IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL LEE MCDONALD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79842-COA

ORDER OF AFFIRMANCE

Michael Lee McDonald appeals from a judgment of conviction, pursuant to a jury verdict, of three counts each of burglary and forgery and two counts each of offering false instrument for filing or recording and perjury. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

McDonald, after believing he was unfairly treated in family court, decided to run for Nevada State Assembly, primarily on the platform of reforming family court.[1] Detective Stanton, of the Criminal Intelligence Section of the Las Vegas Metropolitan Police Department and a member of the Nevada Election Integrity Task Force, began investigating McDonald after reviewing a tip on social media claiming that McDonald did not live in the district in which he was running.

In the course of his investigation, Detective Stanton ultimately verified that McDonald in fact lived in the district in which he was running. However, Detective Stanton also found evidence that McDonald fraudulently altered a letter from his marriage and family counselor, which he filed with the family court three times, and also filed a financial disclosure form that contained incorrect information at the time of filing.

[1]We do not recount the facts except as necessary to our disposition.

McDonald's conduct related to these documents formed the basis of the criminal charges brought against him. After a five-day jury trial, the jury found McDonald guilty of three counts each of both forgery (the letter) and burglary (for entering the court building with the intent to file the fraudulent letter) and two counts each of perjury (the financial disclosure statements) and offering false instrument for filing or record (the letter). This appeal followed.

On appeal, McDonald argues that the judgment of conviction should be reversed because he was the target of unconstitutional selective enforcement.[2] Specifically, he argues "that he was singled out" based on his candidacy for Nevada State Assembly. Additionally, McDonald argues that he was treated differently as evidenced by the high number of documents filed in family court and the low rate of prosecutions related to these filings. We disagree and therefore affirm the judgment of conviction.

We review constitutional challenges de novo. *Grey v. State*, 124 Nev. 110, 117, 178 P.3d 154, 159 (2008). A government entity has discretion in prosecuting its criminal laws, but enforcement "is . . . subject to constitutional constraints." *Wayte v. United States*, 470 U.S. 598, 608 (1985) (internal quotation marks omitted). "'[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'"

---

[2]In his opening brief, McDonald also argues that the district court erred in its calculation of credit for time served; however, in his reply brief, McDonald concedes that he in fact received the correct amount of credit for time served. Therefore, we need not address this issue on appeal.

Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (alteration in original) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

To prevail on a selective prosecution claim the claimant must demonstrate that the prosecutorial policy had a discriminatory effect and it was motivated by a discriminatory purpose. *United States v. Armstrong*, 517 U.S. 456, 465 (1996). "A selective-enforcement claim requires essentially the same showing." *United States v. Griffith*, 928 F.3d 855, 866 (10th Cir. 2019). To establish a discriminatory effect[,] . . . the claimant must show that similarly situated individuals . . . were not prosecuted." *United States v. Armstrong*, 517 U.S. 456, 465 (1996). To show discriminatory purpose, a claimant must establish "that the decision-maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Wayte*, 470 U.S. at 610 (internal quotation marks omitted). "This standard is a 'demanding one.'" *Griffith*, 928 F.3d at 866.

As a preliminary matter, we note that ordinarily issues of selective prosecution or enforcement must be raised prior to trial or they are deemed waived. *See Taylor v. United States*, 798 F.2d 271, 273 (7th Cir. 1986) ("A selective prosecution claim must be raised prior to trial or it will be waived unless adequate cause is shown."); *see also* 22 C.J.S. *Criminal Law: Substantive Principles* § 78 (2019) (same). Here, McDonald argued in the district court that the State engaged in "political, vindictive prosecution. It's not selective enforcement. . . . [T]his is vindictive prosecution through and through." Because vindictive prosecution and selective enforcement are not the same claim, McDonald's argument below was not the same as his argument on appeal. *Cf. Lewis v. State*, 125 Nev. 1056, 281 P.3d 1195 (2009) (recognizing vindictive prosecution and selective prosecution as

independent claims). Indeed, it appears that McDonald conceded his claim of "selective enforcement" before the district court. Therefore, we conclude that McDonald has waived this argument, as it is presented for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Even assuming that McDonald properly raised selective enforcement below, he has failed to meet his burden of proof establishing that selective enforcement occurred under the facts and circumstances presented here. Unless suspect classes are involved in the selective enforcement, the Equal Protection Clause is violated only if there is no rational basis to justify the selective enforcement. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-488 (1955). For that reason, the mere fact that law enforcement agencies prosecute some violations of the law but not others does not of itself constitute prohibited discrimination. *Oyler*, 368 U.S. at 456. Here, nothing in the record suggests that McDonald is a member of a suspect class, nor does he expressly aver that he is.[3] Instead, McDonald contends that he is a class-of-one.

