

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

D.H.,	:	
	:	
Petitioner-Appellant,	:	
	:	No. 108553
v.	:	
	:	
J.C.,	:	
	:	
Respondent-Appellee.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: January 16, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-913093

Appearances:

D.H., *pro se.*

J.C., *pro se.*

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1. Petitioner-appellant, D.H. (“appellant”), brings the instant appeal, *pro se*, challenging the trial court’s denial of her petition for a civil

stalking protection order (“CSPO”) against respondent-appellee, J.C. (“appellee”).¹ Specifically, appellant argues that the trial court applied an incorrect standard in its determination on her petition for a CSPO. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶ 2} On March 27, 2019, appellant filed a petition in the trial court, pro se, seeking an ex parte CSPO against appellee. That same day, the trial court issued a journal entry denying appellant’s petition for an ex parte CSPO, and scheduled the matter for a full hearing on April 9, 2019.

{¶ 3} Appellant filed her petition for a CSPO seeking relief on her own behalf, and on behalf of her four children and ex-husband. In appellant’s petition, she made the following allegations:

[Appellee] has engaged in a pattern of conduct intended to and which has caused extreme anxiety and mental distress. [Appellee] has contacted my ex-husband numerous times and my children have gotten calls from her number[;] she was told a year ago not to contact me but continues to do so by using third parties in a very manipulative fashion, she is my former attorney and when I subpoenaed her phone records in my divorce case, she took a client of hers for medical treatment, showed him the subpoena, and told him I was gathering information on him[,] not her[,] and coached and helped him take out a [domestic violence civil protection order] based on false information she grounded to him[;] she has had third party threaten [me] with loss of my children and or professional license.

Appellant also attached an affidavit to the petition that averred the following:

1. Despite the no contact provisions of this Court’s Order and the seal of confidentiality covering it, [appellee] has continued to cause her

¹ Appellee did not file an appellate brief in this matter, and pursuant to App.R. 18(C), appellee was precluded from participating in oral arguments.

emotional harm by engaging in a pattern of contacting those around her and engaging in relation bullying involving [appellant's] former household members. In so doing, [appellee] has revealed information previously placed under seal by this Court, to the disadvantage of [appellant].

2. I agreed to settle and seal the present case despite [appellee's] ridiculous petition because I was afraid of litigation with my ex-husband, and with the understanding that it would mean the end of [appellee's] officious intermeddling in my affairs. That has not been the case.

3. Instead, [appellee] has ramped up her meddling and use of third parties as proxies to continue to inflict emotional and financial damage.

4. As a result of [appellee's] actions, I have been placed in a state of extreme anxiety I fear men with guns and/or legal process coming to my home unexpectedly, and that I will be injured as a result. I am afraid to sleep at times for fear of additional process being served or additional police involvement not occasioned by my actions. On occasion, I do not sleep at home for this reason and don't tell anyone where I have gone, for fear of harassment.

5. I fear the loss of my children and unanticipated and unfounded legal expenses I cannot afford. I fear I will unintentionally pock-dial someone, resulting in my arrest and my ex-husband obtaining emergency custody of my children. I am sometimes afraid to be away from them for this reason.

{¶ 4} On April 9, 2019, the trial court held a hearing on appellant's petition, and both parties presented testimony on their own behalf. The relevant facts are as follows.

{¶ 5} Appellant and appellee are both lawyers, and are licensed to practice law in Ohio. Appellee had represented appellant in her divorce proceedings against appellant's ex-husband in 2014. Appellee also represented appellant in some capacity in which appellant was the victim in a criminal matter that resulted in appellant's ex-husband being charged with domestic violence.

{¶ 6} Appellant asserted that in January 2019, she discovered that appellee had contacted her ex-husband in May 2018. Appellant asserted that appellee told appellant's ex-husband about her secret inheritance. This secret inheritance was relevant to appellant and her ex-husband's divorce matter. Appellant further asserted that her ex-husband was not aware of this secret inheritance, and only became aware after appellee disclosed this fact to him. Appellant asserted that appellee was the only other person who was aware of this secret inheritance, as such, only appellee could have told appellant's ex-husband about the secret inheritance. Appellant also asserted that she had subpoenaed her ex-husband's phone records in the divorce matter, and the phone records corroborate that appellee had called appellant's ex-husband on May 6 and May 9, 2018.

