20CA1967 Arnold v Polis 07-14-2022

COLORADO COURT OF APPEALS

Court of Appeals No. 20CA1967
El Paso County District Court No. 20CV257
Honorable David Prince, Judge

Kynan S. Arnold,

Plaintiff-Appellant,

v.

Jared Polis, in his official capacity as Governor of the State of Colorado,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division III
Opinion by JUDGE J. JONES
Welling and Davidson*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced July 14, 2022

Kynan S. Arnold, Pro Se

Philip J. Weiser, Attorney General, Paul Koehler, First Assistant Attorney General, Denver, Colorado, for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2021.

¶ 1 In this civil case, plaintiff, Kynan S. Arnold, appeals the district court's dismissal of his claim for declaratory judgment under the Uniform Declaratory Judgments Law (UDJL), sections 13-51-101 to -115, C.R.S. 2021, and C.R.C.P. 57, challenging the constitutionality of section 18-18-405(1)(a), C.R.S. 2021. We affirm.

I. Background

¶ 2 In 2011, a jury found Arnold guilty of possessing chemicals or supplies to manufacture a controlled substance in violation of section 18-18-405, possessing more than a gram of a schedule II controlled substance (methamphetamine), possessing more than eight ounces of marijuana, and possessing drug paraphernalia. *See People v. Arnold*, (Colo. App. No. 18CA0191, Feb. 13, 2020) (not published pursuant to C.A.R. 35(e)) (*Arnold II*). The district court found Arnold guilty of three habitual criminal counts. *Id.*

¶ 3 The court sentenced Arnold to sixty-four years in prison after finding that possessing chemicals or supplies to manufacture a controlled substance is an extraordinary risk crime. *Id.* It also sentenced him to concurrent terms of forty years on each of the convictions for possession of methamphetamine and marijuana to run concurrently with the sixty-four-year sentence. *Id.*

¶ 4 Arnold directly appealed, challenging his habitual criminal convictions and the legality of his sentence. A division of this court affirmed his convictions but concluded that possessing chemicals and supplies isn't an extraordinary risk crime and accordingly vacated his sixty-four-year sentence and remanded the case for resentencing. *People v. Arnold*, (Colo. App. No. 12CA0708, Oct. 30, 2014) (not published pursuant to C.A.R. 35(e)) (*Arnold I*). On remand, the district court resentenced Arnold to forty-eight years on that count.

¶ 5 Arnold then filed a Crim. P. 35(c) motion, asserting numerous claims of ineffective assistance of counsel and arguing that he was entitled to a proportionality review of his sentence. *See Arnold II*. The postconviction court held a hearing and, by written order, denied Arnold's motion. *Id.* On appeal, a division of this court affirmed the district court's denial of his claims. *Id.*

¶ 6 Several months later, Arnold, representing himself, filed this case. His complaint seeks a declaratory judgment that section 18-18-405(1)(a) — the statute proscribing possessing chemicals, supplies, or equipment with intent to manufacture a controlled substance — is unconstitutional for a variety of reasons. More

specifically, his complaint alleges that the statute's clause declaring it "unlawful for any person knowingly to . . . possess one or more chemicals or supplies or equipment with intent to manufacture a controlled substance" (Knowingly Possess Clause) is unconstitutionally vague and overbroad as applied to him and on its face because it criminalizes conduct protected by the First Amendment. (He didn't raise this argument at any point in his criminal case.)

¶ 7 Before receiving a response from the defendants, the district court ruled on Arnold's complaint as follows:

> Mr. Arnold has filed a pleading presented [as] a question of law to be addressed as a request for declaratory judgment. The Court understands from the pleading that Mr. Arnold has been convicted under a criminal statute and wishes to challenge the constitutionality of the statute. This does not present a justiciable issue for resolution under the declaratory judgment statute. This would appear to present an issue for review on appeal of the conviction. Under principles of finality and the general bans on collateral attacks in subsequent litigation, the request does not appear to state a valid claim for relief. The "Question of Law" pleading is denied and the matter dismissed as currently formulated under Colo. R. Civ. P. 12(b)(5).

