State of Minnesota
Steele County

District Court
Third District

Court File Number: **74-CR-11-254**
Case Type: Crim/Traf Mandatory

Notice of Filing of Order

JOEL DAVID EATON
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State of Minnesota vs KEITH LEE KELLING

You are notified that an order was filed on this date.

Dated: June 28, 2011

Kristine Maiers
Court Administrator
Steele County District Court
111 E. Main Street
Owatonna MN 55060
507-444-7700

cc: DANIEL ANDREW MCINTOSH

JUN 29 2011

STATE OF MINNESOTA

COUNTY OF STEELE

DISTRICT COURT
CRIMINAL DIVISION
THIRD JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

vs.

Keith Lee Kelling,

Defendant.

File No. 74-CR-11-254

ORDER

The above-entitled matter came on for hearing before the Honorable Casey J. Christian of the Steele County District Court on February 16, 2011, for Mr. Kelling's Rule 8 appearance and pursuant to the State's motion for issuance of a Domestic Abuse No Contact Order.

Jennifer Dunn-Foster, Assistant Steele County Attorney, appeared on behalf of the state. Attorney Joel D. Eaton, appeared on behalf of Defendant, Keith Lee Kelling, who was also present.

Based upon the record, the Court makes the following:

ORDER

1. The State's Petition for a Domestic Abuse No Contact Order is **DENIED** because Minnesota Statute Section 629.75 is unconstitutionally vague in violation of due process.
2. The attached Memorandum is incorporated herein by reference.

DATED: 6/23/11

BY THE COURT

Casey J. Christian
District Court Judge
Third Judicial District

Court Administrator
Steele County, MN
FILED
Date 6-28-11
By
Deputy

MEMORANDUM

I. INTRODUCTION.

Effective August 1, 2010, the statutory provision related to Domestic Abuse No Contact Orders was amended and moved from Minnesota Statute Section 518B.01, subd. 22 to Minnesota Statute Section 629.75. The substance of the amended language is found in Minn. Statute Section 629.75, subd. 1(b) and (c), which 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.*

(emphasis added). The prior Domestic Abuse No Contact Order provision found in Minnesota Statute Section 518B.01, subd. 22 did not contain the emphasized language above. Furthermore, prior to the amendment of the statute, Domestic Abuse No Contact Orders were often issued as a condition of release. The district court would determine whether to issue a Domestic Abuse No Contact Order as a condition of release by considering whether "(1) release of the person poses a threat to the alleged victim, another family or household member, or public safety; or (2) there is a substantial likelihood the person will fail to appear at subsequent proceedings." Minn. Stat. § 629.72, subd. 2. In fact, Minnesota Statute Section 629.72, subd. 2. requires that "[b]efore releasing a person arrested for or charged with a crime of domestic abuse, harassment, violation of an order for protection, or violation of a Domestic Abuse No Contact Order, the judge shall make finding on record, to the extent possible, concerning the determination made in accordance with the factors specified in clauses (1) and (2) [above]." However, the new language found in Minnesota Statute Section 629.75, subd. 1(b) and (c) clearly states that a Domestic Abuse No Contact Order is "independent of any condition of pretrial release," "may be issued in addition to a similar restriction imposed as a condition of pretrial release," and is "issued in a proceeding that is separate from ... a proceeding in which any pretrial release or sentencing issues are decided." It appears that by adding this language and moving the provision to Section 629.75, the

legislature intended to allow the district court to issue a Domestic Abuse No Contact Order even where the defendant is released after posting the unconditional bail amount. *See State v. Martin*, 743 N.W.2d 261, 265 (Minn. 2008) (noting that conditional release may be offered only as an alternative to money bail without conditions). However, by adding language stating that a Domestic Abuse No Contact Order is "independent" of pretrial release conditions and that such an order must be issued at a proceeding "separate from a proceeding in which pretrial release or sentencing issues are decided," it is explicitly clear that Minnesota Statute Section 629.72, subdivision 2 and Minnesota Rules of Criminal Procedure 6.02, which contain factors to consider when setting terms of conditional release, are inapplicable to the recently amended Domestic Abuse No Contact Order Statute.

