

SUPREME COURT OF NORTH DAKOTA

State of North Dakota v. Richard Allen Anderson

State v. Anderson, 2022 ND 144 (2022) · No. No. 20210363 · Decided July 21, 2022

SUMMARY

The North Dakota Supreme Court affirmed the denial of Richard Anderson's motion challenging the constitutionality of a probation condition restricting internet access under N.D.C.C. § 12.1-32-07(4)(r). The court held that Anderson's as-applied constitutional challenge was not ripe because he was incarcerated and not yet subject to the challenged probation condition. The court also declined to address his facial challenge because it was inadequately briefed.

CASE DETAILS

COURT	Supreme Court of North Dakota
WRITING FOR THE COURT	Gerald W. VandeWalle, Justice; Jon J. Jensen, C.J.; Gerald W. VandeWalle; Daniel J. Crothers; Lisa Fair McEvers; Jerod E. Tufte
JURISDICTION	North Dakota
DECIDED	July 21, 2022
DOCKET	No. 20210363
DISPOSITION	affirmed
PROCEDURAL POSTURE	Anderson appealed from an order of the District Court of McLean County denying his motion challenging the constitutionality of a probation-condition statute and seeking modification of his probation conditions.
STANDARD OF REVIEW	Whether a statute is unconstitutional is a question of law fully reviewable on appeal. The court also applied ripeness principles to determine whether the constitutional challenge presented an actual controversy.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Richard Allen Anderson v. State of North Dakota

TOPICS

[ripeness](#)[appellate procedure](#)[constitutional law](#)[first amendment](#)[criminal procedure](#)

PRACTICE AREAS

criminal procedure

constitutional law

probation

appellate procedure

QUESTIONS PRESENTED

1. Whether Anderson’s as-applied constitutional challenge to N.D.C.C. § 12.1-32-07(4)(r) and the internet-use probation condition was ripe for review while he remained incarcerated and was not subject to the condition.
2. Whether Anderson adequately presented a facial constitutional challenge to N.D.C.C. § 12.1-32-07(4)(r).

HOLDINGS

1. Anderson’s as-applied challenge to the constitutionality of N.D.C.C. § 12.1-32-07(4)(r) and the internet-use probation condition was not ripe because it depended on future contingencies that were not certain to occur.
2. The court declined to address Anderson’s facial challenge because he failed to thoroughly brief and argue that the statute was unconstitutional on its face.

KEY QUOTATIONS

“This court may not render advisory opinions. We may adjudicate only an actual controversy, which requires an issue that is ripe for review. An issue is not ripe for review if it depends on future contingencies which, although they might occur, necessarily may not, thus making addressing the question premature.” (¶ 11)

“The issue raised in his motion depended on future contingencies that were not certain to occur.” (¶ 12)

FACTUAL BACKGROUND

In 2019, Anderson pleaded guilty to corruption of a minor, luring a minor by computer or other electronic means, and sexual assault. He received five years of imprisonment, with two years suspended for five years of supervised probation, including a condition prohibiting internet access unless approved in writing by a parole or probation officer. When Anderson filed his constitutional challenge in October 2021, he remained incarcerated and was not yet on probation or parole. His alleged injury depended on the possibility that, after release, a parole or probation officer would enforce the internet restriction against him.

PROCEDURAL HISTORY

Anderson pleaded guilty in 2019 to corruption of a minor, luring a minor by computer or other electronic means, and sexual assault. The district court imposed a sentence including imprisonment followed by five years of supervised probation with a condition restricting internet access. While incarcerated, Anderson moved for relief under several civil and criminal procedural rules, arguing the statute and probation condition violated the First Amendment. The district court denied the motion, concluding the constitutional challenge was not ripe and that the facial challenge was inadequately supported. The North Dakota Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- Teigen v. State, 2008 ND 88, ¶ 7, 749 N.W.2d 505
- In re P.F., 2008 ND 37, ¶ 7, 744 N.W.2d 724
- Sorum v. State, 2020 ND 175, ¶ 21, 947 N.W.2d 382
- Hoff v. Berg, 1999 ND 115, ¶ 19, 595 N.W.2d 285
- State v. Morris, 331 N.W.2d 48, 58 (N.D. 1983)
- State v. Nice, 2019 ND 73, ¶ 7, 924 N.W.2d 102
- State v. Dvorak, 2000 ND 6, ¶ 28, 604 N.W.2d 445
- In re C.W., 453 N.W.2d 806, 810 (N.D. 1990)
- Communist Party v. Control Bd., 367 U.S. 1, 71 (1960)
- Sprunk v. N.D. Workers Comp. Bureau, 1998 ND 93, ¶ 15, 576 N.W.2d 861
- State v. King, 355 N.W.2d 807, 809 (N.D. 1984)
- Tooz v. State, 38 N.W.2d 285, 287 (N.D. 1949)
- State v. Peltier, 2016 ND 75, ¶ 5, 878 N.W.2d 68
- State v. Kautzman, 2007 ND 133, ¶ 27, 738 N.W.2d 1
- Denault v. State, 2017 ND 167, ¶ 16, 898 N.W.2d 452

OPINION

PER CURIAM.

FILED IN THE OFFICE OF THE CLERK OF SUPREME COURT JULY 21, 2022 STATE OF NORTH DAKOTA IN THE SUPREME COURT STATE OF NORTH DAKOTA 2022 ND 144 State of North Dakota, Plaintiff and Appellee v. Richard Allen Anderson, Defendant and Appellant No. 20210363 Appeal from the District Court of McLean County, South Central Judicial District, the Honorable Lindsey R. Nieuwsma, Judge.

AFFIRMED. Opinion of the Court by VandeWalle, Justice. Ladd R. Erickson, State's Attorney, Washburn, ND, for plaintiff and appellee; submitted on brief. Richard A. Anderson, self-represented, Fargo, ND, defendant and appellant. State v. Anderson No. 20210363 VandeWalle, Justice. [¶1] Richard Anderson appealed from an order denying his motion challenging the constitutionality of N.D.C.C. § 12.1-32-07(4)(r) and seeking modification of his probation conditions.

He argues the probation condition restricting his internet access violates his constitutional rights. We affirm, concluding Anderson's as-applied challenge to the constitutionality of the statute is not ripe for review. I [¶2] In 2019, Anderson pled guilty to corruption of a minor, luring a minor by computer or other electronic means, and sexual assault. Anderson was sentenced to five years

imprisonment with two years suspended for a period of five years of supervised probation subject to the terms and conditions specified in the Appendix A attached to the judgment.

Anderson's probation conditions included that "It is a violation of your probation for you to subscribe to any Internet service provider, by modem, LAN, DSL or any other manner. You may not use another person's Internet or use Internet through any commercial venue until and unless approved in writing by your parole/probation officer." The judgment stated the five-year period of probation would commence when Anderson was released from incarceration or at the expiration of parole. [¶3] In October 2021, Anderson filed a motion entitled, "Motion Challenging Constitutionality of Law 12.1-32-07(4)(r) NDCC and Form 9, N.D.R.

Crim. Procedure Appendix A items 33 and 39, Regarding Parole and Probation Conditions, and Sex Offender Parole Conditions Addendum item 3, and for Modification of Defendant's Parole and Probation Conditions under Rule 60(a)(1 and 6) N.D.R. Civ. Procedure and Rule 35(a) N.D.R. Crim. Proc., Illegal Sentence and Rule 52(b) North Dakota Rules of Criminal Procedure." He argued certain probation conditions, including the condition restricting his use of the internet, violate his rights under the First Amendment of the United States Constitution.

He claimed that he was due to be paroled in the near 1 future and that he encountered probation and parole officers who stated that they intended to restrict his access to the internet. The State and the Attorney General both opposed Anderson's motion. [¶4] The district court denied Anderson's motion.

The court explained N.D.R.Civ.P. 60(a)(1) and (6) do not exist, Anderson did not provide any argument or facts to support relief under N.D.R.Civ.P. 60(b)(1), and there were no grounds to modify the judgment under N.D.R.Civ.P. 60(b)(6).

The court said Anderson did not provide any argument or authority to support a claim under N.D.R.Crim.P. 52(b) and it did not find any obvious error requiring correction. The court stated Anderson had previously submitted the same arguments in support of his request for relief under N.D.R.Crim.P. 35(a), but the court considered the "new" arguments and found the sentence was proper under the facts of this case.

The court denied Anderson's request for relief to the extent he argued his sentence is illegal because N.D.C.C. § 12.1-32-07(4)(r) is unconstitutional. The court explained Anderson's claims for relief on that basis were contingent upon his release from custody, he remained incarcerated and was not currently on probation, and his arguments were based on possible future action and were not ripe for review.

II [¶5] On appeal, Anderson argues N.D.C.C. § 12.1-32-07(4)(r) and the probation condition restricting his use of the internet are unconstitutional. Section 12.1-32-07(4)(r), N.D.C.C., states when the court imposes a sentence of probation, it may impose as a condition of probation to

“[r]efrain from any subscription to, access to, or use of the internet.” [¶6] Whether a statute is unconstitutional is a question of law, which is fully reviewable on appeal.

Teigen v. State, 2008 ND 88, ¶ 7, 749 N.W.2d 505. “All regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution.” Id. (quoting In re P.F., 2008 ND 37, ¶ 7, 744 N.W.2d 724). 2 [¶7] Challenges to the constitutionality of a statute may be “facial” challenges or “as-applied” challenges.

