ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

20020172

Supreme Court No. 20020172

State of North Dakota,)
)
Appellee,)
)
vs.)
)
James Elwood Norman,)
)
Appellant.)

. . . . . .

APPEAL FROM THE ORDER DENYING
NORMAN'S MOTION TO QUASH AN ORDER
REQUIRING A DNA SAMPLE

BURLEIGH COUNTY DISTRICT COURT

THE HONORABLE GAIL HAGERTY, PRESIDING

BRIEF OF AMICUS CURIAE

Jonathan Byers #04583
Assistant Attorney General
600 East Boulevard Avenue, Dept. 125
Bismarck, ND 58505-0040
(701) 328-3404

for the Attorney General
as Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

James Elwood Norman is appealing a District Court order that denied his motion to quash a previous order requiring Norman to submit a DNA sample.

Norman was convicted of murder on September 28, 1992. He was sentenced to the custody of the Department of Corrections and Rehabilitation and remains in the Department's custody at the time of this appeal. Three years after his conviction, the 1995 North Dakota State Legislature enacted a DNA database statute, requiring submission of a DNA sample for listed sexual crime convictions.

Effective August 1, 2001, the North Dakota State Legislature amended N.D.C.C. § 31-13-03 to require DNA sampling for non-sexual convictions in addition to the sexual offenses that had required DNA sampling since August 1, 1995. The offense of murder was among the felony offenses added to those requiring submission of a DNA sample. (Addendum p. 12.)

On December 19, 2001, Assistant State's Attorney Cynthia Feland filed a motion to obtain an order requiring Norman to submit a DNA sample by oral swab as provided by the amended statute. (Appendix p. 7.) Judge Benny Graff signed the order, and Norman filed a motion to quash the order on January 11, 2002. Norman filed a "Response to Motion and Brief for Order Requiring DNA Samples" dated March 15, 2002, resisting the State's motion and challenging the constitutionality of the statute on *ex post facto* grounds. The Attorney General filed a brief defending the constitutionality of N.D.C.C. § 31-13-03.

Norman filed an addendum to his response and argued at the hearing on the motion that the 2001 amendment does not apply to him. The District Court,

Judge Gail Hagerty presiding, found that the statute is retroactive, does apply to Norman, and denied his motion to quash the order. (Appendix pp. 9-11.)

ARGUMENT

I. N.D.C.C. § 31-13-03 IS CLEARLY RETROACTIVE

N.D.C.C. § 1-02-10 provides that no part of the code is retroactive unless it is expressly declared to be so. The rule in this statute "is merely one of statutory construction." State v. Davenport, 536 N.W.2d 686 (N.D. 1995) (citing Gofor Oil, Inc. v. State, 427 N.W.2d 104, 108 (N.D. 1988); State v. Cummings, 386 N.W.2d 468, 471-472 (N.D. 1986); Caldis v. Board of County Commissioners, 279 N.W.2d 665, 669 (N.D. 1979). A statute does not need to include the word "retroactive" in order for it to be applied to events that occurred prior to the effective date of the statute. Intent of retroactive application may be implied. State v. Davenport, supra, citing In re W.M.V., 268 N.W.2d 781, 783-784 (N.D. 1978).

A. The original statute

N.D.C.C. § 31-13-03 was worded as follows prior to the 2001 amendment:

> **Persons to be tested - Costs.** The court shall order **any person convicted on or after August 1, 1995**, of any sexual offense or attempted sexual offense in violation of sections 12.1-20-03, 12.1-20-03.1, 12.1-20-04, 12.1-20-05, 12.1-20-06, subdivision e or f of subsection 1 of section 12.1-20-07, or section 12.1-20-11 or any other offense when the court finds at sentencing that the person engaged in a nonconsensual sexual act or sexual contact with another person during, in the course of, or as a result of, the offense **and any person who is in the custody of the department on or after August 1, 1995**, as a result of a conviction of one of these offenses to have a sample of blood and other body fluids taken by the department for DNA law enforcement identification purposes and inclusion in law enforcement identification data bases. Notwithstanding any other provision of law, if the sentencing court has not previously ordered a sample of blood and other body fluids to be taken, the court retains jurisdiction and authority to enter an order that the convicted

> person provide a sample of blood and other body fluids as required by this section. Any person convicted on or after August 1, 1995, who is not sentenced to a term of confinement shall provide a sample of blood and other body fluids as a condition of the sentence or probation at a time and place specified by the sentencing court. The cost of the procedure must be assessed to the person being tested.

(Emphasis added.)

The phrase "and any person who is in the custody of the department on or after August 1, 1995" was not added to limit DNA sampling to those who were incarcerated. That fact is clear from the additional language requiring a sample from those not sentenced to a term of confinement.

The phrase "and any person who is in the custody of the department on or after August 1, 1995, as a result of a conviction for one of these offenses" was clearly inserted to make the statute apply retroactively to those offenders previously convicted but still incarcerated for a listed offense.

