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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0500**

State of Minnesota,
Plaintiff,

vs.

Jesus Gilberto Garza,
Defendant.

**Filed July 30, 2012
Affirmed; certified question answered in the affirmative
Cleary, Judge**

Clay County District Court
File No. 14-CR-11-4296

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Pamela Harris, Assistant County Attorney,
Moorhead, Minnesota (for plaintiff)

David W. Merchant, Chief Appellate Public Defender, St. Paul, Minnesota; and

Rex Tucker, 7th District Public Defender, Joseph M. Parise, Assistant Public Defender,
Moorhead, Minnesota (for defendant)

Elizabeth J. Richards, Beverly Balos, Minnesota Coalition for Battered Women, St. Paul,
Minnesota (for amicus curiae Minnesota Coalition for Battered Women)

Rana Alexander, Battered Women's Legal Advocacy Project, Minneapolis, Minnesota
(for amicus curiae Battered Women's Legal Advocacy Project)

Kristine Lizdas, Battered Women's Justice Project, Minneapolis, Minnesota (for amicus
curiae Battered Women's Justice Project)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Judge; and Willis, Judge.*

UNPUBLISHED OPINION

CLEARY, Judge

When appellant Jesus Garza was charged with violating a postconviction-probationary domestic-abuse-no-contact order (DANCO), he moved to have the charge dismissed and the DANCO quashed, arguing that Minn. Stat. § 629.75, subd. 1(b), (c) (2010), which provides for the issuance of DANCOs, is unconstitutional because it violates the separation-of-powers doctrine and the right to procedural due process. The district court determined that appellant could not collaterally attack the DANCO and certified three questions to this court regarding the collateral-attack issue and the constitutionality of the DANCO statute. We affirm and answer the first certified question in the affirmative.

FACTS

In August 2011, appellant was sentenced for a criminal offense. In a separate proceeding immediately following sentencing, the district court issued a postconviction-probationary DANCO that prohibited appellant from having contact with the victim of the offense.

In December 2011, the state charged appellant with violating the DANCO. Appellant filed a motion requesting that the charge be dismissed and that the DANCO be

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

quashed. Appellant argued that Minn. Stat. § 629.75, subd. 1(b), (c), which provides for the issuance of DANCOs, is unconstitutional in that it violates the separation-of-powers doctrine and the right to procedural due process. The district court determined that appellant could not collaterally attack the DANCO and issued an order certifying the following questions to this court:

Does *State v. Romine*, 757 N.W.2d 884 (Minn. Ct. App. 2008), preclude a defendant who failed to appeal a post-conviction probationary Domestic Abuse No Contact Order or raise a constitutional challenge to Minn. Stat. § 629.75, Subd. 1(b) and Subd. 1(c), when that order was issued, from collaterally attacking that order or the constitutionality of Minn. Stat. § 629.75, Subd. 1(b) and Subd. 1(c), in a subsequent criminal prosecution for a violation of that order?

Does Minn. Stat. § 629.75, Subd. 2, violate a defendant's constitutional right to procedural due process?

Does the process of issuing a DANCO, pursuant to Minn. Stat. § 629.75, Subd. 1(b) and Subd. 1(c), as a post-conviction probationary order afford a defendant a different level of procedural due process than the process of issuing a DANCO as a pre-trial order, when said defendant has presumably received all the due process guarantees of a criminal proceeding and has either admitted guilt or been found guilty of a pertinent crime prior to the issuance of the post-conviction probationary DANCO?

DECISION

The district court determined that, pursuant to *State v. Romine*, 757 N.W.2d 884 (Minn. App. 2008), *review denied* (Minn. Feb. 17, 2009), appellant is precluded from collaterally attacking the DANCO after being charged with violating it, when he did not appeal the order when it was issued. Appellant argues that his challenge is permissible despite *Romine*. The application of existing caselaw presents a question of law, which an

appellate court reviews de novo. *Great W. Cas. Co. v. Barnick*, 542 N.W.2d 400, 401 (Minn. App. 1996).

