STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1872

State of Minnesota,
Respondent,

vs.

William Thomas Farleigh, Jr.,
Appellant.

Filed October 7, 2008
Affirmed
Shumaker, Judge

Aitkin County District Court
File No. 01-T3-06-3060

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

James P. Ratz, Aitkin County Attorney, Benjamin M. Smith, Assistant County Attorney, 217 Second Street N.W., Aitkin, MN 56431 (for respondent)

Josh Alan Dubois, 2722 Vincent Avenue N., #2, P.O. Box 11007, Minneapolis, MN 55411 (for appellant)

Considered and decided by Toussaint, Chief Judge; Shumaker, Judge; and Stoneburner, Judge.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

On appeal from his conviction for failure to provide proof of insurance, William Farleigh argues that Minn. Stat. § 169.791 (2006), the law requiring such proof, is unconstitutional because it violates Farleigh's right to due process of law and that he was deprived of his constitutional right to counsel. Because we find that Minn. Stat. § 169.791 is consistent with due process of law, and because Farleigh did not timely raise the right-to-counsel issue in the district court, we affirm.

FACTS

Appellant William Farleigh claims that Minn. Stat. § 169.791 (2006)—the no-proof-of-insurance law—is unconstitutional on its face and as it applies to a driver of a motor vehicle owned by someone else. The law requires the state to prove scienter if the non-owner driver discloses the vehicle owner's name and address to the officer making the traffic stop or to the district court administrator on or before the driver's first court appearance.

Farleigh was driving Jeremiah Kubat's pickup truck on August 1, 2006, at an excessive rate of speed just before a deputy sheriff stopped him. Farleigh was unable to produce evidence that the truck was insured, and he did not disclose to the deputy Kubat's name and address. The deputy cited him for the petty misdemeanor of speeding and the misdemeanor of failing to show proof of insurance, and indicated on the citation that Farleigh was to make his first court appearance on August 28, 2006.

August 28 came and went but Farleigh neither appeared in court on that date nor disclosed Kubat's name and address to the court administrator on or before that date.

Ultimately, Farleigh did appear in court, had a jury trial on the misdemeanor offense, and was found guilty. On appeal, he challenges the no-proof-of-insurance statute and the jury instructions the district court gave.

D E C I S I O N

Farleigh urges that Minn. Stat. § 169.791 (2006) is unconstitutional as it relates to a driver of a motor vehicle that someone else owns. He also contends that the definition of the offense, as the jury was instructed on it, violates due process. Respondent State of Minnesota argues at the outset that Farleigh's appeal is untimely, and that, in any event, he failed to raise the constitutional issues in a timely fashion and thus waived them.

Jurisdiction

If an appeal is untimely, we lack jurisdiction to consider it. *See State v. Sullivan*, 265 Minn. 161, 164, 121 N.W.2d 590, 593 (1963) (holding statutory appeal period was jurisdictional). In misdemeanor cases, an appeal must be taken within 10 days after final judgment or the entry of the challenged order. Minn. R. Crim. P. 28.02, subd. 4(3). But the trial court or this court may extend the time for appeal for good cause. *Id.*

Farleigh concedes that he was one day late in filing his appeal. Nevertheless, we found good cause for this minimal delay and, by order dated November 6, 2007, we extended the time for appeal to include the date on which Farleigh filed his notice of appeal. We thus retained jurisdiction over the case, and the state's jurisdictional argument is without merit.

Waiver

Farleigh did not raise the constitutional issues at the pretrial conference or at any other time before the trial began. Issues "which are capable of determination without trial on the merits shall be asserted or made before trial by a motion to dismiss or to grant appropriate relief." Minn. R. Crim. P. 10.01. The failure to include in the motion issues capable of being decided before trial results in a waiver of those issues, subject to the exception that "the court for good cause shown may grant relief from the waiver." Minn. R. Crim. P. 10.03.

Even constitutional issues may be considered waived if not raised in the district court. *See State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989). This court, however, has the authority to review even claims and issues deemed waived if it is in the interest of justice to do so. Minn. R. Crim. P. 28.02 subd. 11. Although prior caselaw has addressed a due-process challenge to Minn. Stat. § 169.791, it did so principally with reference to a driver who was also the vehicle's owner. *State v. Wetsch*, 511 N.W.2d 490 (Minn. App. 1994), *review denied* (Minn. Apr. 19, 1994). In the interest of justice, it is appropriate that we address the same issue in the context of a driver who is not the vehicle's owner. We note that the due-process issue was raised, although belatedly, by Farleigh's challenge to the jury instruction.