¶ 8 Arnold appeals. He argues that the district court erred by dismissing his claim. We disagree and affirm.

II. Discussion

¶ 9 As explained above, Arnold's declaratory judgment claim seeks a ruling that the Knowingly Possess Clause in section 18-18-405(1)(a) is unconstitutional both as applied to him and on its face.

¶ 10 We review de novo a district court's decision to reject jurisdiction to enter a declaratory judgment and its dismissal of a complaint under C.R.C.P. 12(b)(5). *Saxe v. Bd. of Tr. of Metro. State Coll.*, 179 P.3d 67, 72 (Colo. App. 2007) (rejection of jurisdiction); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011) (failure to state a claim).

A. As-Applied Challenge

¶ 11 In his lengthy appellate briefs, Arnold makes only a conclusory assertion that he has standing to challenge the statute as applied, asserting without explanation that he faces a credible threat of future prosecution under the statute. Because Arnold didn't develop this conclusory assertion, we don't need to consider it. *See People v. Venzor*, 121 P.3d 260, 264 (Colo. App. 2005). Nonetheless, we conclude that he lacks standing.

¶ 12 Because a court doesn't have jurisdiction over a claim unless the party asserting it has standing to do so, we must determine whether Arnold has standing before we can address the merits of his constitutional arguments. *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008). Colorado's "generally applicable" test for standing requires a party to show that (1) he suffered injury in fact (2) to a legally protected interest. *Hickenlooper v. Freedom from Religion Found.*, 2014 CO 77, ¶ 8.

¶ 13 To meet the injury-in-fact requirement, the plaintiff must show that the activity complained of "has caused or has threatened to cause injury to the plaintiff such that 'a court [can] say with fair assurance that there is an actual controversy proper for judicial resolution.'" *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286 (Colo. 1992) (quoting *O'Bryant v. Pub. Utils. Comm'n*, 778 P.2d 648, 653 (Colo. 1989)). The injury doesn't have to be tangible, *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004), but "the remote possibility of a future injury" or an injury that is "overly 'indirect and incidental' to the defendant's action" isn't sufficient to establish standing, *id.* (quoting *Brotman v. E. Lake Creek Ranch, L.L.P.*, 31 P.3d 886, 890-91 (Colo. 2001)).

¶ 14 Arnold, who will remain incarcerated for many more years, hasn't explained at all why he faces a concrete threat of future prosecution under the statute. Indeed, Arnold doesn't even assert that he personally is entitled to relief from any injury: he declares that his "intention is to simply receive a declaration as to whether or not the final provision [of the statute] violates the State and Federal Constitution[s]."

¶ 15 As well, the fact Arnold was prosecuted under the statute eleven years ago doesn't give him standing to challenge it now. Crim. P. 35(c) and section 18-1-410, C.R.S. 2021, provide the exclusive procedure for collaterally challenging the constitutionality of a criminal statute under which one is convicted. Crim. P. 35(c)(2)(II); § 18-1-410(1)(b). Because that is so, Arnold isn't entitled to declaratory relief pertaining to the prior prosecution. *See*, *e.g.*, *Taylor v. Tinsley*, 138 Colo. 182, 185-86, 330 P.2d 954, 956 (1958) (declaratory judgment relief isn't available "where another established remedy is available")[1]; *Trinen v. City & Cnty. of*

[1] Contrary to Arnold's assertion, *Taylor v. Tinsley*, 138 Colo. 182, 330 P.2d 954 (1958), hasn't been overruled.

Denver, 725 P.2d 65, 66-67 (Colo. App. 1986) (same); *Greyhound Racing Ass'n v. Colo. Racing Comm'n*, 41 Colo. App. 319, 321, 589 P.2d 70, 71 (1978) (same).

¶ 16 We therefore conclude that the district court properly dismissed Arnold's as-applied claim because he faces no concrete prospect of future prosecution under the statute and because he failed to avail himself of the exclusive procedures for challenging the constitutionality of the statute as actually applied to him. His as-applied claim doesn't present a justiciable controversy.

