 (Iowa 1994)

Maghee v. State, 773 N.W.2d 228 (Iowa 2008)

STATEMENT OF THE CASE

Nature of the case

This is an appeal of the district court's dismissal of the appellant's application for post-conviction relief.

Course of the Proceedings

On March 19, 1992, Mr. Belk was charged by trial information in Benton County Case CR4442 (later converted to FECR4442) with the crimes of Kidnapping in the First Degree (Count I); Sexual Abuse in the Second Degree (Count II), Assault with Intent to Commit Sexual Abuse (Count III), and Possession of a Controlled Substance (Count IV) in violation of Iowa Code sections 710.1(3), 710.2,709.1(1), 709.3(1), 709.11, 204.204(4), and 204.401(3) (1992). (App. pp. 1-4).

On October 15, 1992, Mr. Belk entered guilty pleas for Kidnapping in the Second Degree (Count I), Sexual Abuse in the Second Degree (Count II), Extortion (Count III), and Going Armed with Intent (Count IV) in violation of Iowa Code sections 710.1(3)710.3, 709.1(1), 709.3(1), 711.4(1), and 708.8. (App. pp. 5-8). Mr. Belk was sentenced on the same day to an indeterminate term of

imprisonment not to exceed twenty-five years as to Count I, an indeterminate term of imprisonment not to exceed twenty-five years as to Count II, an indeterminate term of imprisonment not to exceed five years as to Count III, and an indeterminate term of imprisonment not to exceed five years as to Count IV, to be served consecutively, for a total term of sixty years. (App. pp. 5-8).

Mr. Belk filed a notice of appeal on October 29, 1992. On September 28, 1993, the Iowa Supreme Court issued a procedendo which noted that the appeal had been dismissed by the appellant. (App. p. 9).

On December 10, 2010, Mr. Belk filed a Motion for Correction of Illegal Sentence. (App. pp. 10-11). On March 19, 2013, the district court denied Mr. Belk's Motion for Correction of Illegal Sentence. (App. pp. 12-14).

On April 23, 2013, Mr. Belk filed an Application for Post-conviction Relief. (App. pp. 15-18). On September 3, 2013, Mr. Belk filed an Amended Application for Post-conviction Relief. (App. pp. 19-22). On October 13, 2015, a hearing on the Amended Application for Post-conviction Relief was held before the district court. On

January 29, 2016, the district court entered an order dismissing Mr. Belk's Amended Application for Post-conviction Relief. (App. pp. 29-33). On February 16, 2016, Mr. Belk filed a notice of appeal.

Statement of the Facts

Mr. Belk adopts the thorough yet concise rendition of facts presented in the ruling of the district court:

> In 1992 Belk entered guilty pleas to the offenses of kidnapping in the second-degree, sexual abuse in the second degree, extortion, and going armed with intent. Belk received sentences totaling sixty years. The mandatory portion of his sentences expired in 2003. With earned time, Belk's tentative discharge date is in 2019.
>
> The parties stipulate that since his incarceration, Belk "has been almost a model inmate." *Jt. Pretrl. Stmt.* While in prison Belk has held numerous jobs, completed numerous treatment programs, and currently lives on an honor unit. He has also spoken to various victim groups and assists the IDOC by watching inmates at high risk for suicide. Belk was described as motivated, hardworking, and having made good use of his time in prison.
>
> Because of the nature of his convictions, Belk is classified by the IDOC as a sex offender. This classification is based solely on the nature of Belk's convictions - there has been no individualized risk assessment or psychosexual evaluation. Because of his classification as a sex offender,

the IDOC has recommended that Belk complete SOTP.[1] Belk has not completed SOTP.

Upon expiration of the mandatory portion of his sentence, Belk became eligible for parole. He has been reviewed annually by the Iowa Board of Parole ("BOP") since 2005 and has been denied each time. In denying Belk parole, the BOP has cited to both Belk's failure to complete SOTP and to the seriousness of his crimes.

Each time Belk has been reviewed by the BOP, the IDOC has recommended against parole because Belk has not completed SOTP. IDOC employees testified that they were unaware of anyone being paroled without completing IDOC recommended SOTP. Belk's counselor testified that he would never recommend parole for a sex offender who had not completed SOTP, and that in Belk's case, his recommendation to the BOP was based solely on Belk not having completed SOTP, not the seriousness of Belk's convictions.

The general practice of the IDOC is to try and quickly provide treatment to offenders when they are denied parole based on failure to complete that treatment. This practice is not followed for male sex offenders. Participation in SOTP is determined based upon a male sex offender's tentative discharge date. Generally, inmates begin the assessment and treatment process two years prior to their tentative discharge date. As of trial, male sex offenders with a discharge date in 2018 were starting the SOTP process.