A collateral attack is an “attack on a judgment in a proceeding other than a direct appeal.” *Black’s Law Dictionary* 298 (9th ed. 2009). A defendant may not collaterally attack an order in an appeal arising out of a violation of that order. *State v. Cook*, 275 Minn. 571, 571–72, 148 N.W.2d 368, 369 (1967). “As a general rule, a party’s failure to appeal the issuance of a court order precludes a collateral attack on that order in a subsequent proceeding.” *Romine*, 757 N.W.2d at 889–90.

In *Romine*, an order for protection (OFP) had been issued against a defendant. *Id.* at 888. When the defendant was subsequently criminally charged with violating the OFP, he challenged the constitutionality of the order and the statute on which it was based. *Id.* at 889. This court noted that the defendant had the right to appeal the OFP when it was issued, but had not done so, and held that the defendant could not collaterally attack the order after being charged with its violation. *Id.* at 890. However, this court held that the defendant could proceed with a challenge to the constitutionality of the penalties subdivision of the OFP statute because that subdivision was the basis of the offense being reviewed on appeal. *Id.* at 890–91. *See also State v. Harrington*, 504 N.W.2d 500, 503 (Minn. App. 1993) (prohibiting the appellants from challenging the validity of a restraining order in a subsequent action in which they were charged with violating the order), *review denied* (Minn. Sept. 30, 1993). In regard to the ability to collaterally attack an order, we see no difference between the postconviction-probationary DANCO issued in this case and the OFP issued in *Romine* or the restraining order issued in *Harrington*.

Appellant points out that, pursuant to *Romine*, he would not be prohibited from challenging the penalties subdivision of the DANCO statute after being charged with violating the DANCO. *See Romine*, 757 N.W.2d at 890–91. Appellant is not challenging a penalty imposed under Minn. Stat. § 629.75, subd. 2 (2010), the subdivision addressing criminal penalties for violations of DANCOs. However, appellant argues that it is impossible to challenge the DANCO statute’s penal provisions without challenging the entire statute. “Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable.” Minn. Stat. § 645.20 (2010); *see also Romine*, 757 N.W.2d at 890–91 (addressing the merits of a constitutional challenge to the penalties subdivision of the OFP statute after holding that the defendant could not collaterally attack an OFP). Subdivisions 1 and 2 of Minn. Stat. § 629.75 are severable, and appellant could challenge criminal penalties imposed under subdivision 2 for violation of the DANCO without challenging the issuance of the DANCO under subdivision 1.

Appellant argues that he was unable to appeal the DANCO when it was issued because the order was “issued in a proceeding that is separate from but held immediately following” the sentencing hearing. Minn. Stat. § 629.75, subd. 1(c). Appellant further argues that, because a DANCO is “independent of any condition of . . . probation imposed,” he was unable to appeal the order until it was violated. Minn. Stat. § 629.75, subd. 1(b). “A defendant may appeal as of right from any adverse final judgment[] A final judgment within the meaning of these rules occurs when the district court enters a judgment of conviction and imposes or stays a sentence.” Minn. R. Crim. P. 28.02,

subd. 2(1). It is true that there is no distinct provision in the rules of criminal procedure authorizing an appeal of a DANCO when it is issued. However, a postconviction-probationary DANCO is issued as part of and in conjunction with the underlying criminal action, so, under Minn. R. Crim. P. 29.02, subd. 2(1), a defendant would be able to appeal the issuance of a DANCO after a judgment of conviction is entered and a sentence is imposed in the criminal action. *See* Minn. Stat. § 629.75, subd. 1(a) (2010) (“A domestic abuse no contact order is an order issued by a court against a defendant in a criminal proceeding or a juvenile offender in a delinquency proceeding . . .”). Appellant did not appeal the probationary DANCO at the time of his conviction and is precluded from collaterally attacking the order after being charged with violating it.¹

Affirmed; certified question answered in the affirmative.

¹ Because we hold that appellant may not collaterally attack the DANCO, we decline to reach his arguments or the remaining certified questions regarding the constitutionality of Minn. Stat. § 629.75, subd. 1(b), (c). *See State v. Filipovic*, 312 Minn. 147, 151, 251 N.W.2d 110, 112 (1977) (“The certification procedure should not be used to present a hypothetical question or to secure an advisory opinion. Nor should it be invoked until the record is sufficiently developed to present a substantive issue.”).