II. Void for Vagueness.

The void-for-vagueness doctrine is grounded in the Due Process Clause of the Fifth and Fourteenth Amendments of the Federal Constitution and Article I Section 7 of the Minnesota Constitution. Under the void-for-vagueness doctrine, a statute can violate due process for two reasons. First, a statute is unconstitutionally vague if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statue. *State v. Rourke*, 773 N.W.2d 913, 917 (Minn. 2009); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, (1972). Second, a statute is unconstitutionally vague if it authorizes or encourages arbitrary and discriminatory enforcement. *Id.* A statute authorizes or encourages arbitrary and discriminatory enforcement when it lacks adequate standards restricting the discretion of governmental authorities who apply it. *See Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03, 86 S.Ct. 518, 520-21 (1966); *Smith v. Goguen*, 415 U.S. 566, 572-73, 94 S.Ct. 1242, 1247 (1974). The courts have noted that the second prong of the void-for-vagueness doctrine is of greater importance. *Goguen*. 415 U.S. at 572-73; *City of Mankato v. Fetchenhier*, 363 N.W.2d 76, 78 (Minn. Ct. App. 1985). Minnesota Statute Section 629.75 does not run afoul of prong one of the void-for-vagueness doctrine because it clearly prohibits a knowing violation of a Domestic Abuse No Contact Order. The problem with Minnesota Statute Section 629.75 lies in prong two of the void-for-vagueness doctrine, in that the statute completely lacks standards guiding and restricting the discretion of the district court when determining whether to issue a Domestic Abuse No Contact Order.

When a statute imposes criminal penalties, a higher standard of clarity and certainty in the statute is required. *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 n.8, 103 S.Ct. 1855, 1859 n.8, (1983)). Similarly, a higher level of scrutiny applies when a statute implicates a fundamental constitutionally protected activity. *State v. Campbell*, 756 N.W.2d 263, 269 (Minn. Ct. App. 2008) (*citing State v. Hipp*, 213 N.W.2d 610, 614 (Minn. 1973). Lastly, when a statute implicates freedom of speech under the First Amendment, the "defendant is permitted to challenge the statute on its face, that is challenge the hypothetical vagueness of the statute as applied to others, even if the statute is neither vague nor overbroad as applied to the defendant." *Id.* When a statute does not implicate the First Amendment, the court must first apply the void-for-vagueness doctrine to the specific facts of the case at hand before considering a facial challenge. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 102 S.Ct. 1186, 1191 (1982).

a. Minnesota Statute Section 629.75 is quasi-criminal requiring a higher level of clarity and certainty.

Strictly speaking, Minnesota Statute Section 629.75 is not purely a criminal statute. However, the statute defines a Domestic Abuse No Contact Order as "an order issued by a court against a defendant in a criminal proceeding or a juvenile offender in a delinquency proceeding ..." Minn. Stat. § 629.75, subd. 1. Furthermore, the statute provides penalties for violation of a Domestic Abuse No Contact Order. *See* Minn. Stat. § 629.75, subd. 2. Because a Domestic Abuse No Contact Order can only be issued when a defendant has been charged with a criminal offense and the statute provides penalties for violation of such orders, the statute appears to be criminal in nature. Nevertheless, the Minnesota Courts have labeled similar statutes, such as the Harassment Restraining Order statute contained in Minnesota Statute Section 609.748, as "quasi-criminal." *See Dunham v. Roer*, 708 N.W.2d 552, 567-68 (Minn. Ct. App. 2006) (concluding that the Harassment Restraining Order statute is "quasi-criminal" because it provides for criminal punishment even though it is civil in form). At the very least, Minnesota Statute Section 629.75 is "quasi-criminal" because it provides for punishment. *See id.* For purposes of vagueness analysis, "quasi-criminal" statutes are tantamount to criminal statutes making Minnesota Statute Section 629.75 subject to the higher standard of clarity and certainty. *See id.* at 568 (*citing Women's Med. Ctr. of NW Houston v. Bell*, 248 F.3d 411, 422 (5th Cir.2001).

b. Minnesota Statute Section 629.75 implicates the fundamental right of freedom of intimate associations warranting a higher level of scrutiny.

