IN THE COURT OF APPEALS OF IOWA

No. 1-453 / 10-0810
Filed June 29, 2011

RICK NANCE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Mary E. Howes, Judge.

Applicant appeals the denial of his application for post-conviction relief. **AFFIRMED.**

Lauren M. Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Michael J. Walton, County Attorney, and Julie Walton, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

Applicant, Rick Nance, appeals the district court's denial of his application for postconviction relief. In this appeal, Nance claims his postconviction relief counsel was ineffective in 1) failing to call an expert to testify regarding his learning disability; 2) failing to call his criminal trial counsel to testify regarding the discussion, if any, he had with Nance explaining the special sentence of Iowa Code section 903B.2 (2007); and 3) failing to offer testimony, evidence, or argument to support Nance's claim the special sentence under section 903B.2 was unconstitutionally vague and amounted to cruel and unusual punishment. In addition, Nance claims on appeal the district court erred in failing to address his claims the special sentence under section 903B.2 was unconstitutionally vague and amounted to cruel and unusual punishment. We affirm.

I. BACKGROUND AND PROCEEDINGS. On September 17, 2007, Nance was charged with several drug offenses relating to a controlled buy of marijuana. Nance pleaded guilty to two counts of delivery of marijuana and he was sentenced to two concurrent terms of imprisonment not to exceed five years each. These sentences were suspended and Nance was placed on probation for three years.

On August 6, 2008, the State filed an application to revoke Nance's probation alleging, among other violations, Nance committed sexual abuse in June of 2008 when he performed oral sex on a fourteen-year-old girl. The State filed a trial information against Nance on September 17, 2008, charging him as the result of the incident with sexual abuse in the third degree in violation of Iowa

Code section 709.4. Nance accepted a plea deal and filed a written plea of guilty to the lesser included charge of assault with intent to commit sexual abuse, an aggravated misdemeanor, in violation of section 709.11. In the memorandum of plea agreement signed by Nance and his attorney, it states, "Defendant understands that a conviction for an offense under chapter 709, or section 726.2, or section 728.12 mandates special sentencing under Iowa code chapter 903B including possible lifetime parole."

The probation revocation hearing and the sentencing on the sexual abuse charge were both heard on December 18, 2008. The court revoked Nance's probation and imposed the sentence previously suspended on the drug charges, two concurrent five-year terms. The court also imposed a sentence of imprisonment not to exceed two years on the assault charge, ordered this sentence to run consecutively to the drug sentence, and ordered Nance to serve a special sentence not to exceed ten years to be served consecutively to the term of incarceration, as if on parole, under Iowa Code section 903B.2. Thus, Nance was sentenced to a term of incarceration not to exceed seven years and a special sentence not to exceed ten years to be served as if on parole.

Neither the probation revocation nor the assault sentence was appealed. Nance filed an application for postconviction relief on May 1, 2009, alleging the special sentence was unconstitutionally vague and that he did not understand at the time of his plea what the special sentence was because he has a learning disability. He asserted neither his attorney nor the court explained the special sentence to him. In addition, he contends the special and concurrent sentences

were unconstitutional and grossly disproportionate. He sought to have his original sentence vacated, the court to order his sentences to run concurrently, and the special sentence eliminated.

Nance was appointed counsel to represent him at his postconviction relief trial which took place January 8, 2010. At trial, only Nance testified. The court issued a ruling on March 11, 2010, denying Nance's claims. The district court found no legal basis for Nance to complain section 903B.2 was unconstitutional, and found neither Nance nor his counsel presented any evidence or legal precedent to support Nance's claim. The court found no abuse of discretion in the sentences running consecutively and that Nance provided no evidence to support his claim his sentence was unconstitutional or grossly disproportionate.

Nance appeals the district court's denial alleging his postconviction relief counsel was ineffective and the court erred in denying his constitutional challenges to section 903B.2.

II. SCOPE OF REVIEW. While postconviction relief actions are normally reviewed for errors at law, this case is reviewed de novo because Nance claims his constitutional right to effective representation was violated. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In addition, claims alleging a statute is unconstitutional are also reviewed de novo. *State v. Wade*, 757 N.W.2d 618, 622 (Iowa 2008).

