

State of Minnesota
Steele County

District Court
Third District

Court File Number: **74-CR-11-254**

Case Type: Crim/Traf Mandatory

Notice of Filing of Order

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State of Minnesota vs KEITH LEE KELLING

You are notified that an order was filed on this date.

Dated: June 28, 2011

Kristine Maiers
Court Administrator
Steele County District Court
111 E. Main Street
Owatonna MN 55060
507-444-7700

cc: DANIEL ANDREW MCINTOSH

JUN 29 2011

STATE OF MINNESOTA
COUNTY OF STEELE

DISTRICT COURT
CRIMINAL DIVISION
THIRD JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

File No. 74-CR-11-254

vs.

ORDER

Keith Lee Kelling,
Defendant.

The above-entitled matter came on for hearing before the Honorable Casey J. Christian of the Steele County District Court on February 16, 2011, for Mr. Kelling's Rule 8 appearance and pursuant to the State's motion for issuance of a Domestic Abuse No Contact Order.

Jennifer Dunn-Foster, Assistant Steele County Attorney, appeared on behalf of the state. Attorney Joel D. Eaton, appeared on behalf of Defendant, Keith Lee Kelling, who was also present.

Based upon the record, the Court makes the following:

ORDER

1. The State's Petition for a Domestic Abuse No Contact Order is **DENIED** because Minnesota Statute Section 629.75 is unconstitutionally vague in violation of due process.
2. The attached Memorandum is incorporated herein by reference.

DATED: 6/23/11

BY THE COURT



Casey J. Christian
District Court Judge
Third Judicial District

Court Administrator
Steele County, MN

FILED

Date 6-28-11

By [Signature]
Deputy

MEMORANDUM

I. INTRODUCTION.

Effective August 1, 2010, the statutory provision related to Domestic Abuse No Contact Orders was amended and moved from Minnesota Statute Section 518B.01, subd. 22 to Minnesota Statute Section 629.75. The substance of the amended language is found in Minn. Statute Section 629.75, subd. 1(b) and (c), which states:

(b) A domestic abuse no contact order may be issued as a pretrial order before final disposition of the underlying criminal case or as a postconviction probationary order. *A domestic abuse no contact order is independent of any condition of pretrial release or probation imposed on the defendant. A domestic abuse no contact order may be issued in addition to a similar restriction imposed as a condition of pretrial release or probation.*

...

(c) *A no contact order under this section shall be issued in a proceeding that is separate from but held immediately following a proceeding in which any pretrial release or sentencing issues are decided.*

(emphasis added). The prior Domestic Abuse No Contact Order provision found in Minnesota Statute Section 518B.01, subd. 22 did not contain the emphasized language above. Furthermore, prior to the amendment of the statute, Domestic Abuse No Contact Orders were often issued as a condition of release. The district court would determine whether to issue a Domestic Abuse No Contact Order as a condition of release by considering whether “(1) release of the person poses a threat to the alleged victim, another family or household member, or public safety; or (2) there is a substantial likelihood the person will fail to appear at subsequent proceedings.” Minn. Stat. § 629.72, subd. 2. In fact, Minnesota Statute Section 629.72, subd. 2. requires that “[b]efore releasing a person arrested for or charged with a crime of domestic abuse, harassment, violation of an order for protection, or violation of a Domestic Abuse No Contact Order, the judge shall make finding on record, to the extent possible, concerning the determination made in accordance with the factors specified in clauses (1) and (2) [above].” However, the new language found in Minnesota Statute Section 629.75, subd. 1(b) and (c) clearly states that a Domestic Abuse No Contact Order is “independent of any condition of pretrial release,” “may be issued in addition to a similar restriction imposed as a condition of pretrial release,” and is “issued in a proceeding that is separate from ... a proceeding in which any pretrial release or sentencing issues are decided.” It appears that by adding this language and moving the provision to Section 629.75, the

legislature intended to allow the district court to issue a Domestic Abuse No Contact Order even where the defendant is released after posting the unconditional bail amount. *See State v. Martin*, 743 N.W.2d 261, 265 (Minn. 2008) (noting that conditional release may be offered only as an alternative to money bail without conditions). However, by adding language stating that a Domestic Abuse No Contact Order is “independent” of pretrial release conditions and that such an order must be issued at a proceeding “separate from a proceeding in which pretrial release or sentencing issues are decided,” it is explicitly clear that Minnesota Statute Section 629.72, subdivision 2 and Minnesota Rules of Criminal Procedure 6.02, which contain factors to consider when setting terms of conditional release, are inapplicable to the recently amended Domestic Abuse No Contact Order Statute.

II. Void for Vagueness.

The void-for-vagueness doctrine is grounded in the Due Process Clause of the Fifth and Fourteenth Amendments of the Federal Constitution and Article I Section 7 of the Minnesota Constitution. Under the void-for-vagueness doctrine, a statute can violate due process for two reasons. First, a statute is unconstitutionally vague if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. *State v. Rourke*, 773 N.W.2d 913, 917 (Minn. 2009); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, (1972). Second, a statute is unconstitutionally vague if it authorizes or encourages arbitrary and discriminatory enforcement. *Id.* A statute authorizes or encourages arbitrary and discriminatory enforcement when it lacks adequate standards restricting the discretion of governmental authorities who apply it. *See Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03, 86 S.Ct. 518, 520-21 (1966); *Smith v. Goguen*, 415 U.S. 566, 572-73, 94 S.Ct. 1242, 1247 (1974). The courts have noted that the second prong of the void-for-vagueness doctrine is of greater importance. *Goguen*, 415 U.S. at 572-73; *City of Mankato v. Fetchenhier*, 363 N.W.2d 76, 78 (Minn. Ct. App. 1985). Minnesota Statute Section 629.75 does not run afoul of prong one of the void-for-vagueness doctrine because it clearly prohibits a knowing violation of a Domestic Abuse No Contact Order. The problem with Minnesota Statute Section 629.75 lies in prong two of the void-for-vagueness doctrine, in that the statute completely lacks standards guiding and restricting the discretion of the district court when determining whether to issue a Domestic Abuse No Contact Order.

