

IN THE COURT OF APPEALS OF IOWA

No. 9-892 / 08-0917
Filed January 22, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARSHALL CALVIN NICKELSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Douglas S. Russell,
Judge.

A defendant appeals from the special sentence imposed under Iowa Code
section 903B.1 (2007) upon his conviction for third-degree sexual abuse.

AFFIRMED.

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

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant
Attorney General, Harold Denton, County Attorney, and Jerry Vander Sanden,
Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

VAITHESWARAN, J.

A jury found Marshall Nickelson guilty of third-degree sexual abuse. The district court sentenced him to an indeterminate prison term of ten years as well as a special life sentence pursuant to Iowa Code section 903B.1 (2007).

On appeal Nickelson contends his trial attorney was ineffective in failing to challenge the constitutionality of section 903B.1.¹ He argues that section 903B.1 violates (1) the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution; (2) the separation of powers doctrine of the Iowa Constitution; (3) the Equal Protection Clause of the United States Constitution; and (4) the Due Process Clauses of the United States and Iowa Constitutions.

We begin with Nickelson's Eighth Amendment challenge. The Iowa Supreme Court addressed and rejected a virtually identical challenge in *State v. Wade*, 757 N.W.2d 618, 623–24 (Iowa 2008). There, the court held that a

¹ This section provides:

A person convicted of a class "C" felony or greater offense under chapter 709, or a class "C" felony under section 728.12, shall also be sentenced, in addition to any other punishment provided by law, to a special sentence committing the person into the custody of the director of the Iowa department of corrections for the rest of the person's life, with eligibility for parole as provided in chapter 906. The special sentence imposed under this section shall commence upon completion of the sentence imposed under any applicable criminal sentencing provisions for the underlying criminal offense and the person shall begin the sentence under supervision as if on parole. The person shall be placed on the corrections continuum in chapter 901B, and the terms and conditions of the special sentence, including violations, shall be subject to the same set of procedures set out in chapters 901B, 905, 906, and chapter 908, and rules adopted under those chapters for persons on parole. The revocation of release shall not be for a period greater than two years upon any first revocation, and five years upon any second or subsequent revocation. A special sentence shall be considered a category "A" sentence for purposes of calculating earned time under section 903A.2.

related ten-year special sentence contained in Iowa Code section 903B.2 was “not cruel and unusual punishment.” *Wade*, 757 N.W.2d at 624. The court reasoned that “[a]ny additional imprisonment [under section 903B.2] will be realized only if Wade violates the terms of his parole.” *Id.*; accord *State v. Tripp*, ____ N.W.2d ____, ____ (Iowa 2010) (“[T]he extent of any additional punishment for a violation of the conditions of parole, if any, is speculative and will only be realized if Tripp violates the terms of his parole (a state of facts which has not occurred).”).

Section 903B.1 mirrors the provisions of section 903B.2 in most material respects.² Although the sentence is longer, section 903B.1 also provides for imprisonment only if the terms and conditions of the sentence are violated. For that reason, we conclude *Wade* is controlling and section 903B.1 does not amount to cruel and unusual punishment under the Eighth Amendment to the United States Constitution. See also *Tripp*, ____ N.W.2d at ____ (determining defendant’s Eighth Amendment challenge to section 903B.1 was not ripe for adjudication “until the length of [the defendant’s] parole and the extent of his supervision are determined”).

Nickelson also argues that even if the special sentence alone is not cruel and unusual punishment, the requirement that he register with the state’s sex offender registry and the accompanying residency restrictions “in tandem” with the special sentence create a “cumulatively cruel and unusual punishment.” See Iowa Code §§ 692A.2(1) (sex offender registration), 692A.2A (residency

² Section 903B.1 applies to class “C” felony or greater sex offenders, while section 903B.2 applies to class “D” felonies and misdemeanors.

restriction). This argument must fail because, as Nickelson acknowledges, the registration requirement and residency restriction are not “punishment.” See *State v. Willard*, 756 N.W.2d 207, 212 (Iowa 2008) (stating that “being subject to the residency restrictions [of Iowa Code section 692A.2A] is not punishment”); *State v. Pickens*, 558 N.W.2d 396, 400 (Iowa 1999) (holding that the registration requirement of section 692A.2(1) is remedial and not punitive). Therefore, the special sentence in combination with these provisions cannot add to the “punishment” imposed.

Nickelson next raises a separation of powers challenge to section 903B.1. In *Wade*, the Iowa Supreme Court rejected a similar challenge to section 903B.2, stating,

To the extent there are consequences from a parole violation, such decisions are executive or administrative decisions and no judicial function is involved. The consequences of a parole violation under Section 903B.2 do not involve sentencing functions and therefore the statute does not violate the separation-of-powers doctrine.

757 N.W.2d at 628. This rationale applies equally to section 903B.1. Accordingly, we conclude *Wade* is controlling.

We turn to Nickelson’s equal protection challenge to section 903B.1. This court rejected an identical challenge in *State v. Kingery*, 774 N.W.2d 309, 313 (Iowa Ct. App. 2009) (finding *Wade* dispositive of an equal protection claim under section 903B.1). That opinion is controlling.³

³ We note that the equal-protection claim in *Wade* was based on a different classification than that raised here. In *Wade* the defendant challenged the differential treatment of serious misdemeanor and felony sex offenders. 757 N.W.2d at 625. Here, Nickelson challenges the treatment of sex offenders versus other criminal offenders. The court in *Wade* nevertheless addressed the sex-offender and other criminal-offender classification, concluding “that sex offenders are not similarly situated to other criminal offenders, and therefore, under this challenged classification, Iowa Code section 903B.2

We are left with Nickelson’s due process challenges to section 903B.1. His procedural due process challenge is based on the absence of procedures governing possible future proceedings “to implement the revocation of the defendant’s release upon an assertion that defendant has violated a rule of supervision.” This claim is not ripe for adjudication. See *Wade*, 757 N.W.2d at 627 (“A case is ripe for adjudication when it presents an actual, present controversy, as opposed to one that is merely hypothetical or speculative.”). His substantive due process challenge is identical to the one raised and rejected in *Kingery*, 774 N.W.2d at 313–15. That opinion is controlling.

In sum, we conclude section 903B.1 does not violate the specified provisions of the United States or Iowa Constitutions. Accordingly, Nickelson’s trial attorney was not ineffective in failing to challenge that provision on these grounds. See *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009) (stating counsel has no duty to raise a meritless issue). We affirm the imposition of the special sentence under section 903B.1.

AFFIRMED.

does not violate equal protection.” *Id.* at 626. *Wade* is therefore dispositive, as this court concluded in *Kingery*.