

[Cite as *Calicoat v. Calicoat*, 2009-Ohio-5869.]

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

MEGAN CALICOAT :  
 Plaintiff-Appellee : C.A. CASE NO. 08CA32  
 vs. : T.C. CASE NO. 08DV199  
 TIMOTHY CALICOAT : (Civil Appeal from  
 Defendant-Appellant : Common Pleas Court)

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O P I N I O N

Rendered on the 6th day of November, 2009.

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GRADY, J.:

{¶1} Timothy Calicoat, Jr., appeals from a domestic violence  
 civil protection order ("CPO") issued pursuant to R.C. 3113.31,  
 on a petition filed by his wife, Megan Calicoat.

{¶2} On July 31, 2008, Megan<sup>1</sup> filed a petition (Dkt. 1) and an amended petition (Dkt. 2) for a CPO, naming Timothy, as the respondent. Megan's amended petition alleged that, on that same date, Timothy had attempted to run a vehicle in which Megan was a passenger off the road, that Timothy had in the past been physically abusive to Megan, and that Megan felt unsafe.

{¶3} A magistrate of the common pleas court entered a CPO, ex parte, on Megan's petition on the date it was filed. (Dkt. 5). The matter was set for a hearing on August 5, 2008. After several continuances the matter was heard by a magistrate on August 12, 2008.

{¶4} The evidence the parties presented portrayed a marital relationship that is stormy and difficult. Megan testified that, in 2000, Timothy held a gun to her head and said he would kill her if she left him. (T. 25). In August of 2007, according to Megan, Timothy choked her and pushed her around. (T. 24). Megan testified that during the following month, in September of 2007, Timothy assaulted her on their trip home from his sister's wedding, inflicting two black eyes and bruises to her arms. (T. 23).

{¶5} Concerning the events of July 31, 2008, alleged in her petition, Megan testified that she spent the night before at the

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<sup>1</sup>For clarity and convenience, the parties are identified by their first names.

residence of Matthew North, a mutual friend, and that after she and North left the next morning in North's car, Timothy pursued them at a high rate of speed and "tried to get up to us as close as he could to run us off the road." (T. 26). Megan testified that Timothy "chased us through red lights." (Id.) She said that she was frightened Timothy might have a gun he retrieved from their home several weeks earlier. (T. 27). Megan testified that Timothy gave up the chase when North drove into the lot of a service station. (Id.) Megan then called the police. (T. 28).

{¶ 6} Matthew North corroborated Megan's testimony concerning the car chase, saying that Timothy "pretty much tried to run me into the curb." (T. 10). North said that when he tried to get away, "it just turned into a little chase" in which Timothy kept "coming at me when he was beside me." (Id.) North said that Megan "was scared, just freakin' out a little bit. . ." (T. 11).

North testified that during the chase their speeds "could have been close to seventy miles an hour," and possibly as much as ninety miles per hour. (T. 12).

{¶ 7} Timothy testified and denied Megan's claims of abuse. He stated that Megan had assaulted him in the incident following his sister's wedding. Timothy generally conceded to the facts of the chase that Megan and Matthew North described. Timothy said that he had moved out of the marital residence because "I kept

hearin' stuff about Matthew North" (T. 60), and that he waited outside North's residence on the morning of July 31, 2008. When North and Megan drove away he followed them, and "[t]he more I got up on them the faster they went." (T. 61). Timothy agreed that they were "going fast" (T. 67) and that it was not a safe car ride for anyone involved. (T. 67-68). He explained that he just wanted to know what Megan and North were up to, "bein' a married man." (T. 68).

{¶8} Timothy's father testified that he had observed several other altercations between Timothy and Megan. (T. 48). Concerning the fight that occurred on the trip home from his daughter's wedding, Timothy's father accused Megan of starting the fracas. (T. 49). He saw no bruises or black eyes on Megan. (T. 50). Timothy's mother testified that she likewise saw no bruises on Megan several days later, and saw no marks on Megan in the years she and Timothy were married. (T. 55-57).

{¶9} Megan's mother, Sandy Walker, testified that she saw bruises on Megan on at least three occasions during the years of her marriage to Timothy (T. 79), but conceded that she does not know who caused them. (T. 78). Walker speculated that the marks were caused by Timothy, and attributed that allegation to what she had been told by Timothy and Megan's son. (T. 77). Timothy objected to that testimony, but the court overruled the objection.

