IN THE COURT OF APPEALS OF IOWA

No. 1-848 / 10-1340
Filed January 19, 2012

IN RE THE DETENTION OF
JOHN ARNZEN III,

JOHN ARNZEN III,
Respondent-Appellant.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

John Arnzen III appeals from the district court's determination that he is a sexually violent predator under Iowa Code chapter 229A (2007). **AFFIRMED.**

Samuel P. Langholz, State Public Defender, and Matthew S. Sheeley, Assistant State Public Defender, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott and Susan R. Krisko, Assistant Attorney Generals, for appellee.

Heard by Vaitheswaran, P.J., and Doyle and Mullins, JJ.

MULLINS, J.

John Arnzen III appeals the district court's ruling determining he is a sexually violent predator (SVP) under Iowa Code chapter 229A (2007). Arnzen contends his trial counsel was ineffective in failing to argue collateral estoppel, equitable estoppel, election of remedies, and admission by a party-opponent as defenses in his civil commitment trial because the parole board issued him a work release order prior to his SVP adjudication. We affirm.

I. Background Facts and Proceedings.

In 2002, Arnzen pled guilty to three counts of indecent contact with a child in violation of Iowa Code sections 709.12(1) and 709.12(4) (2001). Arnzen was sentenced to a term of imprisonment not to exceed two years on each count, with two counts to run concurrently and one count to run consecutively to the other counts, for a total effective term of four years. Because Arnzen had previously been convicted of indecent contact with a child in 1986, his four-year sentence was doubled to eight years and he was required to serve eighty-five percent of his sentence before becoming eligible for parole or work release. *See* Iowa Code § 901A.2(1). January 28, 2009 was the date that Arnzen was expected to be released from incarceration for that sentence. Arnzen was also sentenced to serve an additional two years of parole or work release for each of the three counts. *Id*. § 901A.2(7).

Prior to Arnzen's release, the department of corrections notified the Attorney General and the multidisciplinary team. *Id*. § 229A.3(1)(a) (2007). On July 12, 2007, the multidisciplinary team convened and notified the Attorney

General of its assessment that Arnzen met the criteria for definition as an SVP. *Id*. § 229A.3(4).

On December 9, 2008, Arnzen met with the Iowa Board of Parole. The next day, the prosecutor's review committee convened and determined that Arnzen met the definition of an SVP. *Id*. § 229A.3(5). The Attorney General filed a petition alleging Arnzen to be an SVP on December 17, 2008. *Id*. § 229A.4(1). The State alleged that Arnzen was an SVP because he had been convicted of a sexually violent offense and he suffers from "a mental abnormality which makes the person likely to engage in predatory acts constituting sexually violent offenses, if not confined in a secure facility." *Id*. § 229A.2(11).

Despite the two assessments and the petition alleging Arnzen to be an SVP, the parole board issued a work release order on December 30, 2008, granting Arnzen work release status on his anticipated release date. In granting the work release, the parole board determined that there was "a reasonable probability" that Arnzen could "be released without detriment to the community" and was "able and willing to fulfill the obligations of a law abiding citizen." *Id*. § 906.4.

The district court held a probable cause hearing on January 6, 2009. *Id*. § 229A.5(2). The following day, the district court entered an order finding probable cause existed to believe Arnzen to be an SVP. *Id*. § 229A.5(4)(b). The district court ordered that upon the date of Arnzen's scheduled release, he should remain in the custody of the department of corrections pending final disposition of the SVP matter. *Id*. § 229A.5(1). The district court further ordered

that Arnzen be transferred to an appropriate secure facility to undergo an evaluation to determine whether he is an SVP. *Id*. § 229A.5(5).

On June 17, 2009, Arnzen moved to dismiss the SVP petition arguing pro se that the State had filed the petition for civil commitment prematurely because he had not been allowed to complete his work release, and the State violated his plea agreement by filing the SVP petition. The district court denied the motion.

