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### Summary of Herman v. State, 122 Nev. Adv. Op. 17

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*Herman v. State*, 122 Nev. Adv. Op. 17 (February 23, 2006)<sup>1</sup>

## **CRIMINAL LAW – DNA EVIDENCE & PRESENTENCE REPORTS**

### **Summary**

In this case, the Court considered two issues: (1) whether DNA evidence voluntarily submitted to a public facility to absolve a defendant of a crime may be used in an unrelated criminal prosecution, and (2) whether reading a presentence report to a jury during the sentencing phase is error when the report cannot be made part of the public record.

### **Disposition/Outcome**

The Court concluded (1) that the DNA evidence was properly admitted; and (2) that the presentence report was improperly read to the jury. The Court affirmed the defendant's conviction, but reversed and remanded for a new sentencing phase.

### **Factual and Procedural History**

In 1997, Leslie Carter was found dead in a women's bathroom in Reno. Carter's body was partially undressed and her injuries indicated a violent struggle. Authorities found blood that was not Carter's in the bathroom and on the victim's pants. Investigators tested the blood for a DNA match, but none was found.

In 1999, Willie Herman was charged with robbery, and voluntarily submitted a blood sample to help prove his innocence. Herman was acquitted. Authorities entered Herman's DNA results into a criminal database without Herman's knowledge or permission.

In 2000, authorities retested the blood found on Carter's pants. It matched Herman's DNA profile. In 2000 and 2001, detectives interviewed Herman three times in Lovelock Correctional Center, where Herman was incarcerated for possession of a controlled substance. When detectives met with Herman for the final time in October 2001, Herman volunteered, without being questioned, that he had not raped or killed Carter. Herman was charged with first-degree murder.

During Herman's trial, two of Herman's former cellmates testified that Herman confessed to killing Carter. During closing arguments, the prosecutor indicated that Herman's statement to detectives that he did not rape or kill Carter contained information about the crime not available to the general public, since it was not publicly known that Carter had been sexually assaulted. The prosecutor also stated that Herman could not explain how his blood was found at the crime scene. The jury convicted Herman.

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<sup>1</sup> By Michael Pandullo

During the sentencing phase, the State read to the jury a presentence report that detailed Herman's multiple prior arrests. The jury sentenced Herman to life without the possibility of parole. Herman appealed.

## **Discussion**

### **A. DNA Evidence**

Herman argued that the DNA evidence from his previous robbery trial was inadmissible at his murder trial. Because Herman failed to raise the issue during trial, the Court was limited to addressing plain error.<sup>2</sup> The Court found no plain error.

Both the United States and Nevada Constitutions prohibit unreasonable search and seizure.<sup>3</sup> Warrantless searches are generally unreasonable, but consent exempts a search from probable cause and warrant requirements.<sup>4</sup> The state must prove consent by clear and persuasive evidence.<sup>5</sup>

The Court found support for the position that when an individual consents to provide or voluntarily provides a DNA sample to authorities, there is no Fourth Amendment violation when that DNA sample is later used in an unrelated proceeding.<sup>6</sup>

The Court then reviewed cases decided by the Supreme Courts of Indiana<sup>7</sup> and Hawaii,<sup>8</sup> which held that an individual has no possessory or privacy interest in his DNA sample when it is placed in a state database. The Court found substantial support for the position that a defendant has no expectation of privacy when he volunteers his DNA sample without limiting the scope of his consent.<sup>9</sup> The Court measures the scope of a defendant's consent by applying a reasonable person standard to determine whether the legitimately obtained DNA sample may, like fingerprints, be used for general investigative purposes.

The Court held that Herman provided his DNA sample without limiting the scope of his consent. A reasonable person in Herman's position would have known that the DNA sample he gave to prove his innocence and the resulting DNA profile would be available for general investigative purposes. Thus, there was no plain error in admitting evidence of Herman's DNA sample.

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<sup>2</sup> Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992); NEV. REV. STAT. § 178.602 (2005).

<sup>3</sup> U.S. CONST. amend. IV; NEV. CONST. art. 1, § 18.

<sup>4</sup> Howe v. State, 112 Nev. 458, 463, 916 P.2d 153, 157 (1996).

<sup>5</sup> Lightford v. State, 90 Nev. 136, 139, 520 P.2d 955, 956 (1974).

<sup>6</sup> Smith v. State, 744 N.E.2d 437, 439 (Ind. 2001).

<sup>7</sup> *Id.* In *Smith*, the defendant moved to suppress DNA evidence obtained in a previous case. In the previous case, the court had ordered the defendant to provide a DNA sample, from which a DNA profile was created. The court held that the DNA sample could be used in the later case because authorities obtained it lawfully. The DNA profile that the state created using the sample belonged to the state, and the defendant had no expectation of privacy in the state's records. Furthermore, the defendant had no possessory or ownership interest in the DNA sample once it was used to create the profile. *Id.*

<sup>8</sup> State v. Hauge, 79 P.3d 131, 142 (Haw. 2003). The Hawaii Supreme Court held that a defendant has no constitutionally protected possessory or privacy interest in his blood sample once authorities lawfully obtain it. Furthermore, a defendant has no privacy interest in the sample itself or the profile created from it. *Id.*

<sup>9</sup> State v. McCord, 562 S.E.2d 689, 693 (S.C. Ct. App. 2002).

## B. Presentence Report

Herman argued that it was error to allow the prosecution to read the presentence report to the sentencing jury. Because Herman did not raise the issue below, the Court only addressed plain error and constitutional error *sua sponte*.<sup>10</sup>

To warrant a new sentencing hearing based on an alleged due process violation, a defendant must show actual prejudice.<sup>11</sup>

During a sentencing proceeding, the court may consider facts and circumstances that would be inadmissible at trial.<sup>12</sup>

The district court is afforded wide discretion in its sentencing decisions and the Nevada Supreme Court refrains from interfering with the sentence imposed when the record does not show prejudice resulting from the admission of information founded on facts supported only by impalpable or highly suspect evidence.”<sup>13</sup> NRS 175.552(3) permits evidence of any matter that the court deems relevant to sentence, regardless of the inadmissibility of that evidence at trial. However, there are constitutional constraints on the court’s discretion.

In the penalty phase of a capital case, evidence of the defendant's character and specific instances of conduct are admissible, but the evidence must be relevant and the danger of unfair prejudice must not substantially outweigh its probative value.<sup>14</sup>

Pursuant to NRS 176.156, a presentence report is to be presented to both the defense and the prosecution, who each may object to any factual errors in the report. The report is confidential and is not to be made part of the public record.<sup>15</sup>

Here, the prosecution read the presentence report to the jury, including a description of seventeen previous unrelated arrests. The Court held that the reading of the presentence report to the jury was tantamount to making it part of the public record. Additionally, the Court found that some of the information contained in the sentencing report, including Herman’s arrest for possession of paraphernalia, was clearly not more probative than it was prejudicial with respect to Herman’s violent character and capacity to kill. Therefore, the Court concluded that it was plain error to allow the prosecution to read the presentence report to the jury, and for a new sentencing proceeding.

## Conclusion

The Court held that it was not plain error to admit Herman’s DNA information at trial. A person who volunteers DNA information for public use without expressly limiting the scope of his consent has no expectation of privacy in his DNA profile. Additionally, the Court held that it was plain error to allow the presentence report to be read to the jury. The Court remanded to the district court for a new sentencing phase.

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<sup>10</sup> Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992).

<sup>11</sup> McKenna v. State, 114 Nev. 1044, 1050, 968 P.2d 739, 742-43 (1998).

<sup>12</sup> Silks v. State, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976).

<sup>13</sup> *Id.* at 94, 545 P.2d at 1161.

<sup>14</sup> *McKenna*, 114 Nev. at 1051-52, 968 P.2d at 744.

<sup>15</sup> NEV. REV. STAT. § 176.156(5) (2005).