STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1794

Colin Dion Sirovy, petitioner,
Appellant,

vs.

State of Minnesota
and
Michael Campion, Commissioner of Public Safety,
Respondent.

Filed July 6, 2010
Affirmed
Ross, Judge

Martin County District Court
File No. 46-CV-09-258

Allen P. Eskens, Eskens, Gibson, and Behm Law Firm, Mankato, Minnesota (for appellant)

Lori Swanson, Attorney General, Joel A. Watne, Assistant Attorney General, Jeffrey S. Bilcik, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and Harten, 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

ROSS, Judge

This case raises issues of federalism. Minnesota Statutes section 171.165, subdivision 1 provides that commercial drivers with Minnesota licenses will be disqualified from operating commercial motor vehicles when they violate specified federal regulations. Colin Dion Sirovy is a Minnesota commercial driver who was charged with driving while impaired. Under the federal regulations referenced in section 171.165, Sirovy will be disqualified from driving commercial vehicles in Minnesota for a year if convicted. Sirovy moved the district court to declare section 171.165 an unconstitutional delegation of legislative authority to the federal government. The district court denied the motion and Sirovy appeals. Because the Minnesota legislature may incorporate extant federal law by reference and the federal regulations incorporated into section 171.165 have not changed since their incorporation, we affirm.

FACTS

Colin Sirovy was arrested and charged with driving while impaired. Sirovy possesses a Minnesota commercial driver's license. If he is convicted of driving while impaired, his commercial license will be disqualified for a period of one year under Minnesota Statutes section 171.165 (2008). The statute provides that "the [Minnesota Commissioner of Public Safety] shall disqualify a person from operating commercial motor vehicles in accordance with the driver disqualifications and penalties in Code of Federal Regulations, title 49, part 383, subpart D and Code of Federal Regulations, title 49, section 384.219." Minn. Stat. § 171.165, subd. 1. The relevant federal regulation

requires that a person's commercial driver's license be disqualified for one year on his first conviction for driving under the influence of alcohol, whether or not he was driving a commercial vehicle at the time. 49 C.F.R. § 383.51 tbl. 1 (2005).

Sirovy moved the district court to declare section 171.165, subdivision 1 unconstitutional. He argued that the provision unconstitutionally delegates state legislative authority to the United States Department of Transportation by authorizing it to define the penalty when a Minnesota commercial driver drives impaired. The district court denied the motion, concluding that section 171.165, subdivision 1 is not an unconstitutional delegation of legislative authority because the provision falls within an exception for "auxiliary" statutes enacted to achieve uniformity in the implementation of a national policy—in this case, uniform standards for the punishment of commercial vehicle operators who drink and drive.

Sirovy appeals.

D E C I S I O N

Sirovy challenges the district court's declaratory judgment concluding that section 171.165, subdivision 1 is not an unconstitutional delegation. "On appeal from a declaratory judgment, we apply a clearly erroneous standard to the factual findings, but review the trial court's determination of questions of law de novo." *Rice Lake Contracting Corp. v. Rust Env't & Infrastructure, Inc.*, 549 N.W.2d 96, 98−99 (Minn. App. 1996), *review denied* (Minn. Aug. 20, 1996). Whether a statute is unconstitutional is a legal question that we review de novo. *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). Minnesota statutes are presumed constitutional. *State v.*

Barker, 705 N.W.2d 768, 771 (Minn. 2005). "[W]e exercise our power to declare a statute unconstitutional with extreme caution and only when absolutely necessary." *Walker v. Zuehlke*, 642 N.W.2d 745, 750 (Minn. 2002) (quotation omitted).

The Minnesota Constitution provides, "The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution." Minn. Const. art. III, § 1. Under this arrangement, our "state legislature may not delegate its legislative powers to any outside agency, including the Congress of the United States." *Wallace v. Comm'r of Taxation*, 289 Minn. 220, 226, 184 N.W.2d 588, 591 (1971).

Sirovy argues that section 171.165, subdivision 1 is unconstitutional because it delegates to the federal Department of Transportation the power to define both the circumstances in which a Minnesota driver is disqualified from operating a commercial motor vehicle and the penalties for disqualification. He argues that, in order to avoid an unconstitutional delegation, a law must be complete when it is enacted, meaning that it must specify both a triggering event and the consequences. Sirovy relies principally on two cases, *Lee v. Delmont* and *Williams v. Evans*, in which the supreme court upheld legislation that gave state agencies discretion to carry out the law. *See* 228 Minn. 101, 114, 36 N.W.2d 530, 539 (1949) (board of barber examiners); 139 Minn. 32, 44, 165 N.W. 495, 498 (1917) (minimum wage commission). But Sirovy's reliance on these cases involving delegation of enforcement discretion to state agencies is misplaced. His

argument ignores more apposite authority establishing that incorporating existing federal law by reference does not implicate separation-of-powers or federalism concerns.