A party may bring a class-of-one equal protection claim showing that he or she "has been intentionally treated differently from others

---

[3]McDonald does suggest, however, that running for public office is a fundamental right protected by the First Amendment. This court is aware of no such right, and judicial decisions addressing that issue have reached the opposite conclusion. *See, e.g., Nev. Judges Ass'n v. Lau*, 112 Nev. 51, 56, 910 P.2d 898, 901 (1996) ("[T]he right to run for office is not deemed a fundamental right . . . ."); *see also Molina-Crespo v. U.S. Merit Sys. Prot. Bd.*, 547 F.3d 651, 656 (6th Cir. 2008) ("[T]here is no protected right to candidacy under the First Amendment . . . ." (internal quotation marks omitted)). Accordingly, we find this argument unpersuasive.

similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

In this regard, McDonald specifically asserts that he "is convinced that he was singled out for criminal prosecution because of his candidacy for State Assembly." First, McDonald does not demonstrate that he was intentionally targeted by law enforcement beyond what should have been expected by a candidate running for office. Detective Stanton testified that no one directed him to investigate McDonald, but rather after seeing the social media tip, Detective Stanton decided to follow up on the claim himself as it was a task he was charged with—specifically, making sure that the candidates reside in their proper districts and do not otherwise engage in fraud-related activities. There is no allegation or legal support that such follow-up investigation was not justified. Second, there was also an absence of evidence demonstrating that Detective Stanton intentionally targeted McDonald, specifically or personally, when further investigating his family law case, versus investigating McDonald within the normal course and scope of his duties, and as part of his discretionary decision-making. *See Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 603 (2008) (determining that the class-of-one doctrine does not apply to state actions that "by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments").

Additionally, nothing in the record suggests that McDonald was treated differently than other similarly situated persons. Although there was no other Nevada State Assembly candidate investigated during McDonald's election cycle, Detective Stanton testified that if he had seen another political candidate engaged in similar conduct he would have investigated that candidate. Further, McDonald also did not present

evidence demonstrating that he was treated differently from other litigants involved in family law cases, rather he suggests that prosecution for the type of conduct for which he was charged was "rare." However, an assertion that enforcement of a law is rare does not satisfy the requirements of a selective enforcement claim.[4] *See City of Eugene v. Crooks*, 637 P.2d 1350, 1352 (Or. Ct. App. 1981) ("[T]he mere fact that law enforcement agencies prosecute some violations of the law but not others does not of itself constitute prohibited discrimination."); *see also People v. Serrata*, 133 Cal. Rptr. 144, 153-54 (1976) (concluding that the fact prosecutions under a statute were rare, even though offenses occurred, does not itself constitute a violation of the Equal Protection Clause).

Finally, McDonald fails to meet his burden that his alleged unequal treatment lacked a rational basis. *See Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981) (explaining that an equal protection claim not involving a suspect class requires "a clear showing of arbitrariness and irrationality"); *see also Zamora v. Price*, 125 Nev. 388, 392, 213 P.3d 490, 492-93 (2009) (providing that the party challenging constitutionality bears the burden of proof). McDonald does not dispute that the State has an interest in investigating fraud-related activities conducted by political candidates and enforcing the laws against those who engage in such activities to ensure fair elections. This doctrine applies even when the fraud is ultimately found to be unrelated to the election. Therefore, we conclude that McDonald has

---

[4]Further, to the extent that McDonald relies on attorney Marshal Willick's testimony as it relates to the enforcement of filing fraudulent documents in family court, we are unable to consider Willick's testimony as it was not included in the appellate record. *See Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) (providing that it is the responsibility of appellant to make an adequate appellate record).

failed to meet his burden of proof demonstrating that he was arbitrarily treated differently from others similarly situated, and that there was no rational basis for the difference in his treatment versus others.

Thus, we conclude that McDonald has failed to demonstrate that he is entitled to a reversal of his conviction based on selective enforcement of the applicable laws.[5] Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Ronald J. Israel, District Judge
Mueller & Associates
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

---

[5]To the extent McDonald raised any other arguments by way of his standard of review statement, we decline to address them as they are not cogently argued or otherwise lack support of relevant authority. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).