IN THE SUPREME COURT OF IOWA

No. 20-0375

TRAVIS BOMGAARS, KYLE CROSS, ANTHONY GOMEZ, JAMES HALL, RAYMOND LABELLE, SHANE MILLETT, KELLY SAND,

Appellants,

v.

STATE OF IOWA,

Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY
HONORABLE BRAD MCCALL, JUDGE

APPELLANT'S FINAL REPLY BRIEF

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ROUTING STATEMENT

The parties are in agreement that the case should be retained by the Supreme Court.

The is a case of first impression regarding the Department of Corrections (DOC) practice of placing inmates into the Sex Offender Treatment Program (SOTP) based solely on a person's discharge date. The practice affects almost all of the estimated 1600 inmates in the custody of the DOC who are classified as needing SOTP. The practice creates what is referred to as a "silent mandatory" sentence.

In Belk v. State, 905 N.W.2d 185 (Iowa 2017) the Iowa Supreme Court held that this kind of claim could be presented in a postconviction case. Belk did not resolve the merits of the claim.

These consolidated postconvictions were filed based on Belk. The merits of the claim are now presented.

Purposes of a Reply Brief

In any reply brief, it is appropriate to do three things. First, the brief can update the case law if there have been any changes in the time since the original brief. There is no such new law.

Second, the brief can point out where there is an agreement as to certain points, perhaps because they are not contested.

Finally, the brief can reply to specific statements by the State in its brief.

STATEMENT OF THE CASE

Nature of the Case and Course of Proceeding:

While there was no disagreement about what was the procedure below, there should be several comments about that procedure, including it limitations.

In Belk v. State, 905 N.W.2d 185 (Iowa 2017) the Iowa Supreme Court authorized Belk to bring his complaint about the DOC's "silent mandatory" under the postconviction statute. The Court said it could be brought under postconviction subsection 822.2(1)(e).

In Belk, the primary question was whether the case could be brought under the postconviction statute at all. The State had argued that it had to be brought under the Administrative Procedures Act.

In identifying 822.2(1)(e), the Supreme Court selected a particular section of Chapter 822 that had implications to the cases below.

First, as is discussed in part IV of the brief, that subsection does not allow for the payment of any appointed counsel. See Section 822.5. Consequently, while counsel was originally appointed in the seven cases, that order was later set aside. Counsel for the Applicants had understood this was likely to happen.

Secondly, venue for an action under 822.2(1)(e) is the county of conviction, rather than the county of incarceration.[1] In the cases below, the State belatedly

[1] Under Section 822.2(1)(f), the provision primarily used in prison disciplinary cases, venue is also in the county of incarceration.

filed a Motion for Change of Venue, seeking to scatter the seven cases that had been already set for a consolidated trial in Jasper County. (Appx. 187) Changing venue would have scattered the cases to seven counties where they would presumably have been tried at separate times with separate judges.

Judge McCall denied the Motion for a change of venue, finding that any challenge to venue had been waived. Appx. 189.

A final procedural limitation occurs because of an assumption that this action was against the DOC and not the Parole Board. Certainly the action was defended by the Assistant Attorney General who represents the DOC. The Parole Board representative appeared as a witness. The Board was not an actual party. Ideally you would want both agencies before the Court for the proceeding.

The problem is that actions against the Parole Board maybe have to be brought under the Administrative Procedures Act. See Bonilla v. Board of Parole, 930 N.W. 2d 751 (Iowa 2019); Maghee v State, 773 N.W. 2d 228 (Iowa 2009); and Pettit v Iowa Department of Corrections, 891 N.W. 2d 189 (Iowa 2017).

Certainly the Supreme Court in these cases has said that actions that primarily involve the DOC should be brought under Chapter 822. At the same time it would seem better practice to have the Parole Board involved in the Court action. Perhaps counsel for the Applicants could have more forcefully argued that the action was against both agencies.

You would like to have both agencies present as each agency can point fingers at the other agency.

In the end, the claim below was fashioned as a claim against the DOC. Indeed that is correct as the primary fault would seem to lie with the DOC. They allowed the log jam with sex offenders to develop over the last 15 years.

