STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0016

State of Minnesota,
Respondent,

vs.

Gerald Lee Jones,
Appellant.

Filed November 5, 2012
Affirmed
Rodenberg, Judge

Itasca County District Court
File No. 31CR112055

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

John Muhar, Itasca County Attorney, Grand Rapids, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Katie M. Elliott, Assistant Public Defender, Chang Lau (certified student attorney), St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Kirk, Judge; and Harten, Judge.*

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

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

RODENBERG, Judge

On appeal from his conviction of multiple counts of attempted felony violation and felony violation of a domestic abuse no contact order (DANCO), appellant argues that the DANCO statute, Minn. Stat. § 629.75 (2010), is unconstitutional because it (1) violates procedural due process; (2) violates substantive due process; and (3) is unconstitutionally vague. Appellant further argues that the district court plainly erred in concluding that appellant's stipulated prior convictions were qualified domestic violence-related offenses. We affirm.

FACTS

On May 31, 2011, appellant Gerald Lee Jones was arraigned on charges of burglary in the first degree and felony domestic assault. The district court issued a domestic abuse no contact order pursuant to Minn. Stat. § 629.75. The DANCO prohibited appellant from having contact with C.A.S.

After the issuance of the DANCO, appellant left two voicemail messages for C.A.S. on C.A.S.'s telephone, one on May 31, 2011, and one on June 1, 2011. Appellant also spoke to C.A.S. over the telephone on two occasions, once on May 31, 2011, and once on June 1, 2011. Appellant's cellmate spoke to C.A.S. over the telephone on June 17, 2011. Appellant's voice could be heard during the telephone call, instructing the cellmate what to say to C.A.S. On June 18, 2011, appellant's cellmate left a message on C.A.S.'s telephone.

On July 27, 2011, appellant was charged with three counts of felony violation of a DANCO for the three telephone conversations and three counts of attempted felony violation of a DANCO for the three messages left on C.A.S.'s telephones.

Appellant moved to dismiss the complaint, arguing that Minn. Stat. § 629.75 is unconstitutional. The district court denied appellant's motion.

On September 6, 2011, appellant stipulated to the state's case pursuant to Minn. R. Crim. P. 26.01, subd. 4, in order to obtain appellate review of the district court's ruling on the constitutionality of Minn. Stat. § 629.75. As part of the stipulation, appellant admitted on the record that he had been convicted of felony terroristic threats on October 29, 2002, felony terroristic threats on March 28, 2005, felony assault in the fifth degree on March 28, 2005, and assault in the third degree on October 9, 2006. However, appellant did not admit that the four prior felony convictions were "qualified domestic violence-related offense[s]" within the meaning of section 629.75, specifically leaving that issue for decision by the district court.

The district court found appellant guilty of five of the six counts of the complaint, acquitting him of the count of attempted felony violation of a DANCO based upon the June 18, 2011 telephone message left by appellant's cellmate on C.A.S.'s telephone.

D E C I S I O N

Appellant challenges the constitutionality of section 629.75, the DANCO statute, arguing that it violates procedural and substantive due process and is unconstitutionally vague. Appellant also argues that whether his stipulated prior convictions were qualified domestic violence-related offenses was a question of fact to which he did not stipulate,

and that his conviction was not in compliance with the requirements of Minn. R. Crim. P. 26.01, subd. 4.

On appeal, the state argues that appellant cannot collaterally attack a DANCO in a criminal proceeding where he is charged with violating the DANCO, contending that appellant should instead have appealed the order at the time it was issued.

I.

This court will generally not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Since the state did not question appellant's ability to collaterally attack the DANCO before the district court, it failed to preserve this issue for appeal and has waived it. *See id.*

Moreover, even if the state had preserved this issue, it was recently addressed by this court in *State v. Ness*, which held that "a defendant may properly challenge the issuance of a pretrial DANCO," such as the DANCO at issue in this case, "in a subsequent proceeding for violation of that DANCO." 819 N.W.2d 219, 224 (Minn. App. 2012), *pet. for review filed* (Minn. Sept. 20, 2012).

II.

Appellant argues that Minn. Stat. § 629.75 violates his right to procedural due process, relying on the three-factor test laid out in *Mathews v. Eldridge*, 424 U.S. 319, 332, 335, 96 S. Ct. 893, 901, 903 (1976).

> The *Mathews* balancing test requires this court to consider: (1) the private interest that will be affected by the governmental action; (2) the risk of erroneous deprivation of this interest through the procedures used and the probable value of additional or substitute procedural safeguards; and

> (3) the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substantive procedural requirements would entail."

Obara v. Minn. Dep't of Health, 758 N.W.2d 873, 878 (Minn. App. 2008) (quoting *Mathews*, 424 U.S. at 335, 96 S. Ct. at 903).

This precise question was addressed in *Ness*, which conducted a thorough review of the *Mathews* factors as they applied to the DANCO statute and "conclude[d] that the procedures provided by Minn. Stat. § 629.75 are constitutionally sufficient and do not violate a defendant's right to [procedural] due process." 819 N.W.2d at 225–28. The DANCO statute did not violate appellant's procedural due process rights.

