IN THE COURT OF APPEALS OF IOWA

No. 6-281 / 05-1192
Filed May 24, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL DEON DOSS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, K.D. Briner and Bruce Zager, Judges.

Michael Doss appeals from the sentence entered upon his conviction for willful injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Guddall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Sue Swan, Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Hecht and Eisenhauer, JJ.

HECHT, J.

Michael Doss, who was convicted of willful injury, appeals from the portion of the sentencing order requiring him to submit a DNA sample for profiling. We affirm.

I. Background Facts and Proceedings.

On March 7, 2005, pursuant to a plea agreement, Doss pled guilty to willful injury, a class "D" felony in violation of Iowa Code section 708.4(2) (2003). On July 8, 2005, the court sentenced Doss to a five-year indeterminate term of incarceration. The court also ordered that Doss submit to DNA profiling. The following colloquy was had at the time of sentencing:

> THE COURT: I'm trying to think, I don't believe – and I'm going to ask counsel this question because I'm just not sure – the change in the law as of July 1st, is he required under the sentencing that's conducted now after July 1st the DNA profiling or not? Counsel know?
> DEFENSE ATTORNEY: I don't know.
> PROSECUTOR: I don't think we've gotten anything from PATC.
> THE COURT: I'm going to go ahead and put it in the order, but I'm not sure if that's for pleas and sentences after July 1st or simply for sentences; but I think I have a feeling it is for sentences imposed after July 1st, so I am going to require that you undergo DNA profil[ing] as required by the new statute as well.

Doss appeals from that portion of the sentencing order requiring him to submit a sample for DNA profiling. Doss first contends the court abused its discretion by imposing DNA profiling as a part of sentencing. Doss alternatively claims trial counsel provided ineffective assistance by failing to argue that mandatory DNA profiling violates (1) the constitutional proscription against unreasonable searches and seizures and (2) his right to equal protection of the laws.

II. Did the Court Properly Order DNA Profiling?

We first address the claim the district court abused its discretion when it ordered Doss to submit to DNA profiling. We review this claim for correction of errors at law. Iowa R. App. P. 6.4.

Legislation requiring all felons to submit to DNA profiling became effective in Iowa on June 14, 2005. *See* 2005 Iowa Acts ch. 158 (codified at Iowa Code ch. 81 (Supp. 2005)). Because Doss was not sentenced until July 8, 2005, the statute required the court to order DNA profiling. Accordingly, we find no abuse of discretion and affirm on this issue.[1]

III. Did Counsel Provide Ineffective Assistance?

We next address the claim trial counsel provided ineffective assistance by failing to argue that mandatory DNA profiling for all felons violates (1) the constitutional proscription against unreasonable searches and seizures and (2) the right to equal protection of the laws.

We review ineffective-assistance-of-counsel claims de novo. *State v. Philo,* 697 N.W.2d 481, 485 (Iowa 2005). To prove a claim of ineffective assistance of counsel, Doss must show by a preponderance of the evidence that his trial counsel (1) failed to perform an essential duty and (2) prejudice resulted. *State v. Martin,* 704 N.W.2d 665, 669 (Iowa 2005). We find the record is adequate to decide the issue. *State v. Arne,* 579 N.W.2d 326, 329 (Iowa 1998).

We start from the premise that statutes are presumed to be constitutional, and the challenger carries a heavy burden of rebutting this presumption.

[1] We also reject Doss' claim that remand is required because the court failed to cite the Code section under which DNA profiling was required. Our review of the sentencing proceeding makes it clear the court's order was based on chapter 81.

Glowacki v. State Bd. of Med. Exam'rs, 501 N.W.2d 539, 541 (Iowa 1993). To be found unconstitutional, a statute "must clearly, palpably, and without doubt infringe upon the constitution." *Id.* (citations omitted).

A. Equal Protection.

We first address Doss' equal protection challenge. In particular, he maintains the current statutory scheme, which requires all felons to undergo DNA profiling, is irrational and that there is no "legitimate law enforcement [purpose] in the indiscriminate application of this statute to every felon in the state." The prevailing view is that statutes similar to the one in this case are valid under the rational-basis test for due process and equal protection.[2] Robin Cheryl Miller, *Validity, Construction, and Operation of State DNA Database Statutes*, 76 A.L.R.5th 239 (2000).