B. The amended statute

The 2001 amendment added the following language, "The court shall order ***any person convicted after July 31, 2001***, of a felony offense contained in chapter 12.1-16, 12.1-17, or 12.1-18, section 12.1-22-01, or chapter 12.1-27.2 ***and any person who is in the custody of the department after July 31, 2001***, as a result of a conviction for one of these offenses to have a sample of blood or other body fluids taken by the department for DNA law enforcement identification purposes and inclusion in the law enforcement identification data bases." (Emphasis added.)

Norman claims that the amendment only requires DNA sampling from offenders convicted after July 31, 2001, who are also in the custody of the department. This claim ignores that the language used in the amendment was the same as the language that required profiling of sexual offenders, and that language indicated a retroactive intent. It also ignores the dual usage of the phrase "any person."

Words and phrases must be construed according to the context and the rules of grammar and the approved use of the language. N.D.C.C. § 1-02-03. If the Legislature wanted to prohibit firearm possession by any person with brown hair and freckles, it would merely pass a law prohibiting firearm possession by **any person** with brown hair and freckles. By passing a law saying firearms possession is prohibited by **any person** with brown hair **and any person** with freckles, the Legislature would be prohibiting possession by any person meeting either of the criteria.

The plain wording of the statute indicates that qualifying offenders still in custody after July 31, 2001, are required to submit a DNA sample.

C. Legislative history

If the intent of the Legislature is not clear on the face of the statute, then the Court can look to the legislative history to determine whether the Legislature intended to require DNA sampling of non-sexual offenders who were convicted before July 31, 2001. The legislative history of House Bill 1208 refutes Norman's argument.

In response to a question about a change in a fiscal note, Kenan Bullinger, Director of the Crime Lab, testified:

> That was a result of us having to profile all current offenders in custody as of July 31, 2000 (sic). That would get us caught up. It is estimated that we would have another 550 people to profile after that every year.

Hearing on H.B. 1208 Before the House Judiciary Committee, 57th Legislative Assembly (N.D. 2001) (Testimony of Kenan Bullinger, Crime Lab Director).

On February 14, 2001, the primary sponsor of the bill explained why more offenders would be tested the first year than thereafter:

> The reason the number is higher the first year is to take into account the present prison population and present parole/probation population.

Hearing on H.B. 1208 Before the House Appropriations Committee, 57th Legislative Assembly (N.D. 2001) (Memo of Representative Lawrence Klemin).

The House Judiciary Committee requested a breakdown of the felonies committed by current inmates and probationers in order to determine what the impact would be of the intended retroactive application. Representative Klemin attached the breakdown to his memo to the House Appropriations Committee. Hearing on H.B. 1208 Before the House Appropriations Committee, 57th Legislative Assembly (N.D. 2001) (Memo of Representative Lawrence Klemin).

The legislative history indicates that the Legislature intended the 2001 amendments to apply to inmates already convicted of the listed crimes and in Department of Corrections and Rehabilitation custody.

II. THE TRIAL COURT DID NOT ERR IN FINDING THAT HIS 1992 CONVICTION FOR MURDER AND PRESENT STATUS AS AN INMATE REQUIRE HIM TO PROVIDE A DNA SAMPLE

All regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution. Olson v. Bismarck Parks and Recreation District, 2002 ND 61, ¶ 11, 642 N.W.2d 864. An act of the Legislature is presumed to be correct, valid, and constitutional, and any doubt as to its constitutionality must, where possible, be resolved in favor of its validity. State v. Burr, 1999 ND 143, ¶ 11, 598 N.W.2d 147.

As discussed above, N.D.C.C. § 31-13-03 does apply to a person convicted of murder that was still incarcerated after July 31, 2001. By using the language "the court *shall* order any person . . ." the Legislature has removed any discretion from the trial court in the matter. Judge Hagerty correctly interpreted the statute, resolved any doubt in favor of the statute's validity, and appropriately ordered Norman to comply as the statute required.

III. NORMAN ABANDONED HIS *EX POST FACTO* CLAIM

Norman presented an *ex post facto* argument in his initial brief to the District Court. However, at the oral argument he focused only on the issue of whether the statute was, in fact, retroactive.

Norman's Statement of the Issues to this Court contains an *ex post facto* claim. However, the brief itself contains no *ex post facto* argument. Issue 3 in the brief repeats the argument that the 2001 amendments are prospective only and do not apply to Norman. Norman abandoned his *ex post facto* challenge by not bringing out any artillery, let alone the heavy artillery.