Farleigh's argument that he had a Sixth Amendment right to counsel before arraignment because of the statutory notice requirement was also raised in Farleigh's challenge to the jury instructions. But a violation of Farleigh's right to counsel, unlike the alleged due-process violation, could not have been cured by an amendment to the jury

instructions.[1] We conclude that Farleigh should have raised this issue in a pretrial motion to dismiss or to suppress evidence. *See generally State v. Willis*, 559 N.W.2d 693, 698 (Minn. 1997) (rejecting arguments for suppression of statements that were based in part on Sixth Amendment). Accordingly, we decline to exercise our authority to review it under Minn. R. Crim. P. 28.02, subd. 11.

The Statute

The no-proof-of-insurance statute requires every driver to "have in possession at all times when operating a vehicle," and to produce on demand, proof of insurance in force on the vehicle. Minn. Stat. § 169.791, subd. 2 (2006). However,

> [a] driver who is not the owner of the vehicle may not be convicted under this section unless the driver knew or had reason to know that the owner did not have proof of insurance required by this section, provided that the driver provides the officer with the name and address of the owner at the time of the demand or complies with subdivision 3.

Id. Subdivision 3 allows the non-owner driver additional time to provide the owner's name and address—until "the date and time specified in the citation for the driver's first court appearance." *Id.*, subd. 3. Farleigh argues that this grace period violates due process.

[1] Farleigh proposed that the due-process violation could be cured by instructing the jury that the state had to prove that he knew or had reason to know the owner lacked proof of insurance, an element the state would have to have proven if Farleigh had given the statutory notice of the owner's identity.

Due Process

Farleigh argues that the statute violates due process by: (1) requiring him to give notice of the owner's name and address by an arbitrary date or forfeit an important defense; and (2) relieving the state of the burden of proving an element of the offense.

The constitutionality of a statute is a question of law that we review de novo. *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). All statutes are presumed constitutional. *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000). The power of an appellate court "to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). The party challenging the constitutionality of a statute has the burden of demonstrating the constitutional infirmity beyond a reasonable doubt. *Id.*

Farleigh characterizes section 169.791 as containing "special discovery rules with strict time limits," and he argues that these "provisions are arbitrary and disproportionate to any legitimate purpose which they might be designed to serve." He also contends that these statutory rules "are overly restrictive of [his] right to present a defense."

A criminal defendant has a due-process right to present a defense. *See State v. Martin*, 591 N.W.2d 481, 486 (Minn. 1999) (mental illness defense). Defendants may be required to disclose their defense(s), however, and to comply with discovery rules. *See State v. Brechon*, 352 N.W.2d 745, 748 n.1 (Minn. 1984). But Farleigh argues that the statutory requirement that he disclose the owner's name and address before arraignment

is arbitrary and unfairly imposes a discovery obligation even before adversarial proceedings have commenced.

This argument misconstrues the statutory notice requirement. The notice requirement is not a requirement that the defendant disclose information relevant to the state's proof of the offense or to a defense. Rather, the notice requirement provides an opportunity for the non-owner driver to require the state to prove a different offense with a greater burden of proof. The statute does not require the non-owner driver to provide information about the owner's insurance on the vehicle, or about his knowledge of that coverage, which would be relevant to rebut the state's evidence as to scienter. It merely requires notice of the owner's identity, which is neither an element of the offense nor a defense.

A non-owner driver may be criminally liable for failing to carry proof of insurance while driving the vehicle. See Minn. Stat. § 169.791, subd. 2 (providing that if driver does not provide proof of insurance on demand he is guilty of a misdemeanor). Farleigh does not contest the legislature's authority to define the crime as being committed by a non-owner driver and being completed at the scene of the traffic stop or other encounter with police. *See Wetsch*, 511 N.W.2d at 492 (holding that the legislature has the authority to define criminal offenses). Nor does he contest the legislature's authority to omit a scienter requirement, as this provision does. *See id.* (noting lack of scienter requirement for failure to provide proof of insurance and legislature's authority to omit scienter requirement).