III.

Appellant argues that the DANCO statute violates substantive due process. Appellant did not raise this issue below, but argues that the district court raised the issue sua sponte by referencing "liberty interests and fundamental rights" in its discussion of appellant's procedural due process challenge.

The district court did reference liberty interests and the First Amendment, but not in the context of a substantive due-process analysis. Instead, the discussion of those interests appeared as part of the district court's procedural due-process analysis. The district court observed that this analysis "proceeds in two steps: courts first examine whether there is a liberty or property interest of which a person has been deprived, and if so courts determine whether the procedures followed were constitutionally sufficient."

Ness, a procedural due-process case, articulated and followed a similar analytical framework, beginning by identifying the liberty interest(s) at stake:

> [T]he defendant's right to contact a family or household member. While an individual has a liberty interest in contacting a family or household member, we must balance this interest and the risk of an erroneous deprivation of that interest through unfair process, against the nature of the government's interest.

819 N.W.2d at 226.

Here, the district court's analysis parallels this court's analysis in *Ness*. The district court was thus engaging in a discussion of procedural, not substantive, due process. The district court did not address the constitutionality of Minn. Stat. § 629.75 on substantive due-process grounds, an issue which appellant neither raised nor briefed before the district court. Accordingly, this issue was not preserved for appeal. *See Roby*, 547 N.W.2d at 357.

IV.

Appellant argues that section 629.75 is void for vagueness because it "authorizes and encourages arbitrary and discriminatory enforcement." *Ness* considered precisely this challenge to section 629.75 and held that the DANCO statute was not unconstitutionally vague. *See* 819 N.W.2d at 228–30. The DANCO in this case is not unconstitutionally vague.

V.

Appellant challenges the district court's application of Minn. R. Crim. P. 26.01, subd. 4. Appellant argues that the procedure established in Rule 26.01, subd. 4, did not

permit the district court to determine that appellant's stipulated convictions for third-degree assault, fifth-degree assault, and two convictions for terroristic threats were "qualified domestic violence-related offense[s]" within the meaning of Minn. Stat. § 629.75, subd. 2.

A qualified domestic violence-related offense "includes a violation of or an attempt to violate sections . . . 609.223 (third-degree assault); . . . 609.224 (fifth-degree assault); . . . [and] 609.713 (terroristic threats)." Minn. Stat. § 609.02, subd. 16 (2010); *see also* Minn. Stat. § 629.75, subd. 2(a) (defining "qualified domestic violence-related offense" for purposes of the DANCO statute by reference to Minn. Stat. § 609.02, subd. 16). Thus, appellant's prior felony convictions are qualified domestic violence-related convictions within the meaning of the statute.

Appellant nevertheless argues that whether a prior conviction is a qualified domestic violence-related offense is a question of fact, and that he did not stipulate that his prior convictions constituted "qualified domestic violence-related offenses."[1] The state posits that the question of whether the convictions are qualified domestic violence-related offenses is one of law, and argues that the district court was entitled to decide that issue based on appellant's stipulation to the underlying convictions.

Whether a particular conviction, once proven, is a qualified domestic violence-related offense is a question of law. *See Moen*, 752 N.W.2d at 534–37 (addressing

[1] The reason that appellant did not concede that the convictions were qualified domestic violence-related offenses appears to have been his attorney's uncertainty as to whether the convictions required a specific domestic violence nexus. This was one of the questions presented in *State v. Moen*, which held that the statute does not require a domestic-violence nexus. 752 N.W.2d 532, 534–36 (Minn. App. 2008).

whether a North Dakota conviction was a qualified domestic violence-related offense as a matter of statutory interpretation, which is a question of law); *cf. State v. Zeimet*, 696 N.W.2d 791, 793–94, 797–98 (Minn. 2005) (addressing whether prior driving-while-impaired convictions could be treated as "qualified prior impaired driving incidents" as a question of law); *State v. Maas*, 664 N.W.2d 397, 398–99 (Minn. App. 2003) (addressing whether a prior conviction under a particular statutory provision was a "qualified prior impaired driving incident" as a question of law), *review denied* (Minn. Sept. 16, 2003).

As a matter of statutory interpretation, the four convictions to which appellant stipulated were "qualified domestic violence-related offenses." Even though appellant did not agree to that legal conclusion, the district court has the authority to proceed under Minn. R. Crim. P. 26.01, subd. 4, where there is a stipulation to the fact of the convictions. The district court correctly determined that the prior convictions to which appellant stipulated were "qualified domestic violence-related offenses."

Since appellant stipulated under Minn. R. Crim. P. 26.01, subd. 4, to the fact of the prior convictions, and the district court correctly applied Minn. Stat. § 629.75, subd. 2, to the stipulated facts, the district court did not err in finding appellant guilty of five of the six counts charged.

Affirmed.