III. INEFFECTIVE ASSISTANCE OF POSTCONVICTION RELIEF COUNSEL. The Iowa Supreme Court in *State v. Dunbar*, 515 N.W.2d 12, 16 (Iowa 1994) held once the district court appoints counsel to represent an

applicant in a postconviction relief action, the applicant is entitled to effective representation. If court-appointed counsel is ineffective, the applicant can raise an ineffective-assistance-of-counsel claim in his appeal from the denial of his postconviction relief application. *Dunbar*, 515 N.W.2d at 16. To prevail on a claim of ineffective assistance of counsel, Nance must prove "(1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Jorgensen*, 785 N.W.2d 708, 712 (Iowa Ct. App. 2009). If either element is lacking, the claim will fail. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). To establish prejudice, Nance must prove "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id*.

In order to sustain his claims, Nance must do more than "simply claim counsel should have done a better job." *Dunbar*, 515 N.W.2d at 15. Nance must specifically identify "how competent representation probably would have changed the outcome." *Id.* In this case, Nance generally alleges his counsel was ineffective in failing to call an expert to testify regarding his learning disability, but fails to provide this court with information as to what testimony the expert would have offered. Nance also claims postconviction counsel was ineffective in not calling his criminal trial counsel to testify at the postconviction relief hearing about what the attorney told Nance during the plea negotiations yet Nance does not show what he contends the attorney would have been said had the attorney been called. In addition, Nance fails to show how the expert's testimony or his trial

counsel's testimony would have resulted in the postconviction relief court finding in Nance's favor.

It appears that during the postconviction relief trial Nance was attempting to use his learning disability and his counsel's lack of explanation of the special sentence to support a claim his plea was not knowing and voluntary. To succeed on such a claim, Nance had to show "a reasonable probability that, but for counsel's error, he would not have entered the plea and would have insisted on going to trial." *State v. Hallock*, 765 N.W.2d 598, 606 (Iowa Ct. App. 2009). At the postconviction relief trial, Nance testified if he had been told about the special sentence, he "probably wouldn't have pled guilty to that." He went on to testify, "I would have thought about not taking the plea or – I'm not going to say take my chances at trial, but I would have kind of worked out something – told him to work out something if he could."

The State argues (1) Nance failed to show prejudice noting that he was charged with third-degree sexual abuse, a class C felony, with a potential prison sentence of up to ten years and mandatory life supervision, *see* Iowa Code § 903.B1, (2) the plea agreement offered an aggravated misdemeanor with a sentence of up to two years and supervision of ten years, and (3) the evidence of guilt on the felony charge was strong. Even if the postconviction court found Nance was not informed about the special sentence, Nance failed to prove, if he had the knowledge, he would not have accepted the plea and insisted on going to trial. *Id*. Because we find Nance suffered no prejudice as a result of postconviction relief counsel's failure to call a learning disability expert or call

Nance's criminal trial counsel, Nance's claims of ineffective assistance of postconviction relief counsel on these grounds fail. *Anfinson*, 758 N.W.2d at 499.

Nance also claims postconviction relief counsel was ineffective for failing to adequately present his claim the special sentence under section 903B.2 was unconstitutionally vague and amounted to cruel and unusual punishment. Because postconviction relief counsel has no duty to raise a meritless issue, we will first address whether Nance's claims have any validity. *Jorgensen*, 785 N.W.2d at 712.

IV. CONSTITUTIONALITY OF SECTION 903B.2. Nance claims section 903B.2 is unconstitutionally vague and the imposition of the ten year special sentence amounted to cruel and unusual punishment. He asserts the postconviction relief court erred in overruling his challenge and his postconviction relief counsel failed to adequately present the claim.

A. Vagueness. The Due Process Clause prohibits the enforcement of statutes that are vague. *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007). A statute is void for vagueness if it "does not give persons of ordinary understanding fair notice that certain conduct is prohibited"; or does not "provide those clothed with authority sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion"; or "prohibit[s] substantial amounts of constitutionally protected activities, such as speech protected under the First Amendment." *Id*. The supreme court has held the void-for-vagueness doctrine applies to statutes establishing criminal or civil sanctions in addition to those proscribing criminal conduct. *Id*. Vagueness challenges are not

determined based on "the subjective expectations of particular defendants." *Id.* at 540.