The Mount Pleasant Correctional Facility is where the vast majority of male sex offenders receive SOTP. SOTP generally lasts between six and eighteen months. Once

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[1] Belk's conviction predates 2005 legislative changes which allow the IDOC to take away earned good time for classified sex offenders who do not complete SOTP.

offenders arrive at Mount Pleasant, they are assessed. Based upon the assessment, offenders are placed into one of two tracks - a low risk track or a moderate to high risk track. Offenders are then placed on a waiting list to start SOTP. Generally, a male sex offender's tentative discharge date is the only criteria for placing them on the waiting list to commence SOTP. There are a few individuals, such as Belk, whose convictions predate 2005, who are provided the opportunity to start SOTP a little sooner.

The purpose of SOTP is to prevent relapse upon an offender's release. Sean Crawford, who currently heads the SOTP program for male offenders, testified that there is empirical evidence that SOTP is effective and significantly lowers recidivism rates. The issues in this case do not concern the efficacy of SOTP, but the timing.

The stated reasons for providing male sex offenders with SOTP based on their tentative discharge date are the numbers of offenders needing treatment and the goal of having the treatment fresh in offenders' minds upon discharge. As of trial, there were approximately 1500 male offenders in the system needing SOTP. There were approximately 175 offenders in SOTP treatment, 150 on waiting lists, and 125 waiting assessment.

Female sex offenders are also required to complete SOTP. They receive SOTP at the Iowa Correctional Institute for Women in Mitchellville. Their numbers are much different.

As of trial, there were approximately six women in SOTP and sixteen female offenders in the system needing SOTP. Treatment is provided to female sex offenders, not based upon their tentative discharge date, but shortly after they are classified.

In addition to the difference between the numbers of male and female sex offenders needing SOTP, there are differences in the overall makeup and needs of male and

female sex. Compared to their male counterparts, few of the females needing SOTP have long term sentences, convictions for offenses involving violence, or child victims. Statutory rape is a common crime for female sex offenders in SOTP.

Female sex offenders also receive different treatment. Many female sex offenders have had some sort of trauma in their background. Treatment for female sex offenders first focuses on addressing that trauma.

Belk testified that he is not unwilling to complete SOTP, he is just unwilling to do it now. Belk received an invitation to commence SOTP in July of 2015, which he refused because it would not be completed much earlier than his tentative discharge date. After he was denied parole in 2010 in part for not having completed SOTP, Belk tried to get into SOTP. He made numerous attempts towards that end. These include the following:

a. On January 14, 2010, Belk filed a transfer request asking that he be transferred to Mount Pleasant to participate in SOTP, which was denied by his counselor on January 19, 2010.

b. On January 20, 2010, Belk filed an appeal with the Classification Committee, which was denied on January 21, 2010.

c. On January 21, 2010, Belk filed an appeal with the Treatment Director, which was denied on January 22, 2010.

d. On January 22, 2010, Belk filed an appeal with the Warden, which was denied on January 25, 2010.

e. On January 26, 2010, Belk filed an appeal with the Director of Corrections and the Assistant Deputy Director of Corrections, which was denied on January 28, 2010, and February 17, 2010.

f. On February 18, 2013, Belk again filed an appeal of his classification with the IDOC.

(App. pp. 29-33).

Further facts may be adduced within the argument portion of this brief.

ROUTING STATEMENT

This case should be routed to the Court of Appeals, pursuant to Iowa Rule of Appellate Procedure 6.401(3)b, as it involves a question of applying existing legal principles.

ISSUE

I. WHETHER THE DISTRICT COURT ERRED IN DISMISSING THE APPLICATION FOR POST-CONVICTION RELIEF.

Standard of Review

The dismissal of an application for post-conviction relief is reviewed to correct errors of law. Dible v. State, 557 N.W.2d 881, 883 (Iowa 1996).

Preservation of Error

Mr. Belk preserved error by arguing against dismissal of his application for post-conviction relief before the district court in a hearing on the matter.

Argument

Mr. Belk's Amended Application for Post-conviction Relief was filed pursuant to Iowa Code §822.2(1)(a), which provides for relief when "[t]he conviction or sentence was in violation of the Constitution of the United States or the Constitution or the laws of this state." Specifically, Mr. Belk alleged that his sentence was a violation of the Equal Protection Clause, a violation of the prohibitions against cruel and unusual punishment, a violation of the Due Process Clause, and a violation of the Ex Post Facto Clause, as they are all contained in the United States and Iowa Constitutions. (App. pp. 19-22).