Freedom of intimate association is a "fundamental element of personal liberty." *Roberts v. Jaycees*, 468 U.S. 609, 618, 104 S.Ct. 3244, 3249 (1984); *see State v. Gray*, 413 N.W.2d 107, 113 (1987) (declining to determine whether the fundamental right of freedom of intimate association is protected under the First Amendment or as an intrinsic element of personal liberty); *State v. Holiday*, 585 N.W.2d 68, 71 n.1 (Minn. Ct. App. 1998) (noting that the Minnesota Courts have treated freedom of association as a conditional right closely associated with First Amendment protections). As stated by the United States Supreme Court, "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Jaycees*, 468 U.S. at 618. Protecting such relationships from unwarranted state interference is central to any concept of liberty. *Id.* at 619. Issuance of a Domestic Abuse No Contact Order implicates this fundamental right to form and maintain intimate relationships by making it a criminal offense to make contact with a "family or household member." *See* Minn. Stat. § 629.75; Minn. Stat. § 518B.01. In fact, Domestic Abuse No Contact Orders can only be issued when the alleged victim of the criminal offense is a "family or household member." *See* Minn. Stat. § 629.75; Minn. Stat. § 518B.01. Family and household members are precisely the class of persons the right to freedom of intimate associations is meant to protect. Thus, Minnesota Statute Section 629.75 implicates this fundamental right warranting a higher level of scrutiny.

c. Minnesota Statute Section 629.75 implicates freedom of speech under the First Amendment of the Federal Constitution and Article I Section 3 of the Minnesota Constitution warranting a facial challenge.

In *Dunham v. Roer*, 708 N.W.2d 552 (Minn. Ct. App. 2006) the Minnesota Court of Appeals considered whether Minnesota Statute Section 609.748 (Harassment Restraining Order Statute) implicates freedom of speech under the First Amendment. When addressing this issue, the court noted that "the focus of the statute is to prohibit repeated and unwanted acts, words, or gestures that have or are intended to have a substantial adverse effect on the safety, security, or privacy of another." *Dunham* 708 N.W.2d at 566. The court concluded that the statute does not implicate freedom of speech under the First Amendment because "the harassment statute only

regulates speech or conduct that constitutes 'fighting words,' 'true threats,' or substantial invasions of one's privacy." *Id.*

Minnesota Statute Section 629.75 is not so narrowly written. There are no limiting terms indicating that a Domestic Abuse No Contact Order or violation of such an order only applies to unprotected speech. *See* Minn. Stat. § 629.75. Furthermore, the *Dunham* decision was based on the principle that the State can regulate conduct that invades the privacy of another. 708 N.W.2d at 566 (*citing Gormley v. Dir., Conn. State Dept. of Prob.*, 632 F.2d 938, 942 (2d Cir. 1980). Under the Harassment Restraining Order Statute, the victim of harassment is the party seeking a restraining order to prohibit conduct that is intrusive upon his or her privacy. *See id.*; Minn. Stat. § 609.748. However, the Domestic Abuse No Contact Order Statute does not even indicate who can petition the court for a Domestic Abuse No Contact Order, nor does it indicate whether it is appropriate to issue such an order over the objection of the alleged victim of the underlying crime. *See* Minn. Stat. § 629.75.

In other words, Minnesota Statute Section 629.75 is not limited to unprotected speech and does not contemplate the privacy interests of the alleged victim of the underlying crime. At its core, issuance of a Domestic Abuse No Contact Order constitutes a prior restraint on speech because it prohibits speech before it is uttered. *See Alexander v. United States*, 509 U.S. 544, 550, 113 S.Ct. 2766, 2771 (1993) (defining prior restraint as forbidding certain communications in advance of the time that such communications are to occur, and noting that restraining orders and permanent injunctions are "classic examples" of prior restraints on speech). Furthermore, such an order cannot be classified as a time, manner, and place restriction because it is directed at conduct and speech that could potentially occur at any time or place. *See Dunahm*, 708 N.W.2d at 565 (concluding that the Harassment Statute is not a time or place restriction on speech because it prohibits conduct that could potentially occur at any time or place). Thus, Minnesota Statute Section 629.75 implicates freedom of speech under the First Amendment of the Federal Constitution and Article I Section 3 of the Minnesota Constitution warranting a facial challenge.

III. Minnesota Statute Section 629.75 is Facially Unconstitutional because it Lacks Adequate Standards Guiding and Restricting the Discretion of the District Court when Determining whether to Issue a Domestic Abuse No Contact Order.

