

IN THE COURT OF APPEALS OF IOWA

No. 3-464 / 11-1228
Filed July 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY ALLEN HOECK,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick,
Judge.

Hoeck appeals from an amended sentence for kidnapping in the first
degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert Ranschau, Assistant
Appellate Defender, for appellant.

Anthony Hoeck, Fort Madison, pro se.

Thomas J. Miller, Attorney General, Richard Bennett, Assistant Attorney
General, and Michael J. Walton, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

EISENHAUER, C.J.

Anthony Hoeck appeals from the corrected sentence on his conviction of first-degree kidnapping, contending the sentence was illegal and violated protections against cruel and unusual punishment. He also raises challenges to the procedure in imposing the corrected sentence. We affirm.

Background Facts and Proceedings. In 1994 Hoeck was convicted by a jury of second-degree murder, first-degree robbery, first-degree kidnapping, criminal gang participation, possession of an offensive weapon, and conspiracy to commit robbery. He was seventeen years old at the time he committed the crimes. On the kidnapping conviction, the court sentenced Hoeck to life imprisonment without the possibility of parole. This court upheld the convictions on direct appeal. *State v. Hoeck*, 547 N.W.2d 852, 860 (Iowa Ct. App. 1996).

In 2011 Hoeck filed a motion to correct illegal sentence, seeking to eliminate the parole ineligibility provision of his life sentence. The trial court granted the motion. Hoeck then filed a motion to reconsider alleging: (1) he was denied his right to be present, to speak in mitigation, and to be heard on why the court should not enter sentence; (2) the court did not exercise discretion in sentencing; (3) the corrected sentence was illegal; and (4) the corrected sentence did not address credit for time served or good-time credit. Hoeck's motion to reconsider was denied. Hoeck appeals.

Scope and Standards of Review. Claims a sentence is illegal are reviewed for correction of errors at law. *State v. Davis*, 544 N.W.2d 453, 455 (Iowa 1996). A court may correct an illegal sentence at any time. Iowa R. Crim. P. 2.24(5)(a). A claim a sentence is unconstitutional because it constitutes cruel

and unusual punishment is a claim the sentence is illegal. *Bonilla v. State*, 791 N.W.2d 697, 699 (Iowa 2010). We review constitutional claims de novo. See *id.*

Illegal Sentence. Hoeck contends the trial court erred in imposing an illegal sentence when it amended his sentence to life with the possibility of parole for an offense committed while he was a juvenile because it did not consider all applicable sentencing factors. His original sentence was mandatory; therefore, the court had no discretion to consider any mitigating factors. He seeks vacation of his sentence and remand for resentencing so the court could consider all applicable sentencing factors.

In *Graham v. Florida*, 130 S. Ct. 2034 (2011), the Court held it unconstitutional to impose a life sentence without parole “on a juvenile offender who did not commit homicide.” Our supreme court considered the same issue in *Bonilla v. State*, 791 N.W.2d 697, 700-701 (Iowa 2010), and concluded “under *Graham*” Bonilla’s “constitutional right to be free from cruel and unusual punishment was violated” when a mandatory sentence of life without parole was imposed for a nonhomicide crime. Noting *Graham* left it to the states “to explore the means and mechanisms for compliance,” the court determined it could comply with *Graham* in Bonilla’s situation by severing the clauses prohibiting parole in Iowa Code sections 902.1 and 906.5 (2005) as unconstitutional as applied to Bonilla and correcting Bonilla’s sentence to life in prison, “with the potential of parole.” *Bonilla*, 791 N.W.2d at 701-03 (citation omitted).

On July 15, 2011, the court granted Hoeck’s motion to correct illegal sentence and struck the parole ineligibility provision of his sentence, thus making him eligible for consideration for parole. Effective July 27, 2011, the legislature

amended section 902.1, making a person under age eighteen when the offense was committed eligible for parole after serving a minimum of twenty-five years. 2011 Iowa Acts ch. 131, § 147 (now codified at Iowa Code § 902.1(2)(a)). Because Hoeck's sentence was corrected before the effective date of the statutory change, it appears Hoeck, like Bonilla, became eligible for annual parole consideration immediately. See *Bonilla*, 791 N.W.2d at 702, n.3.

In *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012), the Court held "a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders" violates the Eighth Amendment restriction against cruel and unusual punishment. The Court discussed at length the differences between juvenile and adult offenders, see *id.* at 2463-69, and concluded a sentencing court "must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 2475. Hoeck contends the court should have vacated the sentence instead of correcting it, so the court would have the opportunity at resentencing to consider all relevant factors.

