STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1785

State of Minnesota,
Respondent,

vs.

Joey Lamarr Lash,
Appellant.

Filed October 6, 2009
Reversed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CR-07-013434

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Marshall H. Tanick, Teresa J. Ayling, Mansfield, Tanick & Cohen, P.A., 1700 U.S. Bank Plaza South, 220 South Sixth Street, Minneapolis, MN 55402-4511 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

KALITOWSKI, Judge

Appellant Joey Lamarr Lash challenges his conviction of misconduct of a public officer, in violation of Minn. Stat. § 609.43(2) (2006). Appellant argues that (1) a personnel rule contained in a city ordinance cannot lawfully constitute the basis for a criminal conviction of misconduct of a public officer; (2) section 609.43(2) is unconstitutionally vague under the due process clause of the Minnesota and federal constitutions; (3) appellant's conviction of misconduct of a public officer, when coupled with a hung jury on the remaining theft-by-swindle charges, is perverse; and (4) the evidence was insufficient to support the conviction of misconduct of a public officer. Because a personnel rule contained in a city ordinance cannot constitute the basis for a misconduct-of-a-public-officer conviction, we reverse.

D E C I S I O N

Appellant was charged with theft by swindle of public funds in excess of $2,500 under Minn. Stat. § 609.52, subds. 2(4), 3(2) (2006), theft by swindle of public funds under Minn. Stat. § 609.52, subds. 2(4), 3(3)(d)(iv) (2006), and misconduct of a public officer or employee under Minn. Stat. § 609.43(2). The misconduct charge was based specifically on alleged acts that "were in excess of his lawful authority in the Minneapolis Code of Ordinances, Title 2 (Administration), Chapter 20 (Personnel), Article II (Payrolls), Section 20.90 (Preparation)." The misconduct charge was not based on a violation of any Minnesota criminal or civil statute.

After an eight-day trial in May 2008, a jury returned a guilty verdict on the misconduct charge. The jury could not reach a unanimous decision as to the remaining theft-by-swindle charges and these charges were dismissed by the state at sentencing. Appellant challenges his conviction of misconduct of a public officer.

I.

Appellant argues that his conviction of misconduct of a public officer must be reversed because the acts alleged—specifically, that appellant's preparation of payroll tabs constituted the reporting of false information, in violation of a Minneapolis city ordinance—do not constitute a crime under any Minnesota statute. Because caselaw mandates that "lawful authority," as used in section 609.43(2), is determined by statute, and because the misconduct charge did not allege an act that exceeded appellant's statutory lawful authority, we reverse appellant's conviction.

As a preliminary matter, appellant did not raise this argument before the district court, nor did appellant bring any posttrial motions requesting a new trial or challenging the verdict. This court will generally not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But appellate courts have discretion to address issues as justice requires and may review an issue affecting the ruling from which the appeal is taken. Minn. R. Civ. App. P. 103.04. Because appellant's challenge has merit and goes to the propriety of his gross-misdemeanor criminal conviction, we conclude that the interests of justice weigh in favor of considering the issue.

Construction of a criminal statute is a question of law that we review de novo. *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002). A statute must be construed according to its plain language, but if it is ambiguous, the intent of the legislature controls. Minn. Stat. § 645.16 (2008).

The amended complaint charged appellant under Minn. Stat. § 609.43(2) as follows:

> That during the period from November 8, 2004, through December 21, 2006, in Hennepin County, Minnesota, Joey Lamarr Lash, in his capacity as a public officer . . . , did acts, including the preparation and certification of payroll tabs containing false information about hours that he claimed to have worked, knowing such acts were in *excess of his lawful authority in the Minneapolis Code of Ordinances*, Title 2 (Administration), Chapter 20 (Personnel), Article II (Payrolls), Section 20.90 (Preparation).

(Emphasis added.)

Section 609.43(2) provides that a public officer, acting in his official capacity, who "does an act knowing it is in excess of lawful authority or knowing it is forbidden by law to be done in that capacity," is guilty of a gross misdemeanor. Minn. Stat. § 609.43(2); *see* Minn. Stat. § 609.02, subd. 4 (2006) (defining gross misdemeanor). The Minnesota Supreme Court has held that the term "lawful authority," as used in section 609.43(2), is determined by state statutes that define or describe a public official's authority. *State v. Serstock*, 402 N.W.2d 514, 517 (Minn. 1987). The legislature has promulgated several statutes that define the general authority of various public officials, including police officers. *See, e.g.*, Minn. Stat. §§ 419.05 (describing duties of police civil service commission members), .06 (providing rules for police departments) (2008).

But when a count of an indictment fails to allege a violation of a "statutory limit" on a defendant's authority, dismissal of that count for failure to state an offense under section 609.43(2) is appropriate. *Serstock*, 402 N.W.2d at 517.

In *Serstock*, the supreme court determined that neither the Code of Professional Responsibility nor the City Ethics Code were intended to delineate "lawful authority" for purposes of section 609.43(2)—a criminal statute. *Id.* at 516. Instead, these codes were intended merely to provide guidelines for professional discipline. *Id.* The *Serstock* court reasoned that restricting the definition of a public official's authority to the statutory provisions enacted by the state legislature would "best assure that the official misconduct statute satisfies the general principles of the Criminal Code which seek to 'protect the individual against the misuse of the criminal law by fairly defining the acts and omissions prohibited . . . .'" *Id.* at 517 (quoting Minn. Stat. § 609.01, subd. 1(2)). Therefore, a charged violation of section 609.43(2) must be based on an act that exceeded an officer's statutory authority, not merely his or her authority under an ordinance or city code. *Id.*

Here, the state did not allege a violation of a statutory limit on appellant's authority. Rather, the state specifically based the charge on an alleged violation of the following administrative requirement:

> The head of each department, or officer having employees of the city under them, shall complete the payroll forms, in the prescribed manner, to report the number of days and/or hours of service rendered by each officer or employee in the respective department. Each department head or officer shall certify such reports to be correct and present them to the city finance department biweekly for payroll processing.

Minneapolis, Minn., Code of Ordinances § 20.90 (1989). We conclude that the act of improperly preparing payroll forms is not an action intended to be a criminal offense under the official misconduct statute. Rather, it is an administrative personnel procedure with no criminal ramifications if violated. *See Serstock*, 402 N.W.2d at 517 (holding that not all actions barred by the city ethics code are intended to be criminal offenses under the official misconduct statute).

We conclude that the amended complaint failed to allege an actionable offense under section 609.43(2), and, therefore, appellant's conviction for misconduct of a public officer is reversed.

II.

Appellant argues that section 609.43(2) is impermissibly vague because it fails to provide adequate notice of proscribed conduct, and invites arbitrary and discriminatory enforcement, and therefore, his conviction under that section should be reversed. Like appellant's first argument, this argument was not raised before the district court, nor did appellant bring any posttrial motions requesting a new trial or challenging the verdict or the jury instructions based on the statute's constitutionality.

Constitutional issues generally will not be addressed if raised for the first time on appeal. *See In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981) (declining to address a constitutional issue raised for the first time on appeal from a termination of parental rights); *Roby*, 547 N.W.2d at 357 (holding that this court will generally not consider matters not argued to and considered by the district court). And the power of this court to declare a statute unconstitutional is to be exercised only when absolutely

necessary, and then only with great caution. *In re Welfare of E.Y.W.*, 496 N.W.2d 847, 852 (Minn. App. 1993), *review denied* (Minn. Apr. 20, 1993). Because we reverse on the ground that the misconduct charge did not allege an act that exceeded appellant's statutory lawful authority, we do not reach the issue of the statute's constitutionality. Nor do we address appellant's argument that his conviction for misconduct of a public officer, when coupled with a hung jury on the remaining theft-by-swindle charges, is perverse.

Reversed.