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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

CITY OF SCOTTSDALE, *Petitioner/Appellee*,

v.

MARK STUART, *Respondent/Appellant*.

No. 1 CA-CV 20-0693
FILED 11-30-2021

Appeal from the Superior Court in Maricopa County
No. CV2019-097394
The Honorable Steven P. Lynch, Judge *Pro Tempore* (Retired)

AFFIRMED

COUNSEL

Mark E. Stuart, Scottsdale
Respondent/Appellant

Scottsdale City Attorney's Office, Scottsdale
By Kenneth Flint
Counsel for Petitioner/Appellee

MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Chief Judge Kent E. Cattani joined.

T H U M M A, Judge:

¶1 Mark Stuart appeals an injunction against workplace harassment entered against him after an evidentiary hearing. The injunction, which was entered in favor of the City of Scottsdale and expired on November 13, 2020, was based on Stuart's threats, including threatening to kill City elected officials. Stuart argues the evidentiary record does not support the injunction and that the statute on which it was based, Arizona Revised Statute (A.R.S.) § 12-1810 (2019), is unconstitutional. For the reasons set forth below, the court rejects Stuart's arguments on appeal.

FACTS AND PROCEDURAL HISTORY

¶2 Stuart and the City have been involved in several legal disputes arising from Stuart's interactions with City officials while advocating for a ballot initiative. Viewing the evidence in a light most favorable to affirming the injunction, *Powers v. Taser Int'l In.*, 217 Ariz. 398, 399 ¶ 4 n.1 (App. 2007), on two different occasions in 2019, Stuart made statements to psychiatric medical personnel threatening City Council members and making other threats. Both incidents were reported to the Scottsdale Police Department.

¶3 In May 2019, in statements to a behavioral health intake counselor, Stuart

> said that he would like to hurt the people that hurt him with the City of Scottsdale. He would like to get in a boxing ring, no gloves, and beat it out with them. He also said that if that wasn't – he wasn't able to do that or if that didn't happen, he would consider learning how to make a bomb, planting the bomb in the

> building when no one would be there. He didn't want anyone fatally injured.[1]

¶4 He also expressed anger with the City Council, adding he was upset because he had been removed from a City Council meeting. In November 2019, Stuart again threatened City Council members in statements made to a psychiatric nurse practitioner during an involuntary psychiatric hospitalization. Among other things, he stated council members had "caused him to go bankrupt," he wanted to "shoot them all" and "he owned guns at home," repeating several times that "he had thought about resorting to violence" and that a promise to his wife was the "only thing preventing him from carrying out his plan."

¶5 Days after learning of the November 2019 threats, the City filed the petition for an injunction against Stuart. The superior court granted the petition, ex parte, that same day and the City served Stuart with the injunction on November 14, 2019. The injunction prohibited Stuart from (1) going to the residences or private workplaces of any City Council Members (Protected Persons); or (2) going to City Hall "except during scheduled City Council/public meetings posted and open to the public," where he would be subject to a search for weapons. The injunction also limited his physical movements at City Council meetings (including specifying where he could sit) and required that communications with the City Council be in writing, according to a specified procedure. The injunction further provided that Stuart could contact the City or Protected Persons through their attorneys or legal process in writing or electronically.

¶6 Stuart did not request a hearing on the injunction until May 2020, about six months after being served. In doing so, Stuart argued the petition seeking the injunction was "insufficient as a matter of law" and "unconstitutionally overbroad and vague." He also claimed there had been no "harassment or contact of any kind . . . on the alleged dates; Allegations are a fabrication." The court then scheduled an evidentiary hearing for May 29, 2020. Over the City's objection, the court granted Stuart's motions to continue the hearing, so that it could be held in person. As a result, the first

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[1] After the counselor testified that Stuart made these statements, when asked whether Stuart gave "any indication as to what building or who he was targeting," she testified that Stuart "was most upset about the city council meetings that he'd been removed from." Other evidence, however, indicated that Stuart was not "specific about the building" that he discussed bombing and that he may have been "talking about the Chamber of Commerce building."

evidentiary hearing began on September 25, 2020. After the City rested in its case in chief, the court denied Stuart's "motion for directed verdict" and Stuart offered evidence.

¶7 The court heard more evidence on October 28, 2020 and November 12, 2020. During these hearings, Stuart testified, cross-examined the City's witnesses, offered his own witnesses and offered other evidence as well as argument. At the end of the November 12, 2020 hearing, the court found by a preponderance of the evidence that Stuart committed acts of harassment or may commit an act of harassment in the future and affirmed, but did not extend, the injunction. The next day, November 13, 2020, the injunction expired. *See* A.R.S. § 12-1810(I) (directing an injunction "expires one year after service on the defendant"). On November 29, 2020, Stuart filed a notice of appeal from the order affirming the injunction.

