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# STATE OF NEBRASKA, APPELLEE, V. RAYMOND A. BORGES, APPELLANT.

791 N.W.2d 336

Filed March 2, 2010. No. A-09-829.

1. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
4. **Constitutional Law: Equal Protection.** The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.
5. **Equal Protection: Proof.** The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action; absent this threshold showing, one lacks a viable equal protection claim.
6. ____: ____. The party alleging a violation of equal protection has the burden to prove that the classification violates the principle of equal protection.
7. **Equal Protection.** The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.
8. **Constitutional Law: Equal Protection: Statutes.** In an equal protection challenge to a statute, the degree of judicial scrutiny to which the statute is to be subjected may be dispositive; if a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny, and if it does not, then courts analyze the classification using rational basis review.
9. **Equal Protection.** Under the rational basis test, the Equal Protection Clause is satisfied as long as there is (1) a plausible policy reason for the classification, (2) the legislative facts on which the classification is apparently based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.
10. ____. The rational relationship standard, as the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause, is offended only if a classification rests on grounds which are wholly irrelevant to the achievement of the government's objectives.
11. ____. In an equal protection analysis, when determining whether a rational basis exists for a legislative classification, courts look to see if any state of facts can be conceived to reasonably justify the disparate treatment which results.

12. **Equal Protection: Proof.** A state-sponsored specialized program for drug offenders does not violate the Equal Protection Clause when a defendant cannot prove he or she was similarly situated to the group for which the program was designed and when the program is rationally related to the State's legitimate interests.
13. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
14. **Sentences.** In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
15. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Cheyenne County: DEREK C. WEIMER, Judge. Affirmed.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

SIEVERS, Judge.

Raymond A. Borges pled guilty to attempted delivery of a controlled substance and was sentenced to 15 to 20 years' imprisonment. Borges appeals his sentence, and for the reasons set forth herein, we affirm the sentencing order of the district court for Cheyenne County. Pursuant to Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008), this case was submitted without oral argument.

## FACTUAL AND PROCEDURAL BACKGROUND

Borges was arrested on November 19, 2008, when he sold 1 gram of methamphetamine to a person cooperating with police officers involved in the Western Nebraska Intelligence and Narcotics Group. When the officers arrested Borges, he dropped a plastic baggie containing methamphetamine. Police then searched his house, where they found additional

methamphetamine. In total, Borges had 6.79 grams of methamphetamine in his possession at the time of his arrest.

Borges was charged in an information filed April 27, 2009, in the district court for Cheyenne County, with delivery of methamphetamine, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 2008), and possession of methamphetamine with intent to deliver, in violation of § 28-416(1)(a). On May 12, the district court accepted Borges' guilty plea to attempted delivery of methamphetamine, which was the charge in the amended information, in violation of Neb. Rev. Stat. § 28-201 (Reissue 2008) and § 28-416, a Class III felony.

On June 18, 2009, Borges filed a motion for a Specialized Substance Abuse Supervision (SSAS) evaluation. The district court held a hearing on such motion on July 14 and filed its order the following day. The court overruled Borges' motion for an SSAS evaluation, finding that Borges did not have a constitutional right under the U.S. or Nebraska Equal Protection Clause to such evaluation. The court found that Borges was not similarly situated to offenders given SSAS evaluations, based upon the evidence adduced at the hearing, and that even if he were similarly situated, there was a rational relationship between the State's legitimate interests and the action taken by the State. The district court filed its sentencing order on July 21, and in such, the court sentenced Borges to 15 to 20 years' imprisonment. Borges filed his notice of appeal with this court on August 20.

## ASSIGNMENTS OF ERROR

Borges assigns as error that the district court (1) erred when it denied his motion for an SSAS assessment, in violation of his right to equal protection under the federal and state Constitutions, and (2) abused its discretion in sentencing him without consideration of an SSAS assessment.

## STANDARD OF REVIEW

[1] Regarding questions of law, an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

[2,3] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion. *State v. Thompson*, 15 Neb. App. 764, 735 N.W.2d 818 (2007). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

## ANALYSIS

*Equal Protection.*

Borges first argues that he had a constitutional right under the Equal Protection Clauses of the U.S. and Nebraska Constitutions to an SSAS evaluation, which is available to other drug offenders in certain Nebraska counties. The SSAS program was implemented to reduce overcrowding in prisons and promote rehabilitation for drug offenders who would not be considered suitable for traditional or intensive supervision probation. The program is offered to offenders with prior felony drug convictions. To qualify, an offender must complete an assessment, which includes a "whole life needs" assessment and a chemical dependency evaluation. The SSAS program started in 2006 and has been utilized in Douglas, Lancaster, Sarpy, Dakota, Buffalo, and Dawson Counties. At the time of the hearing, the remaining 87 Nebraska counties were not involved with the program.

[4,5] The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges. *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006). The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. *Id.* Absent this threshold showing, one lacks a viable equal protection claim. *Id.*

[6] The district court concluded that Borges was not similarly situated based upon the finding that the evidence did not establish what type of criminal defendant is evaluated for the

SSAS program in the counties where the program is being utilized, other than the generic classification "felony drug offenders." The court specifically listed a lack of evidence on the eligible defendants' "prior offenses (nature and number of priors), whether they had been on probation in the past and the success of those efforts, whether they had been incarcerated previously, for how long and with what level of recidivism." The party alleging a violation of equal protection has the burden to prove that the classification violates the principle of equal protection. See *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006). Borges did not identify the precise evaluation criteria for the program, other than that several assessments were required, and failed to show that he would be eligible for the SSAS program even if it were available to him in Cheyenne County. Thus, we agree that the evidence adduced at the hearing failed to show that Borges was similarly situated to felony drug offenders who had been deemed eligible for the SSAS program.

[7,8] However, even if Borges were similarly situated to other felony drug offenders who were eligible for the SSAS program, he failed to show that he was entitled to an SSAS evaluation under the Equal Protection Clause.

> The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. . . . In an equal protection challenge to a statute, the degree of judicial scrutiny to which the statute is to be subjected may be dispositive. . . . If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny. . . . If it does not, then courts analyze the classification using rational basis review.

*State v. Senters*, 270 Neb. 19, 27, 699 N.W.2d 810, 818 (2005) (citations omitted).

[9-11] Borges argues in his brief that he has a fundamental liberty interest and that therefore, strict scrutiny should be utilized by the court. However, what that liberty interest would be in this case is unclear and, during the hearing on the motion for the SSAS evaluation, Borges' counsel conceded that the rational basis test applies.

> Under the rational basis test, the Equal Protection Clause is satisfied as long as there is (1) a plausible policy reason for the classification, (2) the legislative facts on which the classification is apparently based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. . . . The rational relationship standard, as the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause, is offended only if a classification rests on grounds which are wholly irrelevant to the achievement of the government's objectives. . . . When determining whether a rational basis exists for a legislative classification, courts look to see if any state of facts can be conceived to reasonably justify the disparate treatment which results.

*Le v. Lautrup*, 271 Neb. at 936-37, 716 N.W.2d at 719-20 (citations omitted).

[12] The geographic limitations on the SSAS program meet the rational basis test. Deb Minardi, a deputy probation administrator who supervises the SSAS program, testified that the six counties selected were chosen for the test program because they have the highest proportions of felony drug offenders in the state. Minardi testified that the program was not implemented in all 93 Nebraska counties at the onset of the program because of the costs of ensuring each county had the infrastructure and personnel to conduct the program. Minardi testified that the program shows preliminary promise for rehabilitation and reformation of participants but has not been in place long enough to have any definitive evidence of success. Because of high costs, it seems that the program would not likely be expanded to the remaining counties until there is such evidence. The State has a legitimate interest in reducing the number of inmates incarcerated in state facilities, as well as in a lower rate of recidivism among felony drug offenders. Focusing a test program in the counties with the highest number of felony drug offenders is relevant to these objectives and rationally related to these interests. Thus, we hold that a state-sponsored specialized program for drug offenders does not violate the Equal Protection Clause

when a defendant cannot prove he or she was similarly situated to the group for which the program was designed and when the program is rationally related to the State's legitimate interests. Therefore, this assignment of error lacks merit.

*Borges' Sentence.*

[13] Borges argues that the district court abused its discretion by sentencing him to 15 to 20 years' imprisonment without considering an SSAS evaluation. Generally, where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). Neb. Rev. Stat. § 28-105 (Reissue 2008) specifies that the penalty for a Class III felony is 1 to 20 years' imprisonment, a $25,000 fine, or both. Borges' sentence falls within the prescribed statutory range.

[14,15] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*. The district court clearly considered the SSAS program as one of its sentencing options. However, the court pointed out in its July 15, 2009, order on the motion for an SSAS evaluation that the program would not be practicable for Borges, because the program is not available in Cheyenne County. The SSAS program requires that offenders report to a center located in each participating county. The closest reporting center to Cheyenne County is located in Lexington, Nebraska, which is about 200 miles away. Furthermore, a senior probation officer testified that probation officers in counties that are not involved with the SSAS program have not been trained to conduct the whole life needs assessment, which is one of the necessary components.

Borges has a long history of substance abuse. He admits to using alcohol and various drugs and being an addict for

22 years, and he has used methamphetamines on and off for the past 15 years. Borges has an extensive criminal history, including at least 30 convictions, 12 of which were felony arrests. Borges has had 11 alcohol-related arrests and 7 drug-related arrests. He has been sentenced to jail time 16 times, to prison on 4 separate occasions, and to probation 6 times. Notably, Borges has had his probation revoked on three occasions. Borges tested very high on the alcohol, drug, violence, and antisocial scales in his presentence investigation report. Based upon the impracticality of administering the SSAS evaluation in Cheyenne County, a county that does not currently offer the program, and Borges' criminal history, we find that the district court did not abuse its discretion in sentencing Borges to 15 to 20 years' imprisonment. Therefore, Borges' second assignment of error also lacks merit.

AFFIRMED.

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STATE OF NEBRASKA, APPELLANT, V.
DAVID L. ANDERSON, APPELLEE.
779 N.W.2d 623

Filed March 2, 2010. No. A-09-870.

1. **Sentences: Appeal and Error.** When the State appeals and claims that a sentence imposed on a defendant is excessively lenient, the standard of review is whether the sentencing court abused its discretion in the sentence imposed.
2. **Sentences.** Whether a defendant is entitled to credit for time served is a question of law.
3. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
4. ____. It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
5. **Sentences: Words and Phrases.** The phrase "in custody" under Neb. Rev. Stat. § 83-1,106 (Reissue 2008) means judicially imposed physical confinement in a governmental facility authorized for detention, control, or supervision of a defendant before, during, or after a trial on a criminal charge.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Reversed and remanded with directions.

Timothy S. Sieh, York County Attorney, for appellant.

No appearance for appellee.