

IN THE COURT OF APPEALS OF IOWA

No. 0-366 / 89-672

FILED

NOV 29 1990

CLERK SUPREME COURT

WILLIAM WAYNE BUMPUS,

Appellant,

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vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County,
A. M. Critelli, Judge.

Bumpus appeals the district court's dismissal of his
action for postconviction relief. **AFFIRMED.**

Linda Del Gallo, Acting State Appellate Defender, and
B. John Burns, Assistant State Appellate Defender, for
appellant.

Thomas J. Miller, Attorney General, Thomas D. McGrane,
Assistant Attorney General, James A. Smith, County
Attorney, and Joseph P. Weeg, Assistant County Attorney,
for appellee.

Considered by Schlegel, P.J., and Sackett and Habhab,
JJ.

PER CURIAM

Petitioner William W. Bumpus appeals a district court ruling dismissing his action for postconviction relief. We affirm.

Bumpus was convicted in March 1982 of first degree robbery. He appealed to the supreme court, which affirmed his conviction in 1983. First degree robbery is a class "B" felony, Iowa Code § 711.2, punishable by an indeterminate sentence, id. § 902.3, not to exceed twenty-five years, id. § 902.9(1). The sentencing court imposed a mandatory minimum sentence of five years pursuant to Iowa Code section 902.7 because Bumpus used a firearm in committing a forcible felony. In 1986 the parole board imposed a twelve and one-half year mandatory minimum on Bumpus pursuant to Iowa Code section 906.5¹ because Bumpus had previously committed a forcible felony. The applicable language of section 906.5 stated at the time Bumpus was convicted:

If the person who is under consideration for parole is serving a sentence for conviction of a felony and has a criminal record of one or more prior convictions of a similar gravity in this or any other state, parole shall be denied unless the defendant has served at least one-half of the maximum term of his or her sentence.

Iowa Code § 906.5 (1981).

1. Iowa Code section 906.5 was repealed and reenacted as Iowa Code section 902.11. 1988 Iowa Acts 102, 103, ch. 1091, §§ 2, 4.

The crux of petitioner's argument on appeal is that the parole board action extending his mandatory minimum sentence to twelve and one-half years has placed him in double jeopardy in violation of the fifth amendment to the United States Constitution. With respect to the double jeopardy clause, the supreme court has stated:

The rule now generally recognized is that, in order that the plea of former jeopardy may be available, it must appear that the two offenses are in substance the same, or of the same nature, or same species, so that the evidence which proves the one would prove the other. If, however, an essential element of one offense is not necessarily present in the other, then there is no former jeopardy, although the same evidence may be offered to sustain the indictment in each case.

State v. Stewart, 223 N.W.2d 250, 251 (Iowa 1974) (citations omitted). We do not believe section 906.5 creates a separate offense, and therefore, the double jeopardy clause does not apply.

In Mead v. Iowa State Bd. of Parole, 331 N.W.2d 102 (Iowa 1983), the supreme court held that section 906.5 was not violative of the due process or equal protection clauses of the United States Constitution. In overturning the inmates' equal protection challenge, the court remarked that section 906.5 is "a parole board limitation, not . . . a minimum sentence." Id. at 105; Wharton v. Iowa Parole Bd., No. 89-1335, slip op. at 4 (Nov. 21, 1990) (implementation of § 906.5 is "ministerial"). In fact, section 906.5 did not enhance petitioner's sentence, nor did it add an additional penalty, nor did it increase the

maximum amount of time he must serve. See Mead, 331 N.W.2d at 105; State v. Wilson, 314 N.W.2d 408, 409 (Iowa 1982) (holding it unnecessary to plead and prove prior conviction because statute contemplates parole board rather than judicial determination). The Iowa Supreme Court recently rejected similar challenges to section 906.5 in Wharton v. Iowa Parole Board, No. 89-1335, slip. op. at 4 (Nov. 21, 1990), and Cooper v. Iowa Board of Parole, No. 89-1358, slip op. at 2 (Nov. 21, 1990). Because there are no multiple penalties imposed, there is no double jeopardy violation. Cf. Ohio v. Johnson, 467 U.S. 493, 500 (1984).

For the foregoing reasons, we conclude the district court properly dismissed petitioner's action for postconviction relief.

AFFIRMED.