IN THE COURT OF APPEALS OF IOWA

No. 5-831 / 04-1364
Filed August 9, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CORNELL AKHITTO HOOSMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart (trial), District Associate Judge, James C. Bauch and Jon Fister (sentencing), Judges.

Defendant appeals his conviction for possession of marijuana, third offense. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann Brenden, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and James Katcher, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., Hecht, J., and Nelson, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

NELSON, S.J.

I. Background Facts & Proceedings

On December 8, 2003, Waterloo police officers saw Cornell Hoosman coming out of a convenience store. There was an outstanding arrest warrant out for Hoosman, and the officers approached him. Hoosman got out of the car, and then put his hand in his pocket. Officer Robert Michael attempted to grab Hoosman's wrist, but Hoosman was able to throw several items on the ground. The officers found a bag containing marijuana on the ground close to Hoosman.

Hoosman had the following previous drug-related convictions: (1) possession of marijuana with intent to deliver in 1979; (2) possession of marijuana in 1989; and (3) possession of marijuana with intent to deliver in 1992. Because of these previous convictions, Hoosman was charged with possession of marijuana, third offense, which carries a possible enhanced sentence. In addition to the drug-related offenses, Hoosman also had convictions for going armed with intent in 1989 and two counts of attempted murder in 1991. Due to his extensive criminal history, he was charged with being a habitual offender.

At Hoosman's criminal trial, the parties apparently agreed the officers could testify that they approached Hoosman because of the outstanding warrant, but they would not say what the warrant was for. Officer Thomas Sullivan was questioned as follows:

> Q. Why was it significant or important to you to have him stay in the vehicle until other officers arrived to assist? A. Well, that's normal procedure. You usually don't try to go in there by yourself. And also, he's a big boy, and he's been known to resist before.

Immediately after this question, Hoosman's counsel sought a sidebar discussion, but did not seek an admonition to the jury. After officer Sullivan's testimony was completed Hoosman sought a mistrial, claiming that officer Sullivan had testified that he had a propensity for violence. The district court denied the motion for a mistrial. A jury found Hoosman guilty of possession of marijuana.

A separate trial was held on the issue of whether Hoosman should be subject to an enhanced penalty under Iowa Code section 124.401(5) (2003), which provides, "A person who commits a violation of this subsection and has previously been convicted two or more times of violating this chapter . . . is guilty of a class 'D' felony." At the hearing on this matter, Hoosman asked the judge, James C. Bauch, to recuse himself because Judge Bauch had been the prosecuting attorney on a 1979 conviction, and the trial judge in criminal proceedings in 1991. Judge Bauch denied the request to recuse himself, stating that he had no recollection of Hoosman. During the proceedings, Hoosman expressed a desire to represent himself. He refused, however, to answer the questions put to him by the court regarding whether he knowingly and voluntarily gave up his right to an attorney, and the court denied his request. A jury found Hoosman was a third-time offender within the meaning of section 124.401(5).

A third trial was held on the issue of whether Hoosman was a habitual offender. This trial was held before Judge Jon Fister, with Hoosman representing himself. Hoosman called Judge Bauch as a witness and questioned him generally about habitual offender law. A jury found Hoosman was a habitual offender.

The sentencing hearing was held before Judge Bauch. Hoosman was sentenced to a term of imprisonment not to exceed fifteen years, but the sentence was suspended and he was placed on probation for a period of five years.[1]

II. Cruel & Unusual Punishment

Hoosman contends that a fifteen-year sentence for the crime of possession of marijuana constitutes cruel and unusual punishment. A first-time conviction for possession of marijuana is subject to punishment of six months in the county jail. Iowa Code § 124.401(5). However, Hoosman had two previous convictions for possession with intent to deliver, and his sentence was enhanced under a provision which states, "A person who commits a violation of this subsection and has previously been convicted two or more times of violating this chapter . . . is guilty of a class 'D' felony." Iowa Code § 124.401(5). A class "D" felony may be punished by up to five years in prison.

Hoosman was also determined to be a habitual offender under section 902.8, because he was convicted of a class "D" felony and had two or more previous felony convictions—possession of marijuana with intent to deliver, going armed with intent, and two counts of attempted murder. As a habitual offender, Hoosman would be required to serve a minimum sentence of confinement for three years. Iowa Code § 902.8. A habitual offender could be required to serve a term of imprisonment not to exceed fifteen years. Iowa Code § 902.9(3). In fact, Hoosman was sentenced to serve a term of imprisonment not to exceed

[1] Hoosman's probation was later revoked for probation violations and he was ordered the serve the fifteen-year sentence previously imposed

fifteen years. Hoosman argues that the application of the sentencing enhancements in this case made his sentence cruel and unusual because if this had been his first offense he would have only been sentenced to six months in the county jail.

The Eighth Amendment of the United States Constitution prohibits "cruel and unusual" punishment, and this prohibition is applicable to the states through the Fourteenth Amendment. *See Rhodes v. Chapman*, 452 U.S. 337, 344-45, 101 S. Ct. 2392, 2398, 69 L. Ed. 2d 59, 67-68 (1981); *State v. Lara*, 580 N.W.2d 783, 784 (Iowa 1998). Punishment may be considered cruel and unusual if it inflicts torture, is otherwise barbaric, or is so excessively severe it is disproportionate to the offense charged. *State v. Cronkhite*, 613 N.W.2d 664, 669 (Iowa 2000). Our review of constitutional claims is de novo. *State v. Hoskins*, 586 N.W.2d 707, 709 (Iowa 1998).

Hoosman points to another portion of section 124.401(5), which provides:

> If the controlled substance is marijuana and person has been previously convicted two or more times of a violation of this subsection in which the controlled substance was marijuana, the person is guilty of an aggravated misdemeanor.

Hoosman's previous convictions for possession with intent to deliver involved marijuana, and he believes this portion of section 124.401(5) should apply instead of the portion quoted earlier which provides that a third or subsequent offense may be a class "D" felony.

A similar issue was addressed in *State v. Rankin*, 666 N.W.2d 608, 611 (Iowa 2003), which held that the second portion of section 124.401(5) applies only to those convicted two or more times for possession of marijuana. The

marijuana provision only applies to those "convicted two or more times of a violation of this subsection," which would be section 124.401(5). *Rankin*, 666 N.W.2d at 610. Hoosman had two previous drug-related convictions which were not under section 124.401(5). Hoosman was properly sentenced under the provisions relating to a class "D" felony, instead of an aggravated misdemeanor. *See id.* at 611.

In considering whether Hoosman was subjected to cruel and unusual punishment, we must first apply an objective test to consider the harshness of the penalty against the gravity of the offense. *State v. Seering*, 701 N.W.2d 655, 670 (Iowa 2005). In a rare case where a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality, we then apply a proportionality analysis. *Id.* We consider (1) the gravity of the offense in relation to the harshness of the penalty; (2) the severity of the sentence when compared to the sentences imposed for similar crimes in the same jurisdiction; and (3) the severity of the sentence when compared to sentences imposed for similar crimes in other jurisdictions. *Solem v. Helm*, 463 U.S. 277, 291, 103 S. Ct. 3001, 3010, 77 L. Ed. 2d 637, 649-50 (1983).

A sentencing enhancement based on a defendant's status as a habitual offender does not violate the prohibition against cruel and unusual punishment. *See State v. Snyder*, 426 N.W.2d 662, 663 (Iowa Ct. App. 1988). Our supreme court has determined there is nothing cruel or unusual about punishing a person who has committed two crimes more severely than a person who has committed

only one crime. *See State v. August*, 589 N.W.2d 740, 744 (Iowa 1999). Also, the United States Supreme Court has found that an enhanced sentencing penalty for a "third-strike" defendant did not clearly violate the Eighth Amendment. *Lockyer v. Andrade*, 538 U.S. 63, 77, 123 S. Ct. 1166, 1176, 155 L. Ed. 2d 144, 159 (2003).

We conclude Hoosman has failed to meet the threshold requirement to show that his sentence is grossly disproportional to the crime committed. We note that substantial deference is afforded the legislature in setting the penalty for crimes. *Cronkhite*, 613 N.W.2d at 669. We give legislative pronouncements of terms of punishment a strong presumption of constitutionality. *Lara*, 580 N.W.2d at 785. Because we have found the term of imprisonment is not grossly disproportionate to the crime charged, no further analysis is necessary. *Cronkhite*, 580 N.W.2d at 669. We conclude the sentence in this case does not subject Hoosman to cruel and unusual punishment.

III. Recusal of Judge

Hoosman claims Judge Bauch abused his discretion by failing to recuse himself from the district court proceedings. At the second trial, Hoosman asked Judge Bauch to recuse himself because he had prosecuted him on a 1979 charge, and been the presiding judge during a 1991 trial. Judge Bauch was initially listed as a witness for the second trial, but the parties agreed he would not be called. Judge Bauch recused himself during the third trial because he was called as a witness. Hoosman also asked Judge Bauch to recuse himself as the

sentencing judge for the same reasons outlined above, and because he had been a witness in the proceedings.

