

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID CARL POSTLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46827

FILED

JUN 29 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, entered pursuant to a guilty plea, of failure by a sex offender to notify authorities of his change of address. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. The district court sentenced appellant David Carl Postler to serve a prison term of 12 to 30 months.

Postler contends that the district court erred by denying his pre-trial motion to dismiss.¹ In his motion, Postler claimed that the crime of open or gross lewdness can be committed without sexual intent and, therefore, a defendant convicted of this crime has a due process right to a hearing to determine whether the crime was sexually motivated before being required to register as a sex offender. On appeal, Postler asserts that the district court erred by assuming that there was a rational basis for requiring defendants convicted of open or gross lewdness to register as sex offenders. Postler presents three arguments in support of his assertion.

First, Postler argues that Nevada's sex offender registration and notification statutes violate his substantive due process rights

¹Postler reserved the right to appeal the district court's order denying his motion to dismiss. See NRS 174.035(3).

because there is no rational relationship between the registration requirements and the crime of open or gross lewdness when the crime is not sexually motivated. We disagree. Under Nevada law, the offense of open or gross lewdness necessarily involves sexual conduct and is therefore sexually motivated.² Consequently, its inclusion in the legislation defining the term "sexual offense" is rationally related to the State's legitimate interest in "establishing a statewide registry of sex offenders."³

Second, Postler argues that his procedural due process rights were violated because he did not receive a hearing on the question of whether his act of open or gross lewdness was sexually motivated. We disagree. "[D]ue process does not require the opportunity to prove a fact that is not material to the State's statutory scheme."⁴ Under Nevada's statutory scheme, a person convicted of open or gross lewdness is a sex offender and the question of whether his act of open or gross lewdness was sexually motivated is immaterial.⁵ Accordingly, we conclude that Postler was not entitled to a hearing.

²See Young v. State, 109 Nev. 205, 215, 849 P.2d 336, 343 (1993) (defining open lewdness as an "unlawful indulgence of lust involving gross indecency with respect to sexual conduct" (internal citations omitted)).

³1997 Nev. Stat., ch. 451, at 1644, 1654-55.

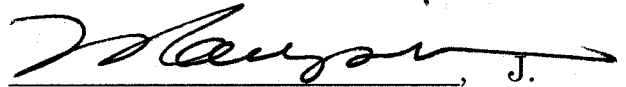
⁴Connecticut Dept. Of Public Safety v. Doe, 538 U.S. 1, 4 (2003).

⁵See NRS 179D.400(1)(a); NRS 179D.410(11).

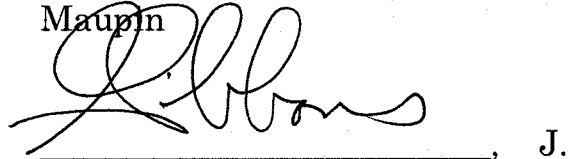
Third, Postler argues that his equal protection rights were violated. We decline to consider this argument because it was not first presented to the court below.⁶

We conclude that the district court did not err in denying Postler's pre-trial motion to dismiss, and we

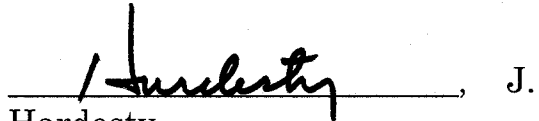
ORDER the judgment of conviction AFFIRMED.



Maupin



Gibbons



Hardesty

cc: Hon. Jerome Polaha, District Judge
Washoe County Public Defender
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁶See McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998).