

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ANGELA DUPAL

Appellee-Petitioner

-VS-

KEVIN SOMMER

Appellant-Respondent

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. W. Scott Gwin, J.

Hon. Julie A. Edwards, J.

Case No. 2009CA00032

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 2008MI00507

JUDGMENT:

Reversed

DATE OF JUDGMENT ENTRY:

November 2, 2009

APPEARANCES:

For Appellee-Petitioner

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Farmer, P.J.

{¶1} On November 24, 2008, appellee, Angela Dupal, filed a petition for a civil stalking protection order against appellant, Kevin Sommer. The two had worked together. After a falling out, appellee complained of receiving subtle threats and numerous text messages and telephone calls from appellant.

{¶2} An ex parte hearing before a magistrate was held on November 24, 2008. By order of protection filed same date, the magistrate granted appellee a temporary civil protection order as against appellant.

{¶3} A full hearing before a magistrate was held on December 3, 2008. By order of protection filed same date, the magistrate granted appellee a full civil protection order as against appellant, in effect for five years or until December 3, 2011. The magistrate filed findings of fact and conclusions of law on December 23, 2008. Appellant filed objections. By judgment entry filed January 23, 2009, the trial court adopted the magistrate's decision.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT ERRED IN DENYING APPELLANT A FULL HEARING."

II

{¶6} "THE TRIAL COURT ERRED IN GRANTING APPELLEE'S PETITION FOR A CIVIL STALKING PROTECTION ORDER AS SUCH WAS AGAINST THE

MANIFEST WEIGHT OF THE EVIDENCE AND AN ABUSE OF THE TRIAL COURT'S DISCRETION."

I

{¶7} Appellant claims he was denied a full hearing. We disagree.

{¶8} R.C. 2903.214(D)(2)(a) states "[i]f the court, after an ex parte hearing, issues a protection order described in division (E) of this section, the court shall schedule a full hearing for a date that is within ten court days after the ex parte hearing. The court shall give the respondent notice of, and an opportunity to be heard at, the full hearing." Appellant argues at the full hearing on December 3, 2008, he was denied the opportunity to cross-examine the sole witness, and his exhibits were not accepted into evidence.

{¶9} At the commencement of the hearing, the magistrate informed the parties that the hearing would be "conducted in accordance with the Rules of Civil Procedure" and each party would be afforded the right to cross-examine the witnesses. T. at 5-6. In actual fact, the parties did not cross-examine each other and appellant did not cross-examine appellee's only witness, Joel Bridges. Neither party requested it and neither party was denied the right.

{¶10} We note the magistrate demonstrated extreme patience in letting each party testify in a stream of consciousness manner for over sixty pages of testimony. The magistrate was specifically interested in any contact between the parties after June 2008:

{¶11} "THE COURT: She no longer had your truck, no longer was renting a vehicle for her, you no longer were renting an apartment for her. There was absolutely

no reason to have any contact with her. Did you have contact with her after June of '08?

{¶12} "MR. SOMMER: No, ma'am. June 22nd was the last I have ever called her.***" T. at 51.

{¶13} The magistrate later explained the following:

{¶14} "And frankly, the only thing that I am interested in is the events that occurred after June of 2008 because everything that occurred before then, obviously it was a mutual, you know, a mutual understanding between the two of you, were both having contact. But if there has been contact since June of 2008, if you have been calling her phone, if you have been text messaging her, if you have been sitting in the parking lot following her in a car, I want to know those details from June of 2008 to today. Because if it has been occurring it needs to stop." T. at 62-63.

{¶15} Mr. Bridges, petitioner's boyfriend, testified he witnessed the phone calls and "harassing text messages." T. at 10. He also acknowledged seeing appellant sitting outside in the parking lot at her residence. Id. There was no time frame as to when he observed these events. His testimony was therefore immaterial. We do not find any error in the magistrate failing to specifically ask appellant if he wanted to cross-examine Mr. Bridges.

{¶16} Appellant never requested the right to cross-examine appellee. At the conclusion of the hearing, the magistrate gave appellant the last opportunity to present anything, and appellant responded, "I would like nothing more than to end this as quickly as possible, Your Honor." T. at 67.

{¶17} We fail to find any lack of due process to appellant. Appellant was offered plenty of time to explain his position. We find the cross-examination of appellee would have been of little avail given the tenor of their relationship.

{¶18} As for appellant's exhibits, they consisted of letters and notes prior to June of 2008, and unauthenticated telephone records with unidentified telephone numbers. T. at 54-56.

