[Cite as *Curington v. Moon*, 2009-Ohio-3013.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

MARQUETTE CURINGTON	:	
	:	Appellate Case No. 22809
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CV-838
v.	:	
	:	
TIFFANY R. MOON	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 19th day of June, 2009.

. . . . . .

MARQUETTE S. CURINGTON, Confidential Address
Plaintiff-Appellee, *pro se*

DANIEL J. O'BRIEN, Atty. Reg. #0031461, 1210 Talbott Tower, 131 North Ludlow Street, Dayton, Ohio 45402
Attorney for Defendant-Appellant

. . . . . .

FAIN, J.

{¶ 1} Defendant-appellant Tiffany Moon appeals from a Civil Stalking Protection Order entered against her. Moon contends that the trial court prejudicially erred in entering the stalking order, because the Vandalia Municipal Court has primary

jurisdiction due to a prior criminal action between the parties. Moon also contends that R.C. 2903.211 is unconstitutional, because it is void for vagueness and does not allow reasonable persons to know in advance what actions are prohibited. Finally, Moon contends that the trial court prejudicially erred in finding that she engaged in a "pattern of conduct" that would justify issuance of a civil protection order.

{¶ 2} We conclude that the trial court did not prejudicially err in entering a civil protection stalking order in favor of the petitioner. Moon failed to raise appropriate objections to the magistrate's decision, and did not file a transcript before the trial court ruled on the objections. There is also no plain error, because this case does not involve exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process. Even if Moon's arguments are considered, they are without merit. The court that previously convicted Moon of telephone harassment did not have jurisdictional priority over the case. R.C. 2903.211(D)(1) specifically permits actions that are the subject of prior convictions to be used in proving menacing by stalking, which is the basis of the civil protection order entered in this case.

{¶ 3} We further conclude that R.C. 2903.211 is not void for vagueness; a person of ordinary intelligence would be able to conform his or her behavior to the requirements of the statute. Finally, Moon's failure to provide a transcript of the hearing for the trial court or for appellate review requires that the magistrate's findings of fact be accepted as established. The established facts show a pattern of conduct justifying issuance of a civil protection order. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 4} In January 2008, plaintiff-appellee Marquette Curington filed a petition in the trial court, requesting a civil protection order on behalf of herself, her husband, Michael Curington, her daughter, Maliya Curington, and her step-daughter, Michelle Curington. Marquette alleged that the respondent, Tiffany Moon, had been tried and convicted in Vandalia Municipal Court for telephone harassment. Marquette further alleged that Moon had repeatedly harassed her in various ways, and that the pattern had continued to escalate.

{¶ 5} The trial court granted an ex parte protection order, and then held a hearing before a magistrate in February 2008. The magistrate's decision indicates that testimony was taken at the hearing from the following parties: Marquette and Michael Curington, and Tiffany Moon. Following the hearing, the magistrate filed a decision, indicating the following factual findings:

{¶ 6} At some point in the past, Michael and Moon had a relationship. Marquette testified that she had received several telephone calls from Moon on August 26, 2007, who said that her brother would "fuck up" Michael Curington. Marquette contacted the Trotwood police, who then spoke with Moon. On the day of the original calls, the police told Marquette that Moon had agreed not to make any more calls to Marquette. However, Moon called Marquette at work the next day and said her brother would "fuck up" Marquette and her husband, Michael. Michael testified that he overheard a call from Moon on August 27, 2007, in which Moon threatened to "fuck up" both Michael and Marquette.

{¶ 7} Marquette contacted the Vandalia police, and filed charges against Moon for telephone harassment. After Moon was convicted of this charge, the court issued a "no contact" order. Subsequently, in January 2008, Marquette saw Moon in a parking lot at a skating rink. Moon had contact with several persons in a vehicle with out-of-state license plates, and eventually went into the rink. Because Marquette was concerned about her safety, she did not enter the skating rink that day. Michael also saw Moon in February 2008, at a Speedway gas station. At that time, Moon told Michael that her brother would kill both Michael and Marquette.