When a statute imposes criminal penalties, a higher standard of clarity and certainty in the statute is required. *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 n.8, 103 S.Ct. 1855, 1859 n.8, (1983)). Similarly, a higher level of scrutiny applies when a statute implicates a fundamental constitutionally protected activity. *State v. Campbell*, 756 N.W.2d 263, 269 (Minn. Ct. App. 2008) (citing *State v. Hipp*, 213 N.W.2d 610, 614 (Minn. 1973)). Lastly, when a statute implicates freedom of speech under the First Amendment, the “defendant is permitted to challenge the statute on its face, that is challenge the hypothetical vagueness of the statute as applied to others, even if the statute is neither vague nor overbroad as applied to the defendant.” *Id.* When a statute does not implicate the First Amendment, the court must first apply the void-for-vagueness doctrine to the specific facts of the case at hand before considering a facial challenge. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 102 S.Ct. 1186, 1191 (1982).

a. Minnesota Statute Section 629.75 is quasi-criminal requiring a higher level of clarity and certainty.

Strictly speaking, Minnesota Statute Section 629.75 is not purely a criminal statute. However, the statute defines a Domestic Abuse No Contact Order as “an order issued by a court against a defendant in a criminal proceeding or a juvenile offender in a delinquency proceeding ...” Minn. Stat. § 629.75, subd. 1. Furthermore, the statute provides penalties for violation of a Domestic Abuse No Contact Order. *See* Minn. Stat. § 629.75, subd. 2. Because a Domestic Abuse No Contact Order can only be issued when a defendant has been charged with a criminal offense and the statute provides penalties for violation of such orders, the statute appears to be criminal in nature. Nevertheless, the Minnesota Courts have labeled similar statutes, such as the Harassment Restraining Order statute contained in Minnesota Statute Section 609.748, as “quasi-criminal.” *See Dunham v. Roer*, 708 N.W.2d 552, 567-68 (Minn. Ct. App. 2006) (concluding that the Harassment Restraining Order statute is “quasi-criminal” because it provides for criminal punishment even though it is civil in form). At the very least, Minnesota Statute Section 629.75 is “quasi-criminal” because it provides for punishment. *See id.* For purposes of vagueness analysis, “quasi-criminal” statutes are tantamount to criminal statutes making Minnesota Statute Section 629.75 subject to the higher standard of clarity and certainty. *See id.* at 568 (citing *Women’s Med. Ctr. of NW Houston v. Bell*, 248 F.3d 411, 422 (5th Cir.2001)).

b. Minnesota Statute Section 629.75 implicates the fundamental right of freedom of intimate associations warranting a higher level of scrutiny.

Freedom of intimate association is a “fundamental element of personal liberty.” *Roberts v. Jaycees*, 468 U.S. 609, 618, 104 S.Ct. 3244, 3249 (1984); *see State v. Gray*, 413 N.W.2d 107, 113 (1987) (declining to determine whether the fundamental right of freedom of intimate association is protected under the First Amendment or as an intrinsic element of personal liberty); *State v. Holiday*, 585 N.W.2d 68, 71 n.1 (Minn. Ct. App. 1998) (noting that the Minnesota Courts have treated freedom of association as a conditional right closely associated with First Amendment protections). As stated by the United States Supreme Court, “choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.” *Jaycees*, 468 U.S. at 618. Protecting such relationships from unwarranted state interference is central to any concept of liberty. *Id.* at 619. Issuance of a Domestic Abuse No Contact Order implicates this fundamental right to form and maintain intimate relationships by making it a criminal offense to make contact with a “family or household member.” *See* Minn. Stat. § 629.75; Minn. Stat. § 518B.01. In fact, Domestic Abuse No Contact Orders can only be issued when the alleged victim of the criminal offense is a “family or household member.” *See* Minn. Stat. § 629.75; Minn. Stat. § 518B.01. Family and household members are precisely the class of persons the right to freedom of intimate associations is meant to protect. Thus, Minnesota Statute Section 629.75 implicates this fundamental right warranting a higher level of scrutiny.

c. Minnesota Statute Section 629.75 implicates freedom of speech under the First Amendment of the Federal Constitution and Article I Section 3 of the Minnesota Constitution warranting a facial challenge.

In *Dunham v. Roer*, 708 N.W.2d 552 (Minn. Ct. App. 2006) the Minnesota Court of Appeals considered whether Minnesota Statute Section 609.748 (Harassment Restraining Order Statute) implicates freedom of speech under the First Amendment. When addressing this issue, the court noted that “the focus of the statute is to prohibit repeated and unwanted acts, words, or gestures that have or are intended to have a substantial adverse effect on the safety, security, or privacy of another.” *Dunham* 708 N.W.2d at 566. The court concluded that the statute does not implicate freedom of speech under the First Amendment because “the harassment statute only

