Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-286

JANUARY TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windham Circuit
	}	
Stephen Robert Bain	}	DOCKET NO. 897/915-7-03 Wmcr
		Trial Judge: Karen R. Carroll

In the above-entitled cause, the Clerk will enter:

Defendant appeals from the district court's order compelling him to submit a DNA sample for the state DNA database. We affirm.

In July 2006, defendant was convicted of two felonies, possession of stolen property by a habitual offender and possession of marijuana, and was given a five-to-ten-year sentence. In December 2007, the Department of Corrections informed defendant that he was required to submit a DNA sample for inclusion in the state DNA database. Defendant declined to submit a sample, and on April 23, 2008 the State moved for an order compelling a sample. See 20 V.S.A. § 1935 (setting forth procedures when person refuses to provide sample). On May 2, defendant filed a memorandum in opposition to the State's motion, arguing that taking and testing a sample violated Article 11 of the Vermont Constitution. Three days later, the State sent defendant additional attachments that had been filed with its motion, including a copy of State v. Martin, 2008 VT 53, ___ Vt. ___, in which this Court held that the DNA database statute did not violate Article 11. More than one month later, on June 12, 2008, defendant filed a motion to enlarge time to file a supplemental memorandum. The State opposed the motion, and the district court denied it on June 16, ruling that defendant already had ample time to prepare for the hearing scheduled for June 20.

At the hearing, defendant appeared by telephone and renewed his claim that the statute violated Article 11. He also contended that application of the statute against him violated the ex post facto clause of Article I, Section 9 of the United States Constitution. Following the hearing, the court ordered defendant to submit a DNA sample. He continued to refuse to submit a sample, however, and on July 18, the court granted the State's motion to use reasonable force to obtain a sample. This appeal followed.

Defendant first argues that the district court abused its discretion by not granting him a continuance to give him more time to prepare for the June 20 hearing. We disagree. Defendant had nearly two months to prepare for the hearing on the State's motion to compel a DNA sample. We find no basis in the record or defendant's brief to overturn the court's determination that defendant had ample time to prepare for the hearing. See State v. Stenson, 169 Vt. 590, 593 (1999) ("The denial of a motion to continue will not be reversed absent a clear abuse of discretion.").

As for the district court's ruling on the State's motion to compel, defendant first argues that the DNA database statute violates Article 11. We decided this issue in State v. Martin, 2008 VT 53, ¶ 35, and defendant has not provided any new argument or other basis for overturning that decision.

Defendant also argues that applying the statute (as amended in 2005) to him violates the ex post facto clause of the United States Constitution. We find no merit to this argument. The focus of an ex post facto inquiry is not on whether a change produces "some ambiguous sort of 'disadvantage' . . . but on whether [it] alters the definition of criminal conduct or increases the penalty by which a crime is punishable." California Dep't of Corr. v. Morales, 514 U.S. 499, 506 n.3. Cut to its essence, the ex post facto clause forbids only the application of laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." Collins v. Youngblood, 497 U.S. 37, 43 (1990). Consequently, federal and state courts across the country have uniformly held that statutes requiring prisoners or convicted felons to provide DNA samples do not violate the federal ex post facto clause, even when the convictions of the persons being asked to provide samples occurred before enactment of the statutes. Gilbert v. Peters, 55 F.3d 237, 238-39 (7th Cir. 1995). This is so because the purpose of these statutes is not to punish the individuals submitting the samples but rather to establish a data bank that will aid future law enforcement and other agencies in identifying individuals. See Shaffer v. Saffle, 148 F.3d 1180, 1182 (10th Cir. 1998) (stating that DNA database statutes do not run afoul of ex post facto clause because they "have a legitimate, non-penal legislative purpose"); Rise v. State of Oregon, 59 F.3d 1556, 1562 (9th Cir. 1995) (stating that DNA database statute does not violate ex post facto clause because its obvious purpose is to assist in identification of criminals, not to punish convicted felons) (called into question on other grounds); People v. Travis, 44 Cal. Rptr. 3d 177, 196 (Cal. Ct. App. 2006) (stating that DNA database statute does not violate ex post facto clause because it was enacted to establish a DNA database and assist in identification of criminals, not to punish convicted felons).

The same is true for Vermont's statute. See 20 V.S.A. § 1931 (stating policy underlying state DNA database statute to assist law enforcement agencies to identify criminals and missing persons); Martin, 2008 VT 53, ¶ 16 (stating that DNA database statute is not intended to subject donors to criminal charges, but rather "to create a DNA database and to assist in the identification of persons at a crime scene should the investigation of such crimes permit resort to DNA testing of evidence"). Although requiring the submission of DNA samples may be viewed as disadvantageous or burdensome, application of the DNA database statute to persons based on conduct that preceded enactment of the statute does not violate the ex post facto clause because the statute neither alters the definition of, nor increases the punishment for, a crime. In this case, defendant was convicted more than one year after the effective date of the statute, which, in relevant part, requires submission of a DNA sample from "every person convicted in a court in

this state of a designated crime on or after the effective date of his subchapter." 20 V.S.A. § 1933(a)(1). In any event, regardless of whether the conduct for which defendant was convicted occurred before the amended statute became effective, there is no ex post facto violation.

Defendant further contends for the first time on appeal that requiring him to submit a DNA sample offends "his belief that he cannot provide a blood or tissue sample because the human body is the temple of God, and only God, our Creator, can call for his blood to spill." **AB at 15** We do not consider this argument because defendant failed to raise it before the district court. See State v. Ruud, 143 Vt. 392, 396 (1983) ("Absent extraordinary circumstances, matters raised for the first time on appeal will not be considered."). We note, however, that defendant fails to articulate how the religion-neutral DNA database law burdens the exercise of his religious beliefs. See Chittenden Town Sch. Dist. v. Dep't of Educ., 169 Vt. 310, 344 (1999) (noting that statute violates free exercise clause only if its purpose or effect is to impede observance of one or all religions); cf. Shaffer, 148 F.3d at 1182 (holding that defendant failed to state a claim for denial of his First Amendment rights because he had not demonstrated that the DNA database statute was not neutral or had been applied to him differently due to his religious beliefs). Finally, defendant cites the Fifth Amendment to the United States Constitution, but does not articulate a colorable reason for overturning the district court's decision based on that amendment. Cf. Shaffer, 148 F.3d at 1181 (recognizing that Fifth Amendment claims are rejected "because DNA samples are not testimonial in nature").

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice