STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0433

State of Minnesota,
Respondent,

vs.

Richard Harlen Savitski,
Appellant.

Filed January 7, 2013
Affirmed
Kirk, Judge

Mille Lacs County District Court
File No. 48-CR-10-2213

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

Janice S. Jude, Mille Lacs County Attorney, Mark J. Herzing, Assistant County Attorney, Milaca, Minnesota (for respondent)

Jenny Chaplinski, Special Assistant Public Defender, St. Cloud, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

KIRK, Judge

Appellant challenges his misdemeanor conviction of four counts of violating Mille Lacs County, Minn., Dev. Code (MLCDC) art.1, div. 1, subd. 6, § 1-146 (2011), prohibiting the construction, erection, or movement of structures without conforming to county ordinances.[1] Because we conclude that the ordinance is not unconstitutionally vague or ambiguous, we affirm.

FACTS

In 2009, appellant Richard Harlen Savitski purchased two tent-like structures at a hardware store. When assembled, each structure resembles a small Quonset hut: arched tent poles are covered with a fabric covering to form a structure approximately 12 feet wide and 20 feet long. Before purchasing the structures, appellant asked three neighbors who own identical structures if they had followed any municipal permitting procedures before assembling their structures. None of his neighbors had. He also reviewed the ordinances posted on the county's website and concluded that the structures did not fall under the county's permitting requirements. Finally, he asked a member of the Princeton Township board in the county whether township or county ordinances required a permit for the shelters. He was told they did not. Appellant then assembled the tents and placed them on his property.

[1] At the time of the incidents giving rise to the charges against appellant, the ordinance was contained at section 601.1. In April 2011, the county board revised the format and numbering of the ordinance, but did not make any substantive changes to the provisions at issue here.

Responding to a complaint regarding appellant's property, a county inspector viewed appellant's land from a nearby road on June 30, 2009. From that vantage point, the inspector saw the structures on appellant's land and she took photographs of them. On July 14, the county issued a letter advising appellant that the structures violated county ordinances and required a permit. Over the following year, county inspectors and appellant had several discussions regarding the structures, and appellant eventually applied for a permit. That application was denied by the county because appellant failed to provide information to establish the snow and wind loads of the structures.

Meanwhile, county inspectors observed the structures still standing on appellant's property on three separate occasions after the first sighting on June 30. The county issued another warning letter on June 10, 2010. In September 2010, appellant was charged with one count of violating the development code. The complaint was amended in February 2011 to add three more counts of the same charge.

Following a jury trial in which the jury convicted appellant of each of the four counts, the district court imposed a 90-day stayed jail sentence, a $1,000 fine, and ordered appellant to bring his property into compliance with the county ordinance or remove the structures. The district court ordered the fine to be reduced to $200 if appellant was in compliance by May 1, 2012. Appellant brought a post-trial motion to dismiss, arguing that the ordinance is unconstitutionally vague. The district court denied appellant's motion.

This appeal follows.

D E C I S I O N

I. The county ordinance is not unconstitutionally vague.

Appellant contends that the ordinance is unconstitutional as applied to him because it is vague and thus violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. "The constitutionality of an ordinance is a question of law which this court reviews de novo." *Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (Minn. App. 2001) (quotation omitted). When, "as here, there is no fundamental right or suspect class involved, an ordinance is presumed to be constitutional, and the burden is on the challenger to prove a constitutional violation beyond a reasonable doubt." *Thul v. State*, 657 N.W.2d 611, 618 (Minn. App. 2003), *review denied* (Minn. May 28, 2003).

The void-for-vagueness analysis involves a two-pronged inquiry. Appellant cannot prevail if he fails to show either that (1) the penal statute does not define the criminal offense with sufficient definiteness such that ordinary people cannot understand what conduct is prohibited, or (2) the penal statute is so indefinite as to encourage arbitrary and discriminatory enforcement. *State v. Bussmann*, 741 N.W.2d 79, 83 (Minn. 2007) (*citing Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983)). Appellant challenges the ordinance under both prongs of the void-for-vagueness doctrine.

The ordinance appellant is accused of violating requires that:

> No structure or part thereof shall hereafter be erected, constructed, reconstructed, moved or structurally altered, and no land shall change in use, unless in conformity with all of the regulations specified in this Chapter and all acts amendatory thereof.

MLCDC art. 1, div. 1, subd. 6, § 1-146. It is a violation of the ordinance for a structure to be "changed in use . . . erected, placed, altered in its exterior dimensions, or moved" without a permit. *Id.*, § 1-148(1). When an applicant seeks a permit from the county, the county reviews the application both for land use and for building code compliance. If either the land use or the building code requirements are not met, a permit will not issue.

The county's development code defines "structure" as "[a]ny building or appurtenance." MLCDC art. 1, § 107.1.01. It defines a building as "[a]ny permanent structure having a roof, which may provide shelter or enclosure of person, animals, chattel or property of any kind." *Id.* On April 22, 2003, the Mille Lacs County board voted to adopt the Minnesota State Building Code (MBC). *See* Minn. R. 1300.0050 (2011) (defining the subdivisions of the MBC). The MBC does not itself define the word "structure," but adopts by reference (with certain exceptions not relevant here) the International Building Code (IBC). Minn. R. 1305.0011, subp. 1 (2011). The IBC defines the word "structure" as "[t]hat which is built or constructed." Int'l Bldg. Code § 202 (2006).

At trial, the county building inspector testified that he enforces the building code that the county board adopted in 2003, and that the building code was enforced against appellant because he did not apply for a permit before erecting the structures. The IBC definition was used by the district court in its jury instructions.

As support for his contention that the ordinance does not provide fair warning of what constitutes illegal activity, appellant points to his unsuccessful effort to accurately

understand the scope of the ordinance and to the confusion that his neighbors obviously held regarding whether the ordinance required a permit for the structures.[2] Respondent argues that appellant received fair warning that his conduct was a violation of the ordinance when he received letters from the county informing him that he needed a permit for the structures.

If appellant has "*actually* received 'fair warning of the criminality' of [his] conduct," then he cannot prevail on his challenge under the first prong of the void-for-vagueness challenge. *State v. Reha*, 483 N.W.2d 688, 691 (Minn. 1992). In *Reha*, the appellant challenged her conviction under a Minneapolis ordinance requiring her property to be kept "clean and sanitary." *Id.* at 692. Our supreme court held that the fair-warning prong of the void-for-vagueness analysis was satisfied by the notice provisions built into the ordinance. *Id.* It reasoned that, because the state prosecuted the violation only as a last resort and only after providing several written notices and a reasonable time for Reha to remedy the violation, Reha had received fair warning that the ordinance prohibited the conduct in which she engaged. *Id.*

This court distinguished *Reha* in *State v. Stallman*, 519 N.W.2d 903, 910 (Minn. App. 1994). Stallman challenged Anoka's cruising ordinance, where the city prohibited

[2] Appellant also relies on *Students Against Apartheid Coal. v. O'Neil*, 660 F. Supp. 333 (W.D. Va. 1987), for the proposition that the word "structure" is prima facie unconstitutionally vague. However, *Students Against Apartheid* is both factually and legally distinguishable. The challenged ordinance was a time-place-manner ban on any "structure" or "extended presence" on a public lawn on the University of Virginia campus. *Id.* at 341. Plaintiffs challenged the ordinance as an unconstitutional limitation of their rights under the first amendment to the United States Constitution. Such challenges are subjected to a higher level of scrutiny than challenges where, as here, the right to free speech is not at issue. *State v. Becker*, 351 N.W.2d 923, 925 (Minn. 1984).

cars from repeatedly driving up and down Main Street between the hours of 9 p.m. and 2 a.m. *Id.* This court found the ordinance unconstitutionally vague because violators were not notified of the definition of cruising or the location of the traffic-control points where the repetitious passage of cars was observed by police. *Id.* Moreover, the traffic-control points were subject to change during the night. *Id.* Cruising *was* defined in the ordinance as passing "a traffic control point three or more times, between the hours of 9:00 P.M. and 2:00 A.M. in a 'No Cruising Zone.'" *Id.* at 905. However, this court characterized the ordinance as "an indefinite law about indefinite conduct to which the average citizen, without going into city hall and studying the fine print, would have no notice." *Id.* at 909.

While the present case resembles both *Reha* and *Stallman*, it is closer to *Reha* in one key respect: appellant received actual notice from a municipal authority warning him that his structures violated the ordinance and giving him an opportunity to cure. We find it troubling that, despite appellant's efforts to ascertain the scope of the ordinance, he was not able to divine that the IBC trumped the definition of "structure" contained in the county's ordinance. Nevertheless, he received multiple notices advising him that he was in violation of the ordinance. "A notice of a violation . . . must be considered notice of *something* in the absence of any showing that the enforcement is arbitrary, discriminatory, or harassing." *Reha*, 483 N.W.2d at 692.

And appellant has not shown that the county's enforcement was arbitrary, discriminatory, or harassing—the second prong of the void-for-vagueness analysis. As a sign that he was unfairly targeted for enforcement, appellant notes that his three

neighbors had the same structures on their property but the ordinance was not enforced against them. Moreover, urges appellant, county inspectors testified to having knowledge of similar structures in other parts of the county erected without a permit.