At the same time, there is the reality that the BOP should share in some responsibility for this practice having developed. 15 years ago the Parole Board played a role in determining when SOTP began. Not only did they give up that role, but they adopted the practice where they would not release anyone unless or until they completed SOTP.

STATEMENT OF FACTS

Whether the DOC behaved or is behaving reasonably, in placing inmates into treatment is to some extent dependent on a determination of what are the facts. A decent factual record was made about the current practice before Judge McCall.

<u>These facts are not in dispute</u>

1. As of September 2019, there were 1,600 inmates in DOC prisons, classified as needing the Sex Offender Treatment Program (SOTP).

2. As of September 2019, there were about 170 inmates in treatment at the Newton Correctional Facility (NCF). With additional staff they might be able to increase that number to perhaps 200. PCR Trans. p. 65, lines 18-20. At that

point there would seem to be limitations unless money is appropriated for construction. PCR Trans. p. 78-79, lines 21-25, 1-10.

3. Since the classed run for 3-4 months, at the moment perhaps 510 can get SOTP in one year. That would increase to 600 with additional staff.

4. Only about 2/3 of participants complete the program.

5. There are more people needing SOTP than beds, by a lot.

6. Placement in SOTP is primarily determined by a waiting list, or more specifically four waiting lists.[2] Placement on these waiting lists is mostly determined by a person's discharge date from prison (TDD).

7. Track I and Track II people were starting treatment about the same time. PCR Trans. p. 66-67, lines 21-25, 1-16.

8. As new people enter prison who need SOTP, whether because of a new sentence or a revocation of a special parole, they are inserted into the waiting list, based on their TDD. A new person can jump over others if they have a short sentence. People who fail the class are also recycled back into the list.

9. The waiting list as a method of determining the date of treatment has been around at least since 2007. PCR Trans. p. 54, lines 5-20.

10. Most of the treatment for men occurs at NCF. The program was moved from the Mount Pleasant Correctional Facility (MPCF) in about 2015.

[2] There are separate waiting lists for low to moderate risk offenders(Track I), higher risk offenders (Track II), special needs offenders, and offenders who primarily speak Spanish. The seven applicants were track I individuals.

11. About ten years ago, when the program was at MPCF, SOTP would be completed within a few months of the TDD. PCR Trans. p. 64, lines 6-7.

12. As of September 2019, the average graduating inmate will finish treatment about 9-12 months prior to the TDD. PCR Trans. p. 85, lines 7-9.

13. 2018-2019 was the first year where progress was made on the waiting list. That meant more people completed the program than got on the list for SOTP. PCR Trans. p. 104, lines 22-23. There was no testimony as to what that number was.

14. Progress was minimal. These numbers were not disputed by the State:

a. 175 inmates in treatment at any one time.

b. 2/3 graduation rate.

c. 3 groups per year

d. That meant 350 graduated/ year (175 times 3 divided by 2/3= 350)

e. 296 new people who need SOTP come into the system. (New sentences and revocations needing SOTP.)

d. That means the sum of all the waiting lists was reduced by at the most 54 during that one year of progress.

15. With additional staff meaning more groups, maybe they can raise the 175 number to 200. That raises the graduating number by about 17. (1/3 will not graduate.) This results in maybe 70 graduates above new people.

16.The Board of Parole (BOP) plays no role in determining where a person is on the waiting list.

17. The BOP will not release a person, classified as needing SOTP, prior to their tentative discharge date unless or until they have completed treatment. PCR Trans. p. 32, lines 4-10.

18.As of 2003, the timing of when a person went to SOTP was affected by the Iowa BOP. The BOP would code a person as 'ready for treatment.' At that point the DOC would place the inmate into treatment, with release to follow completion. After about 2007 the Board stopped using that code.