In *Schreiber v. State*, our supreme court summarily rejected the claim that Iowa Code section 13.10 (1999) (an earlier version of the same statute requiring inmates who have been convicted of certain enumerated offenses to provide a physical specimen for DNA profiling) violated the appellant's equal protection rights. *Schreiber v. State*, 666 N.W.2d 127, 128 (Iowa 2003) (citing *Roe v. Marcotte,* 193 F.3d 72, 82 (2d Cir. 1999); *Gaines v. State,* 998 P.2d 166, 174 (2000); *State v. Olivas,* 856 P.2d 1076, 1087 (Nev. 1993)). Furthermore, equal protection requires that people who are similarly situated be treated similarly. *Kelly v. State,* 525 N.W.2d 409, 411 (Iowa 1994). Here, *all* felons are subject to DNA profiling; thus, all similarly situated individuals are treated in precisely the

[2] Doss concedes a rational-basis review is appropriate because no suspect classification or fundamental right is implicated. *See State v. Ceaser*, 585 N.W.2d 192, 196 (Iowa 1998).

same manner under the law. *See Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 204 (Iowa 2002) ("The first step of an equal protection claim is to identify the classes of similarly situated plaintiffs singled out for differential treatment."). Because Carter has not satisfied the first step of our equal protection analysis, we need not address whether the requirements of chapter 81 have a rational relationship to a legitimate government interest. However, we do so and conclude the statutory provisions authorizing DNA profiling for convicted felons are rationally related to legitimate government purposes such as identifying perpetrators of future crimes and exonerating the innocent. Accordingly, the statute satisfies both prongs of the rational basis standard of review for equal protection analysis. *State v. Leppert*, 656 N.W.2d 718, 725 (N.D. 2003). Therefore, counsel breached no duty in failing to assert an equal protection challenge.

B. Warrantless Search and Seizure.

Doss argues generally that the order requiring him to submit to DNA profiling violates his state and federal constitutional rights against unreasonable searches and seizures. U.S. Const. amend IV; Iowa Const. art. I, § 8. More particularly, he argues that no "special needs" justify the seizure and that the profiling statute impermissibly requires no finding of probable cause.

"The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *United States v. Brignoni-Ponce,* 422 U.S. 873, 878, 95 S. Ct. 2574, 2578, 45 L. Ed. 2d 607, 614 (1975). Even temporary intrusions into one's personal security for investigatory purposes must meet the Fourth Amendment reasonableness

requirement. *See Davis v. Mississippi,* 394 U.S. 721, 726, 89 S. Ct. 1394, 1397, 22 L. Ed. 2d 676, 680-81 (1969). Collection and analysis of blood or other biological samples constitute a search. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 618, 109 S. Ct. 1402, 1413-1414, 103 L. Ed. 2d 639, 660 (1989). The question is whether the seizure of a specimen for DNA profiling, as was ordered here, is reasonable.

Reasonableness "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Brignoni-Ponce,* 422 U.S. at 878, 95 S. Ct. at 2579, 45 L. Ed. 2d at 614-15. The United States Supreme Court has suggested that probable cause is not required when the detention is temporary and brief, is a relatively slight intrusion into the person's privacy, does not involve the exploration of an individual's private life or thoughts, need not be employed repeatedly, is a reliable and effective investigative tool so as not to be subject to abuse, and need not be done unexpectedly or at an inconvenient time. *See Davis,* 394 U.S. at 727-28, 89 S. Ct. at 1397-98, 22 L. Ed. 2d at 681. Furthermore, the Iowa Supreme Court has determined nontestimonial identification orders, which required the giving of a saliva sample for DNA testing, could be constitutionally based upon a finding of reasonable grounds to suspect rather than upon a showing of probable cause. *Bousman v. Iowa Dist. Ct.*, 630 N.W.2d 789, 798 (Iowa 2001) (reasoning saliva sampling does not involve a significant intrusion into a person's bodily security).

Here, we conclude that the balance between the public interest and the individual's right to personal security and privacy falls squarely in favor of the

State. First, In the face of Fourth Amendment challenges, the overwhelming majority of courts have held that DNA collection and typing laws are constitutional. *See Roe v. Marcotte,* 193 F.3d 72, (2nd Cir.1999); *Boling v. Romer,* 101 F.3d 1336, (10th Cir.1996); *Rise v. State of Oregon,* 59 F.3d 1556, (9th Cir.1995); *Jones v. Murray,* 962 F.2d 302, (4th Cir.1992); *State ex rel. Juvenile Dep't of Multnomah County v. Orozco*, 878 P.2d 432, (Or. Ct. App. 1994). We conclude the bodily intrusion of taking a blood or saliva sample is minimal and is not significantly greater than taking fingerprints or a photograph. The State clearly has a compelling interest in obtaining reliable and accurate identifying characteristics of individuals convicted of felonies. Such valid law enforcement interests outweigh a convicted felon's privacy interests. Therefore, Iowa's DNA profiling statute does not authorize unreasonable searches in violation of the Fourth Amendment. Counsel was not ineffective in failing to raise this issue.

AFFIRMED.