FILED
OCT 29 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-328 / 91-131

RONALD LEE STEWART,

Appellant,

vs.

IOWA STATE BOARD OF PAROLE,

Appellee.

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Appeal from the Iowa District Court for Lee County, Harlan W. Bainter, Judge.

Prison inmate appeals board of parole decision applying mandatory minimum term of incarceration for inmates with prior forcible felony convictions. **AFFIRMED.**

Ronald Lee Stewart, appellant, pro se.

Bonnie J. Campbell, Attorney General, and Thomas D. McGrane, Assistant Attorney General, for appellee.

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

SCHLEGEL, J.

Ronald Stewart was charged with robbery in the first degree, Iowa Code §§ 711.1, 711.2 (1987), and going armed with intent, id. at 708.8, on September 17, 1987. A supplemental trial information was also filed on the same day in connection with these charges; the Polk County Attorney's Office sought to charge Stewart as an habitual offender under Iowa Code section 902.8. There is nothing in the record to support a finding that Stewart does not have a prior forcible felony, and there is no challenge to the fact that there is a prior forcible felony.

Stewart was convicted of robbery in the first degree and going armed with intent. The State, however, did not proceed with the habitual offender allegations. The supplemental trial information was dismissed.[1] Stewart was sentenced to a prison term of up to twenty-five years on the first-degree robbery charge and a prison term of up to five years on the charge of going armed with intent. The district court ordered that these two sentences be served consecutively.

Stewart was incarcerated in the Iowa State Penitentiary

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1. Stewart made a motion to dismiss the supplemental information for failure to timely prosecute, and the court sustained the motion. He claims the State intended to proceed with that prosecution. The State notes, however, that its failure to proceed with the charge is understandable since the maximum sentence for one of the crimes charged, first-degree robbery, exceeded the maximum sentence for an habitual offender violation under Iowa Code sections 902.8 and 902.9(2). We are most concerned here with the fact the charge was dismissed.

in Fort Madison. The Board of Parole determined in April 1988 that Stewart would be required pursuant to Iowa Code section 906.5 (1987) (now Iowa Code § 902.11 (1991)) to serve a mandatory minimum sentence amounting to one-half his current sentence before he would be eligible for parole. The Board listed Stewart's prior forcible felonies in its determination, relying on the same prior convictions which had caused the State initially to seek habitual offender sentencing.

After reviewing Stewart's case, the Board on February 8, 1989, notified him that he was being denied parole in part because he had a mandatory sentence to serve before he could be considered for parole. Stewart appealed this decision, and in May 1989 the Board affirmed its decision. Stewart, acting pro se, filed a petition for judicial review pursuant to Iowa Code section 17A.19 to challenge the Board's action. The district court denied Stewart's petition and upheld the Board's action. Stewart, once again acting pro se, has appealed from the district court's ruling.

The scope of review in cases arising out of the Iowa Administrative Procedures Act is limited to the correction of errors at law. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162, 165 (Iowa 1982). A district court decision rendered in an appellate capacity is reviewed to determine whether the district court correctly applied the law. Id. To make that determination this court applies the standards

of section 17A.19(8) to the agency action to determine whether our conclusions are the same as those of the district court. Jackson County Public Hosp. v. Public Employment Relations Bd., 280 N.W.2d 426, 429-30 (Iowa 1979). The scope of review encompasses a review of the entire record and is not limited to the agency's findings. Higgins v. Iowa Dep't of Job Serv., 350 N.W.2d 187, 191 (Iowa 1984). Stewart must show substantial rights have been prejudiced by the erroneous action of the agency. Iowa Code § 17A.19(8) (1991); see Mercy Health Center v. State Health Facilities, 360 N.W.2d 808, 811 (Iowa 1985).

Stewart contends that under the facts of this case, he is subjected to double jeopardy by the application of the mandatory minimum term provided in former section 906.5. Stewart bases this argument on the dismissal of the supplemental information alleging that he should be sentenced as an habitual offender. He argues that once the State's plea for habitual offender sentencing was dismissed, any subsequent enhancement of his present sentence due to his prior convictions amounted to double jeopardy.

The State responds, and the district court found, that double jeopardy has not occurred for two reasons. First, former section 906.5 (now section 902.11) provides merely for a parole restriction and not for an increased sentence. Therefore, there has been no double punishment. Second, the State's dismissed plea for habitual offender

sentencing did not charge a crime or offense. Thus the Board's subsequent action, even if it amounted to a penalty enhancement, could not be a second prosecution or multiple punishment for the same crime or offense.

Stewart asserts the Board's application of former Iowa Code section 906.5 (now section 902.11) violates the double jeopardy clause of the fifth amendment. This section provides in part:

> 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 for a forcible felony or a crime of similar gravity in this or any other state, parole shall be denied unless the person has served at least one-half of the maximum term of the defendant's sentence.

Iowa Code § 906.5 (1987); see Iowa Code § 902.11 (1991). The double jeopardy prohibition "protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." United States v. Halper, 490 U.S. 435, 441, 109 S. Ct. 1892, 1897, 104 L. Ed. 2d 487, 496 (1989). For several reasons, we find no merit in Stewart's double jeopardy argument.

First, Stewart seems to believe there was multiple punishment because of the Board's enforcement of Iowa Code section 906.5 after the dismissal of the habitual criminal charge in the district court which he equates with an acquittal. The habitual criminal provision, Iowa Code §

902.8 (1991), does not define a crime or offense but is only a sentencing procedure. See State v. Popes, 290 N.W.2d 926, 927 (Iowa 1980) (citations omitted); State v. Snyder, 426 N.W.2d 662, 663 (Iowa App. 1988). Therefore, there is no basis for arguing that the dismissal of the habitual offender supplemental trial information was an acquittal of an offense or crime or that the Board's subsequent application of section 906.5 was a second prosecution for the same offense after an acquittal or multiple punishment for the same offense.

Second, application of Iowa Code section 906.5 does not subject Stewart to a second conviction or multiple punishments for prior offenses. The mandatory minimum requirement is not a penalty or a sentence. Mead v. Iowa State Bd. of Parole, 331 N.W.2d 102, 105 (1983). The legislature intended the mandatory minimum requirement to be applied in addition to any sentence imposed by the district court so as to limit eligibility for parole. State v. Remmers, 259 N.W.2d 779, 784 (Iowa 1977). Stewart's prior convictions are considered an aggravating factor that justifies limiting parole board discretion to grant a parole prior to the time one-half of the original sentence is served. The consideration of Stewart's prior convictions in determining his minimum parole eligibility date does not amount to multiple punishment for the same offense and does not violate the double jeopardy clause.

See United States v. Thomas, 895 F.2d 1198, 1201 (8th Cir. 1990).

We determine the Board of Parole's application of Iowa Code section 906.5 does not violate the double jeopardy clause of the fifth amendment. We find Stewart has failed to show prejudice to substantial rights under Iowa Code section 17A.19(8). We conclude the district court correctly applied the law and affirm its decision affirming the agency action.

AFFIRMED.