[Cite as *Clark v. Ellinwood*, 2011-Ohio-145.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Kelly J. Clark

Appellee

v.

Kathleen Ellinwood

Appellant

Court of Appeals No. L-09-1315

Trial Court No. CI0200906442

DECISION AND JUDGMENT

Decided: January 14, 2011

* * * * *

Stephen D. Long, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Respondent-appellant, Kathleen Ellinwood, appeals the November 19, 2009 judgment of the Lucas County Court of Common Pleas granting petitioner-appellee, Kelly Clark, a five-year civil stalking protection order ("CSPO"). For the reasons that follow, we affirm.

{¶ 2} On August 24, 2009, appellee filed a petition for a CSPO pursuant to R.C. 2903.214. Appellee stated the basis for the petition as follows:

{¶ 3} "Started in 2007, $8,000 in damage to cars with arrest made. To this day, she follows me in my truck or my police cruiser flipping me off, yelling. She sits down the road and stares at my home, calls and hangs up on phone. Out on traffic stop she came close to me- then leaving a message on boyfriend's phone wishing me dead and saying it was her that flew by closely; and calling my place of employment bothering my chief with personal business."

{¶ 4} An emergency ex parte hearing was held on August 24, 2009. At the hearing, appellee essentially restated the allegations in her petition. The court granted the order and set the matter for a full hearing.

{¶ 5} In the interim, appellant took the depositions of appellee and Lake Township Police Chief Edward Mark Hummer. The depositions were filed with the court. At the November 18, 2009 hearing, the following evidence was presented. Appellee testified that she is a Lake Township police officer. In June 2007, appellant damaged her personal vehicles that were parked in her driveway; following the crime appellant turned herself in. The repair costs totaled $8,000.

{¶ 6} Appellee testified that while the criminal charges were pending, appellant called her home at 2:00 a.m., yelling profanities and asking where her "f-ing" husband was and to get him out of her bed. Approximately two months later, in 2008, at approximately 5:30 a.m. appellant parked in appellee's driveway with her infant daughter.

Appellee testified that she went out to talk with her; appellee allowed appellant to voice her opinion of her for approximately 45 minutes.

{¶ 7} According to appellee, the next incident occurred in February 2009. Appellee was at a traffic stop on Interstate 280 when she felt a vehicle pass her too closely; she did not see the driver. Shortly thereafter, appellee's boyfriend, appellant's husband, received a message that appellant just saw his girlfriend out on 280 and that she hoped appellee got run over like a dead raccoon.

{¶ 8} Subsequently, appellee testified that appellant tailgated her from appellee's driveway to Toledo and that she was "yelling, screaming, flipping [appellee] off." Appellee testified that it happened a second time while she was in her police cruiser and that appellant again was yelling, screaming, and making obscene gestures.

{¶ 9} Following the issuance of the temporary protection order, appellee testified that on one occasion she was exiting the Oregon fire station parking lot, which is a block and one-half from her home, when she observed appellant drive right beside her and go along the back side of her home. Appellee stated that on the morning of the hearing she observed appellant within two blocks of her home looking at her. Appellee stated that she was requesting a five-year protection order.

{¶ 10} During cross-examination, appellant's counsel proceeded to question appellee about her deposition testimony that was filed with the court. At that point, it was revealed that the court did not have appellee's transcript or the transcript of Chief Hummer's deposition. They were then located.

{¶ 11} Appellee was questioned regarding her allegation that appellant calls her home continuously. Appellee acknowledged that in 2007 appellant made at least two telephone calls. Appellee stated that appellant never verbally threatened her and that she could not hear what appellant was screaming at her from her vehicle.

{¶ 12} Regarding the I-280 incident, appellee stated that after feeling the car "flying by closely" she looked up but did not recognize the vehicle. Appellee acknowledged that she knew the vehicles driven by appellant. Appellee testified that she sought the CSPO because she does not trust appellant. Appellee agreed that she was concerned that appellant would harm her.

{¶ 13} Appellant was first cross-examined. Appellant testified that she called appellee's cellular phone once and her home telephone once. She admitted that she telephoned her husband 35 times during the same time frame. Appellant agreed that in August 2008, she was parked in appellee's driveway. Appellant stated that she was there because she believed that her husband was in appellee's home.

{¶ 14} Appellant denied tailgating appellee and stated that she probably was talking out loud; she denied swearing. Appellant admitted that in February 2009, she drove by appellee who was making a traffic stop on I-280. Appellant agreed that she left the message on her husband's voicemail; however, appellant stated that she was driving southbound while appellee had the vehicle stopped on the northbound side.

{¶ 15} During direct examination, appellant produced her cellular phone records for the date that appellee alleged that she telephoned repeatedly. The records indicated

two calls: the first was made at 12:46 a.m. to appellee's cell phone; the second was made at 12:48 a.m. to appellee's home phone.

{¶ 16} Appellant denied ever verbally threatening appellee. Appellant stated that she did have a 20 minute conversation with appellee where she was able to express her feelings. Appellant stated that it was a civil conversation. Appellant admitted speaking with Chief Hummer; she asked whether the police department had a code of ethics. Chief Hummer indicated negatively but did copy the policies and procedures onto a CD that appellant picked up. Appellant did explain her concerns to Chief Hummer; she denied specifically naming appellee.

{¶ 17} During re-cross examination, appellant was again questioned about the I-280 incident and phone message where she stated that she wished that appellee would become road pizza. Appellant stated that she does not really wish anything for appellee, she destroyed her family. When questioned about whether appellant wished to "get" appellee, appellant stated that "There's nothing left to get."

{¶ 18} Lake Township Police Chief Edward Mark Hummer testified next. Chief Hummer stated that after the June 2007 incident where appellee's personal vehicles were damaged he had appellee return the police cruiser for a few weeks to ensure that it would not be damaged. Chief Hummer testified that in August 2009, appellee came to him and stated that she was having problems with appellant and that she had filed for a civil protection order.

{¶ 19} Chief Hummer testified that appellant telephoned him and asked if the department had a code of moral conduct. Appellant then requested a copy of the policies and procedures which Chief Hummer had copied and appellant picked it up at the office. Chief Hummer stated that he was not bothered by the telephone call and that appellant was polite. Chief Hummer did not feel that appellant was threatening appellee. Appellant did explain the circumstances of her call.

{¶ 20} At the conclusion of the testimony and the arguments of the parties the court granted the CSPO. The court stated:

{¶ 21} "The Court is going to grant the civil protective order. The Court finds that the respondent has damaged vehicles belonging to the petitioner. There have been several phone calls made, two are documented by petitioner, exhibit number one, came to the petitioner's house for a confrontation at one time, called the petitioner's employer and advised the employer of her moral charge.

{¶ 22} "There is absolutely no reason whatsoever to call the chief of police to say what the moral charge is and there's an affair going on. This is another indication of the irrational behavior.

{¶ 23} "Comment to her husband about hoping she becomes road kill, knowing it's going to get back to the officer is totally irrational behavior. Whether she was yelling, whether she was following too closely, whether she was saying things to the officer, the Court's not taking that into consideration.

{¶ 24} "Also, the Court's taken into consideration the potential violation of the civil protective order on two different occasions that was testified to. The civil protective order says 500 feet and two blocks, so she was well, according to the testimony, within that area.

{¶ 25} "The Court is going to grant the civil protective order for a five year period. The Court is also going to order the respondent to receive anger management treatment within the next 30 days and verify to the Court that that anger management program has been completed. * * *."

{¶ 26} The court's judgment was journalized on November 19, 2009 wherein the court stated that, "the [respondent] has damaged property belonging to the petitioner, has made phone call[s] of a threatening nature, has called the petitioner's employer to question her moral character, and has violated the ex parte entry on 2 occasions since the order was granted on 8/24/09." This appeal followed.

