

ORIGINAL

20020160

IN THE SUPREME COURT
THE STATE OF NORTH DAKOTA

Supreme Court No. 20020160

State of North Dakota

Appellant

VS

Mark Leppert

Appellee

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

AUG 27 2002

STATE OF NORTH DAKOTA

.....

APPEAL FROM THE ORDER DENYING
THE STATE'S MOTION FOR A DNA SAMPLE

LAMOURE COUNTY DISTRICT COURT

THE HONORABLE RICHARD W. GROSZ, PRESIDING

BRIEF OF APPELLEE & Addendum

MARK LEPPERT, DEFENDANT

Gary Neuhardt 03423
Attorney for the Appellee
PO Box 346
Oakes, ND 58474
701 742 3231

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT	1
I. Leppert has shown the classification created by N.D.C.C. § 31-13-03 is entitled to strict scrutiny as the standard for review	1
A. Constitutional Standards	1
B. Strict Scrutiny	3
II. Legislative intent narrowly construed when constitutional rights are contravened	5
III. Leppert's DNA is his fundamental right to privacy and the State has not shown a compelling or legitimate interest in adding Leppert to a DNA date base. The legislature did not articualte its rationale or purpose. .	6
CONCLUSION	7
ADDENDUM	8

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Baldock v. North Dakota Workers Comp. Bureau,</u> 554 N.W.2d 441 (N.D. 1996)	2
<u>Boling v. Romer,</u> 101 F.3d 1336 (1997)	4
<u>Cooper v. Gammon,</u> 943 S.W.2d 699 (Mo. App. Ct. 1997)	4
<u>Fear, Loathing & DNA,</u> Shadow Press PO Box 20298 New York, NY 10009	5
<u>Gaines v. State,</u> 998 P.2d 166 (Nev. 2000) cert. denied	3
<u>Griswold v. Connecticut,</u> 381 U.S. 479 (1965)	5
<u>Haney v. North Dakota Workers Comp. Bureau,</u> 518 N.W.2d 195 (N.D. 1994)	2
<u>Hoff v. Berg,</u> 1999 ND 115	2
<u>Kadrmas v. Dickinson Public Schools,</u> 402 N.W.2d 897 (N.D. 1987)	3
<u>NL Industries v. North Dakota Tax Commissioner,</u> 498 N.W.2d 141 (N.D. 1993)	6
<u>People v. Wealer,</u> 264 Ill. App.3d 6, 636 N.E.2d 1129 (2d Dist. 1994)	4
<u>Richter v. Jones,</u> 378 N.W.2d 209 (N.D. 1985)	1
<u>Rise v. Oregon,</u> 59 F.3d 1556 (9th Cir. 1995)	4
<u>Roe v. Wade,</u> 410 U.S. (1973)	5
<u>State v. Olivas,</u> 856 P.2d 1076 (Wash. 1993) ..	3
<u>State v. Rambousek,</u> 479 N.W.2d 832 (N.D. 1992)	4
<u>State v. Sakalleson,</u> 379 N.W.2d 779 (N.D. 1985)	3
<u>State v. Smith,</u> 1999 ND 9	2

<u>Vanderlinden v. Kansas</u> , 874 F.Supp. 1210 (D.Kan. 1995) affirmed <u>Schlicher v.(NFN) Peters I & II</u> , 103 F.3d 940 (10th Cir. 1996)	3
---	---

NORTH DAKOTA CENTURY CODE

Section 12.44.1-15	2
Section 12-47-36	2
Chapter 31-13	3

STATEMENT OF THE CASE

This is an appeal of the District Court order that found North Dakota's DNA data base statute to be unconstitutional as applied to Mark Leppert.

Leppert was convicted of aggravated assault and felonious restraint in LaMoure County on January 28, 1997. He remains incarcerated in the custody of the DOC in Jamestown.

Leppert's crimes were added to the DNA data base statute effective August 1, 2001 by legislative admendment.

Leppert refused to submit to a DNA sample and challenged the State's motion for order to submit on constitutional grounds. District Judge Grosz ruled the DNA data base statute violates Leppert's equal protection rights under the U.S. Constitution.

ARGUMENT

I.