Wallace is more instructive. In *Wallace*, the supreme court held that the legislature could incorporate existing, but not future, federal law by reference. 289 Minn. at 228, 184 N.W.2d at 593. Taxpayers wanted to exclude sick pay from their gross incomes under an exemption in the Minnesota tax code. *Id.* at 222, 184 N.W.2d at 589. The commissioner of taxation denied the exemption, claiming that a more restrictive sick-pay exemption in the federal tax code had been incorporated into state law and prevented the taxpayers from excluding their sick pay. *Id.* at 223−24, 184 N.W.2d at 590. The commissioner's incorporation argument relied on Minnesota Statutes section 290.01, subdivision 20 (1965), which defined "gross income" as "the adjusted gross income as computed for federal income tax purposes as defined in the laws of the United States." When this reference was added to section 290.01, subdivision 20, the Minnesota and federal sick-pay exemptions were materially identical. *Id.* at 225, 184 N.W.2d at 591. The federal provision was later made more restrictive by an amendment barring employees from excluding sick pay received during the first 30 days of illness. *Id.*, 184 N.W.2d at 590−91.

The supreme court held that the 30-day waiting period did not apply in Minnesota because the effect of section 290.01, subdivision 20 "was to adopt the Federal law by reference as it existed at the time that statute was adopted." *Id.* at 228, 184 N.W.2d at 593. The court also necessarily held that state incorporation of federal law by reference is not an unconstitutional delegation that violates the separation of powers. *See id.* at

226, 184 N.W.2d at 592 ("The mere adoption of the method fixed by the Federal law . . . is not a delegation to Congress of the legislative power of the State." (quotation omitted)). *Wallace* therefore establishes that a state statute may incorporate federal law by reference without offending the principles of federalism or separation of powers; the only limit on this kind of incorporation is that state statutes generally may not incorporate unknown future changes to federal law.

Wallace is therefore fatal to Sirovy's argument. Under *Wallace*, the Minnesota legislature validly adopted the extant federal commercial driver's license regulations when, in 2005, it amended section 171.165, subdivision 1 to reference them. *See* 2005 Minn. Laws 1st Spec. Sess. ch. 6, art. 3, § 72, at 3044 (adding reference to federal regulations). To the extent that Sirovy challenges section 171.165, subdivision 1 on the ground that its language would also adopt *future* changes to the federal regulations, he lacks standing. Although neither party addressed the issue of standing, it is appropriate for this court to consider it *sua sponte*. *See Enright v. Lehmann*, 735 N.W.2d 326, 329 (Minn. 2007). To establish standing, a party must show that his injury is fairly traceable to a constitutional violation. *In re Application of Crown CoCo, Inc.*, 458 N.W.2d 132, 135 (Minn. App. 1990), *review dismissed* (Minn. Sept. 14, 1990). Sirovy's injury is not traceable to any future incorporation. His commercial license will be disqualified regardless of whether section 171.165 incorporates future changes to the federal regulations because the operative, disqualifying regulation has remained unchanged since incorporation in 2005. *Compare* 49 C.F.R. § 383.51 tbl. 1 (2008) *with* 49 C.F.R. § 383.51 tbl. 1 (2005). The Minnesota legislature could constitutionally incorporate the

federal regulations as they existed in 2005, and Sirovy lacks any ground to argue that the legislation might also unconstitutionally incorporate future changes to the regulations.

Our holding is also consistent with the supreme court's rationale in *Wallace*. The evil sought to be avoided by prohibiting legislative delegation is that "changes in the foreign legislation may not fit the policy of the incorporating legislature and the person subjected to the changed law would be denied the benefit of the considered judgment of his legislature on the matter." 289 Minn. at 226, 184 N.W.2d at 591. Allowing the incorporation of federal statutes or regulations that exist at the moment of incorporation does not violate this principle. Only when the legislature attempts to incorporate future amendments along with extant federal law does a delegation issue arise.

Sirovy unsuccessfully attempts to distinguish *Wallace*. He points out that, in *Wallace*, the state sick-pay exemption was fully stated within Minnesota law, while section 171.165, subdivision 1 contains no substantive language of its own; it merely references federal regulations. The argument appears to be that *Wallace* was not a true incorporation-by-reference case and that it establishes simply that an existing state statute is not amended by changes to a federal statute that is referenced in another state statute. We do not read *Wallace* to be so constrained.

Sirovy cannot avoid *Wallace*'s clear language: "We . . . hold that the effect of Minn. St. 290.01, subd. 20, was to adopt the Federal law *by reference* as it existed at the time that statute was adopted." *Id.* at 288, 184 N.W.2d at 593 (emphasis added). The *Wallace* court clearly viewed section 290.01, subdivision 20 as incorporating the federal

law by reference. And the existence in *Wallace* of a parallel state sick-pay exemption does not alter this fact.

Affirmed.