STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2047

State of Minnesota,
Respondent,

vs.

Eustaquio Israel Morales Hernandez,
Appellant.

Filed September 16, 2019
Affirmed
Worke, Judge

Mille Lacs County District Court
File No. 48-CR-17-1108

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Damien F. Toven, Princeton City Attorney, Kali A. Gardner, Assistant City Attorney, Dove & Fretland, P.L.L.P., Princeton, Minnesota (for respondent);

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Hooten, Judge; and Klaphake, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

WORKE, Judge

Appellant argues that his conviction must be reversed because the underlying domestic-abuse no-contact order (DANCO) was unconstitutionally vague. We affirm.

FACTS

On May 27, 2017, officers came to the home of appellant Eustaquio Israel Morales Hernandez to take him into custody on an outstanding warrant in an unrelated matter. The officers were met by T.P. who informed them that only she and her children, A.T.L.-H. and A.J.L.-H., were present. Following a search of the home, officers located Hernandez hiding behind the couch that T.P. and the children were sitting on. The officers took him into custody on the outstanding warrant. While transporting Hernandez to jail, the officers were informed by a dispatcher of an active DANCO issued in December 2016 prohibiting Hernandez from contact with T.P.

Hernandez was initially charged with one misdemeanor count of violating the DANCO, and the state later amended the complaint to add two additional charges of misdemeanor DANCO violations pertaining to Hernandez's contact with the protected children. Prior to trial on the DANCO violation charges, Hernandez moved to dismiss for lack of probable cause, asserting that the amended DANCO[1] issued on December 15, 2016,

[1] The DANCO Hernandez was charged with violating amended a DANCO issued two days previously, both of which were pretrial orders. Accordingly, there is no issue before this court regarding Hernandez's ability to collaterally attack the validity of the DANCO. *See State v. Ness*, 819 N.W.2d 219, 224 (Minn. App. 2012) ("Because there is no clear right to appeal the issuance of a pretrial DANCO . . . a defendant may properly challenge the

was unconstitutionally vague. The district court found that the DANCO was sufficiently definite and denied Hernandez's motion to dismiss.

A jury convicted Hernandez of two counts of violating the DANCO, and the district court dismissed the third count. The district court sentenced Hernandez to 90 days in jail, 87 of which were stayed for one year. This appeal followed.

D E C I S I O N

Hernandez argues that the district court erred by denying his motion to dismiss on the basis that the amended DANCO filed on December 15, 2016, was unconstitutionally vague. "It is well established that the right to due process includes the right to not be convicted and punished based on an unconstitutionally vague statute." *State v. Phipps*, 820 N.W.2d 282, 285 (Minn. App. 2012). Here, Hernandez does not present a facial challenge to the constitutionality of the DANCO statute, but instead argues that the specific terms of his DANCO as imposed by the district court are unconstitutionally vague.

In considering whether to apply the void-for-vagueness doctrine to the review of an allegedly vague order for protection (OFP), this court stated: "It is logical to apply the same body of caselaw . . . because an OFP, in the same manner as a criminal statute, proscribes certain conduct that may be punished by criminal proceedings." *Id*. at 286. The same reasoning applies in extending that caselaw to the review of an allegedly vague DANCO, because like an OFP, it proscribes specific conduct and criminal penalties attach to its violation.

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issuance of a pretrial DANCO in a subsequent proceeding for violation of that DANCO."), *aff'd on other grounds*, 834 N.W.2d 177 (Minn. 2013).

"The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *State v. Bussman*, 741 N.W.2d 79, 83 (Minn. 2007). Appellate courts review a claim of vagueness de novo. *State v. Ness*, 834 N.W.2d 177, 184 (Minn. 2013).

Hernandez argues that the amended DANCO is unconstitutionally vague because an ordinary person could not understand and comply with its terms. Hernandez's original DANCO, issued on December 13, 2016, had two clear requirements: (1) Hernandez was ordered "to have no contact directly, indirectly or through others, in person, by telephone, in writing, electronically or by any other means" with T.P., A.T.L.-H., and A.J.L.-H.; and (2) Hernandez was ordered to not go to his home in Princeton, Minnesota. The amended DANCO issued on December 15, 2016, contained the same two conditions, and added the following exception to the second requirement: "[Hernandez] may return to reside at [his home in Princeton] at 6:00 am on Monday, Dec. 19, unless [the] protected person contacts [the] Princeton Police dept. prior to that time and indicates she is no longer residing at the residence."

Hernandez argues that the amended DANCO is unconstitutionally vague because it specifically allowed him to be in his home after December 19, 2016. This, however, misstates the issue both at trial and on appeal. The state asserted in response to Hernandez's motion to dismiss that Hernandez would only be tried for violating the first term of the amended DANCO—that he have no contact with the three protected persons—not for being in his home.

The district court found that the requirement that Hernandez have no contact with the three protected persons was sufficiently definite such that an ordinary person could understand that contact was prohibited, and denied his motion on that basis. *See Phipps* 820 N.W.2d at 286 ("The phrase 'no contact' is clear and understandable."). Because Hernandez was neither tried nor convicted for violating the DANCO by being in his home, any alleged vagueness relating to that term of the order is immaterial to the analysis.

Hernandez also argues that an ordinary person would not know that having contact with the protected persons in his own home would constitute a violation. As to this argument *Phipps* is directly on point. Phipps argued that his OFP was vague because it did not address whether he was allowed to have contact with his estranged wife if she contacted him first. *Id*. This court stated that "the unqualified nature of the no-contact provision makes it clear that no contact whatsoever is permitted . . . . Phipps cannot [claim that he was completely passive] because he apparently spent an entire day with [the protected person] *at his home*." *Id*. (emphasis added). During the motion hearing Hernandez's counsel acknowledged that the police discovered Hernandez in his underwear, which implies that he spent more than a minimal amount of time with the protected persons in his home that day.

Finally, Hernandez asserts that the amended DANCO is vague because it granted him an "unencumbered right to reside" in his home, meaning "a person of common intelligence would be very confused as to what exactly should happen if a protected person invited themselves onto the property." However, this argument is not supported by the terms of the amended DANCO. While the amended DANCO places qualifications upon

the term restricting Hernandez's presence at his home, the requirement that Hernandez have no contact with the protected people is completely unqualified. As discussed in *Phipps*, a person of ordinary intelligence would understand that "no contact" means no contact regardless of where that contact occurred, even including his own home. *See id*. Hernandez's amended DANCO is not void for vagueness, and therefore the district court did not err in denying his motion to dismiss.

Affirmed.