IN THE COURT OF APPEALS OF IOWA

No. 9-220 / 08-0562
Filed June 17, 2009

NAPOLEON HARTSFIELD,
Plaintiff,

vs.

IOWA DISTRICT COURT FOR JONES COUNTY,
Defendant.

Appeal from the Iowa District Court for Jones County, Nancy A. Baumgartner, Judge.

A prisoner challenges an order finding him in contempt of court for refusing to submit to DNA sampling. **WRIT ANNULLED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for plaintiff.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, and Connie S. Ricklefs, County Attorney, for defendant.

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

MANSFIELD, J.

This is a challenge by a prisoner to an order finding him in contempt of court for refusing to provide a DNA sample. For the reasons set forth herein, we uphold the district court's order and annul the writ of certiorari.

I. FACTUAL BACKGROUND.

We restate the facts as set forth in the district court's thorough opinion. In 2002, Napoleon Hartsfield was convicted and sentenced in Scott County for the felonies of possession with intent to deliver, drug tax stamp, delivery of controlled substance, and conspiracy to commit a felony. Hartsfield is currently incarcerated at Anamosa State Penitentiary.

On September 21, 2007, a staff member at Anamosa State Penitentiary attempted to collect an oral swab from Hartsfield for DNA profiling pursuant to Iowa Code section 81.2 (2007). Hartsfield refused to submit to the sampling procedure. Accordingly, the State filed a contempt action pursuant to section 81.4 on October 2, 2007, seeking a warrant of commitment to imprisonment as authorized by section 665.5 until Hartsfield provides the requested specimen for DNA profiling.

Hartsfield raised three arguments in the contempt proceeding. First, he contended the mandatory sampling procedure in chapter 81 was prospective, not retroactive, and did not apply to him because his convictions occurred prior to the adoption of chapter 81. Second, he maintained that prolonging his incarceration because of his refusal to provide a DNA sample would violate the constitutional prohibition against ex post facto laws. Third, he asserted a right to jury trial on the contempt allegations. The district court rejected all three arguments, found

Hartsfield in contempt, and ordered that he "shall be imprisoned until he provides a sample of his DNA as provided in Chapter 81 of the Iowa Code." Hartsfield petitioned our supreme court for a writ of certiorari, which was granted.

II. ANALYSIS.

Certiorari is an action at law; therefore, ordinarily our review is for correction of errors at law. *McKinley v. Iowa Dist. Ct.*, 542 N.W.2d 822, 824 (Iowa 1996). "In our review of a certiorari action, we can only examine 'the jurisdiction of the district court and the legality of its actions.'" *Ary v. Iowa Dist. Ct.*, 735 N.W.2d 621,624 (Iowa 2007) (quoting *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998)). An illegality exists if the district court's factual findings are not supported by substantial evidence or if the district court has not applied the law properly. *Id*.

However, two exceptions to this standard of review have been recognized. *State v. Cullison*, 227 N.W.2d 121, 126 (Iowa 1975). First, where a certiorari action is brought to challenge a contempt judgment, we give weight to the district court's factual findings, but are not bound by them. We examine the evidence to assure that proof of contempt is clear and satisfactory. *Id*. Second, where a certiorari action is brought alleging a violation of constitutional rights, our review is the same as on direct appeal. *See id*. at 126-27; *Shedlock v. Iowa Dist. Ct.*, 534 N.W.2d 656, 658 (Iowa 1995) (discussing that although a certiorari action, the challenge rested on constitutional grounds and review of the facts was de novo). Thus, our review is de novo. *See Cullison*, 227 N.W.2d at 126-27 (stating although brought in a certiorari action, the review of a constitutional issue was the same as if brought on direct appeal); *State v. Hernandez-Lopez*, 639 N.W.2d

226, 233 (Iowa 2002) ("We review constitutional challenges to a statute de novo.").

A. Retroactivity of Chapter 81.

Iowa Code chapter 81 requires "[a] person who receives a deferred judgment for a felony or against whom a judgment or conviction for a felony has been entered . . . to submit a DNA sample for DNA profiling." Iowa Code § 81.2(1). Hartsfield's first argument is that chapter 81 does not apply to individuals, like him, who were convicted and sentenced before chapter 81 was enacted.

We disagree. By its terms, section 81.1 applies to any person "against whom a judgment or conviction for a felony has been entered." Hartsfield is such a person. Had the legislation been designed to apply only prospectively, the terminology "against whom a judgment or conviction for a felony *is* entered" would have seemed the obvious choice. Instead the legislature chose the broader wording: "has been entered."

