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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0165**

In re the Matter of: Sharon K. Fostervold,
Respondent,

vs.

Robert Monson,
Appellant.

**Filed September 16, 2019
Appeal dismissed
Bratvold, Judge**

Kandiyohi County District Court
File No. 34-FA-19-8

Geoffrey H. Kozen, Kelvin D. Collado, Robins Kaplan LLP, Minneapolis, Minnesota; and

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Considered and decided by Bratvold, Presiding Judge; Ross, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

In this appeal from the district court's order for protection (OFP), appellant argues that (1) the OFP's requirement that he transfer his firearms violates his rights under the Second Amendment; and (2) he was denied due process when the district court allowed

respondent to seek a firearm restriction at the hearing despite not identifying that relief in her petition.

First, we decline to consider appellant's Second Amendment challenge to the OFP statute because appellant did not provide notice to the Minnesota Attorney General as required by Minn. R. Civ. P. 5A and Minn. R. Civ. App. P. 144, and because the appellate record is insufficient for us to review this issue. Second, we conclude that appellant's due-process challenge is not properly before this court because he did not raise the issue in district court. Because we conclude that neither of appellant's issues is properly before this court, and there is accordingly nothing for this court to review, we dismiss the appeal.

FACTS

Appellant Robert Monson (age 74) and respondent Sharon K. Fostervold (age 78) were in a romantic relationship from October 2017 to January 2, 2019. In December 2018, Fostervold had knee replacement surgery, which limited her movement and day-to-day functioning.

On January 7, 2019, Fostervold filed an affidavit and petition for an OFP. In her petition, Fostervold attested that she had suffered abuse from Monson's "violent" behavior, that he was "getting worse," and she feared that the "next time [she] will be injured." Fostervold also attested that Monson had told her she could not "break up with him." Fostervold's petition and affidavit described an incident that occurred on January 2, 2019, and she averred that she was "[r]eally scared" of Monson and feared future violence. Fostervold did not request a hearing on the OFP petition. The district court issued an ex parte OFP that same day.

Along with the OFP petition, Fostervold also completed a “law enforcement information form,” which stated that, because the sheriff will “personally serve” the OFP on Monson, it is “important that the Sheriff have accurate and detailed information” about circumstances that could “make service more dangerous.” On this form, Fostervold provided Monson’s address and contact information, and stated that Monson had a “gun (rifle)” that he kept in his “car trunk.” The sheriff served Monson with the ex parte OFP on January 8, 2019.

Monson requested a hearing, which occurred on January 18, 2019. Fostervold testified to the incident on January 2 and that Monson had previously verbally abused her during their relationship. In response to questioning, Fostervold requested that Monson be required to stay away from her home and vacation cabin. Her attorney also asked whether she was requesting a restriction that bars Monson “from possessing ammunition and firearms.” Fostervold asked if the restriction could be for “six months or—a year.” Fostervold also testified that, after her surgery, Monson had brought over his gun and ammunition to her house, and that this “was scary because [she] didn’t know if he’d use it on [her] or not.”

During cross-examination, Monson’s attorney asked Fostervold if she had included in the OFP petition a request to restrict Monson’s “ability to own or possess firearms,” to which Fostervold replied that she had not. Fostervold also agreed that Monson did not use his gun during the January 2 incident, nor did he “threaten to use the gun.” Monson denied that he was violent on January 2 or that he verbally abused Fostervold.

After the hearing on January 23, the district court issued an OFP. The district court found that Fostervold and Monson were in a “significant romantic or sexual relationship” at the time of the January 2 incident. The district court found that on January 2, Fostervold was in a “frail state due to a bad knee,” and the following “acts of domestic abuse” occurred: Monson took two pajama tops from Fostervold, grabbed her bra, the “skin on her mid-back,” and her left forearm, after Fostervold told him to stop; Monson refused to return Fostervold’s house keys unless she had sex with him; Monson “remained” in Fostervold’s home “uninvited”; and Monson “jabbed his finger in a threatening manner within inches from her face and caused her to be extremely scared of further physical harm.”

The district court also determined that, in the days following January 2, Monson entered Fostervold’s car without permission, “let himself in[to]” her home more than once, and did not return her keys. The district court determined that Monson’s conduct caused Fostervold to “change[] her locks and install[] a security system” and that Fostervold’s knowledge that Monson “kept a firearm and ammo in the trunk of his car” added to her fear for her own safety.

The district court ordered Monson not to have any contact with Fostervold, to stay away from her home and cabin for two years, and to pay her \$150 for new locks. And the district court ordered Monson “not to ship, transport, possess, or receive any firearm or ammunition until January 23, 2020 per [Fostervold’s] request” (the firearm restriction). The district court ordered that, “within three business days from the date this order is issued,” Monson must “transfer any firearm [he] possesses to a federally licensed firearms

dealer, a law enforcement agency, or a third party who may lawfully receive them.”
Monson appeals.

