STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0504

State of Minnesota,
Respondent,

vs.

Alfredo Jesse Rosillo,
Appellant.

Filed April 28, 2014
Affirmed
Peterson, Judge

Mower County District Court
File No. 50-CR-11-1745

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

Kristen Nelsen, Mower County Attorney, Jeremy Lee Clinefelter, Assistant County Attorney, Austin, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles Frederick Clippert, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Stauber, Judge.

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

PETERSON, Judge

In this appeal from convictions of five felony counts of violating a domestic abuse no-contact order (DANCO), appellant argues that Minn. Stat. § 629.75 (2010) (1) violates

the separation-of-powers doctrine of the Minnesota Constitution because it creates a new procedure for setting release conditions that conflicts with the rules of criminal procedure and (2) is unconstitutional as applied because the court failed to provide appellant with adequate notice and a chance to be heard. Respondent argues that appellant's constitutional challenge is an impermissible attack on the DANCO order. We affirm.

FACTS

On June 23, 2011, appellant Alfredo Jesse Rosillo made his initial appearance in district court on charges of burglary, robbery, and felony domestic assault, all with a firearm, committed against his girlfriend. The district court explained appellant's rights, including his right to apply for a court-appointed attorney, and stated that appellant would appear before the court again within 15 days, which would give him an opportunity to obtain an attorney.

The court then addressed bail and conditions of release. After explaining the bail study to appellant, the district court asked the prosecutor for recommendations regarding conditions of release. The prosecutor stated: "I would be asking before we get to the issue of bail, it does appear the victim in this case was a domestic relationship. We would be asking for a DANCO in this matter."

The district court explained that, if granted, the DANCO "would apply no matter what the bail would be" and would prohibit appellant from having contact with his girlfriend, the victim of the domestic assault. Appellant asked about getting his clothes from the victim's residence, and the district court stated that appellant could get his clothes with the aid of the sheriff. Appellant did not otherwise question the DANCO or

object to it. Appellant strongly objected to bail being set at $500,000 unconditional and $250,000 conditional. The district court issued the DANCO and set bail at $500,000 unconditional and $250,000 with conditions. The DANCO prohibited appellant from having contact, including telephone contact, with the victim.

Appellant was charged with multiple felony counts of violating the DANCO by repeatedly calling the victim from the jail. At a contested omnibus hearing, appellant challenged the constitutionality of the DANCO statute. The district court denied appellant's challenge on the ground that it was an impermissible collateral attack on the order. The parties submitted the case to the district court for decision on stipulated facts. The district court found appellant guilty of five counts of violating the DANCO and sentenced him within the presumptive range. This appeal followed.

D E C I S I O N

I.

Whether a defendant may challenge the constitutionality of Minn. Stat. § 609.75 in a later proceeding for violating a DANCO is a legal question, which we review de novo. *State v. Ness*, 819 N.W.2d 219, 222 (Minn. App. 2012), *aff'd*, 834 N.W.2d 177 (Minn. 2013).

In *Ness*, this court held that, "[b]ecause there is no right to appeal the issuance of a pretrial DANCO, . . . a challenge to the issuance of the DANCO in a subsequent

prosecution for violating that DANCO is not barred as a collateral attack." *Id.* at 221.[1] Like appellant, Ness raised a constitutional challenge to the DANCO statute. The supreme court affirmed this court's rejection of Ness's constitutional challenge on the merits but did not address whether the challenge was an impermissible collateral attack because the state failed to preserve that issue for review. *State v. Ness*, 834 N.W.2d 177, 181 n.3 (Minn. 2013). Under this court's decision in *Ness*, appellant's constitutional challenge is not barred as a collateral attack on the DANCO.

Respondent argues that this court's conclusion in *Ness* that a defendant may collaterally attack a pretrial DANCO is flawed. But this court "is bound by supreme court precedent and the published opinions of the court of appeals." *State v. Peter*, 825 N.W.2d 126, 129 (Minn. App. 2012) (quotation omitted), *review denied* (Minn. Feb. 27, 2013).

II.

Appellant argues that Minn. Stat. § 629.75 violates the separation-of-powers doctrine of the Minnesota Constitution because the statute creates a procedure for issuing a DANCO that conflicts with Minn. R. Crim. P. 6.02, which governs the procedure for determining pretrial release conditions.

> The constitutionality of a statute presents a question of law, which this court reviews de novo. Minnesota statutes are presumed constitutional, and this court will declare a statute unconstitutional only when absolutely necessary. To prevail, a party challenging the constitutionality of a statute must

[1] This court's *Ness* decision was filed after the district court issued its order holding that appellant's constitutional challenge was an impermissible collateral attack on the DANCO order.

> demonstrate beyond a reasonable doubt that the statute violates a constitutional provision.

State v. Broten, 836 N.W.2d 573, 577 (Minn. App. 2013) (citation and quotations omitted), *review denied* (Minn. Nov. 12, 2013).

Under the separation-of-powers doctrine, the legislature declares what acts are criminal and establishes the punishment for those acts. *State v. Lindsey*, 632 N.W.2d 652, 658 (Minn. 2001). The judiciary "regulates the method by which the guilt or innocence of one who is accused of violating a criminal statute is determined," meaning "evidentiary matters and matters of trial and appellate procedure." *Id.* (quotation omitted).