{¶19} It is unfortunate that some parties preceed pro se, but the trial court/magistrate is not there to try their case or to exercise their rights for them.

{¶20} Upon review, we find appellant was afforded a full hearing.

{¶21} Assignment of Error I is denied.

II

{¶22} Appellant claims the trial court's determination to adopt the magistrate's decision was not supported by a preponderance of the evidence. We agree.

{¶23} A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson*, 66 Ohio St.3d 610, 1993-Ohio-9.

{¶24} R.C. 2903.214 governs protection orders. Subsection (C) states the following:

{¶25} "A person may seek relief under this section for the person, or any parent or adult household member may seek relief under this section on behalf of any other

family or household member, by filing a petition with the court. The petition shall contain or state all of the following:

{¶26} "(1) An allegation that the respondent engaged in a violation of section 2903.211 of the Revised Code against the person to be protected by the protection order or committed a sexually oriented offense against the person to be protected by the protection order, including a description of the nature and extent of the violation;

{¶27} "(2) If the petitioner seeks relief in the form of electronic monitoring of the respondent, an allegation that at any time preceding the filing of the petition the respondent engaged in conduct that would cause a reasonable person to believe that the health, welfare, or safety of the person to be protected was at risk, a description of the nature and extent of that conduct, and an allegation that the respondent presents a continuing danger to the person to be protected;

{¶28} "(3) A request for relief under this section."

{¶29} R.C. 2903.211 governs the offense of menacing by stalking. Subsections (A)(1) and (D)(1) state the following, respectively:

{¶30} "(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.

{¶31} "(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.***"

{¶32} In the magistrate's findings of fact filed on December 23, 2008, the magistrate characterized the relationship between the parties as a "mutual relationship

or arrangement from December 2006 through December 2008." See, Finding of Fact No. 2. The relationship changed in January 2008, "although Petitioner was still residing in the apartment rented by Respondent." See, Finding of Fact No. 6. Appellant's "stalking behavior started in January 2008 after her son was born and after Respondent learned that Joel Bridges was now living with Petitioner." See, Finding of Fact No. 7. The magistrate concluded the relationship "between the parties changed into a bizarre obsession that Respondent had with Petitioner." Conclusion of Law No. 5.

{¶33} Appellant and appellee met at work in December of 2006. T. at 18. Appellee quit work in May or June of 2007. T. at 21. Appellant testified in June of 2007, he permitted appellee to live in his apartment rent free as he was staying at his mother's house the majority of the time. T. at 22-23, 24. All of his personal belongings remained in the apartment. When appellant returned to the apartment to pay some bills, he realized checks were missing from his checkbook. T. at 23-24. Upon investigation, appellant discovered appellee had cashed two checks for approximately \$500. T. at 24. Appellant let it go. T. at 25. Appellant had rented a vehicle for appellee to drive. T. at 22. Following the funeral of a co-worker at the beginning of July 2007, appellant observed appellee's boyfriend, Mr. Bridges, driving the vehicle. T. at 25. Appellant told appellee Mr. Bridges was not to drive the vehicle as he did not have a license or permission to drive the rental. T. at 26. Again, appellant discovered two more missing checks. Id. Again, appellant let it go. T. at 27. Thereafter, at the end of July 2007, appellee was arrested on outstanding warrants and called appellant to bail her out. T. at 28-31. Appellant posted \$1,500 of a \$35,000 bond and managed to get appellee out of jail. T. at 31. Once again, appellant put appellee up in his apartment and paid for a

rental car. T. at 34. Because he was running out of money, appellant stopped the rental car and permitted appellee to use his vehicle. T. at 36. Sometime in November or December of 2007, appellee told appellant she had cancer. T. at 38. Appellant gave appellee about \$350 every two weeks to pay for her "treatments." T. at 39. In January of 2008, appellant went to the apartment and observed Mr. Bridges driving away in the vehicle he had loaned to appellee. T. at 40. When appellee opened the door, she had a baby in her arms. T. at 40-41. Appellant never knew appellee had been pregnant as he thought she had cancer. T. at 42. In March of 2008, appellant "decided to take my vehicle back because I could see the end of whatever relationship coming" and informed appellee that she would have to leave his apartment. T. at 44. At that time, appellee returned appellant's vehicle. T. at 45. Thereafter, appellant once again loaned the vehicle to appellee so she could start moving her belongings out of the apartment. T. at 46. Throughout this entire time, appellant was still giving appellee \$350 every two weeks. T. at 47. At the end of May 2008, appellee finally left the apartment, and appellant gave appellee \$1,200 to buy a vehicle and pay for rent and asked for the return of his vehicle. T. at 47-48. Appellee did not refuse, but "made it very hard on me to get that truck back." T. at 48. On June 7, 2008, appellant admitted to repeatedly sending voicemail and text messages to appellee for the return of his truck. T. at 49. Appellee finally agreed to return the truck at approximately 11:00 p.m. Id. Appellant called appellee to return some of her personal belongings which were left in the truck, but appellee never responded. T. at 50. Appellant testified June 22, 2008 was the last time he had contacted appellee. T. at 51.