D E C I S I O N

The Minnesota Domestic Abuse Act (the Act) allows a petitioner to seek an OFP against an abuser by alleging the existence of domestic abuse. Minn. Stat. § 518B.01, subd. 4 (2018). After notice and the opportunity for a hearing, a district court may grant relief. *See id.*, subd. 6 (2018). In particular, the Act *requires* that a district court prohibit the abuser from possessing firearms and to order the temporary or permanent transfer of any firearms in the abuser’s possession, if the OFP:

(1) restrains the abusing party from harassing, stalking, or threatening the petitioner or restrains the abusing party from engaging in other conduct that would place the petitioner in reasonable fear of bodily injury, and (2) includes a finding that the abusing party represents a credible threat to the physical safety of the petitioner or prohibits the abusing party from using, attempting to use, or threatening to use physical force against the petitioner.

Id., subd. 6(g). The statute does *not* provide that a district court must find that the abuser used firearms in the threatening or abusive conduct before ordering a firearm restriction.
See id.

Here, the OFP (1) restrained Monson from “harassing, stalking, or threatening” Fostervold, and (2) found that Monson “caused [Fostervold] to be extremely scared of further physical harm,” and because Monson returned several times, used Fostervold’s car, and refused to return her keys until the OFP had been filed, Monson represented a “credible threat.” *See id.* The district court also ordered that Monson “may not use, attempt to use,

or threaten to use physical force” against Fostervold. Thus, the district court determined that subdivision 6(g)’s requirements had been satisfied, and ordered Monson not to possess any firearms for one year and to temporarily transfer firearms currently in his possession, as described above. For ease of reference, we will describe this portion of the OFP as the “firearm restriction.”

I. Monson’s Second Amendment challenge to the OFP statute is not properly before this court.

On appeal, Monson does not challenge the district court’s findings in support of the OFP or in support of the firearm restriction. Instead, Monson argues that the firearm restriction, as required by section 518B.01, subdivision 6(g), is unconstitutional under the Second Amendment because he did not use a firearm during the January 2 incident, and because the restriction was not “narrowly tailored” for a “life-long hunter,” and caused a “complete denial” of his rights. Fostervold argues that Monson has waived any constitutional challenge to the firearm restriction.

The Second Amendment to the United States Constitution states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. The Second Amendment is “fully applicable to the State of Minnesota.” *See State v. Craig*, 826 N.W.2d 789, 792 (Minn. 2013). But the right secured by the Second Amendment is “not unlimited.” *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626, 128 S. Ct. 2783, 2816 (2008)).

Under Minn. R. Civ. P. 5A, a party challenging the constitutionality of a state statute must “serve the notice and document” challenging the statute “on the Minnesota Attorney

General . . . by [United States] mail to afford the Attorney General an opportunity to intervene.” *See* Minn. R. Civ. P. 5A.¹ Appellate courts have declined to review the constitutionality of a statute when a party has not complied with the attorney general notice requirements. *See, e.g., Appeal of Leary*, 136 N.W.2d 552, 560 (Minn. 1965) (construing predecessor Minn. R. Civ. P. 24.04 and refusing to decide constitutionality of statute where no notice given to attorney general).

Monson acknowledges that, during district court proceedings, he did not notify the attorney general of his constitutional challenge to the firearm restriction. Monson argues, however, that he was not required to provide notice under rule 5A, because “no document was filed by Mr. Monson.” Monson relies on language from rule 5A, which states “A party that files a pleading, written motion, or other document drawing into question the constitutionality of a federal or state statute must promptly” file a notice of the constitutional question and serve it on the attorney general. Minn. R. Civ. P. 5A. We disagree with Monson’s interpretation of rule 5A, which is not supported by relevant caselaw. A party cannot avoid obligations imposed by rule 5A simply by raising a constitutional challenge orally, rather than in writing. *See In re Leslie v. Emerson*,

¹ This court has interpreted the attorney general notice requirements to apply only to facial constitutional challenges and has held that notice to the attorney general is not required for challenges on an “as applied” basis. *See Welsh v. Johnson*, 508 N.W.2d 212, 215 n.1 (Minn. App. 1993). In some sections of his brief to this court, Monson contends that he is not making a facial constitutional challenge to Minn. Stat. § 518B.01, subd. 6(g). Based on our review, the district court’s findings support the restriction and comply with subdivision 6(g), so there is no way to invalidate the firearm restriction without also addressing the constitutionality of the statute. We therefore conclude that Monson is making a facial challenge to subdivision 6(g) and notice to the attorney general is required.