{¶ 10} On August 21, 2008, the magistrate filed a decision granting Megan's petition for a CPO. (Dkt. 22). The magistrate made the following findings of fact:

{¶ 11} "On July 31, 2008, respondent chased petitioner at a high rate of speed, attempting to run her off the road. Respondent has engaged in previous acts of domestic violence directed at petitioner, including choking her, striking her, pushing her and holding a loaded gun to her head. He has also threatened to kill the petitioner, and petitioner is in fear of further violence from respondent."

{¶ 12} The CPO the magistrate recommended prohibits Timothy from coming within three blocks of Megan and/or abusing her further. Megan is granted exclusive use of the marital residence, "subject to subsequent orders in pending divorce pertaining to disposition of residence." The terms of CPO remain in effect for five years, or until July 31, 2013, unless earlier modified.

{¶ 13} Timothy filed objections to the magistrate's decision. (Dkt. 27). The trial court overruled Timothy's objections and adopted the magistrate's decision as an order of the court. (Dkt. 31). Timothy filed a notice of appeal from that final judgment.

#### FIRST ASSIGNMENT OF ERROR

{¶ 14} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT ADOPTED THE MAGISTRATE'S DECISION SINCE THERE WAS INSUFFICIENT

COMPETENT, CREDIBLE [EVIDENCE] TO SUPPORT A FINDING OF DOMESTIC VIOLENCE."

{¶ 15} When an appellant argues that a finding of domestic violence on which a CPO was issued is against the manifest weight of the evidence, "we must decide whether the court's decision was supported by sufficient competent, credible evidence." *Young v. Young*, Greene App. No. 2005-CA-19, 2006-Ohio-978, at ¶22. "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, syllabus. "Weight" of the evidence refers to the inclination of the greater amount of credible evidence offered in a trial to prove the issue established by the verdict that was reached. *State v. Thompkins* (1997), 78 Ohio St.3d 380.

{¶ 16} Where there exists competent and credible evidence supporting the findings and conclusions of the trial court, deference to such findings and conclusions must be given by the reviewing court. *Jenkins v. Eagle Twp. Trustees*, Vinton App. No. 01CA557, 2002-Ohio-2154. "The underlying rationale

{¶ 17} of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice

inflections, and use their observations in weighing the credibility of the proffered testimony." *Seasons Coal Company, Inc., v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 18} R.C. 3113.31(A) states, in pertinent part:

{¶ 19} "As used in this section:

{¶ 20} "(1) 'Domestic violence' means the occurrence of one or more of the following acts against a family or household member:

{¶ 21} "(a) Attempting to cause or recklessly causing bodily injury;

{¶ 22} "(b) Placing another person by the threat of force in fear of imminent serious physical harm or committing a violation of section 2903.211 [2903.21.1] or 2911.211 [2911.21.1] of the Revised Code."

{¶ 23} Timothy argues that at the hearing on her petition Megan "was unable to relate one credible incident of domestic violence."

(Brief, p. 10). That claim is made with reference to events that Megan said had occurred in years past. It wholly ignores the evidence that Megan offered, through her own testimony and that of Matthew North, concerning the high-speed car chase of July 31, 2008. Megan was then a member of Timothy's family. The evidence supports a finding that Timothy attempted to cause bodily harm to Megan and/or placed her by the threat of force in fear of serious physical harm. R.C. 3113.31(A)(1)(a), (b). Timothy did not

dispute the facts of what occurred, and instead attempted to justify his conduct in relation to Megan's unfaithfulness as his wife. That does not relieve him of the responsibility for his conduct or take it out of the classification as an act of domestic violence as defined by R.C. 3113.31(A)(1).

{¶ 24} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 25} "THE TRIAL COURT ERRED IN ADOPTING THE MAGISTRATE'S DECISION BECAUSE THE MAGISTRATE'S DECISION WAS BASED ON HEARSAY EVIDENCE."

{¶ 26} Sandy Walker, Megan's mother, testified that she had seen bruises on Megan "[a]t least three times" and that Megan "doesn't discuss it with me. Her son does." Megan's attorney then inquired whether "based on this discussions you are currently concerned for your daughter?" Timothy objected to the question as calling for hearsay evidence. The magistrate overruled the objection. Walker responded that "I've been concerned about her safety . . . and my grandson's safety since around 2000. I don't sleep well." (T. 77).