LEPPERT HAS SHOWN THE CLASSIFICATION CREATED
BY N.D.C.C. § 31-13-03 IS ENTITLED TO STRICT
SCRUTINY AS THE STANDARD FOR REVIEW

A. Constitutional Standards

A statute enjoys a conclusive presumption of constitutionality unless it is clearly shown that it contravenes the state or federal constitution. Nor is classification prohibited so long as the classification:

"... is reasonable for the purpose of legislation, is based on proper and justifiable distinctions considering the purpose of the law, is not clearly arbitrary, and is not a subterfuge to shield one class or to burden or to oppress unlawfully in its administration."

Richter v. Jones, 378 N.W.2d 209, (N.D. 1985).

The right to be privacy in North Dakota has long been considered a fundamental right.

" ... It can hardly be questioned the right to privacy is one of the unique values of our society ... "

State v. Sakalleson, 379 N.W.2d 779, (N.D. 1985).

" Therefore state limitations on a fundamental right such as the right to privacy are permissible only if they survive strict constitutional scrutiny."

Hoff v. Berg, 1999 ND 115.

Just as probationers are not completely divested of their constitutional protections Leppert retains his right to privacy.

State v. Smith, 1999 ND 9, 589 N.W.2d 546, (N.D. 1999).

While in jail searches of inmates may be conducted:

" 1. Without undue or unnecessary force or indignity to the person searched. "

or for contraband, or to recover property. N.D.C.C.

§ 12-44.1-15. The warden and staff of the penitentiary are to treat prisoners with kindness. N.D.C.C § 12-47-36.

It seems the legislature has confirmed and conferred upon Leppert a fundamental right to privacy and dignity not to be infringed upon without a compelling governmental interest.

The cases cited by the state to support a rational basis standard of review consider classification of wealth or economic status. Such have always been entitled to a minimum standard of judicial review. Their rational maybe summarized:

" The court has consistently deferred to legislative determinations concerning the desirability of statutory classifications affecting the regulation economic activity and the distribution of economic benefits."

Haney v. North Dakota Workers Compensation Bureau,

518 N.W.2d 195 (N.D. 1994)

" The rational basis test is the traditional test for scrutinizing legislation facing equal protection and is most often utilized in cases involving economic and social welfare legislation."

Kadmas v. Dickinson Public Schools, 402 N.W.2d 897 (N.D. 1987).

B. Strict Scrutiny is appropriate

Leppert has a fundamental right of privacy in his DNA.

Vanderlinden v. Kansas, 874 F. Supp. 1210 (D. Kan. 1995).

No compelling governmental interest is shown in a data base compilation of non-repeat offenders/ those of non-violent or non-sexual offenses. Id. N.D.C.C Chapter 31-13 stated purpose is to compile data on sex offenders and Leppert agrees this is a legitimate governmental interest since sex offenders are often recidivists and more likely to leave DNA as evidence at the crime scene.

The cases cited by the State to support the contention that Leppert has no right to privacy in his blood fail.

Gaines v. State, 998 P.2d 166, (Nev. 2000), cert. denied,

Gaines v. Nevada, 531 U.S. 856 (2000) merely confirm that narrowly drawn statutes requiring DNA markers from those convicted of specific enumerated offenses was rationally related to a legitimate governmental interest in the apprehension of repeat and violent offenders.

The Court in State v. Olivas, 122 Wash. 2d 73, 856 P.2d 1076, (Wash. 1993), in Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995),

in Boling v. Romer, 101 F.3d 1336 (1997) all indicate that the purpose of the statute was the investigation and prosecution of sex offenses and violent offenses with a nexus to high recidivism which is a compelling interest. The North Dakota statute is silent on that purpose and although enumerating specific offenses limits the DNA base to sex related crimes. Leppert is not a repeat offender nor a sex offender. Since criminal statutes are construed in favor of the defendant, would not a narrow interpretation of the data base statute against the government exclude Leppert. State v. Rambosek, 479 N.W. 2d 832 (N.D. 1992). Even the legislative history advanced by the State does not evince a compelling interest that supports DNA collecting at large. It has no purpose since it has not been shown to be efficacious in catching other criminals. In People v. Wealer, 264 Ill. App. 3d 6, 636 N.E. 2d 1129, (2d Dist. 1994) the Court affirmed the principle that the state has a legitimate interest in deterring and prosecuting recidivist acts committed by sex offenders. In Cooper v. Gammon, 943 S.W.2d 699 (Mo. Ct. App. 1997) the Court stressed the high rate of recidivism among certain type of murders and sexual offenders. Since their statute applied to a limited class of felons, a rational relationship existed between the public's interest in identifying and prosecuting these dangerous felons and it is a valid law enforcement function. This can not be said of the North Dakota's statute.