A bench trial was held on the SVP petition July 7-9, 2010. *Id*. § 229A.7(4). At trial, Arnzen's counsel did not raise or argue the application of collateral estoppel, equitable estoppel, election of remedies, or admission by a party-opponent as defenses to the civil commitment.

On July 14, 2010, the district court found Arnzen to be an SVP beyond a reasonable doubt and placed him into the custody of the Iowa Department of Human Services. *Id*. § 229A.7(5). Arnzen appeals. *Id*.

II. Ineffective Assistance of Counsel.

At the outset, Arnzen requests that we make a definitive holding that persons facing civil commitment under chapter 229A have a right to the effective assistance of counsel. Our supreme court has recognized this issue on two previous occasions, but declined to answer it. *See In re Detention of Crane*, 704 N.W.2d 437, 438-39 n.3 (Iowa 2005); *In re Detention of Willis*, 691 N.W.2d 726, 730 (Iowa 2005). In both cases, the court noted that chapter 229A proceedings are civil and not criminal in nature, and therefore the Sixth Amendment to the federal constitution is not directly implicated. *Crane*, 704 N.W.2d at 438 n.3; *Willis*, 691 N.W.2d at 730. Rather, a person's right to counsel in chapter 229A

proceedings is conferred by statute. *See* Iowa Code § 229A.6(1). Although the court has stated that granting the right to effective assistance of counsel "appears to be consistent with precedent," *see Crane*, 704 N.W.2d at 438 n.3, the court has not specifically held such to be so. Instead, the court has assumed the right exists, and then dismissed the underlying claims for lacking merit. *Id*. at 439; *Willis*, 691 N.W.2d at 730. For the purposes of this appeal, we too will assume the right exists.

III. Standard of Review.

We review Arnzen's ineffective assistance of counsel claims de novo. *Crane*, 704 N.W.2d at 438. To succeed on his claims, Arnzen must prove his trial counsel failed to perform an essential duty and prejudice resulted. *Id*. at 439. We will not find counsel failed to perform an essential duty when they fail to pursue a meritless issue. *Id*.; *see also State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011).

IV. Analysis.

Arnzen argues his trial counsel was ineffective for failing to assert four defenses to his civil SVP commitment: (1) collateral estoppel, (2) equitable estoppel, (3) election of remedies, and (4) admission by a party opponent. We find that these defenses are not applicable in this case. Therefore, because Arnzen's underlying claims fail, so too does his ineffective assistance of counsel claims. *Crane*, 704 N.W.2d at 439; *Willis*, 691 N.W.2d at 730.

A. Collateral Estoppel. Arnzen argues that in order for him to be granted work release by the parole board, the parole board was required to find

"there is a reasonable probability that the person can be released without detriment to the community" and he was "able and willing to fulfill the obligations of a law abiding citizen." Iowa Code § 906.4. Arnzen argues these two findings should have been given preclusive effect in the subsequent SVP litigation.

In order for a prior determination to have preclusive effect in subsequent litigation, the following four elements must be shown:

> (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

City of Johnston v. Christenson, 718 N.W.2d 290, 297 (Iowa 2006).

An agency determination will be "entitled to preclusive effect in a judicial proceeding '[w]hen an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . . .'" *George v. D.W. Zinser Co.*, 762 N.W.2d 865, 868 (Iowa 2009) (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642, 661 (1966)). In determining whether the agency is acting in a judicial capacity, we look to the factors set forth in the Restatement (Second) of Judgments:

> 2. An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:
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> a. Adequate notice to persons who are to be bound by the adjudication . . . ;

> b. The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;
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> c. A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series thereof;
>
> d. A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and
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> e. Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

Id. at 868-69 (quoting Restatement (Second) of Judgments § 83 (1982)). We find the procedure used by the board of parole does not meet the requirements to be granted preclusive effect in an SVP judicial proceeding.