The issue of whether the retroactive application of DNA testing violates the *ex post facto* clause has also been addressed in several of the federal circuit courts of appeals. The courts of appeals that have considered the issue have held that retroactive application of DNA testing requirements is regulatory and not punitive. In Jones v. Murray, 962 F.2d 302 (4th Cir. 1992), the court held that Virginia legislation requiring convicted felons to submit blood samples for DNA testing and authorizing prison punishment, including loss of good time, and for discretionary parole, consideration by the Parole Board of an inmate's refusal to provide a DNA sample, did not violate the *ex post facto* clause. In Ewell v. Murray, 11 F.3d 482 (4th Cir. 1993), the court held that Virginia did not violate the *ex post facto* clause by depriving an inmate of good time credits for failure to submit to DNA testing. In Gilbert v. Peters, 55 F.3d 237 (7th Cir. 1995), the court held that Illinois' DNA statute requiring convicted sex offenders to submit a blood specimen to the Department of State Police prior to discharge or parole, even though convicted before the effective date of the statute, did not violate the *ex post facto* clause. In Rise v. State of Oregon, 59 F.3d 1556 (9th Cir. 1995), the court held that an Oregon law requiring offenders convicted of sex offenses before the enactment of the DNA testing statutes to submit a blood sample for DNA testing did not violate the *ex post facto* clause. In Shaffer v. Saffle, 148 F.3d 1180 (10th Cir. 1998), the court held Oklahoma's DNA sample process could be retroactively applied without violating the *ex post facto* clause.

Issue 4 in Norman's brief asserts a three-sentence Fifth Amendment self-incrimination claim. Norman does not offer any case law or explain why a

DNA sample used to identify him in another crime is different than fingerprints that might serve the same purpose. DNA samples are not testimonial in nature. See Schmerber v. California, 384 U.S. 757 (1966) (blood sample does not amount to testimonial or communicative evidence and therefore is not prohibited by the Fifth Amendment.

Fifth Amendment challenges to DNA database statutes have been rejected by other courts. See Boling v. Romer, 101 F.3d 1336, 1340 (10th Cir. 1996); Shaffer v. Saffle, 148 F.3d 1180, 1181 (10th Cir. 1998); Cooper v. Gammon, 943 S.W.2d 699, 705 (Mo. Ct. App. 1997).

Norman's contentions amount to nothing more than naked castings into the constitutional sea, and are not sufficient to command judicial consideration and discussion. See U.S. v. Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970).

IV. THE TRIAL COURT MADE NO FINDING THAT NORMAN WOULD NOT SUFFER NEW LEGAL CONSEQUENCES

Norman's last issue alleges the trial court erred in finding Norman would suffer no legal consequences to a refusal to provide a sample. First of all, there is nothing to indicate Norman is able to refuse a sample. Norman's counsel still refers in his brief to "needles being inserted into his body," even though he was advised at the trial court stage that the samples are taken by oral swab. The statute does not allow a convicted person to refuse the procedure.

Even if Norman was able to refuse the oral swab and did lose good time for his failure to cooperate, loss of good time may be a legal consequence but is still not punishment that would implicate the *ex post facto* clause. See generally State v. Burr, 1999 ND 143, 598 N.W.2d 147 (N.D. 1999) (sex offender

registration provisions are regulatory, not punitive, even though failure to register may carry other consequences).

The trial court did not make any finding about possible legal consequences for refusing to give the sample. Norman cannot claim error in this regard.

CONCLUSION

James Elwood Norman has not demonstrated that his classification as a felon who is required to submit an oral swab is clearly erroneous. Norman has failed to carry the heavy burden of demonstrating that the challenged statute is unconstitutional.

The District Court's Order denying Norman's motion to quash should be affirmed.

Dated this 17th day of September, 2002.

RESPECTFULLY SUBMITTED:

State of North Dakota
Wayne Stenehjem
Attorney General

By: Jonathan Byers
Jonathan Byers #04583
Assistant Attorney General
Office of Attorney General
600 East Boulevard Avenue, Dept. 125
Bismarck, ND 58505-0040
Telephone (701) 328-3404
Facsimile (701) 328-3535

Attorney for the State of North Dakota,
Appellee

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20020172

The State of North Dakota, Appellee, vs. James Elwood Norman, Appellant.	)	**AFFIDAVIT OF SERVICE BY MAIL**

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Peggy Graf states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 17th day of September, 2002, I served the attached MOTION REQUESTING LEAVE TO FILE AMICUS BRIEF and BRIEF OF AMICUS CURIAE upon Kent M. Morrow and Cynthia M. Feland by placing true and correct copies thereof in envelopes addressed as follows:

MR KENT M MORROW
ATTORNEY AT LAW
411 N 4TH ST
BISMARCK ND 58501-4078

MS CYNTHIA M FELAND
BURLEIGH COUNTY ASSISTANT STATES ATTORNEY
514 E THAYER AVE
BISMARCK ND 58501-4413

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Peggy Graf
Peggy Graf

Subscribed and sworn to before me
this 17 day of September, 2002.

Elizabeth Brocker
NOTARY PUBLIC

ELIZABETH BROCKER
NOTARY PUBLIC
STATE OF NORTH DAKOTA
My Commission Expires: Nov. 10, 2004