

IN THE COURT OF APPEALS OF IOWA

No. 0-786 / 10-0099
Filed December 22, 2010

MICHAEL LEE CARGILL, JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, James E. Kelley,
Judge.

Michael Cargill appeals from the district court's denial of his application for postconviction relief. However, on appeal he abandons the claims made and ruled upon in his application for postconviction relief and argues that the district court imposed illegal life without parole sentences on his convictions for murder and kidnapping in violation of the federal and state constitutional provisions against cruel and unusual punishment. **APPEAL DISMISSED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, Michael J. Walton, County Attorney, and Rob Cusack, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes no part.

POTTERFIELD, J.

On October 4, 2004, Michael Cargill, Jr. was sentenced after jury verdicts of guilty of murder in the first degree in violation of Iowa Code section 707.2(1), (2) (2003) and kidnapping in the first degree in violation of Iowa Code sections 710.1 and 710.2—crimes he committed at age sixteen.¹ The district court sentenced Cargill to the mandatory life in prison without parole for both the murder and kidnapping convictions.

Cargill filed a direct appeal, which was dismissed as frivolous. On October 24, 2006, he filed a form petition for postconviction relief. He filed an amended application for postconviction relief on November 13, 2008. After an evidentiary hearing, the district court denied Cargill's application for postconviction relief in a decision filed December 30, 2009.

Cargill now argues for the first time on appeal that the sentencing court imposed illegal sentences in violation of the federal and state constitutional provisions against cruel and unusual punishment when it sentenced him to life in prison without parole for offenses he committed at age sixteen. Cargill does not raise this argument in the context of an ineffective-assistance-of-counsel claim, but rather a direct challenge to the sentences imposed. The State asserts that this claim must be litigated in the first instance in the district court. Therefore the State urges us to dismiss Cargill's present appeal and allow Cargill to file a motion to correct an illegal sentence at the district court level.

¹ Cargill was also adjudged guilty of robbery in the first degree, but the robbery sentence is not at issue on appeal.

In *State v. Bruegger*, 773 N.W.2d 862, 871–72 (Iowa 2009), the Iowa Supreme Court held that the defendant’s claim that his sentence was inherently illegal as violating his right to protection against cruel and unusual punishment constituted a challenge to an illegal sentence that was reviewable on direct appeal despite his failure to raise the claim at trial. Following *Bruegger*, our supreme court ruled in *Veal v. State*, 779 N.W.2d 63, 65 (Iowa 2010), that a postconviction applicant could challenge her life without parole sentence as illegal in violation of the protection against cruel and unusual punishment beyond the three year statute of limitations for postconviction applications codified at Iowa Code section 822.3. The court reasoned that a claim of an illegal sentence “goes to the underlying power of the court to impose a sentence, not simply to its legal validity” and so did not constitute a postconviction relief action and was not subject to postconviction time restrictions. *Veal*, 779 N.W.2d at 65. Thus, Cargill can raise this claim “at any time.” See Iowa R. Crim. P. 2.24(5)(a); *Bruegger*, 773 N.W.2d at 871.

The question remains whether Cargill’s “appeal” from the denial of postconviction relief should be dismissed or whether the postconviction case should be remanded to the postconviction court since “there was no evidentiary hearing where the parties presented evidence for the purpose of addressing a claim” that Cargill’s sentence was cruel and unusual on its face or as applied to Cargill. See *Bruegger*, 773 N.W.2d at 885. In *Bruegger*, the court remanded to the sentencing court to hear the challenge to the illegal sentence, which had not previously been presented to the district court. *Id.* In *Veal*, the court remanded to the postconviction court for hearing on the illegal sentence claims made in the

postconviction application, with the direction that the district court on remand treat the postconviction application as a challenge to an illegal sentence. *Veal*, 779 N.W.2d at 65. However, unlike in *Bruegger*, Cargill is not raising this claim on direct appeal, and unlike in *Veal*, Cargill did not raise this claim before the district court in his postconviction relief application. Rather, Cargill presented this claim for the first time on appeal from the district court's denial of his substantive postconviction claims. Since Cargill has cited no authority on appeal in favor of the issues raised in his application for postconviction relief before the district court, they are waived. See Iowa R. App. P. 6.903(2)(g)(3). His appeal is dismissed.²

APPEAL DISMISSED.

² As to Cargill's argument on appeal alleging an illegal sentence under Iowa Rule of Criminal Procedure 2.24(5)(a), he may file his motion in the district court, accompanied by this ruling and his appellate brief, requesting a new sentencing hearing to allow Cargill and the State to present evidence as to the constitutionality of Cargill's sentence. See *Veal*, 779 N.W.2d at 65.