

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,
Plaintiff-Appellee,

v.

JORDAN KEVIN COLE,
Defendant-Appellant.

Story County Nos.
FECR062466, FECR062327

SUPREME COURT
NOS. 23-1391 & 23-1394

APPEAL FROM THE IOWA DISTRICT COURT
FOR STORY COUNTY
HONORABLE STEVEN P. VAN MAREL, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Cole did not waive his arguments with respect to the findings contained within the civil protective order. Furthermore, his arguments are not a collateral attack on the order but a direct challenge to his criminal conviction.

II. Surety laws and going armed statutes are not sufficient historical analogs to render Iowa Code section 724.26(2)(a) and 18 U.S.C. 922.8(g) immune from constitutional attack.

III. Iowa Code section 725.26(2)(a) is not narrowly tailored to serve a compelling governmental interest under Article I Section 1A of the Iowa Constitution.

STATEMENT OF THE CASE

COMES NOW Defendant-Appellant Timothy Griffin, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's brief filed on August 16, 2024.

While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address questions of waiver and collateral attack and additional points on the merits.

ARGUMENT

I. Cole did not waive his arguments with respect to the findings contained within the civil protective order. Furthermore, his arguments are not a collateral attack on the order but a direct challenge to his criminal conviction.

Contrary to the State's assertion, Cole is not collaterally attacking his civil protection order. Rather, he is attempting to hold the State to its burden to establish the elements of the offense of Possession of a Firearm or Offensive Weapon by a Domestic Abuse Offender through conduct not protected by the state or federal constitutions.

Iowa Code section 724.26(2)(a) provides:

... a person who is subject to a protective order under 18 U.S.C. §922(g)(8) or who has been convicted of a misdemeanor crime of domestic violence under 18 U.S.C. §922(g)(9) and who knowingly possesses, ships, transports, or receives a firearm, offensive weapon, or ammunition is guilty of a class “D” felony.

Iowa Code § 724.26(2)(a) (2023). Thus, in order to establish that Cole is guilty under Section 724.26(2)(a), the State must establish that his protective order was under the auspices of 18 U.S.C. § 922(g)(8). Id. Section 922(g)(8) provides that is unlawful for any person to possess a firearm if they were subject to a court order that:

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force

against such intimate partner or child that would reasonably be expected to cause bodily injury

18 U.S.C. § 922(g)(8) (2023).

In Cole's case, there was no conviction for domestic abuse and the civil protection order included no finding as to whether Cole was a credible threat to his intimate partner. D0033 (FECR062466), Attachment to Additional Minutes of Testimony pp. 1-2 (8/4/23); D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony pp. 1-2 (8/4/23). The order did, however, include a prohibition on the use of physical force. D0033 (FECR062466), Attachment to Additional Minutes of Testimony p. 2 (8/4/23); D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony p. 2 (8/4/23).

While the protective order appears to comply with Section 922(g)(8)(C)(ii), that does not answer the question of whether that subsection is a constitutionally permissible ground for a firearm prohibition and later prosecution. The United States Supreme Court did not answer this question in United States v. Rahimi, finding instead that "[w]hen a restraining order contains a finding

that an individual poses a credible threat to the physical safety of an intimate partner, that individual may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect.” United States v. Rahimi, 602 U.S. ___. ___, 144 S.Ct. 1889, 1896, 1898-99 (2024). As mentioned, Cole’s protective order did not cite that portion of Section 922(8)(g). In fact, Iowa law does not require a finding that the subject of a protective order committed domestic abuse when the order is entered pursuant to a consent agreement. Iowa Code § 236.5(2) (2023).

To be clear, Cole is not attacking the protective order. The State had the ability to institute contempt proceedings for any violation of the protective order. Iowa Code § 664A.7 (2023). Because the State chose to subject Cole to criminal prosecution based on the terms of the protective order, however, Cole is now free to challenge the State’s failure to prove beyond a reasonable doubt that he was, in fact, prohibited from possessing weapons pursuant to Iowa Code section 724.26(2)(a) and 18 U.S.C. 922(8)(g) based on his rights under the state and federal constitutions. See,

e.g., New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1, 17 (2022) (“when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct”); Stromberg v. People of the State of California, 283 U.S. 359, 367-69 (1931) (reversing general verdict of conviction where one of the grounds for conviction violated the First Amendment).

Likewise, Cole did not waive his right to challenge his current conviction when he consented to entry of the protective order. Again, Cole is not challenging the civil protective order on appeal. He is challenging his criminal conviction. The State concedes Cole preserved error for his facial and categorical challenges on appeal by moving to dismiss the prosecution. State’s Brief p. 15. The State’s cited cases on waiver do not support its position because they do not involve later criminal prosecutions and instead involve appellants who did not move to enlarge the findings of the court when the protective orders were extended before appealing the orders. See In re Alatorre, No. 01-0045, 2002 WL 576171 at *1-2

(Iowa Ct. App. Feb. 20, 2002)(defendant appealed lack of findings in extension of protective order without first moving to enlarge findings; criminal prosecution not involved); Sims v. Rush, No. 10-0237, 2010 WL 3503943 at *3 (Iowa Ct. App. Sept. 9, 2010) (same).

The State's request to have this Court avoid the questions presented through concepts of waiver or collateral attack are not convincing. Cole's arguments are properly before the Court.

II. Surety laws and going armed statutes are not sufficient historical analogs to render Iowa Code section 724.26(2)(a) and 18 U.S.C. 922.8(g) immune from constitutional attack.

The State spends a significant amount of its brief discussing what it considered to be close historical analogs to Iowa Code section 724.26(2)(a) and 18 U.S.C. 922.8(g). State's Brief § I(A)(3). The State's examples do not work in Cole's case.

First, as the State properly recognizes, the historical tradition of disarming groups of people based on their religion or ethnicity would not survive constitutional scrutiny today. State's Brief pp. 32-36, 41. United States v. Rahimi, 602 U.S. ___. ___, 144 S.Ct. 1889, 1899, 1901 (2024). Surety laws also have little application to

Cole's case, as those laws did not involve a blanket prohibition on the possession of firearms but instead required the gun owner to post bond in order to possess a weapon. State's Brief pp. 37-40. Id. at 1899-1900. Finally, "going armed" laws are not analogous to Cole's situation, as they generally required a showing of intent to terrorize others with dangerous or unusual weapons. State's Brief at 40-41. Id. at 1900-1901. The protective order in Cole's case prohibited him from using or threatening to use physical force without any finding that he had the intent to do so. D0033 (FECR062466), Attachment to Additional Minutes of Testimony p. 2 (8/4/23); D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony p. 2 (8/4/23).

Rahimi determined these historical traditions were enough to "confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." United States v. Rahimi, 602 U.S. ___, ___, 144 S.Ct. 1889, 1901 (2024). There has been no specific finding in this case that Cole poses a clear threat of physical

violence to another. His firearms prohibition does not comply with either the Second Amendment or Article I Section 1A of the Iowa Constitution.

III. Iowa Code section 725.26(2)(a) is not narrowly tailored to serve a compelling governmental interest under Article I Section 1A of the Iowa Constitution.

Contrary to the State's assertion, the mere fact that a district court issued a civil protective order does not make a prosecution based on the protection order narrowly tailored to serve a compelling government interest. State's Brief pp. 61-65.

Facially, Iowa Code section 724.26(2)(a) is not constitutionally valid, at least to the extent the statute is premised on 18 U.S.C. § 922(g)(8)(C)(ii). Section 922(g)(8)(C)(ii) prohibits firearm possession where a protective order "by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury." 18 U.S.C. § 922(g)(8)(C)(ii) (2023). Unlike Section 922(8)(C)(i), it does not require a finding the subject of the protective order was determined to be a credible threat to their

intimate partner's safety. See *id.* § 922(g)(8)(C) (2023). Without a requirement that a defendant either has been found to have committed domestic abuse or found to pose a credible threat to their intimate partner, Section 922(g)(8)(C)(ii) – and, accordingly, Section 724.26(2)(a) – are not narrowly tailored to serve the government's interest in protecting intimate partners from abuse.

Section 724.26(2)(a) is also not narrowly tailored as applied to Cole. Cole's protective order was entered pursuant to a consent agreement. D0033 (FECR062466), Attachment to Additional Minutes of Testimony p. 1 (8/4/23); D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony p. 1 (8/4/23). Iowa law does not require the District Court to make a finding that the subject engaged in domestic abuse when approving a consent agreement, and the court did not do so in its order. Iowa Code § 236.5(2) (2023). D0033 (FECR062466), Attachment to Additional Minutes of Testimony pp. 1-2 (8/4/23); D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony pp. 1-2 (8/4/23).

Furthermore, Cole's consent agreement did not include a finding that he presented a credible threat to the safety of his intimate partner. D0033 (FECR062466), Attachment to Additional Minutes of Testimony p. 2 (8/4/23); D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony p. 2 (8/4/23). Rather, the agreement simply prohibited Cole from taking any *future* action to threaten or assault his intimate partner. D0033 (FECR062466), Attachment to Additional Minutes of Testimony p. 2 (8/4/23); D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony p. 2 (8/4/23). The order is completely silent as to any *past* action that may have warranted such a restriction. While the prohibition on future assaultive behavior may have complied with 18 U.S.C. § 922(g)(8)(C)(ii), the prohibition on future action unattached to any specific – as opposed to speculative – finding of past abusive behavior is not narrowly tailored to serve the government's interest in protecting victims of abuse.

CONCLUSION

For all of the reasons stated above and in Cole's Brief and Argument, Cole respectfully requests this Court vacate his convictions, sentence, and judgment and remand his case to the District Court for dismissal.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(g)(1) and 6.903(1)(i)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 1,804 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1).

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