It is true that one can conceive of two possible, even plausible, different readings of section 81.1. That is, "has been entered" could mean "has been entered after the effective date of the statute," or "has been entered at any time." Here, however, we believe the non-codified statutory language is conclusive. House File 619, which included the provisions of chapter 81 and which was adopted by the 81st General Assembly, provided in Division I section 18:

> PERSONS REQUIRED TO SUBMIT A DNA SAMPLE PRIOR TO EFFECTIVE DATE OF THIS PROVISION OF THIS ACT. A person convicted . . ., prior to the effective date of this Act, who would otherwise be required to submit a DNA sample under this Act, and who is under the custody, control, or jurisdiction of a supervising

> agency, shall submit a DNA sample prior to being released from the supervising agency's custody, control, or jurisdiction.

See 2005 Iowa Acts, ch. 158, § 18. This provision, in our view, demonstrates conclusively that the legislature meant chapter 81 to be retroactive.

Furthermore, chapter 81's predecessor, Iowa Code section 13.10 (2005), had been applied to all convicted felons in certain categories whether the conviction occurred before the statute's effective date or not. *See Schreiber v. State*, 666 N.W.2d 127, 130 (Iowa 2003). It is highly doubtful that the legislature intended to reduce the scope and coverage of DNA profiling when it replaced section 13.10 with chapter 81 (2007).

Finally, the Department of Justice's 2004 memorandum to the General Assembly explained that the legislation, which became HF 619 in the following session, would be "retroactive for qualifying offenses if individuals were convicted or adjudicated prior to the effective date and are still incarcerated or on supervised release." The legislature had that memorandum before it when it adopted chapter 81.

For the foregoing reasons, we hold that chapter 81 applies to Hartsfield.

B. Ex Post Facto Issues.

Hartsfield next argues that even if chapter 81 applies retroactively, the district court's order that he "shall be imprisoned until he provides a sample of his DNA" violates the constitutional prohibitions against ex post facto laws. Both the United States Constitution and the Iowa Constitution prohibit ex post facto legislation. U.S. Const. art. I, § 10; Iowa Const. art. I, § 21. In *Schreiber*, the supreme court held that Iowa Code section 13.10 did not violate the ex post facto

clause because the statute's purpose was not punitive but to promote public safety. *Schreiber*, 666 N.W.2d at 129-30. Hartsfield argues that the rationale of *Schreiber* does not apply here, however, because the state has requested and the court has ordered that he may be incarcerated beyond the term of his original sentence. That was not the case in *Schreiber*; there "any prison sanctions that may be applied for refusing to provide a specimen . . . do not enhance the sentence imposed by the court for the offense originally committed." *Id*. at 130.

Notably, in *Schreiber*, the court distinguished *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992), which found Virginia's DNA profiling statute to be unconstitutional to the extent it deferred the mandatory release date of a prisoner who refused to provide a DNA sample. *Schreiber*, 666 N.W.2d at 130. Hartsfield argues that his situation is analogous to that of the Virginia prisoners. *See also In re DNA Ex Post Facto Issues*, 561 F.3d 294, 299 (4th Cir. 2009) (reaffirming *Jones* and construing South Carolina's DNA profiling law as not authorizing deferral of inmate release dates in order to avoid constitutional difficulties).

We disagree. Iowa Code chapter 81 differs from the Virginia statute in some respects. The Virginia law simply provided that every previously convicted felon had to provide a DNA blood sample "prior to his release." *Jones*, 962 F.2d at 308. While the potential effect of Iowa's law may be similar, its operating mechanism is different. Chapter 81 does not directly lengthen an inmate's prison term beyond the original sentence or postpone his or her release date; rather, it authorizes contempt proceedings against the contumacious inmate under chapter 665. *See* Iowa Code § 81.4(3). In other words, all the prisoner has to do is provide an oral swab. If he or she refuses to do so, a separate sanction,

namely contempt proceedings, may be initiated. The contempt proceedings may result in further incarceration, but that is the consequence of the inmate's failure to comply with a reasonable regulatory statute, not of the original conviction. In other words, we view Iowa's law as comparable to the federal DNA profiling statute, which punishes failure to provide a DNA sample as a separate misdemeanor and which has been repeatedly upheld against constitutional challenge. *See United States v. Hook*, 471 F.3d 766, 776 (7th Cir. 2006) ("[T]he DNA Act does not operate retroactively to punish Hook for his original crime, but rather any punishment that would ensue would be the result of new conduct, i.e., Hook's failure to comply with the DNA Act."); *Vore v. U.S. Dep't of Justice*, 281 F.Supp.2d 1129, 1138 (D. Ariz. 2003) ("[S]uch non-compliance is punished as a separate offense, which diminishes potential ex post facto problems." (citations omitted)).

We think a relevant constitutional guidepost here is *State v. Seering*, 701 N.W.2d 655 (Iowa 2005). There, the supreme court rejected an ex post facto challenge to Iowa's residency restrictions on convicted sex offenders. *Seering*, 701 N.W.2d at 667-69. Although those residency restrictions are certainly more burdensome than asking an individual to provide a one-time oral swab, the court concluded that they served legitimate, nonpunitive goals. *See id*. at 667. Moreover, in denying the constitutional challenge, the court emphasized that any additional incarceration would be associated with violation of the residency restrictions, not the original underlying offense. *Id*. at 668. Because "the residency restriction carries its own penalty for a violation of the statute," it did not violate the ex post facto clause. *Id*. at 669. Similarly, while Hartsfield's

refusal to submit a DNA sample here may lead to additional incarceration, it is the violation of the DNA profiling law, which "carries its own penalty," that triggers that result.