Despite his general allegation section 903B.2 is vague, a review of Nance's appellate brief reveals Nance is not challenging section 903B.2 as void for vagueness. Nance does not claim a person of ordinary understanding does not have fair notice, or judges do not have sufficient guidance to prevent discriminatory application, or constitutionally protected activities are prohibited. Instead, Nance claims the criminal trial court's explanation of section 903B.2 during sentencing was vague and grossly misleading. Nance is not challenging the statute, but the trial court's explanation of the statute to him.

The trial court stated at sentencing with respect to the special sentence, "Additionally, pursuant to chapter 903B of the code, the defendant will be sentenced to serve an additional consecutive term of not to exceed ten years, that will be served as if on parole." Nance asserts the court's one-sentence comment was totally inadequate to give him any kind of real understanding that he had just agreed to a sentence which effectively increased his possible prison time by nearly 500 percent. This claim is simply a rehashing of his claim above that his attorney and the court failed to make sure he understood the special sentence before he agreed to the plea deal. As we stated above, because Nance failed to prove he would not have accepted the plea deal had he fully understood the special sentence, this claim must fail. Nance's claim section 903B.2 is unconstitutionally vague has no merit.

B. Cruel and Unusual Punishment. Nance also claims his punishment amounts to cruel and unusual punishment. While Nance does not specifically state whether this challenge is to the facial validity of section 903B.2 or whether his challenge is to the application of section 903B.2 to his case, we interpret his appellate brief to be making an "as applied" challenge.

State v. Bruegger, 773 N.W.2d 862, 884 (Iowa 2009), first opened the door for criminal defendants to be able to make an "as applied" cruel and unusual punishment challenge to their sentences. However, these challenges are available only in a "relatively rare case." *Id*. In order to make an "as applied" challenge, a court looks to see whether there is an "unusual combination of features that converge to generate a high risk of potential gross disproportionality." *Id.* In *Bruegger*, the court indentified three factors that made Bruegger's case one of those rare cases: "a broadly defined crime, the permissible use of preteen juvenile adjudications as prior convictions to enhance the crime, and a dramatic sentence enhancement for repeat offenders." *Id*.

The only *Bruegger* factor Nance's case might arguably have is the broadly defined crime. We find Nance has failed to demonstrate his case is one of the rare cases where the defendant is permitted to make an "as applied" cruel and unusual punishment challenge. In addition, even if we were to interpret Nance's case as attacking the facial validity of section 903B.2, the Iowa Supreme Court and our court have upheld section 903B.2 in the face of cruel and unusual punishment challenges when applied to defendant's convicted of indecent exposure. *See State v. Wade*, 757 N.W.2d 618, 624 (Iowa 2008); *see also*

Jorgensen, 785 N.W.2d at 713. If section 903B.2 is not grossly disproportionate when applied to a defendant convicted of the serious misdemeanor of indecent exposure, which carries a penalty of up to one year in the county jail, it certainly is not grossly disproportionate when applied to a defendant convicted of the aggravated misdemeanor of assault with the intent to commit sexual abuse, which carries a penalty of up to two years in prison. *Wade*, 757 N.W.2d at 624. We find Nance's cruel and unusual punishment claim has no merit.

Because we find Nance's constitutional claims have no merit, the postconviction relief court was correct in denying them and Nance's postconviction relief counsel was not ineffective for failing to adequately present them to the court. *See Jorgensen*, 785 N.W.2d at 712 (holding counsel has no duty to raise a meritless issue).

V. CONCLUSION. We find Nance's claims for ineffective assistance of postconviction relief counsel fail as Nance cannot demonstrate he was prejudiced by counsel's failure to call an expert to testify as to his learning disability or by counsel's failure to call his criminal trial attorney. In addition, we find Nance's challenges to section 903B.2 as unconstitutionally vague and amounting to cruel and unusual punishment have no merit, so the postconviction relief court was correct in denying them and postconviction relief counsel was not ineffective for failing to adequately raise them.

AFFIRMED.