19.The seven Applicants all are classified as needing SOTP. As of the time of the hearing in September, 2019, none had started treatment.[3]

This matter is not contested as the State chose not to respond to the factual matter

Judge McCall at page 8 of his ruling noted a high rate of recidivism among untreated sex offenders, quoting the Iowa Supreme Court as saying the risk of recidivism was "frightening and high." Ruling pg. 8, Appx. 124. This had not been an argument advanced by the State before Judge McCall. This quotation did not come from any State's brief. In the opening brief in this case, Appellants

[3] Kyle Cross began treatment in September, 2020.

questioned that language and the underlying conclusion about a high rate of reoffending. See final brief, p. 48-51.

It should be noted that the State did not engage on this issue in its brief. The State presented no contrary evidence with regard to rate of reoffending. The State did not argue that the reference to a "frighteningly high" rate of reoffending was in fact substantiated.

There are some facts from the State's brief that require a response.

1. The State starts its factual discussion by referring to Code Section 903A.2(1)(a)(2). That statute was amended, effective July of 2018. (p.10) The 2018 amendment adopted the interpretation of 903A.2 that had been rejected by the Iowa Supreme Court in State v. Iowa District Court for Jones County, 902 N.W.2d 811 (Iowa 2017). The issue was whether an inmate would lose all accrued earned time if they were removed from or refused SOTP. The Iowa Supreme Court held that the DOC could not change a long established interpretation, without legislation.

The change in law only applies to crimes committed after July 1, 2018. All of the Applicants had crimes prior to that date. All, however, have acknowledged their offense and are in fact pursuing this legal remedy to get into treatment.

2. At page 12 of the State's brief, statistics are given for the length of the four waiting lists at the Newton Correctional Facility (NCF). Those numbers add up to 763. Those numbers reflect sex offenders awaiting treatment who are, in fact, housed at NCF. PCR Trans. p. 111-112, lines 15-25, 1-2.

According to the most recent statistics from the Department there were 888 inmates housed at NCF houses. See https://doc.iowa.gov/daily-statistics.

There were 1600 inmates waiting for SOTP throughout the prison system. PCR Trans. p. 112, line 5. That means perhaps 700 inmates who need treatment are not at NCF and therefore not on the waiting lists. As their TDD gets close to the point where they could do treatment based on the waiting list, they are transferred to NCF.

ARGUMENT

I. ALL SEVEN INMATES PRESENT CLAIMS THAT ARE RIPE FOR JUDICIAL CONSIDERATION.

The State argues that six of the seven inmates cannot be in court at this time because they cannot show a claim that is "ripe for review" (State's Brief page 15). The suggestion is that all but Kyle Cross cannot show the delay in treatment has hurt them with the BOP.

There really is a live controversy.

In State v. Tripp, 776 N.W. 2d 855 (Iowa 2010) the Iowa Supreme Court discussed ripeness. This is what the case said:

> A case is ripe for adjudication when it presents an actual, present controversy, as opposed to one that is merely hypothetical or speculative. *Wade,* 757 N.W.2d at 626–27. The ripeness doctrine is intended
>
> > "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."
> > *State v. Iowa Dist. Ct.,* 616 N.W.2d 575, 578 (Iowa 2000)
>
> State v. Tripp, 776 N.W.2d 855, 859 (Iowa, 2010)

First, it is not disputed that placement of Applicants into SOTP has not occurred because of the waiting list. For example, Raymond LaBelle has been in prison for almost 10 years for a non forcible felony. He is still some distance from treatment.

Second, it is clear that the BOP will not consider Applicants for release until they complete SOTP.

Finally, there is a good record in this case from the representatives of the BOP and the DOC as to how the present system works. There is nothing 'speculative' about the policy in question.

There is a public policy exception to the mootness doctrine. See McGee v. State, 773 N.W.2d 228 (Iowa 2009). Under that exception, a case can be addressed

on appeal if there is a "substantial public interest". The exception looks at such factors as the desirability of an authoritative adjudication to guide public officials in the future, and the likelihood the issue will recur yet evade appellate review.

The same public interest exception should apply to the ripeness doctrine, if in fact it impacts this case.

Ironically, the State suggests that only Kyle Cross has a ripe controversy. The State may well come in at a later date, which is not too far in the future, to say that Cross's claim has become moot. That would be because Cross is the one of the seven which has actually gotten into treatment.