{¶ 7} In addition, appellant asserted that appellee was having third parties contact her ex-husband. Appellant further asserted that she received "robocalls and password resets and phishing attempts," and appellant suspected appellee was behind these attempts either herself or through a third party. Appellant also asserted that appellee was frequently using a third party to contact her ex-boyfriend and her ex-husband, and had called appellant's eight-year-old son's cell phone.

{¶ 8} Appellee stated that she did have prior conversations with appellant regarding her prior representation of appellant. However, appellee denied contacting appellant as alleged in her petition, and as alleged by appellant at the hearing. Appellee also stated that appellant had previously filed a complaint against appellee to the Ohio Supreme Court Disciplinary Counsel. Additionally, in

March 2018, appellee had filed an ex parte petition for a CSPO against appellant. The ex parte order was granted, and thereafter the parties agreed to a stipulation dismissing the CSPO.

{¶ 9} At the conclusion of the April 9, 2019 hearing, the trial court denied appellant's petition for a CSPO noting, "I don't make any finding that [appellant has] been directly or even indirectly contacted by appellee." On April 10, 2019, the trial court issued a journal entry denying appellant's petition for a CSPO.

{¶ 10} On May 10, 2019, appellant filed a notice of appeal assigning one error for our review:

I. The trial court erred in dismissing appellant's petition because it imposed a requirement of "direct contact" for the granting of a [CSPO], rather than the "pattern of conduct" set forth in the governing statute.

II. Law and Analysis

{¶ 11} In appellant's sole assignment of error, she argues that the trial court applied an incorrect standard in its determination on her petition for a CSPO. To this end, appellant argues that the trial court required appellant to demonstrate that appellee had directly contacted appellant.

{¶ 12} In order to obtain a CSPO under R.C. 2903.214, "a petitioner must show, by a preponderance of the evidence, that the respondent engaged in conduct constituting 'menacing by stalking' as defined in R.C. 2903.211." *M.J.W. v. T.S.*, 8th Dist. Cuyahoga No. 108014, 2019-Ohio-3573, ¶ 21, citing *Delaine v. Smith*, 8th Dist. Cuyahoga No. 103860, 2016-Ohio-5250, ¶ 17, citing *Wulf v. Opp*, 12th Dist. Clermont No. CA2014-10-074, 2015-Ohio-3285.

{¶ 13} In accordance with R.C. 2903.214(D)(3), a trial court must hold a full hearing and proceed as in a normal civil action. “[T]he petition is not evidence to be considered at that full hearing.” *M.J.W.* at ¶ 22, citing *Felton v. Felton*, 79 Ohio St.3d 34, 42-43, 679 N.E.2d 672 (1997). Therefore, “[t]he trier of fact must determine whether the preponderance of the evidence presented at the hearing establishes that the respondent violated R.C. 2903.211, the menacing-by-stalking statute.” *Id.*, citing R.C. 2903.214(C)(1).

{¶ 14} R.C. 2903.211 provides, in relevant part:

(A)(1) No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person.

* * *

(D)(1) “Pattern of conduct” means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents.

(2) “Mental distress” means any of the following:

(a) Any mental illness or condition that involves some temporary substantial incapacity;

(b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services.

{¶ 15} A petitioner must establish, by a preponderance of the evidence that the respondent will cause the petitioner to believe that the respondent will cause the petitioner mental distress or physical harm. *M.J.W.*, 8th Dist. Cuyahoga No.

108014, 2019-Ohio-3573, at ¶ 23, citing *M.D. v. M.D.*, 2018-Ohio-4218, 121 N.E.3d 819, ¶ 98-99 (8th Dist.). Furthermore,

“[a] court must take everything into consideration when determining if a respondent’s conduct constitutes a pattern of conduct, even if some of the person’s actions may not, in isolation, seem particularly threatening.” *Guthrie v. Long*, 10th Dist. Franklin No. 04AP-913, 2005-Ohio-1541, ¶ 12, quoting *Miller v. Francisco*, 11th Dist. Lake No. 2002-L-097, 2003-Ohio-1978.

