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2011 IL App. (3d) 100863-U

Order filed August 31, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS)	for the 10th Judicial Circuit,
)	Marshall County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-10-0863
v.)	Circuit No. 10 TR 324
)	
PETER C. DRUMMOND,)	The Honorable
)	Scott A. Shore,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Lytton concurred in the judgment.

ORDER

- ¶ 1 Held: Because defendant fails to allege that he was "using a wireless telephone in voice-activated mode," we affirm the trier of fact's judgment finding him guilty of the prohibited conduct found in Illinois Vehicle Code (625 ILCS 5/12-610(e) (West 2010)).
- ¶ 2 On appeal, defendant challenges the statute which defines the offense of driving a vehicle while operating a wireless telephone (625 ILCS 5/12-610.1(e) (West 2010)) as unconstitutionally vague. We affirm his conviction.

¶ 3

FACTS

¶ 4 Defendant was charged by uniform traffic citation with using a wireless telephone while operating a vehicle in a construction zone, in violation of section 12-610.1(e) of the Illinois Vehicle Code (Code) (625 ILCS 5/12-610.1(e) (West 2010)).¹ Prior to trial, defendant filed a motion to declare subsection (e) unconstitutional on the ground of vagueness. Upon hearing argument, the trial court found the statute constitutional.

¶ 5 The matter proceeded to a bench trial. Illinois state trooper Daniel Williams testified that while on patrol in a construction zone, he observed defendant driving a vehicle while holding what appeared to be a cell phone. Williams effected a traffic stop and asked defendant why he was using a cell phone in a construction zone. Defendant responded that he did not realize it was a violation of law.

¶ 6 Defendant admitted that he was talking on his cell phone when he drove through the construction area. The record does not disclose whether defendant initiated or simply received the call. If defendant did initiate the call, the record also fails to reveal whether he placed the call through voice command or by physically dialing the other party. Defendant testified that there were no workers present and half of the construction barricades were down. Ultimately, the trial court found defendant guilty of using his cell phone in a construction zone and fined him \$75.

¶ 7

ANALYSIS

¶ 8 The sole issue before us is whether subsection (e) of section 12-610.1 of the Code is unconstitutionally vague. Subsection (e) states, in pertinent part:

¹ The uniform traffic citation identifies the nature of the offense as follows: "use of wireless phone in construction zone."

"A person, regardless of age, may not use a wireless telephone at any time while operating a motor vehicle on a roadway in a school speed zone established under Section 11-605 [citation], or on a highway in a construction or maintenance speed zone established under Section 11-605.1 [citation]. This subsection (e) does not apply to*** a person using a wireless telephone in voice-activated mode." 625 ILCS 5/12-610.1(e) (West 2010).

¶ 9 On appeal, defendant argues that subsection (e) violates due process in that it fails to give notice as to what conduct is specifically exempted from the general rule that an individual cannot use a cell phone while operating a vehicle in a construction zone. Defendant specifically calls our attention to the exception found in subsection (e), which provides that the prohibition of using a wireless telephone in a construction zone does not apply "to a person using a wireless telephone in voice-activated mode." See 625 ILCS 5/12-610.1(e) (West 2010). Because defendant fails to allege that he was using his wireless telephone in "voice-activated mode," we find his vagueness challenge not property before his court. Moreover, we find defendant's prosecution and conviction does not offend any due process principles as his conduct clearly falls within the prohibited conduct found in subsection (e).

¶ 10 "A statute is presumed constitutional, and the party challenging the statute bears the burden of demonstrating its invalidity." *People v. Malchow*, 193 Ill. 2d 413, 418 (2000). Courts have a duty to construe a statute in a manner that upholds its validity and constitutionality if it

can be reasonably done. *Malchow*, 193 Ill. 2d at 418. Whether a statute is constitutional is a question of law that we review *de novo*. *Malchow*, 193 Ill. 2d at 418.

¶ 11 A vagueness challenge asserts that the statute violates the due process clause, because due process requires that a statute " 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.' " *Russell v. Department of Natural Resources*, 183 Ill. 2d 434, 442 (1998), quoting *Grayned v. City of Rockford*, 92 S. Ct. 2294, 2298-99 (1972). A statute, however, is not unconstitutionally vague merely because one can imagine hypothetical situations in which the meaning of some terms might be called into question. *People v. Izzo*, 195 Ill. 2d 109, 114 (2001). Instead, the validity of the statute must be judged in light of the particular facts at hand. *Izzo*, 195 Ill. 2d at 114. "So long as a defendant's conduct clearly falls within the statutory proscription, a defendant may be prosecuted under the statute in harmony with due process, even though the statute may be vague as to other conduct." *People v. Larson*, 379 Ill. App. 3d 642, 651 (2008).

¶ 12 The prohibited conduct in subsection (e) is clear: An individual may not use a wireless telephone while operating a motor vehicle in a school, construction, or maintenance speed zone. See 625 ILCS 5/12-610.1(e) (West 2010). It is the "voice-activated mode" exception to the prohibited conduct that defendant argues is vague. Defendant, however, fails to allege that he was operating his wireless telephone in "voice-activated mode." Instead, he merely alleges, in an academic sense, that the exception itself is vague. Again, the validity of a statute must be judged in light of the *particular facts at hand*. See *Izzo*, 195 Ill. 2d at 114. Defendant does not allege, nor does the record reveal, any particular facts that would *possibly* place him within the scope of

the exception. We therefore find defendant's vagueness challenge is not properly before this court.

¶ 13 Because we are charged with the duty of construing subsection (e) in a manner that upholds its validity and constitutionality (*Malchow*, 193 Ill. 2d at 418), we refuse to create a hypothetical situation whereby we can reach defendant's academic constitutional challenge. The only facts before us are that defendant was operating his wireless telephone in a construction zone. Defendant's conduct clearly falls within the statutory proscription. Under the limited facts before us, his prosecution under subsection (e) does not violate due process.

¶ 14 Affirmed.