STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1958

State of Minnesota,
Plaintiff,

vs.

Diane Marie Cox,
Defendant.

Filed June 29, 2010
Certified question answered in the negative
Worke, Judge

Swift County District Court
File No. 76-CR-09-200

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Robin Finke, Swift County Attorney, Harry D. Hohman, Assistant County Attorney, Benson, Minnesota (for plaintiff)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Davi E.F. Axelson, Assistant Public Defenders, Julia Dayton Klein, Lauren J. Galgano, Special Assistant Public Defenders, St. Paul, Minnesota (for defendant)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Willis, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving 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

WORKE, Judge

In this certified-question appeal, defendant challenges the district court's denial of her motion to dismiss, arguing that the dishonored-check statute under which she was charged is unconstitutional. The district court certified the following question: Does the disparity in the severity of punishment between Minn. Stat. § 609.535, subd. 2a(a)(1), and Minn. Stat. § 609.52, subd. 3(4), which arguably contemplate the same acts committed under the same circumstances by persons in like situations (writing worthless checks with an aggregate value more than $500), constitute an equal-protection violation as applied to defendant and those similarly charged in Minnesota? We answer the certified question in the negative.

FACTS

Defendant Diane Marie Cox was charged with one felony count of issuing dishonored checks—value more than $500, in violation of Minn. Stat. § 609.535, subd. 2a(a)(1) (2008). Defendant moved to dismiss the charge on equal-protection grounds, arguing that had she been charged with theft by check under Minn. Stat. § 609.52, subd. 2(3)(i) (2008), she would have been charged with a gross misdemeanor. The district court concluded that the equal-protection challenge failed, but certified the following question:

> Does the disparity in the severity of punishment between Minn. Stat. § 609.535, subd. 2a(a)(1) and Minn. Stat. § 609.52, subd. 3(4), which arguably contemplate the same acts committed under the same circumstances by persons in like situations (writing worthless checks with an aggregate

value over $500), constitute an Equal Protection violation as applied to [d]efendant and those similarly charged statewide?

D E C I S I O N

The constitutionality of a statute presents a question of law, which this court reviews de novo. *State v. Melde*, 725 N.W.2d 99, 102 (Minn. 2006). In doing so, we presume that Minnesota statutes are constitutional and will strike down a statute as unconstitutional only if absolutely necessary. *Id.* To prevail, a party challenging the constitutionality of a statute must demonstrate beyond a reasonable doubt that the statute violates a constitutional provision. *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979).

The Equal Protection Clause of the Fourteenth Amendment provides in relevant part that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "The purpose of the equal protection clause . . . is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445, 43 S. Ct. 190, 191 (1923) (quotation omitted).

"The guarantee of equal protection of the laws requires that the state treat all similarly situated persons alike." *State v. Behl*, 564 N.W.2d 560, 568 (Minn. 1997). But it is only "invidious discrimination" that is deemed constitutionally offensive in an equal-protection claim. *Scott v. Minneapolis Police Relief Ass'n*, 615 N.W.2d 66, 74 (Minn. 2000). "An essential element of an equal protection claim is that the persons claiming

disparate treatment must be similarly situated to those to whom they compare themselves." *St. Cloud Police Relief Ass'n v. City of St. Cloud*, 555 N.W.2d 318, 320 (Minn. App. 1996), *review denied* (Minn. Jan. 7, 1997). Thus, "[a]n individual challenging a statute on equal protection grounds must demonstrate that the statute classifies individuals [either on its face or in practice] on the basis of some suspect trait." *State v. Frazier*, 649 N.W.2d 828, 833-34 (Minn. 2002). A statute challenged on equal-protection grounds, therefore, is presumed constitutional unless a fundamental right or suspect class is involved. *State v. Benniefield*, 678 N.W.2d 42, 45 (Minn. 2004).

Defendant concedes that she is not a member of a suspect class. When an equal-protection claim challenges a statutory classification, but the classification does not involve a suspect class, such as race or sex, we determine whether the classification has a rational basis. *Id.* at 46. The rational-basis standard is met if the classification has a legitimate governmental purpose and will reasonably promote that purpose. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 367, 121 S. Ct. 955, 964 (2001). No particular purpose need be articulated if a reasonable hypothetical purpose may be inferred. *Id.* The rational-basis test includes three prongs: (1) the distinctions between those within the classification and those excluded must be genuine and substantial, providing a reasonable basis to justify the legislation adapted to a particular need; (2) the classification must be relevant to the purpose of the law, providing an evident connection between the distinctive needs of the class and the prescribed remedy; and (3) the statutory purpose must be one that the state can legitimately attempt to achieve. *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991).

