IN THE COURT OF APPEALS OF IOWA

No. 2-337 / 11-1339
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANDRE JEROME LYLE, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Defendant appeals from his sentence for robbery in the second degree claiming it amounts to cruel and unusual punishment under a gross proportionality challenge. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David A. Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, John P. Sarcone, County Attorney, and Frank Severino and Jeff Noble, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

VOGEL, P.J.

Defendant, Andre Lyle Jr., appeals his sentence following his conviction for robbery in the second degree, in violation of Iowa Code sections 711.1 and 711.3 (2009). Pursuant to section 902.12(5),[1] Lyle was sentenced to serve seventy percent of his ten-year sentence before being eligible for parole or work release. Lyle asserts this seventy percent mandatory minimum sentence is cruel and unusual punishment as applied to him. For the reasons stated below, we affirm Lyle's sentence.

I. BACKGROUND AND PROCEEDINGS.

On October 17, 2010, Lawrence Soni loaned two dollars to a group of students at Lincoln High School, including Hernan Alvarez, to purchase marijuana. Soni directed that he would loan the money if the group brought back the marijuana so that he could smoke it with the group. However, the group failed to share the marijuana with Soni. The following day, Lyle and Soni confronted the group in the parking lot of the high school. Alvarez informed Soni he did not have the marijuana that was purchased the day before, but he did

[1] Iowa Code section 902.12 provides:

> A person serving a sentence for conviction of the following felonies, including a person serving a sentence for conviction of the following felonies prior to July 1, 2003, shall be denied parole or work release unless the person has served at least seven-tenths of the maximum term of the person's sentence:
>
> 1. Murder in the second degree in violation of section 707.3.
> 2. Attempted murder in violation of section 707.11.
> 3. Sexual abuse in the second degree in violation of section 709.3.
> 4. Kidnapping in the second degree in violation of section 710.3.
> 5. Robbery in the first or second degree in violation of section 711.2 or 711.3.
> 6. Vehicular homicide in violation of section 707.6A, subsection 1 or 2, if the person was also convicted under section 321.261, subsection 4, based on the same facts or event that resulted in the conviction under section 707.6A, subsection 1 or 2.

repay Soni the two dollars. Alvarez then purchased another bag of marijuana for five dollars from another person present, and tucked it in his pocket. Soni, without warning, punched Alvarez in the right cheek, knocking him to the ground. While he was lying on the ground, Lyle stood over Alvarez, straddling him and demanding the bag of marijuana just purchased. Lyle began searching Alvarez's pockets, and when Alvarez resisted, Lyle punched Alvarez in the left cheekbone. Alvarez handed the marijuana to Lyle, who then left the area with Soni. Lyle recorded the incident—part video, part only audio—on his cell phone and posted the video on his Facebook page.

Lyle and Soni were both charged with robbery in the second degree.[2] After a joint trial on June 27, 2011, the jury found Lyle guilty as charged but found Soni guilty of the lesser-included offense of assault. At Lyle's sentencing on August 5, 2011, Lyle's attorney argued the seventy percent mandatory minimum of Iowa Code section 902.12 was cruel and unusual punishment as applied to Lyle. He asserted Lyle, who was seventeen at the time of the offense, was simply involved in a high school fight in the school parking lot and only took five dollars' worth of marijuana from the victim. Because of his age, his attorney argued Lyle's brain was not fully developed thereby impairing his reasoning. His attorney also pointed to his difficult home life and the detriment that will occur to Lyle if he was forced to associate with "real, real bad people"—that is, other prisoners—for seven years. He asserted the mandatory prison sentence was grossly disproportionate to the events that occurred.

---

[2] Pursuant to Iowa Code section 232.8(1)(c) when a child aged sixteen or older commits a forcible felony, the case is filed and tried in district court unless the court transfers jurisdiction of the case to juvenile court upon a finding of good cause.

Lyle also addressed the court stating he thought he deserved a second chance and did not want to go to prison for five dollars' worth of marijuana. He acknowledged his actions were wrong and wanted an opportunity to get his GED in order to become a functioning member of society.

The State asserted the mandatory minimum sentence was appropriate in this case as Lyle had an extensive juvenile court record, including multiple assaults, had already been given many chances for rehabilitation, and had failed to take advantage of those opportunities. The State asserted Lyle had failed to show remorse for what he did to Alvarez as demonstrated by Lyle recording the assault on video and posting it on Facebook to brag about the incident. The State also reminded the court of the three other, unrelated videos found on Lyle's phone of prior assaults he committed on other students at Lincoln High School.[3]

[3] These videos had previously been introduced into evidence as part of the reverse waiver hearing early on in the court proceeding under Iowa Code section 803.6. In each of the videos, Lyle is seen attacking a victim while the victim was defenseless or unsuspecting.

The first video, entitled "Mexican gets cracked over some weed," shows Lyle and a group of teenagers walking into a wooded area across the street from the school. Lyle put his arm around the victim's shoulders and then punched him once in the face, knocking the victim to the ground. Lyle then left with the person operating the camera. According to the testimony of the school resource officer that investigated the incident, the group promised the victim they would smoke marijuana once they got into the woods. The victim suffered a bloody nose and a cut lip as a result of the incident.

In the second video, Lyle and the camera operator encountered the victim in a residential neighborhood. Lyle verbally confronted the victim, who pulled out a cell phone to call his friend. When the victim turned his head away from Lyle, Lyle struck him in the face, knocking him backward and causing the phone to fly from his hand. After getting struck, the victim bent down to tie his shoe and Lyle ran up on him striking him twice more in the face. When the victim attempted to defend himself and fight back, Lyle retreated with the camera operator.

In the third video, the victim was confronted by a group of teenagers near the school who proceeded to attack him. At the end of video while the victim was crouched on the ground and all other group members had ceased the attack, Lyle is seen running toward the victim and punching him five times in the face. Following the attack, the victim was taken to the hospital having suffered a laceration to his face, multiple bruises, and possibly a concussion.

Based on this information, the State argued the assault on Alvarez was not an isolated incident, and the mandatory seven-year sentence was appropriate.

The district court agreed with the State stating,

> I'm familiar with the defendant's employment circumstances, his mental health and substance abuse history as outlined in the PSI, his family circumstances, the nature of the offense that was committed here and the harm to the victim.
>
> There was force involved in this offense as found by the jury. The defendant's financial circumstances, his need for rehabilitation and potential for that, and the necessity for protecting the community from further offenses by the defendant and others, and the other factors that are set forth in the Presentence Investigation Report.
>
> [Defense Counsel], while I appreciate your argument and passion that you bring to it, I don't think that this is a good case for the application of the principles you have talked about. I think that the sentence is merited by the facts and circumstances of this case, even if I had discretion, which I don't.

Lyle was sentenced to a maximum term of incarceration of ten years and is required to serve the seventy percent mandatory minimum before he is eligible for parole or work release. *See* Iowa Code §§ 902.9(4), 902.12(5). Lyle appeals.

II. SCOPE OF REVIEW.

A defendant may challenge an illegal sentence at any time and because Lyle claims his sentence is cruel and unusual punishment under the federal and state constitution, our review is de novo. *See State v. Oliver*, 812 N.W.2d 636, 639 (Iowa 2012).

III. CRUEL AND UNUSUAL PUNISHMENT—GROSS PROPORTIONALITY CHALLENGE.[4]

The Eighth Amendment of the United States Constitution and article I, section 17 of the Iowa constitution prohibit the infliction of cruel and unusual punishments. Lyle did not indicate at trial or on appeal whether this challenge to his sentence was based on one or both of these provisions. Instead, at trial and on appeal, Lyle asserts under the guidance of *State v. Bruegger*, 773 N.W.2d 862 (Iowa 2009), his sentence is cruel and unusual as applied to him.

In *Bruegger*, the Iowa Supreme Court utilized "the general principles as outlined by the United States Supreme Court for addressing a cruel-and-unusual-punishment challenge under the Iowa Constitution." 773 N.W.2d at 883. It found that a review of a sentence for "'gross disproportionality' under the Iowa Constitution should not be a 'toothless' review and adopt[ed] a more stringent review than would be available under the Federal Constitution." *Id*. It concluded, "Our holding is based on Article I, Section 17 of the Iowa Constitution. Because his cruel-and-unusual-punishment claim under the United States Constitution does not give him any protection beyond that afforded by the Iowa Constitution, we do not give Bruegger's federal claim further consideration." *Id*. at 886 n.9. Thus, as the court in *Bruegger* applied only the Iowa constitution to the cruel and unusual punishment claim, we will apply the same here.

---

[4] Lyle describes his challenge as an "as-applied" challenge to his sentence. The Iowa Supreme Court in *Oliver*, 812 N.W.2d at 640–41, recognized the terminology for an Eighth Amendment challenge has changed with the U.S. Supreme Court's case of *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010). Instead of a "facial challenge" and an "as-applied challenge," "the defendant must challenge his sentence under a 'categorical' approach or make a 'gross proportionality challenge to [the] particular defendant's sentence.'" *Oliver*, 812 N.W.2d at 640–41(citations omitted). Thus, we will treat Lyle's "as-applied" challenge, as a "gross proportionality challenge."

The Iowa Supreme Court in *Bruegger*, 773 N.W.2d at 886, and in *Oliver*, 812 N.W.2d at 647, approved the use of the three-step analysis, first articulated in *Solem v. Helm*, 463 U.S. 277, 292 (1983), to determine whether a sentence is grossly disproportionate to the crime.

> The first step in this analysis, sometimes referred to as the threshold test, requires a reviewing court to determine whether a defendant's sentence leads to an inference of gross disproportionality. "This preliminary test involves a balancing of the gravity of the crime against the severity of the sentence." If, and only if, the threshold test is satisfied, a court then proceeds to steps two and three of the analysis. These steps require the court to engage in an intrajurisdictional analysis "comparing the challenged sentence to sentences for other crimes within the jurisdiction." Next, the court engages in an interjurisdictional analysis, "comparing sentences in other jurisdictions for the same or similar crimes."

Oliver, 812 N.W.2d at 647 (internal citations omitted). If the comparative analysis under steps two and three validates the initial threshold judgment that the sentence is grossly disproportionate, then the sentence is cruel and unusual. *Graham*, 130 S. Ct. at 2022.

Under the initial threshold test, there are four general principles that guide our analysis. *Oliver*, 812 N.W.2d at 650–51. The first is that we give substantial deference to the penalties the legislature has established for crimes. *Id*. at 650. The legislature is given deference because "'[l]egislative judgments are generally regarded as the most reliable objective indictors of community standards for purposes of determining whether a punishment is cruel and unusual.'" *Id*. (citing *Bruegger*, 773 N.W.2d at 873).

"The second principle is that it is rare that a sentence will be so grossly disproportionate to the crime as to satisfy the threshold inquiry and warrant

further review." *Id*. In fact, finding a sentence grossly disproportionate under the Eighth Amendment is "hen's-teeth rare" in the words of one federal circuit. *Bruegger*, 773 N.W.2d at 878 (citing *United States v. Polk*, 546 F.3d 74, 76 (1st Cir. 2008)).

Third, a recidivist offender is considered to be more culpable, and thus, more deserving of a longer sentence. *Oliver*, 812 N.W.2d at 650. Under this principle, our considerations include the offender's criminal history, whether he has shown any remorse for his actions, and whether past attempts at rehabilitation have been successful. *Id*. at 650, 653.

The final principle we consider is that in certain cases unique features can "converge to generate a high risk of gross disproportionality." *Id.* at 651 (citing *Bruegger*, 773 N.W.2d at 884). In *Bruegger*, these features included "a broadly framed crime, the permissible use of preteen adjudications as prior convictions to enhance the crime, and a dramatic sentence enhancement for repeat offenders." 773 N.W.2d at 884.

Utilizing these principles, we must now determine whether Lyle's sentence leads to an inference of gross disproportionality under the threshold test. Lyle was convicted of robbery in the second degree under Iowa Code sections 711.1[5]

[5] Iowa Code section 711.1 provides:

> A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:
>
> 1. Commits an assault upon another.
>
> 2. Threatens another with or purposely puts another in fear of immediate serious injury.
>
> 3. Threatens to commit immediately any forcible felony.

It is immaterial to the question of guilt or innocence of robbery that property was or was not actually stolen.

and 711.3.[6] Lyle contends robbery in the second degree is a broadly defined crime similar to the third degree sexual abuse statute considered in *Bruegger* and *Oliver.*

To commit robbery in the second degree—one must have the intent to commit theft coupled with either committing an assault, threatening or putting another in fear of immediate serious injury, or threatening to immediately commit a forcible felony. *See* Iowa Code § 711.1. While the value of the item being stolen or the type or amount of force will vary with each case, we find the focus should be whether less culpable conduct is caught up with other more serious acts by a broadly written statute. In this case, we do not find Lyle's conduct was less culpable than other acts that could be encompassed by the robbery statute. This factor does not support a finding that Lyle's sentence is grossly disproportionate to his conduct.

In addition to determining the scope of the criminal statute, *Oliver* also directs us to consider the scope of the statute that enhances the sentence. 812 N.W.2d at 646. Here, section 902.12 does not add years to Lyle's sentence as the enhancements did in *Bruegger and Oliver*, but rather mandates he serve seven years of his ten-year sentence before being considered for parole or work release. In addition, section 902.12 is only applicable to those crimes where violence is directed at another person, such as murder, attempted murder, sexual abuse, kidnapping, robbery, and vehicular homicide. Where the scope of the

[6] Iowa Code section 711.3 provides that all robbery which is not robbery in the first degree is robbery in the second degree. Robbery in the first degree requires the perpetrator to be armed with a dangerous weapon or purposely inflict or attempt to inflict serious injury. *See* Iowa Code § 711.2.

statute is narrow, there is less chance for gross disproportionality. *Oliver*, 812 N.W.2d at 652.

Lyle also points to his age as a factor making his sentence grossly disproportionate. Lyle was seventeen years, two months old at the time he committed the robbery. In *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005), *Graham*, 130 S. Ct. at 2026, and *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012), the United States Supreme Court recognized that juveniles may be considered less culpable than adults because some juveniles lack maturity and a sense of responsibility, are more vulnerable to negative influences and outside pressures, and their characters are not as well formed. For this reason, the Court determined juveniles cannot be subject to the death penalty, life in prison without parole for non-homicide cases, or mandatory life in prison without parole for homicide convictions.[7] *Roper*, 543 U.S. at 578; *Graham*, 130 S. Ct. at 2034; *Miller*, 567 U.S at 2460. While we consider Lyle's age as one factor in our analysis, we do not find that his age alone make his punishment grossly disproportionate to the acts he committed. Lyle was less than a year from becoming a legal adult. While Lyle will have to wait until he is twenty-five to be considered for parole or work release, this does not lead us to a conclusion that the sentence is "off the charts." *See Bruegger*, 773 N.W.2d at 886.

[7] The Court in *Roper* noted, "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." 543 U.S. at 573. Because of the difficulty experts have in distinguishing those juveniles capable of reform from those who should be subjected to the most severe punishment, the Court determined the States should not force a jury to try to make this determination in meting out the death penalty to those under the age of eighteen. *Id*.

Finally, Lyle claims the small value of the marijuana he took from the victim, along with the one "minor" punch he delivered makes his sentence grossly disproportionate. While it is true that had Lyle simply taken property from another worth only five dollars, the likely charge would have been theft in the fifth degree, a simple misdemeanor punishable by small fine and possibly no more than thirty days in jail. *See* Iowa Code §§ 714.2(5), 903.1(1)(a). If Lyle had simply assaulted Alvarez, the likely charge would have been assault causing bodily injury, a serious misdemeanor punishable by a fine and possibly no more than a year in jail. *See* Iowa Code §§ 708.2(2), 903.1(1)(b). However, it is the combination of these acts that the legislature has chosen to punish more severely, and we give great deference to its determinations. *Oliver*, 812 N.W.2d at 650.

Lyle's criminal history also weighs against finding his sentence grossly disproportionate. *See Id*. While this was Lyle's first charge prosecuted in district court, the reverse waiver investigation report and the presentence investigation report reveal an adjudication for operating a motor vehicle without the owner's consent, along with an extensive history of services provided in the juvenile system for some non-adjudicated incidences including assault and theft. The evidence also revealed Lyle had a history and pattern of videotaping unprovoked attacks on other students and placing those attacks on social media websites. As the State argued at the sentencing hearing, this shows a clear lack of remorse for his actions and a failure to recognize the pain and humiliation he has inflicted on others.

Based on all of these factors, we find Lyle's sentence does not raise an inference of gross disproportionality to his crime of second-degree robbery. Because we find Lyle has failed to satisfy the threshold test—that is, the balancing of the gravity of the crime against the severity of the sentence—we need not conduct an intrajurisdictional or an interjurisdictional analysis of the sentence. *See id.* at 647. We affirm the district court's imposition of the seventy percent mandatory minimum sentence under Iowa Code section 902.12.

AFFIRMED.