Mr. Belk did not challenge the constitutionality of the original sentence that was imposed on him by the district court, but rather he urged that the policy of the Iowa Department of Corrections

regarding sex offender treatment for male inmates had imposed an unconstitutional de facto mandatory minimum sentence which all but ensured that he would serve his sentence to discharge and thereby deny him the opportunity for parole. Iowa courts have previously permitted persons to challenge the actions of the Iowa Department of Corrections through post-conviction relief proceedings. For example, in Maghee v. State, the Iowa Supreme Court held that an offender could challenge the revocation of his work release through a post-conviction relief action. Maghee v. State, 773 N.W.2d 228 (Iowa 2008). In Maghee, the Court relied upon Davis v. State, 345 N.W.2d 97 (Iowa 1994), which had held that an offender's challenge to an Iowa Department of Corrections disciplinary decision could be litigated in post-conviction relief proceedings. See, Davis, 345 N.W. 2d at 99. The court in Davis concluded that, "postconviction review of the actions of prison officials which involve a substantial deprivation of liberty or property rights" should be permitted. Id. Mr. Belk asserts that the actions of prison official involve a substantial deprivation of his liberty rights and he should therefore be

permitted to pursue a remedy to those actions in post-conviction relief proceedings.

The ruling of the district court acknowledged, “Belk’s claims are important and Belk and others similarly situated deserve an answer to the questions raised.” (App. p. 33). Despite its sympathy for Mr. Belk’s situation, the district court found that Mr. Belk was simply “creatively attempting to bootstrap his claims into those authorized by section 822.2(1)(a)”. (App. p. 32). The district court found that Maghee and Davis were inapplicable to Mr. Belk’s situation because they dealt with disciplinary decisions. (App. p. 32). The district court further noted that Mr. Belk, “cites no [other] authority in support of his argument”. (App. p. 32).

While the district court minimized the legal authority that Mr. Belk presented in defense of his argument, it presented no legal authority of its own to support its ruling dismissing the case. Instead, the district court merely wrung its hands over the possibility that allowing Mr. Belk to proceed, “could greatly expand the types of

claims pursued through post-conviction relief." (App. p. 32; ftn. 2).

The district court further speculated,

> if Belk's claims are appropriately pursued under section 822.2(1)(a), could an inmate with mental illness pursue similar claims, arguing that IDOC's policies for providing mental health treatment to inmates with mental illnesses are unconstitutional and have lengthened the amount of time he or she must serve.[2] Numerous IDOC policies, practices and decisions, including those related to resource allocation, arguably can be claimed to impact the length of an inmate's stay in prison. (App. p. 32; ftn. 2).

To use the district court's example, what would be wrong with an inmate who needs mental health treatment before release being able to argue in post-conviction relief proceedings that an Iowa Department of Corrections rule mandating that treatment come at the end of his sentence so that he is never recommended for parole is unconstitutional? It sounds as though that too would involve a substantial deprivation of liberty, and if a substantial deprivation

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[2] It should be noted that the district court found that SOTP treatment was the exception to the rule, thus making the district court's concerns in this respect unlikely to materialize:

> The general practice of the IDOC is to try and quickly provide treatment to offenders when they are denied parole based on failure to complete that treatment. This practice is not followed for male sex offenders. (App. p. 30; ftn. 2).

liberty occurs, the person being deprived must have the means to challenge the loss of his liberty. If anything, the deprivation of liberty involved in Mr. Belk's case is far more substantial that those deprivations at play in Maghee and Davis. Mr. Belk has been seen by the parole board since 2005 but has not been recommended for parole by the IDOC because of his failure to complete SOTP and has thus had his parole rejected for over a decade and still counting.

Post-conviction review of the actions of prison officials which involve a substantial deprivation of liberty have been allowed in Iowa and there exists no legal basis to deny Mr. Belk that same right in this case. As a result, the district court committed an error of law by dismissing Mr. Belk's post-conviction relief proceeding.

CONCLUSION

For the reasons stated above, the appellant respectfully requests that the Court to find that his application for post conviction relief was dismissed in error and to remand the case to the district court for a hearing on the merits of his application for post-conviction relief.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Appellant, Laverne Belk, requests to be heard in oral arguments on this appeal.

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ATTORNEY'S COST CERTIFICATE

I hereby certify that the actual cost of printing the foregoing Appellant's Brief was the sum of $_________.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 3160 words, excluding the parts of the brief exempted by Iowa R. App. P. 6903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Pages in 14 point Georgia typeface.

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