As illustrated above, Minnesota Statute Section 629.75 implicates freedom of speech under the First Amendment. When a statute implicates the First Amendment, the "defendant is

permitted to challenge the statute on its face, that is challenge the hypothetical vagueness of the statute as applied to others, even if the statute is neither vague nor overbroad as applied to the defendant." *Campbell*, 756 N.W.2d at 269 (*citing Hipp*, 213 N.W.2d at 614). The Domestic Abuse No Contact Order Statute contains absolutely no guidance or standards for the district court to apply when determining whether to issue such an order. *See* Minn. Stat. § 629.75. The statute does define what a Domestic Abuse No Contact Order is, and states that such an order "may be issued as a pretrial order before final disposition of the underlying criminal case or as a postconviction probationary order," but the statute is silent regarding: (1) what factors the court is to consider when determining whether to issue a Domestic Abuse No Contact Order, (2) which evidentiary standard is applied to issuance of a Domestic Abuse No Contact Order (i.e. preponderance, clear and convincing, etc…), (3) whether a petition is required for issuance of a Domestic Abuse No Contact Order, (4) who may petition the court for a Domestic Abuse No Contact Order, (5) whether a Domestic Abuse No Contact Order may be issued over the objection of the alleged victim of the domestic abuse, (6) whether a Domestic Abuse No Contact Order may be issued over the objection of the State, (7) when, if ever, a Domestic Abuse No Contact Order expires, (8) and what authority the court has to modify, lift, or terminate a Domestic Abuse No Contact Order. *See* Minn. Stat. § 629.75. The lack of standards in the statute also greatly inhibits a defendant's ability to challenge the issuance of a Domestic Abuse No Contact Order. Without knowing what factors the courts will consider, a defendant has no way of knowing how to argue against the issuance of a Domestic Abuse No Contact Order.

The lack of procedural standards and guidance is made even more apparent when comparing Minnesota Statute Section 629.75 to the statutory provisions governing Orders for Protection and Harassment Restraining Orders. *See* Minn. Stat. § 518B.01 (Order for Protection); Minn. Stat. § 609.748 (Harassment Restraining Orders). Both the Order for Protection and Harassment Restraining Order statutes contain extensive procedural requirements and guidance including but not limited to: (1) who may petition the court for relief, (2) what must be alleged and contained in the petition, (3) notice and service requirements, (4) when an Order for Protection or Harassment Restraining Order can be issued *ex parte*, (5) under what circumstances a hearing is required, (6) what relief can be provided by the court, (7) procedures for extending an Order for Protection or Harassment Restraining Order, and (7) procedures for modifying or vacating an Order for Protection or Harassment Restraining Order. *See* Minn. Stat. § 518.01;

Minn. Stat. § 609.748. No similar standards and guidance are provided in the Domestic Abuse No Contact Order Statute.

Furthermore, this is not a situation where the courts can save the statute by imposing *post facto* limitations on discretion through case-by-case adjudications because no such limitations appear on the face of the statute. *See State v. Newstrom*, 371 N.W.2d 525, 529 (Minn. 1985) (courts may cure a statute of vagueness by placing a limiting construction on its terms, but courts cannot cure a penal statute by imposing *post facto* limitations on discretion where no such restraints appear on the face of the legislation). Similar to other statutes the courts have declared void for containing no standards guiding and restricting the discretion of those that apply and enforce them, Minnesota Statute Section 629.75 is impermissibly vague. *See e.g. Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242 (1974) (striking down a statute that made it a crime to "publicly treat contemptuously" the United States flag because the statute "sets forth the standards so indefinitely that police, court, and jury are free to react to nothing more than their own preferences for treatment of the flag"); *Giaccio v. State of Pennsylvania*, 382 U.S. 399, 86 S.Ct. 518 (1966) (striking down a statute that allowed a jury to impose costs of prosecution on an acquitted defendant because the statue contains "no standards at all, nor does it place any conditions of any kind upon the jury's power to impose costs [of prosecution]"); *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985) (striking down a compulsory school attendance statute because the statute provided no guidance to enforcement officials limiting their discretion in determining what credentials were "essentially equivalent" to those of a licensed teacher).