Defendant argues that the rational-basis test fails because it is illogical to impose a felony sentence for the lesser of two crimes. *See State v. Roden*, 384 N.W.2d 456, 458 (Minn. 1986) (holding that lesser offense of issuance of a worthless check is necessarily included within the more serious offense of theft by check). This issue was addressed in *State v. Dietz*, which involved the theft of a car transmission valued less than $25. 264 Minn. 551, 552, 119 N.W.2d 833, 834 (1963). The defendants in *Dietz* were charged with grand larceny under a statute providing that it was second-degree grand larceny to steal property with a value less than $25 from an automobile, but it was only petit larceny to steal property worth between $25 and $100 from an automobile. *Id.* at 554, 119 N.W.2d at 835. The defendants argued that it was unconstitutional for a statute to provide a greater penalty for a lesser offense. *Id.* at 557, 119 N.W.2d at 837. The defendants relied on an Oregon case, in which a statute provided for a harsher penalty for the crime of assault with intent to commit rape (life imprisonment or for a period of not more than 20 years) than for the crime of statutory or forcible rape (imprisonment for not more than 20 years). *Id.* Our supreme court noted that Oregon's bill of rights included a provision that penalties shall be proportioned to the offense, but that "[w]e have no such provision in our constitution." *Id.* In the Oregon case, the court stated that life imprisonment for an assault with intent to commit rape was not proportioned to the offense when the greater crime of rape authorized a sentence of not more than 20 years. *Id.* at 557-58, 119 N.W.2d at 837. The court stated that:

> In the Oregon case the penalties are of such a severe nature that even under our constitution it might be that the same result would be reached; but in view of the history of

> our statute, the fact that penalty for the crime of which defendants are now charged has been the same before and after the amendment in 1955, and the fact that the penalty itself certainly does not shock the senses as being cruel and unusual, we cannot see that it violates our constitutional provision.

Id. at 558, 119 N.W.2d at 837. Thus, while an actor may be convicted of either the crime charged or an included offense, Minn. Stat. § 609.04, subd. 1 (2008), there is nothing providing that he or she cannot receive a harsher penalty if convicted of the lesser offense when the sentence does not shock the senses. Here, the disparity in sentences is not enough to shock the senses.

Defendant also argues that the dishonored-check statute fails the rational-basis test because in 2007, the legislature amended the threshold amounts in the theft statute, making the stolen value of $500 to $1,000 a gross misdemeanor and more than $1,000 a felony. *See* Minn. Stat. § 609.52, subd. 3(4). The amendment was not made to the dishonored-check statute; the dishonored-check value of $500 and greater is a felony. *See* Minn. Stat. § 609.535, subd. 2a(a)(1). *Dietz* is also relevant to this issue. 264 Minn. 551, 119 N.W.2d 833. The defendants in *Dietz* who were charged with second-degree grand larceny for stealing property worth less than $25 from a vehicle were charged under a statute that had been amended approximately six years earlier. *Id.* at 554, 119 N.W.2d at 834. Under the second-degree grand-larceny statute, an amendment increased the value of property stolen from $25 to $100 to $100 to $500. *Id.*, 119 N.W.2d at 835. The value increase was not made to another part of the statute, an apparent result of inadvertence. *Id.* Thus, under the statute,

> a person who [stole] property worth from $100 to $500 in any manner; [stole] property of any value from an automobile in the daytime; or property of a value less than $25 from an automobile in the nighttime is guilty of grand larceny in the second degree, but if he [stole] property worth between $25 and $100 from an automobile in the nighttime he is guilty of only petit larceny.

Id. The court held that the statue did not deny the defendants equal protection of the laws because the legislature may classify crimes and prescribe the punishment therefore. *Id.* at 558, 119 N.W.2d at 837. Here, as in *Dietz*, it may have been inadvertence that the dishonored-check statute was not amended; it may have been for some other reason. Regardless, the legislature did not exceed its authority to classify crimes and prescribe punishment because the statutes cover different acts. Defendant did not meet her burden of showing that the statute fails the rational-basis test.

Defendant also argues that there is no purpose in exposing her to harsher punishment when there is a lesser penalty available for a crime contemplating similar conduct. First, "[w]hen two statutes, one general and one specific, cover the same conduct, the specific statute controls the general statute, unless the legislature manifestly intends the general statute to control." *State v. Lewandowski*, 443 N.W.2d 551, 553 (Minn. App. 1989). The dishonored-check statute is more specific than the general theft statute. And the statutes do not apply to the same conduct as defendant contends, providing for different offense elements and different burdens of proof.