The Court should reject the argument that the claims are not ripe.

II. INMATES HAVE A PROTECTED LIBERTY INTEREST IN PAROLE, GIVEN THE WORDING OF THE IOWA PAROLE STATUTE

The State argues that there is no constitutionally protected liberty interest in the parole granting process in Iowa. The State cites in support of this proposition the dissenting opinion in the Belk case, written by Justice Waterman. (State's brief at page 18.)

There is of course the fact that Justice Waterman was in the minority in Belk. The more important problem with Justice Waterman's analysis is that while he cites Greenholts v. Nebraska Penal Inmates case, 442U.S. 1, 99 S.Ct. 2100, 60

L.Ed.2d 668 (1979), he does not discuss Board of Pardons v. Allen, 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987).

Justice Wiggins, writing for the majority in Belk, made clear that Board of Pardons was the important case. 905 N.W. 2d at 190.

Those two United States Supreme Court cases, Greenholtz and Board of Pardons, taken together, establish that whether there is a protected interest depends on the language of the particular state's parole statute. When you compare the Iowa statute with the statute in Montana in Board of Pardons, they are virtually identical.

Neither the State nor Justice Waterman engaged in this comparison of the statutes.

III. THE DOC WAITING LIST POLICY UNREASONABLY INTERFERES WITH THE IOWA PAROLE STATUTE.

The facts of the case make clear that the Iowa DOC, with an assist from the Iowa BOP, unreasonably deprive sex offenders, including the applicants, of a meaningful opportunity to be released on parole.

Sex offenders in prison in Iowa do not get released on parole until near the end of their prison sentences, despite the fact that they have no mandatory minimum sentence. They only go to treatment based on a cold calculation by the DOC using their TDD as the primary variable.

How is the practice unreasonable, a 'pocket veto,' as the term is used in the Bonilla case.

1. The practice is unreasonable because it treats all sex offenders pretty much the same. There is more individual consideration today than there was 10 years ago. However the calculation is still a cold one, primarily dependant on the TDD.

2. The practice is unreasonable because it fails to consider individual factors including:

a. Institutional adjustment, including programs completed.

b. Prior criminal record.

c. Whether the crime was a forcible felony.

d. Whether the person is low risk to reoffend.

e. Whether the total sentence is 5 years or 40.

f. How much time the person has served.

3. It is unreasonable to require everyone to do SOTP in prison. Some offenders in prison have actually started treatment on probation. Cross is one such person. All the judicial districts have their own versions of SOTP, which thanks to a consistency study a few years ago, means they use the same curriculum as the DOC. It is unreasonable to not even consider this as a possibility when there is this kind of demand for the DOC classes.

What should happen is that the DOC should recommend low risk offenders to the Parole Board for consideration of treatment in the communities.

4. Perhaps the biggest reason the practice is unreasonable is that it fails to involve the Board of Parole in the decision of when to do treatment. The Board of Parole is after all the agency that is supposed to look at all these individual factors and make decisions on release.

This lack of involvement by the Board was not always the case. 15 years ago placement into treatment was a collaborative decision.

Response to the argument that the DOC is doing the best they can.

The State argues that, at least at this point, the DOC is doing the best it can. They argue, as did the treatment director, that if there are only so many beds and too many sex offenders, prioritizing based on release date is the only thing they can do.

This argument was accepted by Judge McCall. He suggested that there may have been something unreasonable ten years ago, but that was not the case today. See Ruling dated January 30, 2020, p. 18-19; Appx. 134-135.

This argument should be rejected.

(1) The DOC should not be able to rely on the argument that the waiting list is the only thing they can do, when they presumably spent 10 years getting themselves in this position.

Indeed the DOC has moved SOTP to a more efficient prison, shortened treatment classes, added more facilitators, and increased the number of graduates. They did not appear to have been doing these things from 2005-2015. If there were not enough beds to prevent sex offenders serving their entire sentence, then there should have been more beds added. Classes should have been shortened at that point.

The steps being taken in the last 2 to 5 years are commendable. They should not allow the court to overlook the fact that the DOC got themselves into this mess.