{¶ 8} At the hearing, Moon denied making any threats. She stated that she had filed domestic violence charges against Michael, and that a protection order had been issued by the Montgomery County Common Pleas Court.

{¶ 9} After hearing the evidence, the magistrate concluded that Marquette had proven by a preponderance of the evidence that Moon had engaged in a pattern of conduct causing Marquette to reasonably fear physical harm. The magistrate issued a civil protection order against Moon and in favor of Marquette and her family. The order prohibited Moon from abusing the persons in the order by harming, attempting to harm, threatening, following, or stalking them. Moon was also required to stay 500 feet away from the protected persons wherever they were found, and wherever she knew or should know they were likely to be.

{¶ 10} Moon, acting *pro se*, filed objections to the magistrate's decision. However, she did not file a transcript of the hearing. The trial court subsequently overruled the objections, adopted the magistrate's decision, and entered a civil protection order. Moon appeals from the grant of the civil protection order.

II

{¶ 11} Moon has presented a sole assignment of error and three issues. Moon's sole assignment of error is as follows:

{¶ 12} "THE TRIAL COURT PREJUDICIALLY ERRED IN ENTERING A CIVIL STALKING ORDER AGAINST APPELLANT."

A

{¶ 13} The First Issue Moon raises under her sole assignment of error is that:

{¶ 14} "THE TRIAL COURT JUDGMENT SHOULD HAVE BEEN DISMISSED BECAUSE THE ISSUE WAS WITHIN THE PRIMARY JURISDICTION OF THE VANDALIA MUNICIPAL COURT AND THIS COURT (MONTGOMERY COUNTY COMMON PLEAS) SHOULD HAVE DEFERRED TO VANDALIA MUNICIPAL COURT AND REQUIRED PETITIONER TO EXHAUST HER REMEDIES THERE."

{¶ 15} Under this issue, Moon contends that the trial court should have deferred to the Vandalia Municipal Court, because the Vandalia Municipal Court had previously entered an order preventing Moon from having contact with Marquette, or from facilitating any third party contact with Marquette or Marquette's work place. Moon argues that Vandalia has primary jurisdiction or jurisdictional priority over the dispute, and that the trial court should have deferred to the Vandalia court.

{¶ 16} As a preliminary point, we note that Moon did not raise this argument in the trial court. In objecting to the magistrate's report, Moon stated that she had been convicted of telephone harassment in Vandalia Municipal Court. Moon then contended

only that there was no need for a protection order since a "no contact" order was already in place, and she would be subject to further prosecution if she violated the terms of the order. Moon also failed to present evidence or court documents pertaining to the alleged prior conviction.

{¶ 17} Civ. R. 53(D)(3)(b)(iv) states that:

{¶ 18} "Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b)."

{¶ 19} Based on this rule, we have refused to consider issues that parties fail to raise in objecting to a magistrate's decision, unless plain error is demonstrated. See, *e.g.*, *Maier v. Shields*, Miami App. No. 07-CA-21, 2008-Ohio-3874, at ¶ 50. The plain error doctrine is not favored in civil appeals, and "may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, syllabus.

{¶ 20} We do not find exceptional circumstances in the present case affecting the fairness or integrity of the judicial process. Furthermore, even if we were to consider Moon's arguments, we would find no error.

{¶ 21} The trial court found that Moon engaged in a pattern of conduct that caused Marquette to fear for her physical safety. The court recited evidence to support

its finding, and clearly credited the testimony of Marquette and Michael. We must accept these findings of fact as established, because Moon failed to file a transcript before the trial court ruled on her objections. See, *e.g.*, *Maier v. Shields*, Miami App. No. 07-CA-21, 2008-Ohio-3874, at ¶ 17, and *Adkinson v. Southtown Heating & Cooling, Inc*., Montgomery App. No. 22668. 2009-Ohio-527, at ¶ 13. Moon also failed to provide a transcript of the trial court proceedings for appellate review.