We also believe the United States Supreme Court's decision in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), supports the state's position in this case. *Smith*, which our supreme court cited and relied upon in *Schreiber*, 666 N.W.2d at 129, and *Seering*, 701 N.W.2d at 667, reaffirmed a two-part framework for determining whether a law violates the ex post facto clause. First, was it the legislature's intention to impose punishment? Second, even if the legislature intended to enact a nonpunitive health and safety measure, are the scheme's effects sufficiently punitive as to negate the state's intention to deem it civil? *Smith*, 538 U.S. at 92, 123 S. Ct. at 1146-47, 155 L. Ed. 2d at 176. It appears clear to us that chapter 81, like its predecessor and like other DNA profiling statutes around the country, has an underlying nonpunitive purpose. Its objective is to facilitate the solving of crimes, not to punish them. Likewise, the effects of chapter 81 are not punitive to any significant extent. The initial burden, that of providing an oral swab, is de minimis; and the burden imposed on those who do refuse to meet that burden is the well-recognized sanction of contempt. We hold that chapter 81 as applied to Hartsfield does not violate the ex post facto clause of either the United States or the Iowa Constitutions.

As a final note on this issue, we reject the State's invitation to hold that Hartsfield's appeal is not ripe. The State argues that Hartsfield may change his mind and decide to provide the oral swab before his original sentence is

complete. Hence, the State urges us not to decide his constitutional challenge now. The problem with the state's argument, in our view, is that the State's own litigation position in this case undermines it. The state sought contempt sanctions against Hartsfield, even though Hartsfield is not due to be released for some time, and obtained an order requiring Hartsfield's continued imprisonment until he provides a sample. Now the State complains that Hartsfield is requesting appellate review of the order that it obtained. If the controversy is not ripe, the State should not have sought contempt at this time. We find that there is an "actual, present controversy." *See State v. Sluyter*, 763 N.W.2d 575, 580-81 (Iowa 2009) (holding that a contempt order was ripe for judicial review even though the plaintiff had not yet been arrested or put in jail).

C. Jury Trial.

Hartsfield's final argument is that he should have been granted a jury trial. The State asks us to find that this argument was not preserved, because Hartsfield did not file a jury demand before the hearing, although he asserted his right to a jury trial during the hearing. The district court did not conclude that the argument was procedurally barred, but instead addressed it on the merits. We will do so as well.

We agree with the district court that no jury trial was required here, because the contempt proceeding was civil in nature. The United States Supreme Court has held that criminal contempt proceedings carry with them a right to jury trial when the punishment exceeds six months imprisonment. *Taylor v. Hayes*, 418 U.S. 488, 496, 94 S. Ct. 2697, 2702, 41 L. Ed. 2d 897, 906 (1974). Our supreme court has followed this line of authority. *M.A. v. Iowa Dist. Ct.*, 517

N.W.2d 205, 207 (Iowa 2004). However, where a contempt proceeding results in imprisonment only for so long as the defendant refuses to comply, i.e., the defendant "carries the keys of his prison in his own pocket," that is generally considered a civil proceeding where no jury trial is required. *United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827-29, 114 S. Ct. 2552, 2557, 129 L. Ed. 2d 642, 651-53 (1994).

Hartsfield concedes that he "carries the keys of his prison in his own pocket." However, he insists that Iowa does not recognize the civil-criminal contempt distinction and, therefore, his contempt proceeding should be treated as criminal. Contrary to Hartsfield's argument, *Scully v. Iowa District Court*, 489 N.W.2d 389, 393 (Iowa 1992), indicates that the distinction between the two forms of contempt has some vitality in Iowa. There the supreme court had to decide whether a state-court contempt order was subject to the federal Bankruptcy Code's automatic stay, 11 U.S.C. § 362(a), a question that turned on whether the order was criminal or civil in nature. The supreme court acknowledged that "[o]ur cases do not present a clear civil/criminal dichotomy in distinguishing between punitive and coercive contempt sanctions." Nonetheless, it contrasted sanctions imposed pursuant to Iowa Code section 665.5, which it regarded as "purely coercive," with those imposed pursuant to section 665.4, which it regarded as "primarily punitive." Since the sanctions there had been imposed pursuant to section 665.4, they were criminal in nature and not subject to the Bankruptcy Code's automatic stay. Here, the sanctions were imposed pursuant to section 665.5, the "keys in the pocket" subsection, and thus we agree with the district court that no jury trial was required.

For the foregoing reasons, we uphold the district court's order and annul the writ.

WRIT ANNULLED.