II.

Legislative intent narrowly construed when
constitutional rights are contravened

Leppert asserts a private fundamental right in his DNA. DNA does more than a finger print. It contains thousands of codes, markers, infinitely and intimately describing the person. Simple biology tells us this. " Fear, Loathing and DNA ", Shadow Press, PO Box 2098, New York, NY 10009. (Addendum). Leppert does not want the government to have his intimacies disclosed.

" The 4th and 5th Amendments were described as protections against all governmental invasions of the sanctity of a man's home and the privacies of life. We recently referred to the 4th Amendment as creating a right to privacy no less important than any other right carefully and particularly reserved to the people. We have had many controversies over these penumbral rights of privacy and repose. These cases bear witness that the right of privacy which press for recognition is a legitimate one."

Griswold v. Connecticut, 381 U.S. 479 (1965).

" The Court's decisions recognizing a right o privacy also acknowledge that some state regulation in areas protected by that right is appropriate ... Where certain fundamental rights are involved the Court has held that limiting those rights may be justified only by a compelling state interest and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake."

Roe v. Wade, 410 U.S. 119 (1973).

The State cites Skinner and Schmerber to suggest that a DNA sample is the same as collecting blood alcohol. Leppert concurs that a sample for a drug or alcohol test is permissible under certain circumstances but it is the use of and the nature of the DNA that confers upon him the right to privacy.

In North Dakota the strict scrutiny standard applies to challenges of statutes on equal protection on infringement of

fundamental rights. If the statute does not show a compelling state interest in distinct, necessary elements to further its purpose, the statute will be stricken. Baldock v. North Dakota Workers Comp. Bureau, 554 N.W.2d 441 (N.D. 1996).

III.

Leppert's DNA is his fundamental right to privacy and the State has not shown a compelling or legitimate interest in adding Leppert to a DNA data base. The legislature has not articulated its rationale or purpose.

Leppert has advanced his right to privacy in his DNA is fundamental requiring a strict scrutiny standard of review. The statutes in review do not indicate a purpose or rationale for the collection of his DNA. Rather the statute proposes the collection of DNA for sex related crimes only. The legislative history erroneously suggests all crime solving, prevention and exoneration of the innocent has a foundation in DNA data basing. This premise is patently and arbitrarily false except in " sex-related " crimes. The statute is vague in its application and the legislature's purpose or policy is so void of any nexus between DNA collection and crime solving the Court could not have formulated an identifiable purpose under any review.

" Nevertheless this Court's review does require that a purpose may conceivably or may reasonably been the purpose and policy of the relevant governmental decision maker ... (classification scheme must rationally advance a reasonable and identifiable governmental objective)."

NL Industries, Inc. v. ND State Tax Comm., 498 N.W.2d 141 (N.D. 1993).

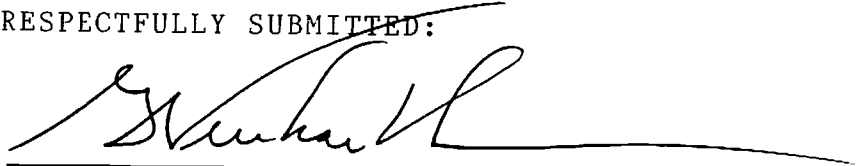
To iterate the objective can not be met by the legislation purposed or enacted.

CONCLUSION

Since Leppert has a fundamental right of privacy in his DNA, the statute under strict scrutiny should be stricken in violation of his due process rights under the Equal Protection of the state and federal constitutions.

Dated this August 27, 2002.

RESPECTFULLY SUBMITTED:

A handwritten signature in dark ink, appearing to read "Gary Neuharth", is written over a horizontal line.

Gary Neuharth 03423
Attorney for Appellee
PO Box 346
Oakes, ND 58474
701 742 3231