{¶ 22} There is also no error concerning jurisdictional priority. The jurisdictional priority rule provides that:

{¶ 23} " ' " [a]s between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of prior proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties." ' * * * ' "In general, the jurisdictional-priority rule applies when the causes of action are the same in both cases, and if the first case does not involve the same cause of action or the same parties as the second case, the first case will not prevent the second." ' " *State, ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs*., 120 Ohio St.3d 372, 376, 2008-Ohio-6253, at ¶ 16 (citations omitted).

{¶ 24} "The jurisdictional-priority rule is inapplicable here because the common pleas court case involves different parties and different causes of action; the Blade's mandamus action [in the Supreme Court of Ohio] is premised upon its August 2007 requests for public records and the alleged deletion of e-mails, whereas the common pleas court complaint [brought by six residents of the county] does not mention any records requests or destruction of records." Id.

{¶ 25} In this case, as in *State, ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of*

Commrs., supra, the latter-filed action at least arguably involves different parties and different causes of action.

{¶ 26} Furthermore, the Ohio Revised Code appears to contemplate that the civil stalking protection orders and prosecutions for Menacing by Stalking, under R.C. 2903.211, are not mutually exclusive remedies. Marquette's request for a civil protection order was sought pursuant to R.C. 2903.214(C)(1), which allows individuals to seek civil protection orders based on allegations that a respondent has engaged in a violation of R.C. 2903.211 against the persons or persons to be protected. The trial court concluded that Moon had engaged in conduct violating R.C. 2903.211(A)(1), which provides that "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."

{¶ 27} A "pattern of conduct" is defined under R.C. 2903.211(D)(1) as "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*." (Emphasis supplied). The emphasized language specifically permits actions that may have been the subject of prior convictions to be used in proving menacing by stalking.

{¶ 28} This is logical, because petitions for a civil protection order based on menacing by stalking could be based on conduct that gave rise to a prior proceeding, and may also involve conduct that did not result in criminal charges. In fact, this is the situation in the present case, as two incidents (at the skating rink and at the Speedway gas station) would not have been part of the criminal case that was based on telephone harassment. These latter events occurred after the criminal charges were apparently

filed in August 2007, and would not, in any event, fit within the requirement that the causes of action in the first and second case are the same.

{¶ 29} The penalties provided in a criminal action may also not be as broad as those encompassed by a civil protection order. For example, if we assume the truth of Moon's unverified statements about the criminal order, it does not contain distance requirements, and does not apparently protect the other persons covered by the civil protection order.

{¶ 30} Moon's argument additionally fails because she did not provide the trial court with documentation about the prior criminal case. "A trial court may not take judicial notice of earlier proceedings, either in its own court or another court, except for proceedings in the immediate case under consideration. * * * 'The rationale for this holding is that, if a trial court takes judicial notice of a prior proceeding, the appellate court cannot review whether the trial court correctly interpreted the prior case because the record of the prior case is not before the appellate court.' " *Dombelek v. Ohio Bur. of Workers' Comp*., 154 Ohio App.3d 338, 346, 2003-Ohio-5151, at ¶ 26 (citations omitted). See, also, *State v. Brewer*, 121 Ohio St.3d 202, 208, 2009 -Ohio- 593, at ¶ 22, n. 3.

{¶ 31} Accordingly, the First Issue is without merit.

B.

{¶ 32} Moon's Second Issue under her sole assignment of error is that:

{¶ 33} "THE MENACING BY STALKING STATUTE R.C. 2903.211 IS UNCONSTITUTIONAL AS VIOLATIVE OF DUE PROCESS OF LAW IN THAT IT IS

'VOID FOR VAGUENESS' AND DOES NOT ALLOW A REASONABLE PERSON TO KNOW IN ADVANCE WHAT IS LAWFUL AND WHAT IS PROHIBITED AND IMPINGES UPON AND/OR INHIBITS THE EXERCISE OF FREE SPEECH."

{¶ 34} Under this issue, Moon contends that R.C. 2903.211(A)(1) is void for vagueness, because it requires an individual to read the mind or emotions of another person. Moon contends that a person of ordinary intelligence cannot know what another person may believe is intended, especially whether the intention is to cause mental distress.