DISCUSSION

I. Stuart Has Not Shown That This Court Has Jurisdiction Over His Appeal.

¶8 This court has an independent duty to determine whether it has appellate jurisdiction. *See State v. Bayardi*, 230 Ariz. 195, 198 ¶ 7 (App. 2012) (citing cases). As the appellant, Stuart has the burden to show this court has appellate jurisdiction. *See Jessica C. v. Dep't of Child Safety*, 248 Ariz. 203, 205 ¶ 9 (App. 2020) (citing authority). Here, the injunction expired before Stuart filed his notice of appeal, and Stuart has not shown collateral consequences resulting from the now-expired injunction. Thus, this appeal is arguably moot. *See Cardoso v. Soldo*, 230 Ariz. 614, 617 ¶ 5 (App. 2012); *see also Kondaur Capital Corp. v. Pinal Cnty.*, 235 Ariz. 189, 193 ¶ 8 (App. 2014) (Arizona courts rarely consider moot issues).

¶9 Furthermore, although questioning the constitutionality of A.R.S. §12-1810 (the statute on which the injunction was based), Stuart has not properly presented a constitutional challenge. To properly press such a challenge, Stuart needed to serve various documents on the Arizona Attorney General, the Speaker of the Arizona House of Representatives and the President of the Arizona Senate. *See* A.R.S. § 12-1841. The record does not show that Stuart took these actions, indicating this court lacks jurisdiction over Stuart's attempted constitutional challenge. *See DeVries v. State*, 219 Ariz. 314 (App. 2008). For these reasons, Stuart has not shown that this court has jurisdiction over his appeal, including his facial challenge to the constitutionality of A.R.S. § 12-1810.

II. Stuart Has Not Shown That the Superior Court Erred In Affirming the Injunction.

¶10 Jurisdictional concerns notwithstanding, Stuart also has not established a basis for relief.

A. Stuart Has Not Shown the Superior Court Incorrectly Assessed the Evidence.

¶11 This court reviews the grant of an injunction for an abuse of discretion. *Wood v. Abril*, 244 Ariz. 436, 438 ¶ 6 (App. 2008). This court defers to the superior court's credibility assessment and weighing of conflicting evidence and will affirm if the record contains substantial evidence supporting the injunction. *Williams v. King*, 248 Ariz. 311, 317 ¶ 26 (App. 2020).

¶12 Stuart claims no procedural irregularities. Stuart presented his case to the finder of fact, cross-examined witnesses, testified, called witnesses on his own behalf and submitted evidence for consideration. The record shows that he had a full and fair opportunity to develop and present his case over an extended period. After receiving the evidence and hearing argument, the court weighed that evidence (which at times conflicted), considered witness credibility and affirmed the injunction. To the extent Stuart argues this court should reweigh evidence or credibility, that is what the superior court does at trial, not what this court does on appeal. *Williams*, 248 Ariz. at 317 ¶ 26. Stuart has not shown that the court erred, as a factual matter, when it affirmed the injunction.

¶13 Stuart next argues that the statements portrayed as harassment were not "true threats," and are, instead, protected speech. He also argues that the court did not require the City to prove that he made a true threat and that the injunction was granted without the court applying the proper burden of proof. In pressing these arguments, Stuart relies on *In re Kyle M.*, 200 Ariz. 447 (App. 2001). *Kyle*, however, affirmed a delinquency finding for a juvenile's violation of a statute criminalizing "threatening or intimidating" conduct. *Id.* at 452 ¶ 26. *Kyle* also focused on context and circumstances in determining whether a statement is a "true threat" for the purpose of adjudication under that criminal statute. *Id.* at 451 ¶ 21.

¶14 "True threats" are statements "made 'in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict bodily harm upon or to take the life of'" a person. *Citizen Publ'g Co. v. Miller*, 210 Ariz. 513, 520 ¶ 29 (2005) (citation omitted); *accord Kyle*, 200

Ariz. at 451 ¶ 21 (citing cases). Stuart argues that the context and circumstances of his statements are dispositive that he made no true threat: he told psychiatric personnel several times that he did not intend to harm anyone, the thoughts he recounted were thoughts from the past and he promised his wife that he would not harm anyone. Contrary to Stuart's argument, however, in context and under the circumstances presented, the court properly could find Stuart's statements were "true threats."

