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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-122

OCTOBER TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
Victor Hall	}	DOCKET NO. 1928-5-06 Cncr
		Trial Judge: Geoffrey W. Crawford

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

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

Defendant is an inmate convicted and sentenced on two counts of aggravated sexual assault following his guilty plea. While incarcerated, defendant refused to submit a DNA sample. The State filed a motion to compel, and following a hearing on the motion, the district court ordered defendant to submit a sample. See 20 V.S.A. § 1935 (setting forth procedure for compelling DNA sample). Defendant appeals and raises several arguments, none of which have merit.

Defendant first argues that although he was convicted of a felony, he is only technically a convicted felon, because he is not actually guilty of the crimes for which he was convicted. This argument is unavailing. "[A] § 1935 hearing is not a forum for defendants to collaterally attack their convictions." State v. Wigg, 2007 VT 48, ¶ 6, 181 Vt. 639 (mem.). "The statute limits the scope of the compelled-sampling hearing to the sole issue of whether the person refusing to provide the sample is a person statutorily required to provide one." Id. ¶ 5. Defendant is an incarcerated convicted felon statutorily required to submit a DNA sample. See 20 V.S.A. § 1933(a) (stating who is required to submit a DNA sample) and § 1932(12)(A) (defining a "designated crime" as including "a felony").

Defendant further argues, however, that the statute violates his constitutional rights protecting him against unlawful searches and seizures. We recently rejected this argument, even as applied to nonviolent felons. See State v. Martin, 2008 VT 53, ¶ 35, 184 Vt. 23. Accordingly, this argument must fail, as must defendant's argument challenging the rationale for requiring convicted felons to submit DNA samples. Equally unavailing is defendant's argument that there are less invasive ways of extracting nontestimonial evidence, such as fingerprinting. Courts have routinely held that DNA sampling is nontestimonial, that DNA database statutes do not implicate the Fifth Amendment right against self-incrimination, and that DNA sampling is a uniquely

reliable method of identifying individuals. See, e.g., id. ¶¶ 23-33; United States v. Reynard, 473 F.3d 1008, 1021 (9th Cir. 2007) (holding that DNA sampling is physical and nontestimonial evidence); Jones v. Murray, 962 F.2d 302, 307 (4th Cir. 1992) (explaining unique reliability of DNA testing, as opposed to traditional methods like fingerprinting).

Next, defendant attacks the validity of the motion hearing on the following grounds: (1) the State's attorney did not participate in the hearing, making the district court an advocate for the State; and (2) the court failed to explicitly address his claim that forcing him to submit a DNA sample would violate his sincerely held religious briefs. Regarding the first claim of error, the State filed a written motion and supporting affidavit with the court, and the court considered those documents in requiring defendant to submit a DNA sample. There is no error. As for defendant's second complaint, we determine below that his freedom-of-religion argument is without merit; the fact that the district court did not explicitly address the argument does not require reversal of the court's decision.

Defendant argues that compelling the extraction of bodily fluids for DNA sampling violates his constitutional right to freely exercise his religion because the body is the temple of God. In opposing the State's motion to compel a DNA sample, defendant argued that the extraction of his bodily fluids would violate Chapter I, Article 3 of the Vermont Constitution. At the hearing on the State's motion, defendant stated, without further explanation, that the government's extraction of a DNA sample for its own interests violated his religious belief that he be in control of his own body according to God's will. The district court generally rejected defendant's constitutional arguments, but did not specifically address this argument.

We have stated that Article 3 of the Vermont Constitution adds no further protection than that afforded under the First Amendment of the United States Constitution. Hunt v. Hunt, 162 Vt. 423, 435-36 (1994). "The right of free exercise protected by the First Amendment 'does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " Kaemmerling v. Lappin, 553 F.3d 669, 677 (D.C. Cir. 2008) (quoting Employment Div. v. Smith, 494 U.S. 872, 879 (1990)). Defendant does not contest that the DNA law is a generally applicable, religion-neutral law; therefore, he cannot prevail on his constitutional argument, even if we assume that the law has some incidental effect on his sincerely held religious briefs. See id.

Defendant also raises federal statutory law in support of this argument, but he did not preserve that argument below. In any event, such an argument is unavailing. Federal statutory law prohibits the government from imposing a "substantial burden" on an incarcerated individual's exercise of religion, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on the individual (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000cc-1(a). A burden is considered substantial when a government action places substantial pressure on an adherent to modify his behavior in a way that violates his sincerely held religious beliefs. Kaemmerling, 553 F.3d at 678. Similar to the prisoner in Kammerling, defendant in this case argues that every cell of his body is a sacred part of the temple of God subject only to his own control and not to the secular interests of the state. See id. As in Kammerling, we conclude that defendant has failed

to demonstrate that the government's action impedes any religious observance of defendant or calls for him to modify his religious behavior in any meaningful way. Id. at 679. Further, even if he had made such a showing, courts have recognized that DNA profiling of convicted felons serves a compelling governmental interest and is the least restrictive means of doing so. E.g., id. at 679-81 (rejecting similar freedom-of-religion argument under federal law); cf. Martin, 2008 VT 53, ¶ 20 (citing special needs of police furthered by DNA sampling statute).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice