IN THE COURT OF APPEALS OF IOWA

No. 8-122 / 07-0723
Filed March 26, 2008

JERRY LEE COLE JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

Jerry Lee Cole Jr. appeals from the district court's denial of postconviction relief from his convictions for two counts of attempted murder and two counts of willful injury. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, and Ralph Potter, County Attorney, for appellee State.

Considered by Huitink, P.J., and Zimmer and Miller, JJ.

ZIMMER, J.

Jerry Lee Cole Jr. appeals from the district court's denial of postconviction relief from his convictions for two counts of attempted murder and two counts of willful injury. He contends the district court erred in denying his claim of an illegal sentence because his convictions for willful injury should have merged with his convictions for the greater offense of attempted murder. We affirm.

I. Background Facts and Proceedings.

On April 11, 2001, Ron Mormann and Deanna Johnson were sitting in Mormann's truck in Dubuque County. A blue van drove alongside Mormann's vehicle. Cole got out of the van and exchanged some words with Mormann. Cole then turned Mormann around and shot him in the back of the head. Mormann dropped to the ground and pretended to be dead. Cole then walked around to the passenger side of Mormann's truck and shot Johnson in the back of the head and chest. Cole stood near the passenger side of Mormann's truck for a while and then left. Mormann was able to call for help on his cell phone after Cole left the area.

On April 20, 2001, the State charged Cole with two counts of attempted murder in violation of Iowa Code section 707.11 (1999), first-degree robbery in violation of section 711.2, and two counts of willful injury in violation of section 708.4(1).

The State and Cole eventually reached a plea agreement.[1] Cole agreed to enter a guilty plea to two counts of attempted murder and two counts of willful

[1] The agreement was reduced to writing and signed by Cole, his attorneys, and the prosecuting attorney.

injury. In return, the State agreed to dismiss the charge of robbery in the first degree. The terms of the plea agreement provided that Cole would receive a specific combination of concurrent and consecutive sentences for the two counts of willful injury and the two counts of attempted murder. The parties agreed his total sentence would be forty years. The agreement was conditioned on the trial court's agreement to be bound by the terms of the negotiated agreement.

Cole appeared before a district court judge on April 26, 2002, and tendered pleas of guilty to two counts of attempted murder and two counts of willful injury. The district court agreed to be bound by the parties' plea agreement, accepted the pleas of guilty entered by Cole, and scheduled sentencing.

On May 28, 2002, Cole appeared in district court for sentencing. The court sentenced Cole to a term not to exceed twenty-five years on both counts of attempted murder to run concurrently, up to ten years for one count of willful injury to run consecutively, and up to five years for one count of willful injury to run consecutively for a total sentence of forty years. The sentences imposed were consistent with the parties' plea agreement, and Cole made no claim that his sentences should merge. As provided in the parties' plea agreement, the court dismissed the charge of robbery in the first degree. Cole did not appeal from his convictions.

On November 16, 2006, Cole filed a pro se motion to correct an illegal sentence. The district court treated Cole's motion as an application for postconviction relief and appointed counsel to represent Cole in that proceeding. His counsel filed an application for postconviction relief, which challenged the

legality of Cole's sentence and also raised a number of other claims. On March 28, 2007, a postconviction hearing was held. Cole withdrew all grounds for postconviction relief except the original challenge to the legality of his sentence. No witnesses were called at the hearing.

On April 3, 2007, the district court entered its ruling denying Cole postconviction relief from his convictions. In its ruling, the court concluded that willful injury was not a lesser-included offense of attempted murder and therefore, the sentences originally imposed were not illegal.

Cole now appeals from the postconviction court's decision.

II. Scope and Standards of Review.

An illegal sentence may be corrected at any time. Iowa R. Crim. P. 2.24(5); *State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995). To the extent Cole presents a constitutional double jeopardy claim, our review is de novo. *State v. Godbersen*, 493 N.W.2d 852, 854 (Iowa 1992). To the extent he claims a violation of Iowa Code section 701.9, our review is on error. Iowa R. App. P. 6.4.

III. Discussion.

Cole argues that his convictions for attempted murder and willful injury of Mormann, as charged in Counts I and IV of the trial information, should have merged and that his convictions of attempted murder and willful injury of Johnson, as charged in Counts II and V, should have merged. His brief on appeal acknowledges that his claim raises a "potential challenge to established precedent," and he argues "there is a conflict among the decisions of the Iowa Supreme Court" regarding the issue he presents. For the following reasons, we

conclude the district court was correct in concluding Cole is not entitled to merger of his willful injury and attempted murder convictions.

Iowa Code section 701.9 codifies the double jeopardy protection against multiple punishments for the same offense. That section provides:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Iowa Code § 701.9; *see also* Iowa R. Crim. P. 2.6(2). Under this provision, the lesser-included offense merges into the greater offense and judgment is to be entered only on the greater offense. *See Halliburton*, 539 N.W.2d at 343-44. If the Double Jeopardy Clause is not violated because the legislature intended double punishment, section 701.9 is not applicable and merger is not required. *State v. Finnel*, 515 N.W.2d 41, 44 (Iowa 1994); *State v. Gallup,* 500 N.W.2d 437, 445 (Iowa 1993).

The Double Jeopardy Clause prohibits multiple punishments for the same offense. *Garrett v. United States*, 471 U.S. 773, 777-78, 105 S. Ct. 2407, 2410-11, 85 L. Ed. 2d 764, 770-71 (1985). In deciding whether a punishment is constitutionally permissible under the Double Jeopardy Clause, we look to what punishment the legislature intended to impose. *Finnel*, 515 N.W.2d at 43. In determining legislative intent, we decide whether the crimes meet the legal elements test for lesser-included offenses. *Id.*

To apply the legal elements test for lesser-included offenses, we compare the elements of the two offenses to determine whether it is possible to commit the greater offense without also committing the lesser offense. *State v. Lewis*,

514 N.W.2d 63, 69 (Iowa 1994). When we compare the elements of willful injury and attempted murder, we recognize that willful injury requires the State to prove the victim suffered a serious injury while serious injury is not an element of attempted murder.[2] As the State points out, our supreme court has previously held that willful injury is not a lesser-included offense of attempted murder. *State v. Clark*, 475 N.W.2d 193, 196 (Iowa 1991) ("Application of the legal elements test plainly demonstrates that willful injury is not a lesser-included offense of attempted murder."). Our court has reached a similar conclusion. *State v. Adcock*, 426 N.W.2d 639, 640 (Iowa Ct. App. 1988).

On appeal, Cole suggests that we should apply a fact-based analysis and conclude that willful injury is a lesser-included offense of attempted murder under the circumstances of this case. However, we do not believe that approach is the appropriate test to be used in determining what punishment the legislature intended to impose. *See State v. Webb*, 313 N.W.2d 550, 552 (Iowa 1981) (explaining "the legal test for identifying lesser included offenses depends on the statutory definition of the greater offense rather than the evidence by which the offense may be proved in a particular case").

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[2] The elements of attempted murder, as set forth in Iowa Uniform Criminal Jury Instruction No. 700.21, include:

1. The defendant committed an act or acts.
2. By his act or acts, the defendant expected to set in motion a force or chain of events which could have caused or resulted in the death of the victim.
3. When the defendant acted, he specifically intended to cause the death of the victim.

The elements of willful injury include, as defined in Iowa Uniform Criminal Jury Instruction No. 800.10, include:

1. The defendant assaulted the victim.
2. The defendant specifically intended to cause a serious injury to the victim.
3. The victim sustained a serious injury.

Cole argues that strict application of the elements test has been "diluted" by our supreme court's decision in *State v. Hickman*, 623 N.W.2d 847 (Iowa 2001). We disagree. In *Hickman*, the court noted that in applying the elements test "it is not necessary that the elements of the lesser offense be described in the statutes in the same way as the elements of the greater offense." 623 N.W.2d at 850. Thus, the court held that "purposely inflicted or attempted to inflict a serious injury" described the same element as "specifically intended to cause a serious injury." *Id.* at 852. Because the court determined that the legislature intended to convey the same thought in those phrases, the court concluded that it is impossible to commit first-degree robbery under the purposely-inflicts-serious-injury alternative without also committing willful injury and, therefore, the two offenses must merge. *Id.* In this case, however, we question whether there is a legitimate issue as to whether any elements of willful injury and attempted murder were intended by the legislature to convey the identical thought and, therefore, the identical element. Moreover, we note, as the district court did in denying Cole postconviction relief, that our supreme court in *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006), has recently reaffirmed the application of the "impossibility test," which provides that in looking solely at the elements of the offense in question, one offense is a lesser-included offense of the greater when the greater offense cannot be committed without also committing the lesser. We are not convinced that our supreme court's decision in *Hickman* "dilutes" prior precedent to the extent that we must find that Cole's convictions for willful injury merge with his convictions for attempted murder.

Like the district court, we conclude the parties' plea agreement was based on a proper interpretation of existing law which permits a defendant to be sentenced for both attempted murder and willful injury.[3] Therefore, we reject Cole's contention that his convictions should be merged because willful injury is a lesser-included offense of attempted murder, and we affirm the district court's denial of Cole's application for postconviction relief.

AFFIRMED.

[3] Because we reach this conclusion, we find it unnecessary to address the State's argument that the charges of willful injury and attempted murder of Johnson were based on separate acts and would not merge even if the offenses were lesser and greater offenses of each other.