B. Facial Challenge

¶ 17 Arnold also asserts that section 18-18-405(1)(a) is unconstitutional on its face because it overbroadly proscribes speech protected by the First Amendment.[2] The "speech" he claims is unlawfully punished is the practice of chemistry. We recognize that the district court's brief order doesn't expressly address Arnold's facial challenge to the statute. But that doesn't prevent us from affirming the court's order so long as the record supports the

[2] Arnold appears to concede in his reply brief that his vagueness argument fails.

court's ultimate ruling dismissing the complaint. *See Rush Creek Sols., Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 406 (Colo. App. 2004).

¶ 18 The UDJL provides that any person "whose rights, status, or other legal relations are affected by a statute" may seek a declaratory judgment on "any question of construction or validity arising under the . . . statute." § 13-51-106, C.R.S. 2021. We must construe this provision liberally. § 13-51-102, C.R.S. 2021; *Saxe*, 179 P.3d at 79. But even doing so, we conclude that Arnold lacks standing to assert a facial challenge to the Knowingly Possess Clause.

¶ 19 We agree with Arnold that the standing analysis is substantially relaxed in the context of facial First Amendment claims. But Arnold's argument boils down to the idea that anyone's standing is established for First Amendment claims whenever there is a risk of chilling anyone else's constitutionally protected speech. That isn't so.

¶ 20 It is true that in certain First Amendment cases, courts will relax the traditional approach to standing. But only in the context of third-party standing — that is, when a party as to whom

enforcement of a statute is made or threatened, and as to whom the law may constitutionally be applied, nevertheless seeks a declaration that, because the law is unconstitutional on its face as to others, it can't be applied to him (or anyone). *See People ex rel. Tooley v. Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d 348, 355 (Colo. 1985) ("[T]he limitations on third party standing have been substantially relaxed in the context of [F]irst [A]mendment claims."); *City of Englewood v. Hammes*, 671 P.2d 947, 950 (Colo. 1983) ("In First Amendment cases, . . . the rules of standing are broadened to permit a party to assert the facial overbreadth of statutes or ordinances which may chill the constitutionally protected expression of third parties, regardless of whether the statute or ordinance could be applied constitutionally to the conduct of the party before the court."); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("[T]he Court has altered its traditional rules of standing to permit — in the First Amendment area — 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965))).

¶ 21 In this case, the statute was enforced against Arnold many years ago and, as discussed, his exclusive remedies for challenging that enforcement were those pertaining to criminal convictions — a direct appeal and a Rule 35(c) motion. And, as noted, Arnold doesn't plausibly allege any possibility of future enforcement of the statute against him.

¶ 22 Arnold's lack of standing aside, his free speech challenge fails on the merits. He asserts that the statute chills his ability and the ability of others to expressively associate with chemistry because it causes people who work in certain fields — such as aromatherapy, photography, or plumbing — to face the threat of prosecution when they use certain chemicals or chemistry glassware. We disagree.

¶ 23 In some cases, conduct can be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington*, 418 U.S. 405, 409 (1974); *see Curious Theater Co. v. Colo. Dep't of Pub. Health & Env't*, 216 P.3d 71, 79 (Colo. App. 2008), *aff'd*, 220 P.3d 544 (Colo. 2009). "To determine if conduct is expressive, we look to whether (1) '[a]n intent to convey a particularized message was present' and (2) 'the likelihood was great that the message would be understood

by those who viewed it.'" *Curious Theater*, 216 P.3d at 79 (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

¶ 24 We conclude that engaging in chemistry, as Arnold characterizes it, doesn't convey an intent to present a particularized message and therefore isn't speech. To hold otherwise would seem to permit literally anyone to assert a facial free speech challenge to any law criminalizing almost any conduct. Moreover, it's clear that the statute only proscribes conduct related to otherwise illegal activities: the actor must have the "intent to manufacture a controlled substance." § 18-18-405(1)(a). In sum, while "Breaking Bad" is a constitutionally protected work of art, Walter White's production of methamphetamine wasn't.

III. Conclusion

¶ 25 The district court's judgment is affirmed.

JUDGE WELLING and JUDGE DAVIDSON concur.