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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1062

State of Minnesota,
Respondent,

vs.

Bradley Stephen Rierson,
Appellant.

Filed April 17, 2017
Affirmed
Johnson, Judge

Itasca County District Court
File No. 31-CR-14-2643

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

John J. Muhar, Itasca County Attorney, David S. Schmit, Assistant County Attorney, Grand Rapids, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Lauermann, Assistant County Attorney, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

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

JOHNSON, Judge

Bradley Stephen Rierson pleaded guilty to five counts of felony communication with a minor describing sexual conduct. On direct appeal, he argues that his guilty pleas

are invalid on the ground that the statute underlying his convictions is unconstitutional. We conclude that the statute is not unconstitutional and, therefore, affirm.

FACTS

In December 2012, a woman reported to law enforcement that her 14-year-old daughter was receiving sexually oriented messages via Facebook. An investigation revealed that Rierson, who then was 40 years old, had exchanged hundreds of messages with the girl from September to December of that year.

In September 2014, the state charged Rierson with nine counts of felony communication with a minor describing sexual conduct, in violation of Minn. Stat. § 609.352, subd. 2a(2) (2014). The case went to trial in January 2016. Before the case was submitted to the jury, Rierson and the state entered into a plea agreement. Rierson pleaded guilty to five counts, and the state dismissed the remaining four counts. The district court accepted the guilty pleas. On April 5, 2016, the district court imposed concurrent sentences of 15, 20, 25, 30, and 36 months of imprisonment. Rierson appeals.

D E C I S I O N

Rierson argues that his guilty pleas are invalid because the statute on which the convictions are based, Minnesota Statutes section 609.352, subdivision 2a(2) (2014), is unconstitutional.

A.

Before considering the merits of Rierson's argument, we consider whether Rierson has waived his right to challenge his convictions on the ground that the statute is unconstitutional.

In general, "a guilty plea by a counseled defendant operates as a waiver of all nonjurisdictional defects." *State v. Lothenbach*, 296 N.W.2d 854, 857 (Minn. 1980); *see also McLaughlin v. State*, 291 Minn. 277, 280-82, 190 N.W.2d 867, 870-71 (1971). According to the general rule, if a defendant "solemnly admit[s] in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Lothenbach*, 296 N.W.2d at 857 (quoting *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608 (1973)). But Rierson does not complain of a procedural defect in his case occurring before his plea; rather, he contends that the entire prosecution is invalid because the statute on which it is based is unconstitutional.

We are unaware of any Minnesota caselaw concerning whether such an argument is waived by a guilty plea. Because Rierson's argument is based on his rights under the United States Constitution, *see Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 1712 (1969), it is appropriate to refer to federal caselaw. The United States Court of Appeals for the Eighth Circuit has considered the issue and synthesized the caselaw by stating,

> a person may, despite a valid guilty plea, pursue a certain type of claim that has been variously defined as a claim that attacks "the State's power to bring any indictment at all," *United States v. Broce*, 488 U.S. 563, 575, 109 S. Ct. 757, 765 (1989), that protects a defendant's "right not to be haled into court," *Blackledge v. Perry*, 417 U.S. 21, 30, 94 S. Ct. 2098, 2104 (1974), and that "the charge is one which the State may not constitutionally prosecute," *Menna v. New York*, 423 U.S. 61, 62 n.2, 96 S. Ct. 241, 242 n.2 (1975) (*per curiam*).

Weisberg v. Minnesota, 29 F.3d 1271, 1279 (8th Cir. 1994). The Eighth Circuit applied this rule of law in *United States v. Seay*, 620 F.3d 919 (8th Cir. 2010), a case in which the defendant pleaded guilty to an offense based on a statute that, he asserted, was unconstitutional. *Id.* at 922. The court concluded that Seay's argument raised the question whether the state could "'constitutionally prosecute' him," *id.* at 923 (quoting *Menna*, 423 U.S. at 62 n.2, 96 S. Ct. at 242 n.2), or whether "he should never have been 'haled into court' at all," *id.* (quoting *Blackledge*, 417 U.S. at 30, 94 S. Ct. at 2104). Accordingly, the court determined that Seay, by pleading guilty, had not waived his argument that the statute underlying his conviction was unconstitutional. *Id.* The Eighth Circuit's decision in *Seay* is consistent with its prior opinions on the issue. *See United States v. Morgan*, 230 F.3d 1067, 1071 (8th Cir. 2000); *Country v. Parratt*, 684 F.2d 588, 589 n.1 (8th Cir. 1982); *Sodders v. Parratt*, 693 F.2d 811, 812 (8th Cir. 1982) (*per curiam*).

In this case, Rierson argues that the statute setting forth the offenses to which he pleaded guilty is unconstitutional. His argument, like the argument in *Seay*, raises the question whether the state may constitutionally prosecute him for the offenses charged. *See Seay*, 620 F.3d at 923. Thus, Rierson's argument was not waived by his guilty plea.

B.

We now turn to the merits of Rierson's argument. Rierson was convicted of violating a statute that provides, in relevant part:

> A person 18 years of age or older who uses the Internet, a computer, computer program, computer network, computer system, an electronic communication system, . . . to commit any of the following acts, with the intent to arouse the sexual desire of any person, is guilty of a felony . . . :

. . . .

> (2) engaging in communication with a child or someone the person reasonably believes is a child, relating to or describing sexual conduct . . . .

Minn. Stat. § 609.352, subd. 2a(2).

On June 20, 2016, this court issued an opinion in which we concluded that section 609.352, subdivision 2a(2), is overbroad in violation of the First Amendment to the United States Constitution and article I, section 3, of the Minnesota Constitution and, thus, is facially unconstitutional. *State v. Muccio*, 881 N.W.2d 149, 157-61 (Minn. App. 2016). On July 1, 2016, Rierson filed a notice of appeal in this case. On August 23, 2016, the supreme court granted the state's petition for further review in *Muccio*. *State v. Muccio*, No. A15-1951 (Minn. Aug. 23, 2016) (order). The supreme court issued its opinion in *Muccio* last month, concluding that section 609.352, subdivision 2a(2), is *not* substantially overbroad and, thus, *not* unconstitutional. *State v. Muccio*, 890 N.W.2d 914, 919-29 (Minn. 2017). Because Rierson's sole argument is identical to the defendant's argument in *Muccio*, the supreme court's opinion in *Muccio* is dispositive.

Thus, Rierson's guilty pleas are not invalid on the ground that the statute underlying his convictions is unconstitutional.

Affirmed.