889 N.W.2d 13, 16-17 (Minn. 2017) (finding that defendant failed to follow rule 5A when making an oral motion challenging the constitutionality of a DNA-collection statute and failing to notify the attorney general).

Monson also argues that he did not know Fostervold would seek a firearm restriction, therefore, he did not have to notify the attorney general that he was challenging the constitutionality of the OFP statute. But Monson knew or should have known about the firearm restriction. Both the factual allegations in the petition and the plain language of section 519B.01 put Monson on notice that a firearm restriction may be imposed after a hearing. *See* Minn. Stat. § 518B.01, subd. 6(g). Thus, we conclude that Monson failed to comply with rule 5A during district court proceedings.

Monson's Second Amendment challenge to the OFP statute is not properly before this court for two additional reasons. First, Monson provided inadequate notice to the attorney general during appellate proceedings. *See* Minn. R. Civ. App. P. 144 (requiring that a party challenging the constitutionality of a statute provide notice to the attorney general on appeal). Monson notified the attorney general two days before he filed his appellate brief. Rule 144 requires, however, that notice "afford an opportunity to intervene." *Id.* Monson's delayed notice to the attorney general of the issue on appeal did not reasonably afford the opportunity to intervene. Therefore, Monson's challenge is not properly before this court because he failed to provide required notice to the attorney general under rule 5A and under rule 144.

Second, even if Monson's failure to notify the attorney general was not fatal to his Second Amendment challenge, we would still decline to review the issue because the

record is insufficient to establish whether the firearm restriction violates Monson's constitutional rights. *See Elwell v. County of Hennepin*, 221 N.W.2d 538, 545 (Minn. 1974) (holding that lack of notice to attorney general does not bar reviewing court from considering constitutional issue if the issue was adequately raised and considered at the district court and the appellate record is sufficient for review). Among other things, Monson only vaguely referred to his constitutional rights during the district court proceedings. For example, Monson's attorney stated that a firearm restriction should not "override the [Second Amendment] right" because a firearm was not used during the incident. More importantly, the district court did not decide whether a temporary firearm restriction violated Monson's rights under the Second Amendment. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." (quotation omitted)). Thus, we have neither a record nor a district court decision on which to address the constitutionality of the firearm restriction.

We therefore conclude that Monson's constitutional challenge to section 518B.01, subdivision 6(g), is not properly before us, and we decline to address it.

II. Monson's due-process challenge is also not properly before this court.

Monson argues that the district court violated his procedural due-process rights because Fostervold's OFP petition did not notify him that the evidentiary hearing may result in a firearm restriction. Monson contends that the OFP petition did not "indicate that [Fostervold] was asking the court to prohibit" him from possessing a firearm.

The United States and Minnesota Constitutions provide that the government shall not deprive a person of “life, liberty, or property without due process of law.” U.S. Const. amends. V, XIV; Minn. Const. art. I, § 7. Due process requires notice and the opportunity for a hearing to present arguments. *See In re Minnikka Props., LLC*, 834 N.W.2d 572, 580 (Minn. App. 2013).

Monson’s due-process argument is not properly before this court because he did not raise the issue in district court. Monson thus did not give the district court an opportunity to decide the due-process challenge.² And, as previously stated, we “consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.” *See Thiele*, 425 N.W.2d at 582; *see also Rubey v. Vannett*, 714 N.W.2d 417, 424 (Minn. 2006) (declining to address “due process claim” because appellant “did not raise [it] in the district court”).

In addition, Monson’s due-process argument to this court is unsupported by legal authority. *See State, Dep’t of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (holding that appellate courts decline to reach issues that are inadequately briefed). Monson argues that he was “ambushed” by the firearm restriction at the hearing. But he provides no legal authority to support his assertion that a district court violates due process when it grants relief that is mandated by statute. *See Minn. Stat.*

² Monson argues that his trial attorney’s statement to the district court that he was unaware Fosterhold sought a firearm restriction sufficiently preserved his due-process challenge for appeal. We disagree and conclude that simply stating that the OFP petition did not include a “request for restriction of firearms” does not sufficiently raise nor preserve a due-process argument. We also note that Monson did not seek a continuance or request an opportunity to file written submissions.

§ 518B.01, subd. 6(g); *see also CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 563 (Minn. App. 2001) (providing that receipt of notice of a hearing is sufficient to satisfy the reasonable notice requirement of due process), *review denied* (Minn. Nov. 13, 2001).

Because neither Monson's Second Amendment claim nor his due-process argument is properly before us, we conclude that there is nothing for us to review. Accordingly, we dismiss the appeal.

Appeal dismissed.