{¶34} Appellee testified appellant was "paying" her to obtain cocaine for him. T. at 58. Appellee freely admitted to "using" appellant, manipulating him so he would bond her out of jail, and purposefully taking "advantage" of him and leading "him on for a little bit." T. at 60. Appellee stated the "deal was to continue getting him his coke and to stay away from Joel and basically he wanted to control and dictate my life." T. at 60-61. Appellee did not deny taking blank checks from appellant and cashing them. She also did not deny telling appellant she had cancer.

{¶35} At this point in the testimony, the magistrate stated she was only interested in what occurred after June 2008 as cited supra. T. at 62-63. In response to the magistrate's request to focus on what occurred after June 2008, appellee stated, "I had initially wanted contact to stop in January after my son was born. Because that's when things - - that's when his text messages and his - - that's when the stalking issues started because he was mad." T. at 63. Appellee testified to harassing telephone calls and text messages, including subtle threats by appellant to turn her in to her probation officer for contacting Mr. Bridges in violation of a no-contact order, up to June 2008 when she returned the truck to appellant. T. at 63-66. Appellee testified appellant was sitting in the parking lot of her new apartment complex when she "took the keys and I just threw them at him and I said get out. Don't ever come back here again. You're causing scenes where my child lives. I live here. Residents are looking at me. You are calling the police. It's ridiculous. Enough is enough." T. at 66. This occurred on June 7, 2008. T. at 49. Appellee did not testify to anything happening after this date.

{¶36} The trial court then asked appellant if he had anything else to say in response. T. at 66. Apparently appellant was laughing because the trial court said,

"You know, I'm glad that you think that these proceedings are funny, but you have now taken up an hour and 15 minutes of my time and I don't think it's very funny, Mr. Sommer." T. at 66-67. Appellant responded that he "would like nothing more than to end this as quickly as possible," and "I'm sorry, there had been no contact." T. at 67.

{¶37} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 1997-Ohio-260.

{¶38} "[B]ased upon the testimony and the evidence that the Court has heard and listening to the testimony, watching the demeanor of the Defendant" the magistrate clearly chose to reject appellant's protestations of no contact and instead believed appellee in granting the civil protection order. T. at 67.

{¶39} In her petition filed November 24, 2008, appellee alleged, "[t]he respondent and I worked together at LSI Graphics Solutions. The respondent was my supervisor. The respondent started showing stalking behavior toward me a few weeks after I was hired." This "stalking behavior" allegedly occurred in 2006 at the start of the relationship. T. at 18. She further alleged the following:

{¶40} "He has called my phone constantly, sit (sic) outside my house and sent me numerous text messages. I have made several reports with the Canton Police Department and Perry Police Department. I have asked the respondent to stop contacting me and he continues to contact me. I had to move from my former residence because the respondent would not leave me alone."

{¶41} No timelines are indicated in the petition. Appellant indicated appellee received his truck back on June 7, 2008 and he last contacted appellee on June 22, 2008 to return some of her personal belongings. There is nothing in the record to establish any contact or threatening behavior from appellant between June 22, 2008 and the time of the filing of the petition, November 24, 2008.

{¶42} In cases such as these, demeanor and attitude are very important and it is very true that these do not "translate well on the written page." However, we find there is no evidence in the record to establish the mandates of R.C. 2903.211 and R.C. 2903.214. The allegations in the petition are very broad and allege "stalking behavior" almost two years before the filing of the petition. Appellee consented to the relationship throughout 2007 and only testified to harassing text messages and telephone calls starting in January of 2008. However, appellee continued to reside in appellant's apartment rent free until May 2008, and retained possession of his truck until June 7, 2008. No evidence was presented to establish a "pattern of conduct" after June 2008.

{¶43} Upon review, we find the trial court erred in granting appellee a full civil protection order as against appellant.

{¶44} Assignment of Error II is granted.

{¶45} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby reversed.

By Farmer, P.J.

Gwin, J. and

Edwards, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Julie A. Edwards

JUDGES

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JUDGES