Due to the lack of any standards found in Minnesota Statute Section 629.75, the district courts are left with unfettered discretion in determining when to issue a Domestic Abuse No Contact Order. This unfettered discretion creates a great danger that the statute will be applied arbitrarily and inconsistently. *See Rourke*, 773 N.W.2d at 917 (a statute is unconstitutionally vague if it authorizes or encourages arbitrary and discriminatory enforcement); *see also Groguen*, 415 U.S. at 574 (noting that the more important aspect of the void-for-vagueness doctrine is the requirement that the legislature establish minimal guidelines to govern enforcement); *Fetchenhier*, 363 N.W.2d at 78 (same). Because Minnesota Statute Section 629.75 lacks standards guiding and restricting the discretion of the district court in violation of due process, the statute is unconstitutionally vague.

IV. Even Assuming Minnesota Statute Section 629.75 does not Implicate Freedom of Speech, the Statute is Still Unconstitutional as Applied to Mr. Kelling and as applied *in toto* because the Statute Lacks Adequate Standards Guiding and Restricting the Discretion of the District Court when Determining whether to Issue a Domestic Abuse No Contact Order.

When a statute does not implicate the First Amendment, the court must first apply the void-for-vagueness doctrine to the facts of the case before considering a facial challenge. *Flipside,* 455 U.S. at 494-95; *see also State v. Reha*, 483 N.W.2d 688, 691 (Minn. 1992) (a person whose conduct is clearly proscribed cannot complain of the vagueness of the law as applied to other). After determining that the statute is impermissibly vague as applied to the facts of the case at hand, the court must then determine whether the statute is impermissibly vague on its face. *Id.* "To succeed in a facial challenge to vagueness outside the context of the First Amendment, a complainant must demonstrate that the law is impermissibly vague in all its application." *Dunham*, 708 N.W.2d at 568 (quoting *State v. Enyeart*, 676 N.W.2d 311, 320 (Minn. Ct. App. 2004).

Most of the vagueness problems of Minnesota Statute Section 629.75, discussed above, are applicable to Mr. Kelling. In the instant case, the State petitioned the district court for a Domestic Abuse No Contact Order. Based on the record, it appears that the alleged victim supports the Domestic Abuse No Contact Order Petition. The State argued that the probable cause portion of the complaint "stands for itself," warranting a Domestic Abuse No Contact Order. Even with these facts, the following vagueness issues are still present: (1) what factors should the court consider when determining whether issuance of a Domestic Abuse No Contact Order is appropriate in Mr. Kelling's case, (2) which evidentiary standard should be applied when determining whether to issue of a Domestic Abuse No Contact Order in Mr. Kelling's case (i.e. preponderance, clear and convincing, etc…), (3) whether the State is the appropriate party to bring a Domestic Abuse No Contact Order petition, (4) if the court issues a Domestic Abuse No Contact Order, when, if ever, does the order expire, and (5) if the court issues a Domestic Abuse No Contact Order, what authority does the court have to modify, lift, or terminate the order. Mr. Kelling is also placed in a position where he is unsure how to challenge the Domestic Abuse No Contact Order Petition because the statute does not indicate what factors the court will consider. Applying the void-for-vagueness doctrine to the facts of Mr. Kelling's case shows that the statute is impermissibly vague as applied to him because it lacks any standards guiding and restricting the discretion of the district court.

Furthermore, and as illustrated above, the Domestic Abuse No Contact Order Statute is impermissibly vague in all circumstances. There are simply no standards and guidance in the statute making it ripe for arbitrary and discriminatory application. *See Rourke*, 773 N.W.2d at 917 (Minn. 2009); *Goguen*, 415 U.S. at 572-73. And as noted, this is not a situation where the courts can save the statute by imposing *post facto* limitations on discretion through case-by-case adjudications because no such limitations appear on the face of the statute. *See Newstrom*, 371 N.W.2d at 529 (Minn. 1985) (courts cannot cure a penal statute by imposing *post facto* limitations on discretion where no such restraints appear on the face of the legislation). Even assuming that Minnesota Statute Section 629.75 does not implicate the First Amendment, the statute is unconstitutionally vague under due process of law as applied to Mr. Kelling and as applied *in toto* because it lacks standards guiding and restricting the discretion of the district court.