But to prevail on his argument that he was the subject of unconstitutional arbitrary enforcement of the ordinance, appellant must make a prima facie showing:

> (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of a constitutional right.

State v. Russell, 343 N.W.2d 36, 37 (Minn. 1984); *see also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503, 102 S. Ct. 1186, 1196 (1982) ("Here, no evidence has been, or could be, introduced to indicate whether the ordinance has been enforced in a discriminatory manner or with the aim of inhibiting unpopular speech."). Appellant bears the burden of introducing evidence "*in this case* to indicate whether the [county] enforced the ordinance in an arbitrary or discriminatory manner." *Reha*, 483 N.W.2d at 692.

A county inspector testified that violations are typically investigated only after the county receives a complaint. County inspectors indicated that they did not attempt to enforce the ordinance against appellant until they received a complaint about the structures. Appellant presented no evidence of invidious or bad-faith motives on the part

of the county in its enforcement. For these reasons, appellant's challenge under both prongs of the void-for-vagueness test must fail.

II. The IBC's definition of "structure" is not ambiguous, and the rule of lenity is inapplicable here.

Appellant next argues that the ordinance is ambiguous as to what constitutes a structure. Appellant maintains that, even if the IBC's definition of "structure" as something "built or constructed" is taken at face value, it is ambiguous whether a structure such as the one appellant placed on his land meets the definition since it is more accurately characterized as being "assembled" rather than "built" or "constructed." The state argues that the distinction between the terms "built" and "assembled" are not legally significant because they both represent different means of reaching an illegal end, and it is the illegality of the result and not the means of reaching the result that matter here.[3]

The rule of lenity is closely related to the requirement of a fair warning, the first prong in the void-for-vagueness doctrine. *United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 1225 (1997). "Before conduct hitherto innocent can be adjudged to have been criminal, the legislature must have defined the crime, and the act in question must

[3] The state also contends that appellant did not challenge the ordinance under a rule of lenity theory at the district court and has therefore waived the argument on appeal. Generally, this court will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). However, there is "authority for the proposition that constitutional rights can be asserted on appeal when the interests of justice require consideration of such issues, when the parties have had adequate time to brief such issues, and when such issues are implied in the lower court." *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 410 (Minn. 1982). The rule of lenity is "a sort of junior version of the vagueness doctrine." *United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 1225 (1997) (quotation omitted). Because the rule of lenity is so closely related to the challenge that appellant raised at the district court, we exercise our discretion to consider it here.

clearly appear to be within the prohibitions or requirements of the statute . . . ." *State v. Finch*, 37 Minn. 433, 435, 34 N.W. 904, 905 (1887). The rule of lenity requires that, if it is fairly doubtful that a certain act falls within a statute, "such acts or conduct must be regarded as not within the statute." *State v. Walsh*, 43 Minn. 444, 445, 45 N.W. 721, 721 (1890). A statute is only ambiguous when its language is subject to more than one reasonable interpretation, but an ambiguous statute "should be resolved in favor of the criminal defendant in the interest of lenity." *State v. Leathers*, 799 N.W.2d 606, 608 (Minn. 2011). The rule of lenity, however, "does not require the narrowest possible interpretation to the statute." *State v. Carufel*, 783 N.W.2d 539, 542 (Minn. 2010) (quotation omitted).

The threshold question is whether the statute under which appellant was convicted is ambiguous. "A statute is ambiguous if its language is subject to more than one reasonable interpretation." *State v. Peck*, 773 N.W.2d 768, 772 (Minn. 2009). Minnesota courts have yet to construe the term "structure." In adopting the IBC by reference, the MBC amends the IBC to rely on the *Merriam-Webster Collegiate Dictionary* "available at www.m-w.com" to provide "ordinarily accepted meanings." Minn. R. 1305.0201 (2011).

Merriam-Webster defines "construct" as "to make or form by combining or arranging parts or elements." "Build" is defined as "to cause to be constructed." Thus, when the district court instructed the jury that "'[s]tructure' is defined as that which is built or constructed," it asked the jury to determine whether appellant made or formed the structures by combining or arranging parts or elements. The district court apparently

understood this as the question being submitted to the jury because, when appellant objected at trial to the state's line of inquiry with a witness as to whether the structures were built or constructed, the court sustained the objection and noted that "it's up to the jury to determine what built or constructed means." And the jury evidently decided that a structure that is "assembled" falls within the parameters of a structure that is made or formed by combining or arranging parts or elements.

Under the definitions contemplated by the MBC, the definition of "structure"—and therefore the ordinance itself—is not ambiguous and the rule of lenity cannot be applied to construe the ordinance to appellant's benefit.

Affirmed.