The notice provision that Farleigh challenges as a "discovery rule" in fact gives the non-owner driver a grace period to provide the information otherwise requested of him at the scene. And, if he does so, it requires the state to prove an additional element of scienter as part of a different offense. *See* Minn. Stat. § 169.791, subd. 2 (providing that non-owner driver may not be convicted unless he "knew or had reason to know" the owner did not have proof of insurance). The notice provision plainly shifts the prosecution, to the defendant's benefit, to an entirely different offense. Farleigh presents no authority holding that the legislature, in providing such a benefit, cannot impose a procedural condition on the criminal defendant.

The readily discernible purpose of the no-proof-of-insurance statute is to ensure that motor vehicles operated in Minnesota are covered by insurance that will protect others from potentially devastating economic loss and hardship resulting from injury or death in motor vehicle accidents. *Cf. Dairyland Ins. Co. v. Starkey*, 535 N.W.2d 363, 365 (Minn. 1995) (describing purpose of no-fault automobile insurance law as relieving the economic distress of uncompensated victims of automobile accidents). That such a protective function is a proper governmental purpose seems beyond dispute.

To implement this protective purpose, the legislature enacted section 169.791, which imposes a criminal penalty for the failure to prove the existence of insurance. Minn. Stat. § 169.791, subd. 2. Recognizing that a driver might not also be the vehicle's owner, the legislature provided the driver a way to escape the strict liability offense of failure to provide proof of insurance at the scene. The legislature provided the owner-

driver a similar escape from strict liability by providing proof of insurance by the time of the owner-driver's first court appearance. *Id.*, subd. 2a.

In summary, we are not persuaded that the legislature, which could require a non-owner driver to provide proof of insurance at the time of driving without regard to the identity of the owner, cannot require a non-owner driver to furnish the owner's identity by a certain date prior to trial. To conclude otherwise would be to rewrite the statute.

Farleigh also argues that section 169.791 violates due process because it relieves the state of the burden of proving each element of the offense, and he challenges the jury instructions on that basis. The court charged the jury:

> If the defendant did not provide proof of insurance or the owner's name and address to the peace officer upon demand or to the court administrator on or before the date and time specified in the citation for the driver's first court appearance, then the defendant's belief that the vehicle was insured is not a legal defense.

This instruction, as well as the statute, Farleigh claims, relieved the state of the burden of proving a knowing violation of the law.

Due process prevents the state from shifting the burden of disproving an element of an offense to the defendant. *State v. Cannady*, 727 N.W.2d 403, 408 (Minn. 2007). But the driver's knowledge that the vehicle is not covered by insurance is not an element of the offense. As noted above, the statute makes it a crime for the driver not to "produce the required proof of insurance upon the demand of a peace officer." Minn. Stat. § 169.79, subd. 2. This crime is completed at the scene, and does not require scienter. *See Wetsch*, 511 N.W.2d at 492 (noting that failure to provide proof of insurance is a

strict liability crime). The fact that the legislature has allowed the non-owner driver to provide the owner's identity, at that time or later, and thereby force the state to prove scienter, does not violate due process.

The notice the statute requires of the driver, which is only notice of the owner's identity, does not require the driver to prove either that the owner had insurance or that the driver knew of that insurance. The owner's identity is not an element of the crime, or even evidence that would prove an element of the crime. Even assuming scienter were an element of the offense, the notice provision does not require the driver to prove lack of scienter (or lack of knowledge). Thus, it does not shift the burden of proof on an element of the offense to the defense. Furthermore, as discussed above, the notice requirement does not constitute a defense. Rather, it is a procedural mechanism for shifting the nature of the offense to be proved to the benefit of the defendant.

It is the legislature's prerogative to define criminal offenses. *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990). The legislature also has the authority to create and define defenses to crimes. *See Schumann v. McGinn*, 307 Minn. 446, 467, 240 N.W.2d 525, 537 (1976) (stating that the legislature has the legitimate authority to define crimes and defenses). The legislature may create a strict-liability crime as long as its intent to do so is made clear in the statute. *State v. Neisen*, 415 N.W.2d 326, 329 (Minn. 1987). We conclude that the legislature may properly define a non-owner driver's failure to provide proof of insurance as a strict liability crime, and that it may condition the state's need to prove scienter on a pre-arraignment defense notice of the owner's identity.

As discussed above, we do not address Farleigh's right-to-counsel claim because it was not properly raised by pretrial motion in the district court.

Affirmed.