¶15 Stuart argues that, because he professed no current intention to act or harm, the statements could not be true threats. That argument, however, turns on a credibility determination made by the superior court at trial. *Williams*, 248 Ariz. at 317 ¶ 26. That court weighed the evidence presented and decided that the evidence presented a true threat sufficient to affirm the injunction. Stuart has shown no error in that determination.

B. Stuart Has Shown No Violation of His Constitutional Rights.

¶16 The injunction provided that, if Stuart chose to attend City Council meetings, he was required to submit to a search upon entering the building, present any statements he wished to make in writing, be accompanied by security while in the building and restrict his ability to freely move about the building. Stuart argues these restrictions violated his First, Fourth and Fourteenth Amendment rights. On this record, Stuart's arguments fail.

1. First Amendment Rights.

¶17 Stuart argues the injunction improperly limited his First Amendment right under the U.S. Constitution[2] to participate in political speech at City Council meetings. The injunction did restrict the manner of his participation at such meetings; it did not, however, preclude his participation and did not restrict the content of his speech. Accordingly, the injunction was a permissible content-neutral time, place and manner restriction. *See State ex rel. Napolitano v. Gravano*, 204 Ariz. 106, 111-13 ¶¶ 15-25 (App. 2002).

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[2] Although Stuart argues the injunction improperly limited his Article II, Section 6 right under the Arizona Constitution, he has not shown how the protections under that provision differ from his First Amendment rights. *See State v. Stummer*, 219 Ariz. 137, 142 ¶ 16 (2008) ("With regard to unprotected speech, Arizona courts construing Article 2, Section 6 have followed federal interpretations of the United States Constitution.").

¶18 Nor has Stuart shown the injunction fails under intermediate scrutiny. *Id.* Stuart could engage in political discussion, attend meetings and express his views. The injunction was put in place in light of his threats toward City officials, which were found to be credible. Thus, limiting Stuart's movement and form of providing commentary was a reasonable precaution that both allowed him to continue to participate in the political discussion and maintain the safety of the City Council members and City property.

2. Fourth Amendment Rights.

¶19 Stuart claims that the requirement of the injunction that he submit to a search upon entering City Hall was an unreasonable warrantless search in violation of his Fourth Amendment rights. Searches conducted as a condition of entering public buildings, however, are specifically exempt from the warrant requirement. *See, e.g.*, *United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007) (en banc) (airports); *McMorris v. Alioto*, 567 F.2d 897, 898-99 (9th Cir. 1978) (courthouses). Here, as in *Aukai*, "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable,'" including "searches now routine at airports and at entrances to courts and other official buildings." *Aukai*, 497 F.3d at 958 (citation omitted).

¶20 As applied, the record suggests that Stuart last attended a City Council meeting in March 2018. If so, he was never subject to the injunction's search protocol he challenges. And there is no other suggestion in the record that he was subject to a search under the injunction. He also had adequate advance notice that if he went to City Hall, he would be subject to search. The injunction provided for such a search based on specific references to violence against individuals who would be present at City Hall and Stuart's access to weapons. Nor is there anything suggesting a search pursuant to the injunction would have been improperly invasive. Thus, Stuart has not shown that the provision of the injunction prohibiting him from bringing weapons to City Hall and authorizing a search for weapons violated his Fourth Amendment rights. *Aukai*, 497 F.3d at 960; *McMorris*, 567 F.2d at 898-899.

3. Fourteenth Amendment Rights.

¶21 Stuart asserts that his Fourteenth Amendment right to due process was violated because the notice provided under A.R.S. § 12-1810 did not explain that speaking to psychiatric personnel about prior violent thoughts during an evaluation could constitute harassment. He also argues

that "it strains credulity to believe that the public could perceive that speaking to a psychiatric nurse in confidence is harassing someone in the workplace."

¶22 To the extent that Stuart argues the psychiatric personnel had to advise him that threats he made could be used against him to seek an injunction, he has not supported the argument with any legal authority. Although he argues that A.R.S. § 12-1810 is quasi-criminal, he provides no case or other authority supporting that argument. Indeed, he concedes that the statute has never been considered by any published decision.

¶23 Although unstated, Stuart's argument appears to be based on the thought that the injunction and possible consequences should have been considered in the context of a mental health evaluation. He implies that violent ideations, past or present, while a person is in a psychiatric state, coupled with access to weapons, should not be considered a legitimate threat. The superior court, however, considered evidence showing the context of Stuart's statements, including his psychiatric state, and still affirmed the injunction. That court was not required to discredit Stuart's statements based on the setting in which they were made.

