

SUPREME COURT OF IOWA

State of Iowa v. Mitch Buesing

No. 17-1750 (Iowa Dec. 14, 2018) · No. No. 17-1750 · Decided December 14, 2018

SUMMARY

The Iowa Supreme Court affirmed Mitch Buesing’s sentences for first- and second-degree theft. The court held that Buesing failed to preserve his due process challenge to the sentencing court’s consideration of the Iowa Risk Revised assessment and declined to address his related ineffective-assistance claim on direct appeal because the record was insufficient.

CASE DETAILS

COURT	Supreme Court of Iowa
WRITING FOR THE COURT	Per curiam
JURISDICTION	Iowa
DECIDED	December 14, 2018
DOCKET	No. 17-1750
DISPOSITION	affirmed
PROCEDURAL POSTURE	Direct appeal from criminal sentencing. Buesing challenged the sentencing court's reliance on an Iowa Risk Revised assessment report and asserted related ineffective assistance of counsel.
STANDARD OF REVIEW	The court reviewed preservation of the due process claim and whether the record was sufficient to decide the ineffective-assistance claim on direct appeal.
PRECEDENTIAL VALUE	Unpublished; the opinion states that it shall not be published.
PARTIES	Mitch Buesing v. State of Iowa

TOPICS

- sentencing
- due process
- preservation of error
- ineffective assistance
- post-conviction relief

PRACTICE AREAS

- Criminal law
- Criminal procedure
- Sentencing
- Appellate procedure
- Post-conviction relief

QUESTIONS PRESENTED

1. Whether Buesing preserved a due process challenge to the district court's consideration of the Iowa Risk Revised assessment report at sentencing.
2. Whether the court could decide on direct appeal Buesing's claim that counsel was ineffective for failing to object to use of the assessment report.

HOLDINGS

1. A defendant may not raise a due process objection to the sentencing court's reliance on information in a presentence investigation report for the first time on direct appeal. Because Buesing affirmatively told the sentencing court it could rely on the presentence investigation report, he failed to preserve the claim.
2. The court could not reach Buesing's ineffective-assistance claim on direct appeal because the record was insufficient to decide it.

KEY QUOTATIONS

“For this reason, we find Buesing failed to preserve his due process claim for direct appeal.” (4)

“Additionally, we cannot reach Buesing’s ineffective-assistance-of-counsel due process claim on direct appeal for the reasons stated in Gordon.” (4)

FACTUAL BACKGROUND

Buesing pleaded guilty to first-degree theft arising from a September 2016 burglary-related theft and second-degree theft involving property recovered from his residence in March 2017. The presentence investigation report included an Iowa Risk Revised assessment that classified him as high risk for recidivism. At sentencing, Buesing and counsel reviewed the report, made one correction concerning Buesing's weight, and expressly stated that they knew of no reason the court could not use the report. The district court imposed consecutive prison terms for the two theft convictions.

PROCEDURAL HISTORY

Buesing pleaded guilty to first-degree theft and second-degree theft under a plea agreement, after which the district court sentenced him to consecutive prison terms. He appealed, arguing that reliance on the Iowa Risk Revised assessment report violated due process and that counsel was ineffective for failing to object. The Supreme Court of Iowa held that the due process claim was not preserved and that the ineffective-assistance claim could not be decided on the direct-appeal record, and affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Gordon, ___ N.W.2d ___ (Iowa 2018)

OPINION

PER CURIAM.

IN THE SUPREME COURT OF IOWA No. 17–1750 Filed December 14, 2018 STATE OF IOWA, Appellee, vs. MITCH BUESING, Appellant. Appeal from the Iowa District Court for Cerro Gordo County, Colleen D. Weiland, Judge. A defendant appeals his sentence claiming the sentencing factors relied upon by the district court violated his due process rights. AFFIRMED. Mark C. Smith, State Appellate Defender, and Mary K. Conroy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Carlyle D. Dalen, County Attorney, and Gina A. Jorgensen, Assistant County Attorney, for appellee. 2 PER CURIUM. On September 3, 2016, Susan Wiley returned to her Mason City home and found a bicycle in her backyard that did not belong to her family. When she walked the bike around to the front of her house, the other person with her outside the house, Mike Damm, heard someone exit the back of the house.

