



IN THE COURT OF APPEALS OF IOWA

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GARY JAMES COLLINS,	)	
Petitioner-Appellant,	)	Filed December 26, 1984
vs.	)	<u>4-414</u>
STATE OF IOWA,	)	<u>83-1491</u>
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Jasper County, Van Wifvat and Luther T. Glanton, Judges.

Petitioner appeals from the order denying his application for postconviction relief from a revocation of probation. AFFIRMED.

Fern S. Shupeck, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant Attorney General, for respondent-appellee.

Considered by Oxberger, C.J., Snell, and Schlegel, JJ.

OXBERGER, C.J.

The petitioner has appealed from the trial court denial of his application for postconviction relief. He claims revocation of his probation and imposition of the original twenty-year sentence resulted in cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution and Article I, §§ 9 and 17 of the Iowa Constitution. He has further claimed the decision constituted an abuse of the discretion of the court. We affirm.

Petitioner's 1974 conviction for assault with intent to commit rape in violation of Iowa Code section 698.4 (1973) was affirmed on direct appeal. State v. Collins, 236 N.W.2d 376 (Iowa 1975). A new trial was granted by a federal court in 1978. In re Application of Collins, 577 F.2d 1107 (8th Cir. 1978). In 1979 petitioner pleaded guilty and was sentenced to confinement for a term not to exceed twenty years but the sentence was suspended and he was placed on probation for five years.

Later in 1979 petitioner was arrested for operating a motor vehicle while intoxicated but, following his plea of guilty, probation was not revoked even though terms of probation required abstention from alcoholic beverages and obedience to all laws. He was instead ordered to seek alcohol rehabilitation treatment. In 1983 probation was revoked following his plea of guilty for second offense OWI notwithstanding evidence that he had achieved some success in efforts to improve himself while on probation. The court denied postconviction relief, finding that reimposition of the original sentence constituted punishment that was neither excessive nor cruel and unusual.

The scope of our review of the trial court decision involves correcting errors of law. Hahn v. State, 306 N.W.2d 764, 768 (Iowa 1981). The factual findings must be upheld if supported by substantial evidence. Michels v. Brewer, 211 N.W.2d 293,

294 (Iowa 1973). However, when a constitutional question has been raised, as it is here, this court must look at the totality of the circumstances shown by the record. Hall v. State, 325 N.W.2d 752, 753 (Iowa 1982).

The petitioner's argument that the imposition of the original sentence constitutes cruel and unusual punishment is premised on the Supreme Court's holding that punishment cannot be grossly disproportionate to the severity of the crime. See Ingraham v. Wright, 430 U.S. 651, 667, 97 S. Ct. 1401, 1410, 51 L. Ed. 2d 711, 727-28 (1977). The factors to be considered include the gravity of the offense and harshness of the penalty, along with the treatment of others in the same jurisdiction who committed crimes of equal or greater severity, and treatment of people in other jurisdictions who commit the same crime. Solem v. Helm, ____ U.S. ____, ____, 103 S. Ct. 3001, 3010, 77 L. Ed. 2d 637, 649-50 (1983). Collins claims that considering the usual punishment given to a person who commits the crime of second offense drunk driving, the punishment is disproportionate to the aggravated misdemeanor.

In revoking probation and imposing the twenty-year sentence, however, the court was not sentencing Collins for the crime of operating a motor vehicle while intoxicated. The court instead was imposing the original sentence handed down when Collins pleaded guilty to the crime of attempting to rape an eighty-year-old woman. See Iowa Code § 908.11 (1983). Considering the gravity of the offense, harshness of the penalty, and treatment of others who commit the crime of assault with intent to commit rape, the sentence is neither cruel and unusual nor disproportionate to the offense.

In a probation revocation hearing two determinations are made by the court; whether a violation of probation has occurred, and whether the individual should be committed to prison, or steps taken to protect society and improve the chances of rehabilitation. Patterson v. State, 294 N.W.2d 683, 684 (Iowa 1980). The

petitioner does not dispute the first part of the determination that he violated his probation. Instead, he claims the court erred in imposing the full sentence, when he says he had shown progress in rehabilitating himself.

The crime involving the attack on the woman occurred while the defendant was intoxicated. The record shows he has been diagnosed as a paranoid schizophrenic and manic depressive. A specific requirement of his probation included abstention from alcohol. The drunk driving offense which lead to revocation of the probation was his second alcohol-related offense occurring during probation, and followed the court's admonition to him earlier to obtain alcohol rehabilitation treatment.

Considering all the factors presented to the court, we find there was no abuse of discretion on its part and affirm its decision.

AFFIRMED.