The parole board, an executive agency, is vested with the authority to determine which prisoners shall be released on parole or work release. Iowa Code § 906.3. The parole board is given "broad discretion" in making these parole decisions. *State v. Wade*, 757 N.W.2d 618, 628 (Iowa 2008). The procedures used by the parole board only require the board to annually review the status of certain inmates and to provide the inmate with notice of the board's decision. Iowa Code § 906.5(1); Iowa Admin. Code § 205-8.6. The board of parole is not required to interview inmates. *See Taylor v. State*, 752 N.W.2d 24, 26-27 (Iowa Ct. App. 2008) (upholding amendment eliminating annual interviews in favor of annual case review). However, if it chooses to do so, the board of parole shall give the inmate ample opportunity to express views and present materials. Iowa Admin. Code § 205-8.12. But, the inmates' statement may still

be limited by the parole board in any manner as to topic or time. *Id*. § 205-8.14(2). Although the inmate should normally be able to review the information considered by the board and be given an opportunity to respond to it, the inmate has no right to cross-examine or confront witnesses. *Id*. § 205-8.11. The board of parole is not required to hear oral statements or arguments either by attorneys or other persons. Iowa Code § 906.7. Furthermore, the board of parole is given broad investigatory powers. The board of parole may request reports from all persons employed in a correctional institution concerning an inmate's conduct or character. Iowa Code § 906.6; Iowa Admin. Code § 205-8.11. The board of parole also has subpoena powers. Iowa Code § 906.8. As the foregoing procedures show, parole decisions are meant to be informal proceedings seeking to implement the legislature's intent to control the prison population and to assure prison space for the confinement of persons who release would be detrimental to society. *Id*. § 906.5(2). As informal proceedings, "[t]he grant or denial of parole or work release is not a contested case as defined in section 17A.2." *Id*. § 906.3.

Because the parole board was not acting in a judicial capacity when it made Arnzen's work release decision, its decision is not afforded preclusive effective in the subsequent SVP litigation. Accordingly, Arnzen's counsel was not ineffective for failing to raise and argue this issue.

B. Equitable Estoppel. Arnzen also argues the State should be barred from the SVP commitment under equitable estoppel. The doctrine of equitable estoppel is "a common law doctrine preventing one party who has made certain representations from taking unfair advantage of another when the

party making the representations changes its position to the prejudice of the party who relied upon the representations." *ABC Disposal Sys., Inc. v. Dep't of Nat. Res.*, 681 N.W.2d 596, 606 (Iowa 2004). The doctrine's elements are:

> (1) a false representation or concealment of material facts; (2) lack of knowledge of the true facts on the part of the actor; (3) the intention that it be acted upon; and (4) reliance thereon by the party to whom made, to his prejudice and injury.

Id.

Our courts "have consistently held equitable estoppel will not lie against a government agency except in exceptional circumstances." *Id*. at 607. "A person seeking to invoke the doctrine of equitable estoppel against a government body 'bears a heavy burden, particularly when the government acts in a sovereign or governmental role rather than a proprietary role.'" *Id*. (citations omitted). The "exceptional circumstances" under which "equitable estoppel will lie against the government include instances when, 'in addition to the traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent.'" *Fennelly v. A-1 Machine & Tool Co.*, 728 N.W.2d 163, 180 (Iowa 2006) (quoting 28 Am. Jur. 2d *Estoppel and Waiver* § 140, at 559 (2000)). Good faith errors of government officials do not provide the exceptional circumstances required for equitable estoppel claims. *See ABC Disposal Sys., Inc.*, 681 N.W.2d at 607 (describing how no exceptional circumstances exist when a department of natural resources official acted in good faith and within his authority, but made an erroneous interpretation of the law when he informed a company that it did not need to obtain a sanitary disposal project permit).

Arnzen has not pointed to or shown any affirmative misconduct or wrongful conduct by the two executive agencies in this case. There is no evidence that the parole board or the department of corrections acted in bad faith or outside their statutory authority. Although the record is not clear on how much information the parole board actually had before it when it made its work release decision, Arnzen argues the parole board had knowledge of the SVP proceedings but assumed its work release order would not inhibit them.[1] This assumption would, at worst, be an erroneous interpretation of the law, which would be insufficient to amount to the "exceptional circumstances" needed to prevail on his equitable estoppel claim. *Id*. According, we find his claim fails and his counsel was not ineffective.