Id. at ¶ 30.

{¶ 16} This court reviews the decision of whether or not to grant a CSPO for an abuse of discretion. *N.P. v. T.N.*, 8th Dist. Cuyahoga No. 106314, 2018-Ohio-2647, ¶ 20, citing *Williams v. Flannery*, 8th Dist. Cuyahoga No. 101880, 2015-Ohio-2040, ¶ 6. “Abuse of discretion” means an approach that is unreasonable, arbitrary, or unconscionable. *Reising v. Reising*, 8th Dist. Cuyahoga No. 104864, 2017-Ohio-2859, ¶ 9. Therefore, the question before this court is whether there was some competent, credible evidence to support each element of menacing by stalking. *Strausser v. White*, 8th Dist. Cuyahoga No. 92091, 2009-Ohio-3597, ¶ 33, citing *Reynolds v. White*, 8th Dist. Cuyahoga No. 74506, 1999 Ohio App. LEXIS 4454 (Sept. 23, 1999).

{¶ 17} In the instant case, in denying appellant’s petition for a CSPO, the trial court found that appellee had not directly or even indirectly contacted appellant. Specifically, after allowing the parties an opportunity to present testimony, the trial court stated: “I don’t make any finding that [appellant has] been directly or even indirectly contacted by [appellee].” (Tr. 29.)

{¶ 18} Appellant argues that the trial court abused its discretion when it applied the incorrect standard in its determination on her petition for a CSPO. In support of her argument in this regard, appellant argues that contact, whether direct or indirect, is not the proper inquiry when deciding whether or not a respondent has committed menacing by stalking.

{¶ 19} This court has noted that a trial court abuses its discretion when it applies the wrong standard of proof. *Reising*, 8th Dist. Cuyahoga No. 104864, 2017-Ohio-2859, at ¶ 15. In particular, in *Reising*, this court noted that the trial court did not apply the correct standard of proof when it determined a respondent's motion to terminate a CSPO. *Id.* at ¶ 16. The trial court applied the clear and convincing evidence standard rather than applying the preponderance of the evidence standard. As such, because the trial court improperly applied a higher standard of proof than the law required, this court found that the trial court abused its discretion. *Id.*

{¶ 20} Appellant also directs this court's attention to several cases from other appellate districts, *R.S. v. J.W.*, 9th Dist. Summit No. 28970, 2018-Ohio-5316; *Fondessy v. Simon*, 6th Dist. Ottawa No. OT-11-041, 2013-Ohio-3465; and *Hayton v. White*, 5th Dist. Ashland No. 04-COA-030, 2004-Ohio-6640. Appellant argues that these cases "were decided in conformity with the [menacing by stalking] statute based on a pattern of conduct, and not on whether a particular action did or did not constitute a direct 'contact' with [appellant.]" Appellant's brief at 7. In essence, appellant argues that the trial court applied a different standard than the above-cited cases.

{¶ 21} In the instant case, and unlike *Reising*, there is nothing in the record to suggest that the trial court applied the incorrect *standard of proof*. Pursuant to the menacing by stalking statute, R.C. 2903.211, the trial court was tasked with determining whether appellee engaged in a pattern of conduct and knowingly caused appellant to believe that appellee will cause physical harm to appellant or cause mental distress to appellant. Thus, although direct or indirect contact is not explicitly stated in the statute, we find this statement made by the trial court merely to be a threshold inquiry as to whether or not appellee *engaged* in a pattern of conduct towards appellant. In its determination as to whether or not to grant a petition for a CSPO, a trial court is tasked with determining whether a respondent *engaged* in any action towards a petitioner as required by the menacing by stalking statute. As such, a review of the trial court's judgment denying appellant's petition for a CSPO does not suggest that the trial court failed to consider whether appellee engaged in a pattern of conduct as required by R.C. 2903.211. Nor does the trial court's judgment suggest that the trial court applied an incorrect standard of proof.