Wiley and Damm were alarmed and took a pitchfork with them to enter the home. Inside, they found someone had rummaged through belongings and had stolen Wiley’s property, including silverware, jewelry, and other household goods and personal items.

On September 9, the State charged Mitch Buesing with theft in the second degree in violation of Iowa Code sections 714.1(1) and 714.2(2) (2016), and burglary in the second degree in violation of Iowa Code sections 713.1 and 713.5 for the burglary of Wiley’s home on September 3.

On September 12, the State moved to amend the original theft charge to theft in the first degree, after learning the total value of the stolen property was in excess of \$10,000. Buesing pled not guilty to both charges. While the charges were pending against Buesing, on March 5, 2017, an unknown person broke into Krista Conroy’s car, and her bracelet, purse, wallet, and iPad were stolen.

On March 10, Mason City police officers received a call from Conroy, who told officers she had activated her app, 1 which indicated her missing iPad was at 95 Oak Run Drive in Mason City—Buesing’s residence. Officers obtained and executed a search warrant for Buesing’s home that same day. At Buesing’s home, officers recovered numerous items that had been reported as stolen, including, Milwaukee power tools; a Milwaukee Shop vacuum; seven Stihl power 1Presumably the “Find my iPhone” app, which allows users to link all of their Apple devices together so if one goes missing, users can locate the missing device using a different device.

3 tools; a fluke meter; a code reader; various tools, a tool box, and power chargers; two iPads, including Conroy’s; two iPhones; a coat; Conroy’s ID, credit cards, and jewelry. On April 7, the State charged Buesing with theft in the second degree for the items recovered on March 10, 2017. Buesing again pled not guilty.

On September 12, Buesing changed his plea and pled guilty to theft in the first degree for the September 3, 2016 event and theft in the second degree for the items found during the search on March 10, 2017. Pursuant to a plea agreement, the State agreed to dismiss the burglary charge, support the recommendation of the presentence investigation report (PSI) preparer, and recommend Buesing's convictions be served concurrently with other sentences for his probation revocations and consecutively for the two theft charges.

The department of correctional services prepared a PSI. It included an Iowa Risk Revised assessment report (IRR). The IRR determined Buesing to be high risk for recidivism. On October 30, the district court sentenced Buesing. Buesing and his attorney reviewed the PSI and his attorney told the court, Only one correction, Your Honor.

On page one, he's indicating his weight is 190 pounds. Other than that, Your Honor, we have no changes, additions, corrections. I don't know of any reason why the court cannot use this document for sentencing. The court sentenced Buesing to prison for a maximum of ten years for theft in the first degree, to be served consecutively with five years for theft in the second degree.

The judge stated the two prison terms were to be served concurrently with two other sentences Buesing was to serve due to his probation revocation. Buesing appeals. 4 On appeal, he contends the district court violated his due process rights by using the IRR in sentencing.

In the alternative, he argues the court abused its discretion by considering the IRR without understanding the purpose and limitations of the IRR. The alternative argument is in essence a due process argument. He also argues counsel provided ineffective assistance by failing to object to the sentencing proceeding because the court's consideration of and reliance on the IRR violated Gordon's due process rights.

Today, we filed an opinion in *State v. Gordon*, ____ N.W.2d ____ (2018). In *Gordon*, we held a defendant could not raise this due process argument for the first time on appeal when the defendant did not bring the issue to the district court at the time of sentencing. *Id.* at _____. Furthermore, we held we could not address the due process issue under the rubric of ineffective assistance of counsel because the record is insufficient to reach this claim.

Id. Here, Buesing not only failed to raise a due process issue at the time of trial, but as in *Gordon*, he told the court it could rely on the information in the PSI. For this reason, we find Buesing failed to preserve his due process claim for direct appeal. Additionally, we cannot reach Buesing's ineffective-assistance-of-counsel due process claim on direct appeal for the reasons stated in *Gordon*.

See *id.* Of course, Buesing may bring a separate postconviction-relief action claiming ineffective assistance of counsel based on due process, if he so wishes. Therefore, we affirm the judgment of the district court. **AFFIRMED.** All justices concur except Appel, J., who concurs specially. This

opinion shall not be published. 5 #17–1750, State v. Buesing APPEL, Justice (concurring specially).

For the reasons expressed in State v. Gordon, ___ N.W.2d ___, ___ (Iowa 2018) (Appel, J., concurring), I concur in the result in this case.