{¶ 27} Timothy objected that the magistrate erred in overruling his objection. The trial court overruled the objection, finding that the objection Timothy made in the proceedings before the magistrate was properly overruled as untimely because "[t]he

objection pertained to the subsequent question which was properly overruled." (Dkt. 31, p. 2).

{¶ 28} Timothy repeats his argument on appeal that the question asked of Walker elicited hearsay testimony, which is inadmissible.

Evid.R. 802. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). However, "where a statement is relevant under the facts and circumstances of a case to show its effect on a particular listener, the statement may be relevant without regard for its truth." Weissenberger's Ohio Evidence Treatise (2008 Ed.), §801.7. The statement, being admissible for that purpose, is then not hearsay. *Id.*

{¶ 29} The question asked of Walker pertained to Walker's state of mind concerning her daughter's safety. Walker's belief that Megan was at risk of harm by Timothy was merely a conclusion, and was objectionable as such. However, on the tests for relevance in Evid.R. 401, Walker's belief was relevant to prove that Timothy had threatened force that could place Megan in fear of imminent physical harm. R.C. 3113.31(A)(1)(b). Furthermore, though the question required Walker to rely on her grandson's out-of-court statements, Walker was not asked to repeat his assertions, and she did not.

{¶ 30} The second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 31} "THE TRIAL COURT ERRED IN ADOPTING THE MAGISTRATE'S DECISION SINCE THE MAGISTRATE'S DECISION IS BASED UPON AN UNCONSTITUTIONAL STATUTE AND APPELLANT WAS NOT AFFORDED ADEQUATE DUE PROCESS OF LAW."

{¶ 32} "A. THE TRIAL COURT ERRED IN ADOPTING THE MAGISTRATE'S DECISION SINCE THE MAGISTRATE'S DECISION RESULTED IN AN IMPROPER TAKING OF PROPERTY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS."

{¶ 33} A CPO granted on a finding that the respondent engaged in domestic violence against the petitioner may grant possession of the marital residence to the petitioner to the exclusion of the respondent, and may also prohibit the respondent from returning to the residence, R.C. 3113.31(E) (1) (b), (2). However, no CPO may in any manner affect the title to real property. R.C. 3113.31(E) (5). Further, no CPO may remain in effect for more than five years, and during that time may be modified by the court that issued the CPO. R.C. 3113.31(E) (3) (a).

{¶ 34} The CPO the trial court approved on August 21, 2008, grants Megan the right to exclusive possession of the marital residence and prohibits Timothy from interfering with her right and/or entering the residence, subject to orders issued

subsequently in a pending divorce action. All terms of the order will remain in effect until July 31, 2013, unless modified or dismissed by the court.

{¶ 35} Timothy argues that excluding him from the real property he owns and for which he must make mortgage payments while Megan has the exclusive right to its use constitutes a taking of his private property for a public purpose without just compensation, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Section 19, Article I of the Ohio Constitution, and likewise violates his inalienable right to possess property guaranteed by Section 1, Article I of the Ohio Constitution.

{¶ 36} "Laws enacted in the proper exercise of the police power . . . even though they result in the impairment of the full use of property by the owner thereof, do not constitute a 'taking of private property' . . ." *State ex rel Taylor v. Whitehead* (1982), 70 Ohio St.2d 37, 40, quoting from *Pritz v. Messer* (1925), 112 Ohio St.628, paragraph one of the syllabus. The property rights guaranteed by the Ohio Constitution are likewise subject to a proper exercise of the police power. See *Ghaster Properties, Inc. v. Preston* (1964), 176 Ohio St.425. As *Ghaster* pointed out, the fallacy of a contention that ownership of land includes an unrestricted right to its use "is demonstrated by the words of

Section 19 of Article I of the Ohio Constitution that '[p]rivate property shall ever be held inviolate, but subservient to the public welfare,'" *Id.* at 430. (Emphasis in the original.)

{¶ 37} The police power is the authority of government to adopt and enforce measures to protect the public health, safety, morals, and general welfare, and to the extent that the exercise of the police power is reasonable and has a real relationship to a legitimate governmental purpose, it has been held not to infringe constitutional rights, despite some incidental interference with individual rights. See *State v. Martin* (1958), 168 Ohio St. 37.

