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FEDERAL CASES

FOREIGN STATE CASES

PROCEDURAL HISTORY

Appellant was charged by complaint with two counts of Criminal Defamation in the Tenth Judicial District. At the omnibus stage of the proceedings, appellant moved to dismiss all charges, arguing (1) that prosecution violated appellant's freedom of speech and (2) the criminal defamation statute, Minnesota Statute § 609.765, is unconstitutionally vague and overbroad. The District Court requested briefs from both parties and subsequently issued two orders. The first order, dated January 14, 2014, denied appellant's motion and found that Minnesota Statute § 609.765 is not vague. The District Court's second order, dated April 15, 2014, again denied appellant's motion and found that Minnesota Statute § 609.765 is "not substantially overbroad and does not regulate a substantial amount of constitutionally protected conduct." [1]

On April 29, 2014, appellant pled guilty to both counts with a stipulated facts trial, as permitted by Minnesota Rule of Criminal Procedure 26.01, subdivision 4, and *State v. Lothenbach*, 296 N.W.2d 854 (1980) (superseded by Rule 26.01). The Honorable Amy R. Brosnahan found the defendant guilty beyond a reasonable doubt of both charged counts of Criminal Defamation via written order dated May 7, 2014.[2] Appellant was sentenced on May 21, 2014, but all terms of the sentence were stayed pending the appeal period.

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[1] A copy of the District Court's Orders pertaining to appellant's motion to dismiss is included in the addendum.

[2] A copy of the District Court's Order finding proof beyond a reasonable doubt is included in the addendum.

LEGAL ISSUE

I. IS MINNESOTA STATUTE § 609.765 CONSTITUTIONAL OR, ALTERNATIVELY, CAN IT BE NARROWLY CONSTRUED TO SURVIVE SCRUTINY?

Ruling Below: In two separate orders, the District Court found that Minnesota Statute § 609.765 is constitutional.

STATEMENT OF THE CASE AND FACTS

The appellant had a dating relationship with an adult female and, following the relationship, was voluntarily tested for sexual-transmitted infections. On August 29, 2013, the appellant and his ex-girlfriend were arguing and the appellant was very angry about having to go through the "intrusive" process to be tested for certain sexually transmitted infections. The appellant sent messages to his ex-girlfriend and her seventeen year-old daughter that mentioned getting even with them and that he was going to "do something" to both of them. Early the next morning, the seventeen year-old daughter began to receive phone calls from adult males wanting to have sex with her. In addition to the several calls, the daughter also received at least two photographs of males with an erect penis and a video of a male masturbating saying that "he would be there in 20 minutes to meet her."

The daughter informed her mother (the appellant's ex-girlfriend) and it was afterward that the ex-girlfriend discovered two postings on Craigslist in the "men seeking women" section, purporting to be from herself and her daughter. The first posting was published at 0436 on August 30, 2013, with the heading "i dare any of you sluts to fight me" and the content of that posting says "bring it on sluts! I'll fuck you up! you all can kiss my ass! slutty bitches! i'm the best slut! come prove it!! bring it nigger ho's! [Daughter's first name]" and lists the cell phone number for the seventeen year-old daughter. Approximately six minutes later, another posting was made with the heading "who want to help me cheat on my BF" and the content read "my BF says I'm a slut! i want to show him how big a slut i am. Come on guys!! i want ALL CUMMERS! i'm blond, sexy, thin, hot!! and i'll even let ya do my daughter....shhh.." and then listed the cell phone number for the appellant's ex-girlfriend. Both listings provided a location

of "Isanti, MN." Neither the appellant's ex-girlfriend nor her daughter posted either of the Craigslist entries.