Iowa Court Rule 51, Canon 3(C)(1) provides, "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." While there is a constitutional right to a neutral and detached judge, mere speculation as to judicial bias is not sufficient to prove the grounds necessary for recusal. *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994). Only personal bias or prejudice stemming from an extrajudicial source constitutes a disqualifying factor. *State v. Millsap*, 704 N.W.2d 426, 432 (Iowa 2005). A judge's perception or attitude arising from the judge's participation in a case is not a disqualifying factor. *Id.*

A party seeking recusal of a judge has the burden of showing the grounds for recusal. *Taylor v. State*, 632 N.W.2d 891, 894 (Iowa 2001). A party must show actual prejudice before recusal is necessary. *State v. Sinclair*, 582 N.W.2d 762, 766 (Iowa 1998). A judge must consider "whether reasonable persons with knowledge of all facts would conclude that the judge's impartiality might be questioned." *Mann*, 512 N.W.2d at 532. We will not reverse a judge's decision on whether or not to recuse unless there has been an abuse of discretion. *Millsap*, 704 N.W.2d at 432.

We find Judge Bauch did not abuse his discretion, under the facts of this case. Hoosman has not shown that Judge Bauch had any personal bias or prejudice arising from an extrajudicial source. Although Judge Bauch had contact with Hoosman from previous criminal cases, this is not an "extrajudicial"

source, and furthermore, Judge Bauch stated he did not remember Hoosman. Hoosman has not shown any actual prejudice due to Judge Bauch's participation in the present case. We note Judge Bauch properly recused himself from the proceeding where he was called as a witness by Hoosman.

IV. Motion for Mistrial

Hoosman asserts the district court erred by not granting him a mistrial during his first trial. He claims that the testimony by officer Sullivan that he previously resisted arrest should be deemed inadmissible under Iowa Rule of Evidence 5.404(*b*). Hoosman claims he is entitled to a new trial that is not tainted by evidence of his prior bad acts.

The State claims that Hoosman's motion for a mistrial was untimely. A mistrial motion must be made when the grounds for it first become apparent. *State v. Jackson*, 422 N.W.2d 475, 479 (Iowa 1988). Here, while defense counsel asked to approach the bench after officer Sullivan's testimony, he did not make a formal motion for a mistrial at that time. Only later, after Sullivan's testimony was completed, did Hoosman seek a mistrial. We seriously question whether error has been preserved in this case.

Even if we were to find the mistrial motion to be timely, however, we determine the district court did not abuse its discretion in denying the motion. A trial court has wide discretion in considering a motion for a mistrial. *State v. Piper*, 663 N.W.2d 894, 901 (Iowa 2003). An abuse of discretion will be found only when a defendant shows prejudice which prevents a fair trial. *See State v. Trudo*, 253 N.W.2d 101, 106 (Iowa 1977). The trial court is in a better position to

observe the matters raised in a mistrial motion, and to ascertain its effect on the jury. *State v. Brotherton*, 384 N.W.2d 375, 381 (Iowa 1986). Here, officer Sullivan did not testify that Hoosman was violent, as defense counsel alleged, but instead merely stated, "he's been known to resist before." The district court did not abuse its discretion in denying the motion for a mistrial.

V. Ineffective Assistance

Finally, Hoosman contends that he received ineffective assistance because his defense counsel did not object to evidence that there was an outstanding warrant against him. As noted above, the parties apparently agreed the officers could testify there was an arrest warrant out for Hoosman, but they could not state what it was for. Hoosman now claims that his counsel should not have entered into this agreement.

Our review on this constitutional issue is de novo. *Berryhill v. State*, 603 N.W.2d 243, 244-45 (Iowa 1999). To prevail on a claim of ineffective assistance of counsel, Hoosman must prove (1) his attorney failed to perform an essential duty and (2) prejudice resulted to the extent he was denied a fair trial. *See State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998).

We determine this issue should be preserved for possible postconviction proceedings. *See State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). ("Ordinarily, ineffective assistance of counsel claims are best resolved by postconviction proceedings to enable a complete record to be developed and afford trial counsel an opportunity to respond to the claim."). From the record on appeal it is not clear if there was an agreement between the parties, and if there

was such an agreement, defense counsel's reasons for entering into the agreement.

We affirm Hoosman's conviction.

AFFIRMED.