

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY VICTOR DALE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43640

FILED

APR 18 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, entered pursuant to a plea of nolo contendere, of second degree murder. Sixth Judicial District Court, Pershing County; Richard Wagner, Judge.

The issues on appeal concern the sentencing phase of the case. Appellant Timothy Dale murdered his brother and received a sentence of life in prison with possibility of parole after ten years. During the sentencing hearing, the district court referred to the biblical story of Cain and Abel and made several references to the religious beliefs of the victim and the victim's family. Dale now argues these religious references violated his due process rights because the district judge's religious beliefs infected the sentencing process. Dale further argues that his sentence amounts to cruel and unusual punishment and that the requirement that he submit to DNA testing is unconstitutional.

Biblical references

At the sentencing hearing, the district court made several religious references. First, the district court analogized this case to the biblical legend of Cain and Abel. Second, the district court referred to the effects of murder, stating that "it deprives people of the right to change their life, in religious terms, to repent and change their life around and make the best of it." Third, the district court advised the victim's family

that they should be content with the sentence imposed, assuring them that “the God that you worship, each of you,” will decide the ultimate punishment. Finally, the district court told Dale “the life you took is certainly worth the life that you ought to spend in prison.”

Dale did not challenge these religious references below; however, this court may address plain error and constitutional error sua sponte.¹ This court has consistently afforded the district court wide discretion in its sentencing decisions “[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.”²

Dale cites to the Fourth Circuit Court of Appeals decision in United States v. Bakker in support of his argument that religious references during sentencing amount to a due process violation.³

However, as noted by the Ohio Supreme Court, “Bakker in no way supports a per se rule prohibiting all religious references by a sentencing judge.”⁴ Instead, “Bakker represents the exceptional case where a judge’s religious comments implicate the fundamental fairness of a sentencing proceeding by revealing that the judge’s personal religious views were the primary basis for the sentencing decision.”⁵

¹Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992).

²Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); see also Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).

³925 F.2d 728 (4th Cir. 1991).

⁴State v. Arnett, 724 N.E.2d 793, 803 (2000).

⁵Id.

Although the biblical references were inappropriate under the circumstances, we conclude the comments did not amount to a violation of due process. Dale's sentence was in accord with the appropriate statutory penalty and was supported by the recommendation from the presentencing report. There is no indication that the district court's religious convictions informed or biased his decision. The references, when considered in light of the entire sentencing proceedings, do not leave the perception that the sentencing was influenced by the court's religious beliefs. Therefore, we conclude no due process violation occurred.

DNA testing

Dale next contends that compulsory genetic marker testing is unconstitutional because it violates the Fourth Amendment of the United States Constitution. Dale urges this court to overrule its decision in Gaines v. State⁶ and declare NRS 176.0913 unconstitutional, arguing that the Supreme Court's decisions in City of Indianapolis v. Edmond⁷ and Ferguson v. City of Charleston⁸ render compulsory DNA testing statutes unconstitutional. We disagree.

A number of state and federal courts have recently considered the argument advanced by Dale and have concluded these statutes are constitutional.⁹ For example, in United States v. Kincade, the Ninth

⁶116 Nev. 359, 374, 998 P.2d 166, 175 (2000).

⁷531 U.S. 32 (2000).

⁸532 U.S. 67 (2001).

⁹See, e.g., Miller v. U. S. Parole Comm'n, 259 F. Supp. 2d 1166, 1177-78 (D. Kan. 2003); U. S. v. Sczubelek, 255 F. Supp. 2d 315, 323 (D. Del. 2003); State v. Martinez, 78 P.3d 769, 776 (Kan. 2003); El v.

continued on next page . . .

Circuit Court of Appeals sitting en banc held that a federal genetic marker testing statute did not violate the Fourth Amendment of the United States Constitution.¹⁰ The Ninth Circuit based its decision in Kincade on several factors: a detainee's substantially diminished expectations of privacy, the minimal intrusion occasioned by blood sampling, and the overwhelming societal interests so clearly furthered by the collection of DNA information from convicted offenders.¹¹

Moreover, our review of the Supreme Court's holdings in Ferguson and Edmond do not render compulsory DNA testing statutes like NRS 176.0913 unconstitutional and Dale's reliance upon them is misplaced. Dale's argument is without merit, and we are unpersuaded to disturb our holding in Gaines.

CONCLUSION

We conclude that the district court did not violate Dale's due process rights during sentencing. We also reject Dale's contention that the compulsory DNA testing statute is unconstitutional. We have also considered Dale's argument concerning cruel "and/or" unusual

... continued

Mechling, 848 A.2d 1094, 1097-98 (Pa. Commw. Ct. 2004); In re D.L.C., 124 S.W.3d 354, 373 (Tex. App. 2003).

¹⁰379 F.3d 813, 839 (9th Cir 2004).

¹¹Id.

punishment and conclude that it is without merit. Accordingly, we
ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Richard Wagner, District Judge
State Public Defender/Carson City
State Public Defender/Winnemucca
Attorney General George Chanos/Carson City
Pershing County District Attorney
Pershing County Clerk