Investigator Kevin Carlson of the Isanti County Sheriff's Office interviewed the appellant. Initially he denied any involvement with the Craigslist postings and reported that his account was hacked. However, when confronted with the IP address, user account, and e-mail information used to publish the postings, the appellant admitted that he placed the two ads on Craigslist because "he was just mad at the whole situation." The appellant was then charged with two counts of Criminal Defamation, in violation of Minnesota Statute § 609.765

ARGUMENT

I. MINNESOTA STATUTE § 609.765 IS CONSTITUTIONAL OR, IN THE ALTERNATIVE, CAN BE NARROWLY CONSTRUED TO SURVIVE SCRUTINY

The United States and Minnesota constitutions guarantee the freedom of speech to its citizens. The First Amendment prohibits Congress from abridging the freedom of speech, U.S. Const. amend. I, and the Minnesota Constitution states that "[a]ll persons may freely speak, write and publish their sentiments on all subjects, *being responsible for the abuse of such right.*" Minn. Const. art. I, § 3 (emphasis added). Because of the constitutional protections guaranteeing free speech, statutes that limit the content of speech are presumptively invalid and the government seeking to enforce the statute has the burden to rebut the presumption. *U.S. v. Stevens*, 559 U.S. 460, 468 (2010).

But that is not to say that all speech is constitutionally protected. "[T]he First Amendment has 'permitted restrictions upon the content of speech in a few limited areas.'" *Id.* at 468 (quoting *R.A.V. v. St. Paul,* 505 U.S. 377, 382-383 (1992)). Among the categories of

unprotected speech is defamation and "speech integral to criminal conduct." *Stevens*, 559 U.S. at 468 (citing *Beauharnais v. Illinois*, 343 U.S. 250, 254-255 (1952); quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). Accordingly, "[t]he prevention and punishment of [unprotected speech has] never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

As aforementioned, the Minnesota Constitution states that those who abuse the right of free speech are to be responsible for such abuse. Minn. Const. art. I, § 3. And one of the ways that the legislature has held Minnesotans responsible is codified by Minnesota's criminal defamation law. Minn. Stat. § 609.765. The statute defines criminal defamation as "anything which exposes a person or a group, class or association to hatred, contempt, ridicule, degradation or disgrace in society, or injury to business or occupation." Minn. Stat.§ 609.765 subdivision 1. Further, the statute defines what acts constitute criminal defamation:

> Whoever with knowledge of its defamatory character orally, in writing or by any other means, communicates any defamatory matter to a third person without the consent of the person defamed is guilty of criminal defamation and may be sentenced to imprisonment for not more than one year or payment of a fine of not more than $3,000, or both.

The criminal defamation statue also provides five justifications – that is, defenses – to an otherwise defamatory act:

(1) the defamatory mater is true and is communicated with good motives and for justifiable ends; or

(2) the communication is absolutely privileged; or

(3) the communication consists of fair comment made in good faith with respect to persons participating in matters of public concern; or

(4) the communication consists of a fair and true report or a fair summary of any judicial, legislative or other public or official proceedings; or

(5) the communication is between persons each having an interest or duty with respect to the subject matter of the communication and is made with intent to further such interest or duty. Minn. Stat. § 609.765.

A. Speech About a Private Citizen on a Private Issue has Limited First Amendment Protection

In order to properly examine the constitutionality of Minnesota's criminal defamation statute, it is necessary to look at the history of defamation in the United States. The United States Supreme Court, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), established the rules in relation to civil defamation claims. When a defamatory statement is made about a public official, that official will not be entitled to any recovery in a civil suit "unless he proves that the statement was made with actual malice – that is, with knowledge that is was false or with reckless disregard of whether it was false or not." *Id.* at 279-280. In *Garrison v. Louisiana*, the United States Supreme Court held that "the *New York Times* rule also limits state power to impose criminal sanctions for criticism of the *official conduct of public officials*. 379 U.S. 64, 67 (1964) (emphasis added). The important factual distinction in both *New York Times* and *Garrison* is that the alleged defamatory conduct involved statements made about public officials.