{¶ 35} "[A]n unconstitutionally vague statute is one which either forbids or requires the doing of an act in terms so vague that individuals of common intelligence must necessarily guess at its meaning and differ as to its application. * * * The vagueness doctrine requires a statute to give fair notice of offending conduct. * * * Moreover, in order to be declared unconstitutionally vague, the statute must lack explicit standards such that it permits arbitrary and discriminatory enforcement." *State v. Werfel*, Lake App. Nos. 2002-L-101, 2002-L-102, 2003-Ohio-6958, at ¶ 59 (citations omitted).

{¶ 36} Courts must employ the following three-part analysis when analyzing statutes under the void-for-vagueness doctrine:

{¶ 37} "First, the wording of the statute must provide fair warning to the ordinary citizen so that citizens may conform their behavior to the requirements of the statute. * * * Second, the wording of the statute must preclude arbitrary, capricious and discriminatory enforcement. * * * Finally, the wording of the statute should not unreasonably impinge or inhibit fundamental constitutionally protected freedoms." *State v. Barnhardt*, Lorain App. No. 05CA008706, 2006-Ohio-4531, at ¶ 7 (citation omitted).

{¶ 38} Both *Werfel* and *Barnhardt* concluded that R.C. 2903.211 is not void for vagueness, because the statute contains a scienter requirement. *Werfel*, 2003-Ohio-6958, at ¶ 62, and *Barnhardt*, 2006-Ohio-4531, at ¶ 12. The Eleventh District Court of Appeals noted in *Werfel* that:

{¶ 39} "The level of intent required by a statute can mitigate any perceived vagueness, both facial and as applied. R.C. 2903.211 requires that the offender, 'knowingly cause another to believe that the offender will cause physical harm to the other person or cause mental distress to the other person.' 'Knowingly' is one of the culpable mental states defined in R.C. 2901.22(B), which states: 'A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

{¶ 40} "The scienter requirement vitiates any claim that the statute's purported vagueness could mislead a person of ordinary intelligence into misunderstanding what is prohibited. Viewing the statute in its entirety, we hold that a person of ordinary intelligence would be able to discern what conduct is prohibited. The statute, criminalizes conduct only when taken with the requisite mental state. * * * Moreover, the statute sets forth sufficient guidelines for its enforcement. Therefore, R.C. 2903.211 is not void for vagueness." 2003-Ohio-6958, at ¶ 61-62.

{¶ 41} We agree with the above statements. A person of ordinary intelligence would understand what R.C. 2903.211 prohibits, and the statute does not impinge on constitutionally guaranteed freedoms. Freedom of speech does not include threats to "fuck up" or to kill other people.

{¶ 42} Moon's Second Issue is without merit.

C

{¶ 43} Moon's Third Issue under her sole assignment or error is as follows:

{¶ 44} "THE TRIAL COURT PREJUDICIALLY ERRED IN FINDING THAT APPELLANT ENGAGED IN A 'PATTERN OF CONDUCT' WITHIN THE STATUTE."

{¶ 45} Under this issue, Moon contends that the trial court's decision is not supported by the evidence, because telephone calls without conduct are not "incidents" and the incident at the skating rink was allegedly a figment of Marquette's imagination.

{¶ 46} We are required to accept the magistrate's findings of fact, because Moon failed to file a transcript before the trial court ruled on her objections. *Maier*, 2008-Ohio-3874, at ¶ 17. The magistrate's factual findings are, therefore, accepted as established, and warrant issuance of a civil protection order. In addition, Moon failed to file a transcript at the appellate level. "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, we have nothing to pass upon and, thus, we have no choice but to presume the validity of the lower court's proceedings and affirm." *Shirley v. Kruse*, Greene App. No. 2006-CA-12, 2007-Ohio-193, at ¶ 22.

{¶ 47} Accordingly, Moon's Third Issue is without merit.

III

{¶ 48} All of Moon's issues presented in support of her sole assignment of error having been found to be without merit, her sole assignment of error is overruled, and the judgment of the trial court is Affirmed.

. . . . . .

DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

Marquette S. Curington
Daniel J. O'Brien
Hon. A. J. Wagner