The decisions in *Graham* and *Bonilla* are distinguishable from Hoeck's situation because they involved sentences of life without parole for juveniles convicted of nonhomicide offenses. Although the sentence Hoeck challenged as illegal was for the nonhomicide offense of kidnapping, he also was convicted of second-degree murder. In any event, Hoeck received the benefit of both decisions because the court corrected his sentence by deleting the parole ineligibility provision of his sentence.

Under *Bonilla*, severing the illegal portion of a sentence without vacating the whole sentencing scheme is a permissible way to correct an illegal sentence. *Bonilla*, 791 N.W.2d at 702; see also *Graham*, 130 S. Ct. at 2030 (leaving the decision how to correct a sentence to the states); *State v. Maghee*, 573 N.W.2d 1, 7 (Iowa 1997) (stating where a portion of a defendant's sentence is improper or invalid, the court can sever the sentence, if possible, without disturbing the balance of the sentence). The court was not required to vacate Hoeck's sentence and resentence him. Consideration of various sentencing factors and possible mitigating circumstances was not required. *Miller* does not require a different result. See *Miller*, 132 S. Ct. at 2475 (providing for consideration of mitigating circumstances and other sentencing factors when sentencing a juvenile convicted of murder to life without parole).

We conclude Hoeck's corrected sentence is not illegal.

Pro Se Claims. Hoeck raises several claims in his pro se supplemental brief. The State moved to strike the pro se brief, asserting it is "not a proper supplemental pro se brief" because it was not filed within fifteen days of service of his attorney's brief. See Iowa R. App. P. 6.901(2)(a). The docket shows Hoeck's attorney moved to withdraw in October 2011. In May 2012 Hoeck filed an "appellant's brief." The clerk docketed it as a response to the motion to withdraw, but noted it was "titled appellant's brief." In November 2012 the court denied the motion to withdraw. In January 2013 Hoeck's attorney filed the proof brief. What we now have as Hoeck's "pro se brief and argument," filed in April 2013, is a photocopy of his May 2012 file-stamped "appellant's brief" with a new cover. Although the clerk considered the May 2012 document a "response" to

the motion to withdraw, the fact remains it was filed before the expiration of fifteen days after Hoeck's attorney filed his brief. We deny the motion to strike.

Hoeck contends the court violated his right "by ex parte resentencing and issuing a revised mittimus." He argues he had a right to be present and to make a statement in mitigation of punishment." The court did not resentence Hoeck; it corrected his sentence by striking one provision. A defendant's presence is not required "at a reduction of sentence under rule 2.24." Iowa R. Crim. P. 2.27(3)(b). Rule 2.24 includes correction of sentences. A defendant need not be present when a sentence is corrected "so long as the disposition would not be aided by the defendant's presence and the modification does not make the sentence more onerous." *State v. Cooley*, 691 N.W.2d 737, 741 (Iowa Ct. App. 2004). In Hoeck's case, the life sentence as corrected was still mandatory, so "the disposition would not be aided" by his presence, and the correction did not make the sentence more onerous. We affirm on this issue.

Hoeck contends the court "illegally originally sentenced [him] when it failed to articulate its reasons for imposing consecutive sentences and failed when denying relief." He also contends the original sentencing court failed to advise him of his right of allocution. He asserts his May 2011 motion to correct illegal sentence raised the claim the original consecutive sentences were illegal because the original sentencing court failed to state reasons for imposing consecutive sentences.

Contrary to Hoeck's assertion, his May 2011 motion to correct illegal sentence did not raise any claim concerning consecutive sentences. Nor did it claim the original sentencing court failed to advise him of his right of allocution. A

review of the transcript shows these claims were not raised or even mentioned in the hearing. Hoeck argues he is not required to preserve error on alleged sentencing defects. See *State v. Boltz*, 542 N.W.2d 9, 10 (Iowa Ct. App. 1995). He is correct such errors can be preserved without raising them during the sentencing proceeding, but they still must be “timely rais[ed]” on appeal. *Id.* They were first mentioned in the post-hearing motion to amend or enlarge; this is not “timely raising” them on appeal and does not preserve them for our review. See *Starling v. State*, 328 N.W.2d 338, 342 (Iowa Ct. App. 1982) (noting a rule [1.904(2)] motion is necessary to preserve error on a claim “when a trial court fails to resolve an issue, claim, or legal theory *properly submitted for adjudication*”) (emphasis added). These claims are not properly before us.

Hoeck’s corrected sentence is not illegal. His alleged procedural errors in correcting the sentence are without merit. His alleged errors in the original sentencing are not preserved for our review.

AFFIRMED.