{¶ 38} The protection of victims of domestic violence from further harm has as its purpose the protection of the public welfare, which is a proper exercise of the police power conferred on the General Assembly by Section 1, Article II of the Ohio Constitution. The provisions of R.C. 3113.31(E) authorizing exclusion of perpetrators of domestic violence from the residences of their victims is reasonable, and it has a real relationship to the purpose of protecting victims of domestic violence from further harm. Orders issued pursuant to that section constitute valid exercises of the police power that supersede the constitutional protections against takings of private property on which Timothy relies. Furthermore, the term of the prohibitions imposed on Timothy is not excessive, because he may obtain a

modification by order of the court that issued the order, in either the present case or in another domestic relations action commenced in the same court. R.C. 3113.31(A)(2); *State v. Price*, 118 Ohio St.3d 144, 2008-Ohio-1974, at ¶20.

{¶ 39} “B. THE TRIAL COURT ERRED IN ADOPTING THE MAGISTRATE’S DECISION BECAUSE THE STATUTE UPON WHICH THE CPO WAS ISSUED IS VOID FOR VAGUENESS.”

{¶ 40} Timothy argues that R.C. 3113.31 is void for vagueness because it does not give fair notice of the conduct it proscribes and the penalty imposed if the law is breached. *Kolender v. Lawson* (1983), 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903. Specifically, Timothy contends that because the prohibition in R.C. 3113.31(A)(1)(b) against “[p]lacing another person by threat of force in fear of imminent serious physical harm” necessarily must take account of the reasonableness of another person’s subjective reactions, courts must determine each case not on a uniform standard but on an ad hoc basis. *In re Complaint Against Harper* (1996), 77 Ohio St.3d 211.

{¶ 41} The void for vagueness doctrine is embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments. It is a general principle of statutory law that a statute must be definite to be valid. A statute is void for vagueness when its prohibition is so vague as to leave an individual without knowledge of the

nature of the activity prohibited. To avoid a vagueness defect, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement, so that people of common intelligence need not guess at its meaning. 16B American Jurisprudence 2d, Constitutional Law, §920.

{¶ 42} R.C. 3113.31(A) does not prohibit merely placing another person in fear. It prohibits doing that through a threat of force that is sufficient to place another person in fear of imminent serious physical harm. "Serious physical harm" is defined by R.C. 2901.01(A)(5) to include any of the injurious consequences identified in paragraphs (a) through (e) of that section. An injury is "imminent" when it results from an immediate and real threat. Black's Law Dictionary, 7<sup>th</sup> Ed. "'Force' means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1).

{¶ 43} Taken together, the elements of domestic violence as defined by R.C. 3113.31(A)(1) are sufficiently definite to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and to avoid the conduct the section prohibits, which is a threat of force that is by its nature reasonably sufficient to place another person in fear of immediate and serious

physical harm. Therefore, R.C. 3113.31 is not void for vagueness.

{¶ 44} The third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶ 45} "THE TRIAL COURT ERRED IN ADOPTING THE MAGISTRATE'S DECISION BECAUSE THE CPO HEARING VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS BECAUSE RESPONDENT WAS NOT GIVEN ADEQUATE NOTICE OF THE CLAIMS AGAINST HIM AND WAS NOT GIVEN ADEQUATE OPPORTUNITY TO PREPARE A DEFENSE."

{¶ 46} The amended petition that Megan filed (Dkt. 2) specifically alleged the facts of the car chase of July 31, 2008, as the grounds for Megan's domestic violence claim and her need for a CPO. A return of service attached to the ex parte CPO (Dkt. 6) states that the amended petition and CPO were personally served on Timothy by the Sheriff of Miami County on July 31, 2008. At the evidentiary hearing that was held on August 19, 2008, both parties were heard concerning the facts of the alleged car chase that occurred and which constituted an act of domestic violence.

{¶ 47} Timothy's contention that he lacked notice and an opportunity to be heard in relation to the allegations regarding the car chase on which the CPO was granted is meritless. To the extent that Timothy's argument concerns evidence of other, past events, it likewise lacks merit. Megan's amended petition alleged that Timothy had physically abused her in the past. Timothy

therefore did not lack notice of that allegation, and Megan was entitled to offer evidence to prove it. Timothy did not object that the evidence Megan offered concerned matters outside the petition Megan filed. Timothy may not now complain that it did.

*Bacon v. Daniels* (1881), 37 Ohio St. 279.

{¶ 48} The fourth assignment of error is overruled. The judgment of the trial court will be affirmed.

FROELICH, J., And FRENCH, J., concur.

(Hon. Judith L. French, Tenth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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