(2) Doing the best the DOC can still means that the Applicants will spend their entire prison sentence, less perhaps 12-18 months in prison. That was not the sentence that was presumably anticipated by the sentencing parties at the time.

(3) Progress in the last year was not really all that much. Maybe the Applicants can go to treatment 6 months earlier than would have been the case a few years ago. There is still a mandatory minimum sentence, it is just not quite as long.

(4)The DOC actually does have alternatives. Low risk individuals with non-forcible sex felonies could do SOTP in the community under supervision. After all, virtually all sex offenders today have special sentences.

The DOC participated in the consistency efforts in the last five years to ensure that the same curriculum was used by the DOC and the parole offices. PCR

Trans. p. 56, lines 9-25. Community based corrections could now handle SOTP for those low risk offenders.

The DOC could also set up SOTP programs at other prisons.

Specific response to Judge McCall's math

Applicants spent some time in the opening brief discussing Judge McCall's mathematics. See Applicant's brief, page 54-57. Judge McCall had suggested in his ruling that the DOC was going to be able to eliminate entirely the waiting list in four years. Appx. 134. This factual conclusion allowed Judge McCall to find the State's efforts to be reasonable and therefore lawful.

Judge McCall suggested in his initial ruling that the DOC would in fact be able to eliminate the entire waiting list in 4 years. Ruling page 18, Appx. 134. Judge McCall's math was just incorrect, as he himself recognized in ruling on the Motion to Enlarge.

Judge McCall in denying the Motion to Enlarge said that even if he had made a mistake on the math, the fact remained that for the first time in years the IDOC was able to graduate more inmates from SOTP than the number of new committed inmates required to participate in SOTP. Ruling page 2, App. 118.

The State's brief says the "focus on the District Court's mathematics is largely unimportant." (page 23)

What is important about both of these responses is that neither addresses the fact that the Judge's mathematics were flawed. Neither addresses the fact that even

if the DOC has made progress, it was small. It is going to be years before the silent mandatory is eliminated, particularly for Applicants.

So what is that math that was problematic?

1. For the year leading up to the hearing, the DOC graduated more people from treatment than came into the system needing SOTP.
2. The Treatment Director never said what that number was.
3. If you look at the numbers, however, the much heralded accomplishment did not make that much of a dent in the waiting list.
4. Even with additional counselors, maybe the DOC can graduate 300 people a year. But, if the historical statistics are correct, close to that number comes into the prison system.
5. The State does not take issue with the fact that it could be 14 to 16 years before the waiting list is largely eliminated.
6. The particular Applicants in the cases below will have long since discharged their sentence serving a substantial portion of the sentence as a silent mandatory.

This court should conclude that as a mathematical fact, whatever reduction in the waiting list that took place in the year prior to the hearing did not make a significant dent in the problem.

IV. THERE SHOULD BE A RIGHT TO COUNSEL FOR A BELK CLAIM UNDER CHAPTER 822.

The legal argument here is not complicated. The parties agree that the Supreme Court ruling in Belk v. State is important and central to the analysis. There are just several things that can be said about the Belk case that are not particularly disputed by the State's brief.

First, the issue presented in Belk was whether Belk's claim could be brought under the postconviction statute or the Administrative Procedures Act. A majority of the Supreme Court said that the claim could be brought under the postconviction statute.

Second, Belk certainly did not discuss the implications of its reference to a particular subsection with regard to the right to counsel.

Appellants are specifically complaining about the sentence they were given. As such, Iowa Code Section 822.2(1)(a) should apply. While the Supreme Court addressed that subsection in Belk, it did not do so in the context of a well-developed record where it has been shown that the DOC practice does in fact give them a silent mandatory minimum sentence.

The Court should also consider whether the claim below could be brought under 822.2(1)(c). That was a subsection recognized by the Iowa Court of Appeals in Mears v. State Public Defender, 2013 WL 2371308 (Iowa App. 2013). The State in its brief does not discuss the Mears case.