4. Vagueness Challenge.

¶24 Stuart argues that A.R.S. § 12-1810 is unconstitutionally vague because it does not provide fair notice of what conduct it prohibits sufficient to allow a person to act accordingly. He asserts that the statute "contains no explicit standards for enforcement, thus inviting arbitrary and discriminatory enforcement." He also argues that, when making the statements, he thought he was having a confidential conversation with a psychiatric nurse and had no intention to threaten, annoy, harass or confide in anyone other than the person from whom he was seeking help.

¶25 As to Stuart's lack of fair notice argument, by statute, "'Harassment' means a ***single threat*** or act of physical harm or damage or a series of acts over any period of time ***that would cause a reasonable person to be seriously alarmed*** or annoyed." A.R.S. § 12-1810(S)(2) (emphasis added). Stuart has not shown that this definition was unclear about whether death threats or threatened bombings would fall within its scope.

¶26 Nor does Stuart's reliance on *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) show he lacked fair notice. *Coates* involved a criminal conviction for violating a city ordinance prohibiting more than three people assembling on any sidewalk and "conduct[ing] themselves in a manner

annoying to persons passing by." *Id.* Finding that the "annoying" requirement was unconstitutionally vague, *Coates* observed:

> Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, "men of common intelligence must necessarily guess at its meaning."

402 U.S. at 612, 614. *Coates* did not, somehow, declare that threats to kill public officials or bomb buildings could not be criminalized, let alone could not provide a basis for an injunction. Stuart cites no authority suggesting *Coates* applies to such threats. More broadly, and regardless of the outer reach of A.R.S. § 12-1810(S)(2), Stuart has not shown that a threat to kill public officials and bomb buildings would not "cause a reasonable person to be seriously alarmed." Accordingly, on the facts presented, Stuart's vagueness argument fails.

5. Overbreadth Challenge.

¶27 Stuart contends that A.R.S. § 12-1810 is unconstitutionally overbroad in violation of the First Amendment. Stuart contends that A.R.S. § 12-1810 directly limits an individual's right to speak freely through the issuance of an injunction if annoying or alarming. As potentially applicable here, "courts will invalidate a statute that reaches a substantial amount of constitutionally protected conduct." *State v. Boehler*, 228 Ariz. 33, 35 ¶ 5 (App. 2011) (citations omitted).

¶28 Stuart first argues that "[t]he undisputed facts of this case show that A.R.S. § 12-1810 was applied to Stuart because he engaged in protected speech about issues of public concern in Scottsdale." To the extent Stuart presented that fact-based argument at trial, the superior court rejected it. Nor does the record on appeal show the injunction was issued in retaliation. And as shown above, the injunction did not prohibit Stuart from peacefully exercising his Constitutional free speech rights.

¶29 A facial challenge to a statute, as Stuart presses here, requires a showing that the statute cannot be constitutionally applied in any context. *State v. Burke*, 238 Ariz. 322, 325 ¶ 4 (App. 2015). Stuart has not shown that threats to kill and bomb – found to be credible true threats by the finder of fact – cannot constitutionally provide the basis for an injunction. For this

same reason, Stuart has not shown that the injunction violated a limiting portion of the statute, providing that a court may not issue an injunction that "prohibits speech or other activities that are constitutionally protected or otherwise protected by law." A.R.S. § 12-1810(L)(2). The superior court did not exceed its jurisdiction or otherwise violate A.R.S. § 12-1810(L)(2).

¶30 Finally, even if the outer reaches of the statute may raise vagueness concerns, its application to threats to kill and bomb does not. "'A statute is unconstitutionally vague if it does not give persons of ordinary intelligence a reasonable opportunity to learn what it prohibits and does not provide explicit instructions for those who will apply it.'" *State v. Coulter*, 236 Ariz. 270, 273 ¶ 6 (App. 2014) (citations omitted). But "'[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness.'" *Coulter*, 236 Ariz. at 273 ¶ 4 (citations omitted). On these facts, A.R.S. § 12-1810 clearly applied and clearly authorized the injunction issued here. For these reasons, Stuart's overbreadth challenge fails.

CONCLUSION

¶31 For these reasons, the court rejects Stuart's arguments on appeal. As the successful party, the City is awarded its taxable costs on appeal contingent upon its compliance with ARCAP 21.

AMY M. WOOD • Clerk of the Court
FILED: AA