But following *New York Times* and *Garrison*, the United States Supreme Court then provided the rules regarding the defamation of private individuals. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). The Supreme Court had "no difficulty in distinguishing among defamation plaintiffs" and noted that public officials have greater access to minimize the "adverse impact on reputation." *Gertz*,

418 U.S. at 344. "Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater." *Id.* Because public officials voluntarily subject themselves (via seeking public office) to public scrutiny, they are viewed as inviting comment on their performance. *Id.* at 345. But that is not the case with private individuals: "he has relinquished no part of his interest in the protection of his own good name . . . private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." *Id.*

When deciding *Dun & Bradstreet*, the United States Supreme Court noted that "[l]ike every other [prior] case in which this Court has found constitutional limits to state defamation laws, *Gertz* involved expression on a matter of undoubted *public concern*." *Id.* at 756 (emphasis added). The *Dun & Bradstreet* Court reaffirmed that it has "long recognized that not all speech is of equal First Amendment importance" because "[i]t is speech on matters of public concern that is at the heart of the First Amendment's protection." *Id.* at 758-759 (internal quotations and citations omitted). A new rule was announced for defamation claims by private individuals on matters of private concern: "In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages – even absent a showing of 'actual malice.'" *Id.* at 761.

Taken together, the case law from the United States Supreme Court demonstrates that the First Amendment safeguards the freedom of speech in varying degrees, dependent upon the issue and person(s) being spoken about. Public issues receive the most First Amendment protection because the founders sought to encourage debate and discussion about those issues most important to free society. By the same accord, public officials have (usually) voluntarily trust

themselves into the spotlight and are, therefore, subject to criticism and comment from the public that they serve. Any defamation claims in relation to a public official and/or matter of public concern will be viewed with the guidance from *Garrison*, *New York Times*, and *Gertz*. However, when defamatory statements concerning a private individual and a private matter are involved, the First Amendment recognizes that this type of speech has "less constitutional value." In fact, "[a]ctivities which are intended to embarrass, annoy or harass are not protected by the First Amendment." *State v. Helfrich*, 922 P.2d 1159, 1164 (Mont. 1996) (citing *People v. Holt*, 649 N.E.2d 571, 581 (Ill. 1995)).

B. Minnesota Statute § 609.765 is Constitutional or, In the Alternative, Can be Narrowly Construed

With respect to the constitutionality of Minnesota Statute § 609.765 (or any other statute), it will only be deemed "overly broad if it deters the exercise of First Amendment rights by unnecessarily punishing constitutionally protected along with unprotected activity." *In the Matter of the Welfare of S.L.J.*, 263 N.W.2d 412, 417 (Minn. 1978) (citations omitted). The unprotected activity in this case is the defendant's Craigslist postings. As the District Court found, Minnesota Statute § 609.765 is "specific as to the definition of conduct that is defamatory, giving specific definition to those things that constitute criminal defamation as well as limits that can be prosecuted."[3] Because the appellant's speech is unprotected and because the criminal

[3] The amicus brief proposes situations in which the defamation statute could criminalize constitutionally protected speech but those hypotheticals overlook the definition, conduct, and limitations described in the statute itself. Specifically, the statute would not permit a bad restaurant experience told to others to be prosecuted because that example does not take into account the justifications listed in the statute itself. Additionally, the example of a woman discussing a break up with her friends would not be subject to the defamation statute because it does not meet the definition of defamation and would also meet one of the delineated justifications.

defamation statute does not unnecessarily criminalize protected speech, it cannot be said that Minnesota Statute § 609.765 is over broad.

Appellant also argues that Minnesota Statute § 609.765 is unconstitutional because it does not permit for truth to be an absolute defense. Appellant references *State v. Helfrich*, 922 P.2d 1159 (Mont. 1996), in which a defamation statute, identical to Minnesota Statute § 609.765 in all relevant respects, was struck down by the Supreme Court of Montana. In *Helfrich*, the court found that the statute did not allow for truth as an absolute defense in a civil case, which was contrary to the *New York Times* decision. *Id.* at 1161. The Montana court also referenced other state courts which struck down as unconstitutional "criminal defamation statutes which require, as a defense, that the alleged defamatory material be communicated with good motives and for justifiable ends." *Id.* (citations omitted). The reasoning cited in *Helfrich* referred to the Montana Constitution, which permits the truth to be given as evidence in libel cases – but the defamation statute only allowed for truth to be admitted *along with* a showing of good motives and justifiable ends. *Id.* at 1162. The *Helfrich* court found that to be a legislative dilution of the guarantees of the Montana constitution. *Id.*