{¶ 27} Appellant now raises two assignments of error for our review:

{¶ 28} "Assignment of Error I: Clark failed to meet her burden of proof by establishing that Ellinwood acted with the requisite intent to prove menacing by stalking, and by failing to prove she suffered mental distress or any risk of physical harm. And, the trial court's decision failed to comply with the statutory and legal mandates.

{¶ 29} "Assignment of Error II: Ellinwood's right to due process was violated both in how the order was imposed, and by the length of the order."

{¶ 30} We will first address the appropriate standard of review for an appeal of the grant or denial of a CSPO. In *Gruber v. Hart*, 6th Dist. No. OT-06-011, 2007-Ohio-873, this court, following several Ohio appellate courts, determined that where the challenge is to the terms of a CSPO, the appellate court applies an abuse of discretion standard. Id. at ¶ 17. However, where the challenge is to the issuance of the order, a manifest weight of the evidence standard of review is applied. Id.

{¶ 31} In appellant's first assignment of error, she contends that the trial court erred in its issuance of the order, that the order is against the manifest weight of the evidence and not supported by sufficient evidence, and that the duration of the order is excessive. Appellee sought a CSPO pursuant to R.C. 2903.214 which provides, in relevant part:

{¶ 32} "(C) 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:

{¶ 33} "(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 * * *."

{¶ 34} R.C. 2903.211(A)(1) provides: "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."

{¶ 35} "Pattern of conduct" is defined 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." R.C. 2903.211(D)(1). Further, "mental distress" includes "[a]ny mental illness or condition that involves some temporary substantial incapacity" or "[a]ny mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services" whether or not the individual sought such services. R.C. 2903.211(D)(2).

{¶ 36} In the present case, the court specifically found that the activities that appellant conceded to have engaged in were sufficient to support the award of the CSPO. Those activities, as set forth above, included damaging appellee's vehicles, calling appellee's home and cell phone, confronting appellee, stating to appellee's boyfriend that appellant wished appellee would be "road kill," and calling appellee's boss and questioning her moral character. The court also noted appellants' two "potential" violations of the temporary order which appellant testified to.

{¶ 37} Though some of these incidents are seemingly "stale," a court is required to take everything into consideration "'even if some of [her] actions comprising this behavior, considered in isolation, might not appear to be particularly threatening.'" See *Tuuri v. Snyder* (Apr. 30, 2002), 11th Dist. No. 2000-G-2325, quoting *Still v. Still* (Apr. 23, 1999), Montgomery App. No. 17416. Further, during the hearing the trial court was able to observe the witnesses and assess their credibility.

{¶ 38} Based on the foregoing, we conclude that the trial court did not err when it granted the CSPO, and the court's judgment is supported by competent and sufficient evidence. Further, we cannot conclude that the trial court abused its discretion when imposing the terms of the CSPO. Although appellant did not physically threaten appellee, such a threat is not required. Appellee clearly stated that she felt concerned for her safety; this satisfies the "mental distress element." See *Irwin v. Murray*, 6th Dist. No. L-05-1113, 2006-Ohio-1633. Further, appellant damaged her property, telephoned appellee looking for her husband, and stated that she wished appellee would become "road kill" or "road pizza."

{¶ 39} Based on the foregoing, we find that appellant's first assignment of error is not well-taken.

{¶ 40} In appellant's second assignment of error, she contends that the CSPO violated her due process rights by infringing on her custody rights relating to her minor daughter and by restricting her ability to live in a small community with appellee.

{¶ 41} Upon review, we must reject appellant's argument. Potential logistical issues regarding appellant's attendance at her daughter's "extracurricular activities" does not rise to the level of impinging on appellant's constitutional right to due process of law. Appellant's second assignment of error is not well-taken.

{¶ 42} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE