IN THE COURT OF APPEALS OF IOWA

No. 2-338 / 11-1340
Filed May 23, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSHUA PATRICK POULSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, James D. Scott, Judge.

The defendant appeals from the district court's denial of his motion to correct an illegal sentence. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Patrick Jennings, County Attorney, and Jill Esteves, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DOYLE, J.

Joshua Poulson appeals from the district court's denial of his motion to correct an illegal sentence following his convictions and sentences for two counts of lascivious acts with a child. He claims the district court (1) violated his due process rights by failing to hold a hearing on the motion, (2) failed to give adequate reasons for the imposition of consecutive sentences, and (3) erred in rejecting his cruel and unusual punishment claim.[1] We affirm.

I. Prior Proceedings.

Pursuant to a written plea agreement with the State, Joshua Poulson pleaded guilty to two counts of lascivious acts with a child in exchange for the dismissal of a third-degree sexual abuse charge. The crimes were committed when Poulson was seventeen years old. His victim was six. The district court accepted Poulson's guilty plea and, in March 2008, sentenced him to five years on the first count of lascivious acts with a child and ten years on the second, to be served consecutively. A special sentence of lifetime supervision under Iowa Code section 903B.1 (2007) was also imposed.

More than three years later, Poulson filed a pro se motion to correct an illegal sentence under Iowa Rule of Criminal Procedure 2.24(5)(a). He claimed

[1] The State urges us to find Poulson has waived all these claims "by failing to adequately argue the same." *See State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003) *overruled on other grounds by State v. Hanes*, 790 N.W.2d 545 (Iowa 2010) (finding defendant waived argument on issues presented "in one-sentence conclusions without analysis"). While Poulson's arguments are succinct, to say the least, we decline to find a waiver, as he has cited some authority in support of his positions on appeal. *See* Iowa R. App. P. 6.903(2)(g)(3) ("Failure to cite authority in support of an issue *may* be deemed waiver of that issue." (Emphasis added.)); *State v. Stoen*, 596 N.W.2d 504, 507 (Iowa 1999) (refusing to find a waiver under rule 6.903(2)(g)(3) where court was "able to reach the merits without having to undertake the appellant's research and advocacy and without having to assume a partisan role").

"imposing a sentence of 'LIFE' for a criminal offense that only requires a 10 year sentence . . . is cruel and unusual punishment and in violation of" the federal and state constitutions. He requested "an evidentiary hearing with his participation on this matter where all facts can be fully and fairly determined." Instead, the district court entered an order denying Poulson's motion without a hearing. Poulson appeals.

II. Discussion.

A. Denial of Motion without a Hearing.

We begin with Poulson's ill-defined due process claim, which we elect to address despite his failure to raise the issue in the district court proceedings. *See State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999). Without specifying the constitutional provisions under which he is proceeding, Poulson asserts the "court should have at least noticed [him] of the intention to deny the motion and given [him] the opportunity to respond."[2]

The case Poulson cites in support of this proposition—*Poulin v. State*, 525 N.W.2d 815, 816 (Iowa 1994)—is inapposite, as it involves a since-amended rule of civil procedure requiring hearings on summary judgment motions. *See Brown v. State*, 589 N.W.2d 273, 275 (Iowa Ct. App. 1998) (stating our existing summary judgment rules do not "prevent[ ] the trial court from reviewing the

[2] When, as here,

> there are parallel constitutional provisions in the federal and state constitutions and a party does not indicate the specific constitutional basis, we regard both federal and state constitutional claims as preserved, but consider the substantive standards under the Iowa Constitution to be the same as those developed by the United States Supreme Court under the Federal Constitution.

King v. State, 797 N.W.2d 565, 571 (Iowa 2011).

summary judgment motion and response thereto and ruling thereon without affording the parties a hearing").

Furthermore, although procedural due process "requires notice and the opportunity to be heard prior to depriving one of life, liberty, or property," it is not a technical concept with fixed content unrelated to time, place and circumstances. *State v. Izzolena*, 609 N.W.2d 541, 552 (Iowa 2000). Due process is instead flexible, with such procedural protections as the particular situation demands. *Id.* (employing a balancing test examining the private interest at stake, the risk of erroneous deprivation, and the government's interest to determine what process is due in a given case).