Admittedly, Minnesota Statute § 609.765 has the same subdivision that was called into question by the Montana and other state court systems; when reviewing the cases, these courts have declined to narrowly construe the statute. *Helfrich*, 922 P.2d at 1161 (citing *Tollett v. United States*, 485 F.2d 1087 (8th Cir. 1973); *Gottschalk v. State*, 575 P.2d 289 (Alaska 1978); *Weston v. State*, 528 S.W.2d 412 (Ark. 1975); *People v. Ryan*, 806 P.2d 935 (Colo. 1991); *Commonwealth v. Armao*, 286 A.2d 626 (Pa. 1972); and *State v. Powell*, 839 P.2d 139 (N.M. 1992). But unlike these courts, the Minnesota Supreme Court has taken on the task and

narrowed a defamation statute which made it a crime to defame a police officer. *State v. Crawley*, 819 N.W.2d 95, 102-103 (Minn. 2012). In *Crawley*, the court reviewed the applicable definitions and found that while the statute made certain speech a crime, it also criminalized protected speech. *Id.* at 104. Noting that there are significant effects to striking down a statute, the Court reaffirmed that such action should not only be done "sparingly" but also "with hesitation, and then only as a last resort." *Id.* at 105 (internal quotations and citations omitted).

The *Crawley* court referenced the decision in *In re Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991) when reminding us of the rule that "[w]hen possible, however, this court narrowly construes a law subject to facial overbreadth attack so as to limit its scope to conduct that falls outside first amendment protection while clearly prohibits its application to constitutionally protected expression." *Crawley*, 819 N.W.2d at 105. (quoting *In Re Welfare R.A.V.*, 464 N.W.2d at 509). After a narrowing construction and application, the court held that the statute in question was constitutional.[4] *Crawley*, 819 N.W.2d at 115.

In this case, if the court finds Minnesota Statute § 609.765 to be unconstitutional, it should follow the example provided in *Crawley* and narrow the scope of the statute. More specifically, should the court find that the criminal defamation statute is unconstitutional because it does not allow truth for an absolute defense, the court could narrow the justification to eliminate the good motives and justifiable ends qualifier and simply allow the first justification to read "the defamatory matter is true." Again, although other jurisdictions have refused to do such a modification, the *Crawley* court narrowed Minnesota Statute § 609.505 to apply only to defamatory speech about a police officer. Furthermore, the United States Supreme Court has

[4] Ultimately, the Court did reverse the conviction on the grounds that it occurred before the narrowing of the statute was done.

recognized that an otherwise unconstitutional law can (and should) still be imposed in order to deter speech that is unprotected: "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law – particularly a law that reflects 'legitimate state interested in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

Here, even if Minnesota Statute § 609.765 is "chilling," to prohibit any enforcement of the statute would justify the appellant's behavior – which would itself be chilling to the law and order of our society. The Minnesota Constitution intended for those who abuse the freedom of speech to be held responsible and the enforcement of Minnesota Statute § 609.765 is the avenue from which that can occur. The appellant posted two Craigslist ads purporting to be his ex-girlfriend and her daughter. In doing so, he intentionally solicited sexually explicit responses from strangers. The appellant posted these listings as revenge on his ex-girlfriend and subsequently admitted to being their author. Accordingly, Minnesota Statute § 609.765 should be enforced in order to protect the state's legitimate interest in maintaining control over this type of harmful, unprotected conduct.

CONCLUSION

For the reasons stated above, the State requests this court find that the appellant's speech Minnesota Statute § 609.765 is constitutional and the appellant's speech is not constitutionally protected; alternatively, the State requests this court narrowly construe Minnesota Statute § 609.765 to survive scrutiny.

Respectfully submitted,

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Dated: October 23, 2014

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