Mears involved a complaint that a particular imposed sentence was being improperly administered by the DOC. The DOC was refusing in all cases to give jail credit toward the two year period of revocation of a special sentence. The State Public Defender argued that the claim had to be brought under subsection "e" and therefore no appointed counsel was available. The Court of Appeals found that by not allowing jail credit, the total sentence served could exceed the maximum permitted. The maximum permitted was the two years. Without the jail credit the person could serve two years plus the number of days in jail.

In thinking about the current case and the waiting list practice, you can describe what is happening is that the sentence as being administered by the DOC exceeds the maximum allowed. If the DOC was in fact imposing a mandatory minimum sentence, and that was not authorized by code or imposed by a judge, a challenge could be based on a 822.2(1)(c).

Consider this hypothetical. A court imposes a 5 year mandatory minimum sentence, which by code should be reduced by earned time. See for example Section 903A.6. If the DOC would not give earned time towards the mandatory, a claim could be brought under 822.2(1)(c). Counsel could be appointed and paid. Presumably, the action could be brought by a Motion to correct illegal sentence, where appointed counsel also would be allowed. For cases considering his kind of earned time question in different contexts see Breeden v. Iowa Dept. of

Corrections, 887 N.W.2d 602 (Iowa, 2016) and State v. Coleman, 2016 WL 6825401, at *1 (Iowa,2016).

That essentially is what the applicants are complaining about here. Labelle, for example, is arguing that the ten years he has been required to serve so far, exceeds the sentence he was given, since he was given no mandatory minimum sentence.

This Court should revisit the language in Belk about the available subsections, and find that the claim presented in these cases can be brought under a subsection of the postconviction statute when appointed counsel is available.

CONCLUSION

Almost from the beginning of time, the roles have been established in the Iowa criminal justice system. The legislature writes the criminal statutes and establishes the punishments. The courts adjudicate guilty and impose the sentence, consistent with what the legislature has said. The Department of Corrections administers the sentence. Since we mostly have indeterminate sentencing, the Board of Parole decides when individuals can and should be released back into the community.

This mostly is the way things are done for most criminal offenders who are sent to prison.

Because of choices made by the Department of Corrections over the years, this process with regard to sex offenders stopped working. There were too many sex offenders sent to prison. There were not enough beds in treatment to get everyone treatment in a reasonable time. All the DOC could do was to scramble to make sure that everyone completed treatment before they were released back into the community.

This had the effect of essentially eliminating the Parole Board in release decisions for all sex offenders.

This practice became known as the "silent mandatory sentence". Sex offenders, like all seven applicants, are sent to prison with no mandatory minimum sentence from the judge. Because of the silent mandatory, dictated by the lack of treatment beds, they have to serve virtually their entire prison sentence before they are released. This has been true even when most sentences now include special paroles to the community.

This case challenges that practice. Analytically, there are four steps in the reasoning.

1. There are the facts established at the hearing. Because of the number of sex offenders and the lack of treatment beds, all sex offenders serve most of their sentences. The Parole Board is largely irrelevant to the release decision.

2. Under the Iowa parole statute, there is an expectation of release that is, in fact, protected by the United States Constitution. No third party can interfere with the right to a reasonable consideration for release.
3. The waiting list practice by the DOC has become, essentially, a pocket veto to release that the Iowa Supreme Court frowned on in Bonilla v. Board of Parole, 930 N.W. 2d 751 (Iowa, 2019).
4. The present practice is unreasonable and needs to be fixed. It needs to be fixed in a way that is consistent with the basic understanding set out by the Iowa Code of how the criminal justice system should work.

This court should reverse the District Court decision and remand the case to Judge McCall to address the particular remedies that would allow for more reasonable consideration of release decisions for all sex offenders, including the seven individuals who appear in this case.

RESPECTFULLY SUBMITTED,

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ATTORNEY'S CERTIFICATE OF COSTS

I, Philip B. Mears, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellant's Page Proof Reply Brief was $22.40.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(f)(1) or (2) because:

[X] this brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 and contains __4,853__ words, excluding the parts of the brief exempted by Iowa Rs. App. P. 6.903(1)(f)(1)

/s/ Philip B. Mears — _12/18/2020____
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