Minn. Stat. 629.75, subd. 1, states:

> (b) A domestic abuse no contact order may be issued as a pretrial order before final disposition of the underlying criminal case or as a postconviction probationary order. A domestic abuse no contact order is independent of any condition of pretrial release or probation imposed on the defendant. A domestic abuse no contact order may be issued in addition to a similar restriction imposed as a condition of pretrial release or probation. . . .
>
> (c) A no contact order under this section shall be issued in a proceeding that is separate from but held immediately following a proceeding in which any pretrial release or sentencing issues are decided.

A DANCO is not a pretrial release condition. The statute expressly states that a DANCO "is independent of any condition of pretrial release." Minn. Stat. § 629.75, subd. 1(b). In this case, the fact that appellant violated the DANCO while in jail shows that it was not a pretrial release condition. Under the statute, violation of a DANCO does

not result in bail revocation. Rather, the statute makes a DANCO violation a criminal offense and establishes punishments for violations. Minn. Stat. 629.75, subd. 2.

Appellant also argues that the DANCO statute encroaches on the judicial function because Minn. Stat. § 629.75, subd. 1(c), mandates the issuance of a DANCO. *See* Minn. Stat. 645.44, subd. 16 (2012) ("'Shall' is mandatory."). Appellant argues that this mandate conflicts with Minn. R. Crim. P. 6.02, subd. 1, which sets forth the procedure for the district court to use when determining pretrial release conditions, including restrictions on associations. But as already discussed, a DANCO is not a pretrial release condition. Moreover, appellant's argument misconstrues the DANCO statute. Minn. Stat. § 629.75, subd. 1(c), does not mandate the issuance of a DANCO. Rather it states that, if a DANCO is ordered, it shall be issued in a separate proceeding. Minn. Stat. § 629.75, subd. 1(b), grants the district court discretion to decide whether to issue a DANCO, stating that a DANCO "may be issued as a pretrial order before final disposition of the underlying criminal case or as a postconviction probationary order." *See* Minn. Stat. § 645.44, subd. 15 (2012) ("'May' is permissive.").

The DANCO statute provides a method for protecting victims of domestic abuse that is separate from and does not conflict with the procedure for determining bail and pretrial release conditions. Because appellant has failed to show that the DANCO statute violates the separation-of-powers doctrine, his constitutional challenge on this basis fails.

III.

In determining whether a party has been afforded procedural due process, the court considers (1) the private interest that is affected by government action; (2) the risk

of a party being erroneously deprived of a protected interest due to a lack of procedural safeguards and the probable value of additional or substitute procedural safeguards; and (3) the governmental interest, including the fiscal and administrative burdens resulting from additional or substitute procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976); *see also Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988) ("The due process protection provided under the Minnesota Constitution is identical to the due process guaranteed under the Constitution of the United States.").

Appellant argues that he had the right to associate with his girlfriend. Freedom of intimate association "receives protection as a fundamental element of personal liberty." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18, 104 S. Ct. 3244, 3249 (1984). But the right is not unlimited. *See City of Chicago v. Morales*, 527 U.S. 41, 53, 119 S. Ct. 1849, 1857 (1999) (stating that statute aimed at curtailing social contact between gang members and others did not impair First Amendment right of association). And the state has a "strong interest in preventing violence in a domestic setting." *Baker v. Baker*, 494 N.W.2d 282, 288 (Minn. 1992). Appellant argues that the government's interest was only speculative when the DANCO was issued because there was no evidence that appellant had been in contact with his girlfriend or attempted to influence her testimony. We disagree. Appellant's arrest on charges of burglary, robbery, and felony domestic assault, all with a firearm and all committed against his girlfriend, gave rise to a legitimate and present concern for the girlfriend's safety.

Appellant argues that the DANCO statute as applied to him was inadequate to protect his privacy interest in associating with the victim because he had inadequate

notice that the DANCO would issue, the district court failed to hold a separate hearing to determine whether to issue a DANCO, and appellant was unrepresented and had only a minimal opportunity to be heard. "In determining the likelihood of an erroneous deprivation, we must assess the relative reliability of the procedures used and the substitute procedures sought." *State v. Wiltgen*, 737 N.W.2d 561, 569 (Minn. 2007). The basic consideration is whether appellant was dealt with fairly and not subjected to a mistaken deprivation of a legitimate privacy interest. *State v. LeDoux*, 770 N.W.2d 504, 514 (Minn. 2009).

In *Ness*, the supreme court rejected a facial due-process challenge to the DANCO statute. 834 N.W.2d at 183. Under *Ness*, appellant's argument that he was entitled to representation fails. Although the district court did not comply with the statutory requirement of a separate proceeding, the court told appellant that a DANCO might be issued and gave him an opportunity to speak. After the court told appellant that he could get his clothes with the sheriff's aid, appellant did not express any further concern or raise any objection to the DANCO. Because appellant has failed to show any prejudice resulting from the lack of a separate proceeding, his due-process challenge fails.

In a pro se supplemental brief, appellant raises the same due-process issues that we have already addressed. He also raises issues that pertain to the underlying charges. Those charges are the subject of a separate appeal, and issues pertaining to them are not properly before this court in this appeal.

Affirmed.