C. Election of Remedies. Election of remedies is an equitable defense which prohibits a party from pursuing inconsistent remedies as redress for the same wrong. *Gourley v. Nielson*, 318 N.W.2d 160, 161 (Iowa 1982). Its purpose is "to protect a party from contradictory claims by a single party." *State v. Halverson*, 362 N.W.2d 501, 503 (Iowa 1985). The defense consists of three elements: (1) existence of two or more remedies, (2) inconsistency between them, and (3) an intelligent and intentional choice of one of them. *Id*. We apply the defense narrowly because it is not favored. *Id*.; *see also Friederichsen v. Renard*, 247 U.S. 207, 213, 38 S. Ct. 450, 452, 62 L. Ed. 1075, 1084 (1918) ("At

[1] The statutes and administrative rules support a finding that the parole board had or should have had knowledge of the pending SVP proceedings. *See, e.g.,* Iowa Code §§ 906.5(3), 906.6; Iowa Admin. Code §§ 205-8.7, 205-8.10.

best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended . . . .").

Arnzen argues the parole board and the department of corrections are both "agencies with jurisdiction" under chapter 229A, and thus as a single party chose work release over civil commitment. *See* Iowa Code § 229A.2(1) (defining "agency with jurisdiction" to include both the department of corrections and the Iowa board of parole). The State argues that the board of parole and the department of corrections are two separate and distinct government agencies, and that the agencies did not make an intelligent and intentional choice between remedies. We agree with the State.

The record does not show the board of parole believed it was foregoing an SVP proceeding when granting Arnzen work release. Chapter 229A is a more specific statute than Chapter 906, so the legislature's intent would be thwarted if we were to limit 229A actions that might be seen by some as contradictory with board of parole actions under chapter 906. Although the board of parole is an "agency with jurisdiction," its role in an SVP proceeding is to provide notice to the Attorney General prior to the inmates anticipated discharge. Iowa Code § 229A.3(1). The Attorney General, after receiving assessments from the multidisciplinary team and the prosecutor's review committee, makes a determination to file a petition. *Id*. § 229A.4(1). The board of parole has no discretion in whether to file an SVP petition. Accordingly, as separate and distinct government actors, the board of parole and Attorney General were working along parallel paths. The doctrine of election of remedies does not

preclude distinct and independent grounds of actions which may be concurrently or consecutively pursued to satisfaction. *Gray v. Bowers*, 332 N.W.2d 323, 324 (Iowa 1983). Furthermore, a sentence for a criminal offense and the resulting eligibility for parole or work release serves a different purpose than civil commitments of sexually violent predators; they are not simply two inconsistent methods of accomplishing the same objective. *Halverson,* 362 N.W.2d at 503.

D. Admission by a Party-Opponent. Arnzen further argues the work release order constituted an admission by a party opponent under Iowa Rule of Evidence 5.801(*d*)(2)(D). He claims that since the board's conclusions flatly contradict the material allegations in the SVP petition, the board members who approved the work release should have been called to testify about the materials they reviewed and the legal conclusions they reached before issuing the work release order. Even if we assume the parole board's work release was an admission by a party opponent and admissible under rule 5.801(*d*)(2)(D), Arnzen has not shown how testimony from the board members would have prevented him from being adjudicated as an SVP. The work release order was admitted into evidence during the SVP trial.

V. Conclusion.

For the foregoing reasons, we find that Arnzen's counsel was not ineffective for failing to raises the defense of collateral estoppel, equitable estoppel, election of remedies, and admission by a party opponent in his SVP trial. Accordingly, we affirm the district court's ruling determining Arnzen is an SVP under Iowa Code chapter 229A.

AFFIRMED.