Poulson has not indicated what, if anything, would have been gained by a hearing on his motion. *See State v. Trudo*, 253 N.W.2d 101, 104 (Iowa 1977) (rejecting defendant's due process claim regarding lack of hearing on a consolidation issue because defendant did not show necessity of such a hearing); *see also* Iowa R. Crim. P. 2.27(3)(b) (stating a defendant's presence is not required at a reduction of sentence under rule 2.24); *State v. Cooley*, 691 N.W.2d 737, 741 (Iowa Ct. App. 2004) (holding a defendant's presence is not required when a district court is correcting an existing sentence, "so long as the disposition would not be aided by the defendant's presence and the modification does not make the sentence more onerous").

Nor has Poulson shown that his interest in a hearing outweighs the government's interest in avoiding the administrative burden and costs attendant with such a hearing. *See Izzolena*, 609 N.W.2d at 552 (considering the administrative burden on the state in determining a defendant did not have a due

process right to a restitution hearing under Iowa Code section 910.3B); *see also State v. Gonzalez*, 718 N.W.2d 304, 309 (Iowa 2006) (finding it was improper for district court to hold a hearing on defendant's motion to dismiss a trial information because such a hearing "only wastes valuable judicial resources that the court can use for other matters").

B. Reasons for Consecutive Sentences.

Poulson next claims the district court did not provide adequate reasons for the consecutive sentences it imposed. *See* Iowa R. Crim. P. 2.23(3)(d) ("The court shall state on the record its reason for selecting the particular sentence."). He characterizes this claim as a challenge to an illegal sentence, which is not subject to our normal rules of error preservation. *See* Iowa R. Crim. P. 2.24(5)(a) ("The court may correct an illegal sentence at any time."); *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010) (discussing breadth of this rule).

While rule 2.24(5)(a) and our cases "allow challenges to *illegal* sentences at any time . . . they do not allow challenges to sentences that, because of procedural errors, are illegally *imposed*." *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001). In *State v. Wilson*, 294 N.W.2d 824, 825 (Iowa 1980), our supreme court held that a trial court's failure to state reasons for the sentence imposed is a defective sentencing procedure, which does not constitute an illegal sentence under rule 2.24(5)(a). Poulson is accordingly barred from raising this claim in his appeal from the court's denial of his rule 2.24(5)(a) motion. *Cf. Lathrop*, 781 N.W.2d at 293 ("In summary, errors in sentencing may be challenged *on direct appeal* even in the absence of an objection in the district court. Illegal sentences

may be challenged at any time, notwithstanding that the illegality was not raised in the trial court or on appeal." (Emphasis added.)).

C. Cruel and Unusual Punishment.

Poulson finally asserts the "consecutive sentence [of fifteen years in prison] and the lifetime parole were cruel and unusual as applied to the defendant." Unlike the preceding claim, this does present a challenge to an illegal sentence that may be brought at any time. *See State v. Bruegger*, 773 N.W.2d 862, 872 (Iowa 2009). Our review is de novo. *Id.* at 869.

1. Term of imprisonment. We begin with Poulson's challenge to the length of his term of imprisonment, which requires us to determine whether the consecutive sentences imposed were grossly disproportionate to his crimes using the three-step analysis set forth in *Solem v. Helm*, 463 U.S. 277 (1983). *See State v. Oliver*, ___ N.W.2d ___, 2012 WL 1058249, at *10 (Iowa 2012).[3] This approach allows us to consider the particular circumstances of a case to determine whether the sentence imposed is unconstitutionally excessive. *See id.* at *11.

"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." *Id.* at *10. "This preliminary test

[3] We note that in *Oliver*, our supreme court clarified the terminology that is now used in cruel and unusual punishment case law. New nomenclature replaces the previous distinctions between facial and as-applied claims. *Oliver*, 2010 WL 1058249, at *3. Now a defendant's challenge to his sentence follows either a categorical approach, questioning the general sentencing practice, or a "gross proportionality" comparison of a particular defendant's sentence with the seriousness of the particular crime. *See id*. (citing *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010)). Because Poulson does not contest the constitutionality of all consecutive sentences or the special sentence mandated under Iowa Code section 903B.1, his challenge falls within the second classification.

involves a balancing of the gravity of the crime against the severity of the sentence." *Bruegger*, 773 N.W.2d at 873. "If, and only if, the threshold test is satisfied, a court then proceeds to steps two and three of the analysis," which involve intra- and interjurisdictional comparisons. *Oliver*, 2012 WL 1058249, at *11. It is a rare case, however, "'in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'" *Bruegger*, 773 N.W.2d at 873 (citation omitted). This is not one of those rare cases.