{¶ 22} In support of her petition for a CSPO, appellant alleged that appellee called appellant's eight-year-old son's cell phone. Appellant also alleged that "anonymous texts" were sent to appellant's phone, presumably by appellee, but appellant was unclear as to who, if any of her family members, received these texts. Appellant further alleged that she received texts from her ex-boyfriend that actually were drafted and sent by appellee.

{¶ 23} In our review of the transcript, we find that appellant failed to present any evidence upon which the trial court could have concluded that appellee engaged in any conduct towards appellant. We find that the evidence presented by appellant consisted of general assertions. Although appellant testified that appellee had sent her various texts, appellant did not present screenshots or any copies of the text messages purportedly from appellee that would corroborate these allegations. Appellant simply alleged that appellee has caused her harm, and appellee had intermeddled in appellant's affairs without providing any supporting evidence. In this way, appellant's general assertions do not detail that there were any specific instances of conduct by appellee upon which the trial court could have considered as evidence that appellee engaged in a pattern of conduct constituting menacing by stalking.

{¶ 24} General assertions by a petitioner that a respondent caused them harm are insufficient for establishing that a respondent engaged in conduct that consisted of menacing by stalking. *M.J.W.*, 8th Dist. Cuyahoga No. 108014, 2019-Ohio-3573, at ¶ 23. This court, in *M.J.W.* at ¶ 31, noted that such general assertions were insufficient for establishing that a respondent engaged in a pattern of conduct as required by R.C. 2903.211. This court further noted that although the petitioner testified to one particular incident where the respondent approached and screamed at the petitioner, the petitioner spoke in generalizations about the respondent's behavior. *Id.* As a result, this court found that the trial court erred in granting the CSPO because the petitioner "failed to elaborate on a second incident that would

have caused him to believe [the respondent] would cause him mental distress or physical harm.” *Id.*

{¶ 25} Although not presented in her appellate brief, appellant argued at oral argument that the trial court failed to hold an adequate hearing on her petition for a CSPO. “An issue raised during oral argument for the first time and not assigned as error in an appellate brief is waived.” *Andreyko v. Cincinnati*, 153 Ohio App.3d 108, 2003-Ohio-2759, 791 N.E.2d 1025, ¶ 20 (1st Dist.), citing *Watkins v. Ohio Dept. of Human Servs.*, 10th Dist. Franklin No. 00AP-224, 2000 Ohio App. LEXIS 5018 (Oct. 31, 2000).

{¶ 26} Notwithstanding this procedural defect with regard to appellant’s new argument, pursuant to R.C. 2903.214(D)(3), on a petition for a CSPO, a trial court must hold a full hearing and proceed as in a normal civil action. Therefore, to the extent that appellant argues that she was not afforded an opportunity to cross-examine appellee or call appellee as a witness, we find no such requirements within R.C. 2903.214(D)(3). *See Welborn-Harlow v. Fuller*, 6th Dist. Wood No. WD-11-013, 2013-Ohio-54 (finding that the trial court in a CSPO proceeding did not abuse its discretion by not allowing the respondent to call a witness and affirming the trial court’s denial of the respondent’s request for a jury trial).

{¶ 27} Furthermore, there is nothing in the record to suggest that appellant was not afforded a full and fair opportunity to be heard on her petition for a CSPO. *Walker v. Walker*, 5th Dist. Stark No. 2010CA00311, 2011-Ohio-3933, ¶ 22. The trial court afforded both appellant and appellee an opportunity to present their

arguments related to appellant's petition for a CSPO. As such, we find nothing in the record to suggest that the trial court failed to hold a hearing as required by R.C. 2903.214(D)(3).

{¶ 28} Based on our review of the record, we find that appellant failed to present sufficient evidence upon which the trial court could have concluded that appellee had engaged in a pattern of conduct as required by the menacing by stalking statute. Therefore, we find that there existed no competent, credible evidence to support each element of menacing by stalking. As such, we find that the trial court did not abuse its discretion in denying appellant's petition for a CSPO.

{¶ 29} Accordingly, appellant's sole assignment of error is overruled.

{¶ 30} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

MARY J. BOYLE, P.J., and
LARRY A. JONES, SR., J., CONCUR