See Sorum v. State, 2020 ND 175, ¶ 21, 947 N.W.2d 382. “A claim that a statute on its face violates the constitution is a claim that the Legislative Assembly exceeded a constitutional limitation in enacting it, and the practical result of a judgment declaring a statute unconstitutional is to treat it ‘as if it never were enacted.’” Id. (quoting Hoff v. Berg, 1999 ND 115, ¶ 19, 595 N.W.2d 285).

An “as-applied” challenge is a claim that the statute is unconstitutional in a particular case. See State v. Morris, 331 N.W.2d 48, 58 (N.D. 1983). “Generally, a party may only challenge the constitutionality of a statute as applied to that party.” State v. Nice, 2019 ND 73, ¶ 7, 924 N.W.2d 102 (quoting State v. Dvorak, 2000 ND 6, ¶ 28, 604 N.W.2d 445). [¶8] The district court rejected Anderson’s arguments about the constitutionality of N.D.C.C. § 12.1-32-07(4)(r) and his probation conditions.

The court explained: [Anderson’s] claims for relief on this basis are contingent upon his release from custody because they relate to parole/probation conditions that would apply if and when [Anderson] is released from custody.

As can be inferred from [Anderson’s] brief, he remains incarcerated at this time, is not currently on probation or parole, and thus is not currently subject to the parole/probation conditions he is challenging. [Anderson’s] arguments are also based on the assumption that a parole/probation officer will deny his requests to access the internet... at some indeterminate date in the future.

Based on these facts, [Anderson’s] claim is not ripe for review. [¶9] Anderson was incarcerated when the district court denied his motion. Because he was still incarcerated, none of the potential harm Anderson alleged in his motion had actually occurred. Anderson was not on probation and the alleged unconstitutional probation condition did not yet apply to Anderson.

The harm Anderson alleged he would suffer was mere speculation. [¶10] On appeal, Anderson argues his constitutional rights have been violated because his internet use has been severely limited since his release from prison and the probation condition has prevented him from furthering his education³ or seeking employment.

Because Anderson was still incarcerated when the district court denied his motion, these arguments were not made to the district court and there is no information in the record to support his current allegations. [¶11] “Merely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated.” *In re C.W.*, 453 N.W.2d 806, 810 (N.D.

1990) (quoting *Communist Party v. Control Bd.*, 367 U.S. 1, 71 (1960)). The adjudication of the constitutionality of a statute when there is only merely a potential for impairment of constitutional rights would result in an advisory opinion. *C.W.*, at 810. It is well settled that courts should not give advisory opinions where no actual controversy needs to be decided.

Id. We have explained: This court may not render advisory opinions. We may adjudicate only an actual controversy, which requires an issue that is ripe for review. An issue is not ripe for review if it depends on future contingencies which, although they might occur, necessarily may not, thus making addressing the question premature. *Sprunk v. N.D. Workers Comp.*

Bureau, 1998 ND 93, ¶ 15, 576 N.W.2d 861 (citations and quotations omitted). “As a general rule a court will inquire into the constitutionality of a statute only to the extent required by the case before it and will not anticipate a question of constitutional law in advance of the necessity of deciding it, and will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” *State v. King*, 355 N.W.2d 807, 809 (N.D.

1984) (quoting *Tooz v. State*, 38 N.W.2d 285, 287 (N.D. 1949)). [¶12] We agree with the district court that Anderson’s argument that the statute was not constitutional as applied to him was not ripe for review. The issue raised in his motion depended on future contingencies that were not certain to occur.

We conclude the question was raised prematurely and we will not consider his arguments at this time. 4 [¶13] Anderson has also asserted a facial constitutional challenge to the statute. The depth and the magnitude of constitutional arguments require an individual making such a challenge to either prepare an adequate and thorough foundation to support the argument, or forego its presentation.

The mere reference to a statute’s constitutionality, with nothing more, does not meet the standard of persuasion required to mount an attack on constitutional grounds. *State v. Peltier*, 2016 ND 75, ¶ 5, 878 N.W.2d 68 (quoting *State v. Kautzman*, 2007 ND 133, ¶ 27, 738 N.W.2d 1).

To the extent Anderson argues the statute is unconstitutional on its face, he failed to thoroughly brief and argue the issue. See *Denault v. State*, 2017 ND 167, ¶ 16, 898 N.W.2d 452 (stating a party is required to do more than submit bare assertions to adequately raise a constitutional issue, and only issues that are thoroughly briefed and argued will be decided on appeal).

We will not address this issue on appeal. III [¶14] We affirm the district court's order denying Anderson's motion challenging the constitutionality of N.D.C.C. § 12.1-32-07(4)(r) and the conditions of his probation. [¶15] Jon J. Jensen, C.J. Gerald W. VandeWalle Daniel J. Crothers Lisa Fair McEvers Jerod E. Tufte 5