Under the dishonored-check statue, "[w]hoever issues a check which, at the time of issuance, the issuer intends shall not be paid, is guilty of issuing a dishonored check and may be sentenced as provided in subdivision 2a." Minn. Stat. § 609.535, subd. 2

(2008). A person convicted of issuing a dishonored check may be sentenced "to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both, if the value of the dishonored check, or checks aggregated . . . is more than $500." *Id.*, subd. 2a(a)(1), (b) (stating that the value of dishonored checks within any six-month period may be aggregated). The statute further provides that intent may be demonstrated by proof that (1) at the time of issuance, the issuer did not have an account with the drawee; (2) at the time of issuance, the issuer had insufficient funds and the issuer failed to pay the check within five days after notice of nonpayment; or (3) when presentment was made within a reasonable time, the issuer had insufficient funds and failed to pay the check within five days after notice of nonpayment. *Id.*, subd. 3 (2008).

Under the theft statute, a person commits a theft when obtaining property by intentionally deceiving an individual with a false representation, which is known to be false, made with intent to defraud, and which does defraud the person to whom it was made. Minn. Stat. § 609.52, subd. 2(3). A false representation includes the "issuance of a check . . . knowing that the actor is not entitled to draw upon the drawee therefor." *Id.*, subd. 2(3)(i). The penalty is "imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both, if the value of the property or services stolen is more than $500 but not more than $1,000." *Id.*, subd. 3(4).

The dishonored-check statute appropriately covers the conduct here because each time defendant issued a check, the recipients of the dishonored checks sent notice and demand for payment to defendant, which is included in the dishonored-check statute but not in the theft statute. And the fact that there may be reasons, such as a lesser penalty,

for defendant wanting to be prosecuted under one statute rather than another that "does not mean that a prosecutor is obligated to prosecute [her] that way." *State v. Love*, 350 N.W.2d 359, 361 (Minn. 1984).

Additionally, in *State v. Barnes*, the appellant was convicted of first-degree domestic-abuse murder and argued that the statute violated the Equal Protection Clause because the elements of the crime overlapped with those of third-degree depraved-mind murder. 713 N.W.2d 325, 328 (Minn. 2006). The appellant argued that there was no significant difference between the culpable mental state required by the two statutes and that the huge disparity in the two sentences violated equal protection. *Id.* at 330. The appellant relied on an equal-protection analysis of Professor Wayne R. LaFave's classification of three types of overlapping statutes and the equal-protection implication of each. *Id.* The three classifications include: (1) one statute defines a lesser included offense of the other and they carry different penalties—this classification is considered "certainly unobjectionable"; (2) the statutes overlap and carry different penalties—this classification is considered a "harder case"; and (3) the statutes are identical—this category is considered "highly objectionable." *Id.* at 330-31. The court determined that the statutes were not sufficiently overlapping to present equal-protection concerns because they punish very different conduct. *Id.* at 331.

Here, the two statutes fall under the first category—lesser-included offense. *Roden*, 384 N.W.2d at 458. This type of overlap in statutes is "certainly unobjectionable" because the statutes "afford guidance to the prosecutor, but . . . do not foreclose the prosecutor from deciding" under which statute the defendant will be prosecuted.

4 Wayne R. LaFave, et al., Criminal Procedure § 13.7(a) at 256 (3d ed. 2007). The prosecutor had discretion in charging; thus, defendant has not shown that the statute fails the rational-basis test.

Finally, when a defendant fails to show that he or she is treated differently from similarly situated individuals, an as-applied equal-protection argument fails. *Reed v. Albaaj*, 723 N.W.2d 50, 55 (Minn. App. 2006) (holding that service member confined in military prison for crimes committed while in military service is not similarly situated to service members not so confined). In *State v. Richmond*, the appellant argued that the third-degree controlled-substance-crime statute violated equal-protection guarantees because "it provides more severe punishment for purportedly the same conduct proscribed under the fourth-degree statute and committed under the same circumstances by similarly situated persons." 730 N.W.2d 62, 70-71 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). We held that the appellant failed "to make any showing that others similarly situated were prosecuted under the less severe fourth-degree statute rather than the third-degree statute." *Id.* at 73. The court determined that the appellant could not merely rely on the "potential for discriminatory enforcement." *Id.* Thus, under Minnesota law, "[t]he possibility that a law *may* actually fail to operate with equality is not enough to invalidate it." *John Hancock Mut. Life Ins. Co. v. Comm'r of Revenue*, 497 N.W.2d 250, 254 (Minn. 1993) (quotation omitted). Defendant fails to show disparate treatment; therefore, her equal-protection challenge fails.

Certified question answered in the negative.