

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

Tina Palmer

Court of Appeals No. OT-12-029

Appellee

Trial Court No. 10CV582H

v.

Joseph Abraham

DECISION AND JUDGMENT

Appellant

Decided: July 12, 2013

* * * * *

Christopher Marcinko for appellant.

* * * * *

SINGER, P. J.

{¶ 1} Appellant appeals the judgment of the Ottawa County Court of Common Pleas overruling his objections and adopting a magistrate's decision to grant a civil stalking protective order. Appellee has not responded. Because we conclude that the trial court acted within its discretion when it overruled appellant's objections to the magistrate's decision, we affirm.

{¶ 2} On August 20, 2010, appellee, Tina Palmer, filed a petition seeking the issuance of a civil stalking protection order against her neighbor, appellant Joseph Abraham. Appellee alleged that appellant and his wife incessantly videotaped her family, including recording her 13-year-old boy and three and five year-old neighbor children jumping on a trampoline in the yard. According to appellee, appellant also accused her family of being drug dealers, made false statements about them to the dog warden, called them “white trash” and endangered their son on the road in front of the parties’ houses. Appellee reported that appellant’s behavior engendered fear and anxiety in her family, causing the children to lose friends, and appellee to lose sleep.

{¶ 3} On August 23, 2010, the trial court issued an ex parte protective order, prohibiting appellant from having contact with appellee’s family pending a hearing on the petition before a magistrate. The hearing was originally set for August 30, 2010. The matter, however, was continued, with the hearing eventually commencing on November 16, 2010, with additional testimony on January 25 and March 21, 2011.

{¶ 4} After the hearing, the magistrate issued a decision, finding sufficient evidence that appellant had engaged in a pattern of conduct sufficient to cause mental distress to appellee “to the point that she requires medication.” The magistrate extended the ex parte order to a full civil stalking protection order for a period of five years. On April 13, 2011, appellant filed objections to the magistrate’s decision, complaining that

the form of the order did not comply with the civil rules and asserting that appellant's acts did not amount to menacing by stalking and, therefore, could not be the basis for issuance of a civil protection order.

{¶ 5} On November 11, 2011, the trial court overruled appellant's objections, concluding that appellant had shown no prejudice from the magistrate's failure to follow Civ.R. 53(D)(3)(iii). Moreover, the court found the magistrate's decision supported in the evidence and law. The court adopted the magistrate's decision. Appellant appealed this judgment, but this court dismissed the appeal because the judgment was not in compliance with Civ.R. 54(E). On remand, the court complied with the rule and this appeal followed.

{¶ 6} Appellant sets forth the following two assignments of error:

I. The magistrate in this matter erred in preparing a non-conforming magistrate's decision.

II. The Court abused its discretion and erred in unreasonably attributing the alleged mental distress of the Petitioner to any actionable conduct on the part of respondent, when the manifest weight of the evidence demonstrates no conduct which could reasonably be perceived as constituting Menacing By Stalking in the context of these proceedings. The lack of actionable conduct by the petitioner makes the issuance of a CPO against the manifest weight of the evidence.

Civ.R. 53(D)

{¶ 7} In his first assignment of error, appellant complains that the magistrate's decision fails to comply with the mandatory instructions of Civ.R. 53(D)(3)(a)(iii) that a magistrate's decision, "shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, * * * unless the party timely and specifically objects to that factual finding or legal conclusion * * *."

{¶ 8} Appellant is correct, the magistrate's decision did not include the mandated caveat. Nonetheless, the trial court is correct; the absence of this warning did not operate to appellant's prejudice as he was not procedurally barred from assigning error. An appeals court may only reverse the decision of a trial court if it determines that the decision operated to the prejudice of the appellant. App.R. 12(B). Since the omission of which appellant complains visited no prejudice upon him, his first assignment of error is not well-taken.