In conducting our proportionality review, we keep in mind the general principle "that we owe substantial deference to the penalties the legislature has established for various crimes." *Oliver*, 2012 WL 1058249, at *13. A sentence for a term of years within the bounds authorized by statute, as is present here, is not likely to be grossly disproportionate. *See Bruegger*, 773 N.W.2d at 873.

We observe that sex offenses are considered particularly heinous crimes. *See State v. Harkins*, 786 N.W.2d 498, 507 (Iowa Ct. App. 2009). Victims of this offense often suffer from devastating effects, including physical and psychological harm. *Id.* Indeed, at the sentencing hearing, the victim's mother described the disturbing effects Poulson's abuse had on her young son, including depression and recurring nightmares.

Sex offenders also have a frighteningly high risk of recidivism. *Id.*; *see also Oliver*, 2012 WL 1058249, at *13 (discussing recidivism concern in examining length of offender's sentence). Though Poulson was not a repeat sex offender, he admitted to having sexually abused his young victim continually over the course of a year. He also had a prior arrest as a juvenile for choking his

younger brother. *See id.* ("[W]hen determining the gravity of the offender's crime, a district court can consider the offender's criminal history.").

Finally, we consider the unique features of a case, which can converge to generate a high risk of potential gross disproportionality. *Bruegger*, 773 N.W.2d at 884. The unique feature at issue in this case is Poulson's status as a seventeen-year-old juvenile when the crimes were committed. *See id.* at 876-78 (noting special considerations at issue when considering cruel and unusual punishment claims as applied to juveniles). He urges that given his young age when he committed the criminal acts, "he should not be subject to a prison sentence of up to 15 years." We disagree.

While Poulson's age is material to our assessment of the constitutionality of his particular sentence, it is not determinative. Our legislature has decided that juveniles who were sixteen and seventeen should be originally charged as adults when they commit certain serious offenses. *See State v. Terry*, 569 N.W.2d 364, 367 (Iowa 1997). In deference to the legislature's thinking, we do not find Poulson's status as an older teenager by itself creates a situation where his consecutive sentences are disproportionate to his crime. *See Bruegger*, 773 N.W.2d at 873 (stating legislative pronouncements are generally regarded as the most reliable objective indicators of community standards for the purpose of determining whether a punishment is cruel and unusual). As our supreme court stated in *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999), Poulson

> committed *two* serious crimes. The fact he will have to serve his sentences consecutively does not make these otherwise permissible sentences disproportionately severe. There is nothing cruel and unusual about punishing a person committing *two* crimes

> more severely than a person committing only one crime, which is the effect of consecutive sentencing.

2. Special sentence. Poulson next argues the special sentence of lifetime supervision under section 903B.1 constitutes cruel and unusual punishment as applied to him. We agree with the State that this claim is not ripe for our review. *See State v. Tripp*, 776 N.W.2d 855, 859 (Iowa 2010) (holding based on the record in that case that a cruel and unusual punishment challenge to section 903B.1 for the crime of third-degree sexual abuse was not ripe for adjudication).

Because Poulson is still serving his term of imprisonment for the crimes of lascivious acts with a child, the special sentence imposed under section 903B.1 has not yet commenced. *See* Iowa Code § 903B.1. To analyze his claim, we would be required to assume Poulson will serve lifetime parole when he could, in fact, be released from parole at any time. *See id.*; *see also Tripp*, 776 N.W.2d at 858. As in *Tripp*, we "would also be analyzing the sentence without the benefit of any conditions that may be placed on him in the future." 776 N.W.2d at 858-59. Until the length of Poulson's parole and the extent of his supervision are determined, Poulson's challenge is not ripe. *Id.* at 859.

For the foregoing reasons, we affirm the district court's denial of Poulson's motion to correct an illegal sentence.

AFFIRMED.