IN THE COURT OF APPEALS OF IOWA

No. 1-255 / 10-0438
Filed June 15, 2011

JUSTIN A. KEENE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Dubuque County, Margaret L. Lingreen, Judge.

Applicant appeals the district court's denial of his application for postconviction relief. **APPEAL DISMISSED.**

Steven J. Drahozal of Drahozal Law Office, P.C., Dubuque, for appellant.

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney General, Ralph Potter, County Attorney, and Christine Corken, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

SACKETT, C.J.

Justin A. Keene appeals a district court's denial of his application for postconviction relief alleging that the indeterminate sentence of twenty-five years for knowingly transmitting human immunodeficiency virus, which he has now served, should be found to be cruel and unusual punishment. Keene now having served his sentence and been released from custody, we agree with the State that the issue is moot. While it is likely that others may in the future receive the same sentence, it is unlikely the issue will escape appellate review and we find no compelling reason to address it here. We dismiss the appeal.

SCOPE OF REVIEW. Keene raises a constitutional issue; consequently our review is de novo. *State v.Turner*, 630 N.W.2d 601, 607 (Iowa 2001); *State v. Keene*, 629 N.W.2d 360, 363 (Iowa 2001); *State v. Cronkhite*, 613 N.W.2d 664, 666 (Iowa 2000).

BACKGROUND. Keene was convicted of a class B felony for having unprotected sexual intercourse with a mentally ill woman who was unaware that Keene had the human immunodeficiency virus. On April 2, 2009, Keene filed an application of postconviction relief in Dubuque County asserting his conviction or sentence was in violation of the Constitutions of the United States and Iowa; specifically asserting the statute prohibiting criminal transmission of human immunodeficiency virus violates the prohibition against cruel and unusual punishment in that it carries a term of punishment of up to twenty-five years of confinement.

The district court found, even if an individual assessment of the punishment imposed on Keene was made, the sentence was not cruel and unusual. The district court did not find Keene's sentence disproportionate as applied, or that it was illegal as asserted in his petition. The court also found a failure of proof as to Keene's postconviction application.[1]

ANALYSIS. Keene has been released from custody[2] so a decision on the issue he raises would have no legal effect in Keene's case. Keene bears a heavy burden in seeking our review of a moot issue. He must first show the issue should be addressed under the public importance doctrine. *State v. Hernandez-Lopez*, 639 N.W.2d 226, 234 (Iowa 2002). If he is successful in making that showing, then he must prove the unconstitutionality beyond a reasonable doubt and refute every reasonable basis upon which the sentence could be found to be constitutional. *Id*. at 237; *Santi v. Santi*, 633 N.W.2d 312, 316 (Iowa 2001).

MOOTNESS. The State seeks to dismiss this claim on mootness grounds. Generally an appeal is deemed moot if the issue becomes nonexistent or academic and, consequently, no longer involves a justifiable controversy. *In re M.T.*, 625 N.W.2d 702, 704 (Iowa 2001); *Polk Cnty. Sheriff v. Iowa Dist. Ct.*, 594 N.W.2d 421, 425 (Iowa 1999). The parties agree and we find this to be a moot issue. Iowa appellate courts generally refrain from reviewing moot issues.

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[1] The court entered a consolidated ruling denying three postconviction applications Keene filed.

[2] The State noted that at the time Keene filed his brief on November 15, 2010, he expected to discharge his sentence on December 12, 2010. The State further contends and Keene does not disagree that he was in fact discharged on said date and his sentence has expired.

See Polk Cnty. Sheriff, 594 N.W.2d at 425; *Shannon v. Hansen*, 469 N.W.2d 412, 414 (Iowa 1991). However, an exception exists for issues of broad public importance likely to recur. *M.T.*, 625 N.W.2d at 704; *T & K Roofing Co. v. Iowa Dep't of Educ.*, 593 N.W.2d 159, 162 (Iowa 1999); *Maguire v. Fulton*, 179 N.W.2d 508, 509-10 (Iowa 1970). There are four factors that we review in considering whether to address a moot issue, namely: (1) the private or public nature of the issue, (2) the desirability of an authoritative adjudication to guide public officials in their future conduct, (3) the likelihood of the recurrence of the issue, and (4) the likelihood the issue will recur yet evade appellate review. *Polk Cnty. Sheriff*, 594 N.W.2d at 425; *see also Shannon*, 469 N.W.2d at 414. The last factor is perhaps the most important factor. *See M.T.*, 625 N.W.2d at 704-05. For if a matter will likely be moot before reaching an appellate court, then the issue may never be addressed. *See State v. Hill*, 334 N.W.2d 746, 747 (Iowa 1983).

Keene has been released from custody and a decision on his challenges will have no legal effect in this case. Additionally, while it is reasonable to assume others may be convicted and given the same sentence, there is no reason to believe their cases would evade appellate review given the length of the sentence. *See Polk Cnty. Sheriff*, 594 N.W.2d at 425-26. This is in contrast to the situation in *Hernandez-Lopez*, 639 N.W.2d at 235, where the court addressed constitutional challenges to Iowa Code section 804.11[3] noting that persons would be detained under the provision of the statute for a relatively short

[3] Iowa Code section 804.11 provides for the arrest of a material witness who might not be available for service of a subpoena.

duration and a detainee would in all probability be released from custody before an appellate court could reach the issue.

Additionally, the issue of whether a twenty-five-year sentence for the criminal transmission of HIV constitutes cruel and unusual punishment in violation of the Eighth Amendment was addressed in *State v. Musser*, 721 N.W.2d 734, 748–50 (Iowa 2006). There the court addressed whether Musser's sentence appeared grossly disproportionate in view of the gravity of his offense. *Musser*, 721 N.W.2d at 749. In rejecting this claim the court said:

> Viewed objectively, we cannot say the punishment set by the legislature for the crime of criminal transmission of HIV is grossly disproportionate to the harm sought to be punished and deterred. HIV is the causative agent of AIDS. AIDS is a chronic, life-threatening condition. AIDS . . . is the final and most serious stage of HIV disease . . . . At the present time, there is no cure for AIDS. It has proven to be a universally fatal illness. Clearly, the dire consequences of this crime can be significant and serious. The potential harm to the public welfare from the spread of this deadly virus is equally grave and severe.

Id. (citations and internal quotation marks omitted).

While recognizing this holding, Keene contends *Musser* did not dispose of all the arguments he now makes and we agree. *Musser* did not discuss whether a sentence of fewer years could serve the same purpose; nor did *Musser* compare the sentence to other sentences, having only compared criminal transmission of HIV with first-degree robbery; nor did *Musser* address whether the Iowa sentence is more severe than those of other states. Keene also argues that since *Musser* the statute was changed. These issues were not all raised before the district court and those that were raised were poorly developed. While these arguments may well be raised in the future by others so sentenced, we do

not believe there is reason to address these arguments in a moot controversy on a poorly developed record.

Keene also has filed a pro se supplemental brief where he contends (1) he was not competent at the time of the plea and sentencing hearings, (2) his attorney had a conflict of interest and was ineffective in failing to bring his pro se issues to the court, and (3) the punishment for violation of Iowa Code section 709C.1 is cruel and unusual in violation of the United State and Iowa constitutions.

The State contends, and we agree, that Keene's challenge to his competency is too late. *See Berryhill v. State*, 603 N.W.2d 234, 245 (Iowa 1999). Even if this is not the case, there was medical evidence that Keene was not suffering from any mental condition that would render him incompetent. There is no evidence to support his claims of ineffective assistance of counsel. We have found his cruel and unusual punishment issue moot.

APPEAL DISMISSED.