Menacing By Stalking

{¶ 9} When a trial court reviews objections to a magistrate's decision, review is de novo. Not only is the court not bound by the magistrate's decision, the court has an obligation to conduct an independent review as to the objected matters to ascertain whether the magistrate has properly determined the facts and appropriately applied the law. Civ.R. 53(D)(4)(d); *Kovacs v. Kovacs*, 6th Dist. No. E-03-051, 2004-Ohio-2777, ¶ 6.

{¶ 10} When a court of appeals reviews the decision of a trial court overruling objections to a magistrate’s decision, the standard of review is abuse of discretion. The trial court’s ruling will not be disturbed absent an abuse of discretion. *Dulaney v. Taylor*, 10th Dist. No. 12AP–365, 2013-Ohio-1147, ¶ 7. An abuse of discretion is more than an error of law or lapse of judgment, the term connotes that the court’s attitude was arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 11} The issuance of a civil stalking protection order is governed by R.C. 2903.214. For a petitioner to be entitled to the protection order, he or she must establish by a preponderance of the evidence that the respondent violated R.C. 2903.211, the menacing by stalking statute. R.C. 2903.214(C); *Striff v. Striff*, 6th Dist. No. WD-02-031, 2003-Ohio-794, ¶ 10.

{¶ 12} 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.” One who violates this prohibition is guilty of menacing by stalking, a first degree misdemeanor. R.C. 2903.211(B)(1). A “pattern of conduct” is two or more actions or incidents closely related in time. R.C. 2903.211(D)(1). “Mental distress” includes:

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. R.C. 2903.211(D)(2)(b).

{¶ 13} One acts “knowingly” when he or she is aware that his or her conduct “will probably cause a certain result or will probably be of a certain nature.” R.C. 2901.22(B).

{¶ 14} In his second assignment of error, appellant insists that none of the conduct of which appellee complains was unlawful and, therefore, could not reasonably form the basis of mental distress of the type appellee claims.

{¶ 15} Appellant states that videotaping from his home or car in public is not unlawful. Indeed, according to appellant, police and the township trustees advised him to take pictures to support his various complaints. The purpose of this photography, then, appellant maintains, was to document his complaints of a zoning violation against appellee’s husband, improper operation of a dirt bike by appellee’s son, dogs running loose to the dog warden, an environmental hazard to the EPA, or his purported reasonable suspicion of appellee’s drug related activity that he reported to the county drug task force. Appellee’s accusation that appellant caused her son to ride his dirt bike into a ditch was simply the result of the boy’s driving inexperience and a misunderstanding, appellant maintains.

{¶ 16} Direct threats are unnecessary to establish menacing by stalking. It is sufficient if the accused exhibits a pattern of behavior with an awareness that his conduct will likely cause another to become mentally distressed or believe the accused will cause

physical harm. *Toledo v. Emery*, 6th Dist. Nos. L-99-1067, L-99-1155, 2000 WL 864305 (June 30, 2000). “Moreover, it is the function of the trier of fact to determine whether a victim has suffered mental distress as the result of a defendant’s behavior. No expert testimony is required. No evidence that psychological treatment has been undertaken is necessary.” *Id.*, citing *State v. Tichon*, 102 Ohio App.3d 758, 763, 658 N.E.2d 16 (9th Dist.1995); *State v. Schwab*, 119 Ohio App.3d 463, 468, 695 N.E.2d 801 (12th Dist.1997).

{¶ 17} Appellee’s witnesses testified that on multiple days appellant pursued his drive-by videography six or more times a day. Appellee’s children testified that their friends stopped coming to the house because of the constant surveillance. Appellee testified that appellant’s behavior caused her to lose sleep and become distraught to the extent that she required medication. She also testified that she was fearful of an escalation of appellant’s behavior.

{¶ 18} It seems clear that there was evidence presented at the extensive hearing on this petition by which the trier of fact could have found that appellant engaged in a pattern of activity that caused mental distress to appellee. There was also evidence presented by which the trier of fact could have found that appellant knew that such distress would result from this behavior. In that regard, we can find no abuse of the trial court’s discretion when it overruled appellant’s objections and adopted the magistrate’s decision. Accordingly, appellant’s second assignment of error is not well-taken.

{¶ 19} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
