

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

Dorothy Fondessy

Appellee

v.

Anthony Simon

Appellant

Court of Appeals No. OT-11-041

Trial Court No. 11-CV-515H

DECISION AND JUDGMENT

Decided: August 9, 2013

* * * * *

Ernest E. Cottrell, Jr., for appellee.

Wesley M. Miller, Jr., for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a civil stalking protection order (“CSPO”) issued by the Ottawa County Court of Common Pleas against defendant-appellant, Anthony Simon, for the protection of plaintiff-appellee, Dorothy Fondessy, and her husband Wayne Fondessy. Simon now challenges that order through the following assignments of error:

Assignment of Error I.

The trial court erred as a matter of law when it granted the stalking civil protection order against the appellant.

Assignment of Error II.

The trial court erred, based on the weight of the evidence, when it granted a stalking civil protection order against the appellant.

{¶ 2} On September 27, 2011, Dorothy filed a petition seeking a CSPO against appellant for the protection of herself and her husband Wayne. In describing the nature and extent of the pattern of conduct that caused Dorothy to believe that appellant would cause her and Wayne physical harm or causes or has caused them mental distress, Dorothy attached to the petition written narratives from herself and Wayne regarding the history of appellant's harassing behavior toward them that they asserted caused them mental anguish. They asserted that over the past four years, appellant had engaged in harassing behavior toward them including trespassing, verbal abuse, inappropriate gestures, a death wish and obscenities. Dorothy stated that appellant had deliberately blocked her from mowing her lawn so that he could yell vulgarities at her and constantly yells obscenities and gives obscene gestures toward her and Wayne while they are gardening. The narratives also asserted that Wayne had open heart surgery in 2005, that appellant's behavior was affecting his health, and that the Fondessys were in fear of their lives and well-being. The lower court issued an ex parte civil protection order and

scheduled the matter for a full hearing. That hearing proceeded on October 18, 2011, at which the following evidence was presented.

{¶ 3} Dorothy testified that she and Wayne have lived at their home on North Genoa-Clay Center Road in Ottawa County since 1974. When they first built their home, Dorothy's uncle, Charles Simon, was their neighbor to the north. Appellant is Charles Simon's son. When Charles Simon died in 2005, appellant inherited his property and the disputes between the parties began. Initially, there was a property line dispute that was resolved with a survey. Dorothy then described a number of confrontations between the parties over the years.

{¶ 4} In 2006, appellant was upset that the Fondessys' lilac bushes were hanging over a fence that marked the property line. The Fondessys then gave appellant permission to trim the bushes but he used a chain saw to severely cut them, including the parts of the bushes that were on the Fondessys' property.

{¶ 5} The Fondessys' property contains a pond that abuts the parties' property line. Appellant regularly discharged lawn clippings into the pond when mowing his lawn. In late April 2006, Dorothy noticed appellant throwing sticks and debris into the pond. She approached appellant and asked him why he was throwing garbage into the pond. Appellant denied doing so and used vulgarities. Wayne then approached Dorothy and appellant, and appellant said to Wayne "I hope you have another heart attack and die."

{¶ 6} During another encounter, Dorothy testified that she was mowing her lawn at a time when appellant was also mowing his lawn. Appellant approached Dorothy and ran his mower into her mower at the property line. He then asked if she had sold any farmland recently. When Dorothy did not respond appellant called her a “f ***ing c**t.”

{¶ 7} Dorothy also testified that over the years appellant has continually used his leaf blower to blow leaves and debris onto the Fondessys’ property and has used a pipe to discharge sump pump water from his property onto the Fondessys’ property.

{¶ 8} Dorothy stated that although appellant has never directly threatened her, throughout all of these exchanges, his verbiage and rage have caused her to fear him and have caused her mental distress. She further testified that she fears for her husband’s health because he has high blood pressure and the confrontations upset him.

{¶ 9} Wayne Fondessy also testified regarding the numerous confrontations over the years. Wayne stated that during the parties’ initial property line dispute, appellant threatened to take away an easement which lead to the Fondessys’ farmland. Without the easement, the farmland would be worthless. Wayne stated that although he tried to not talk to appellant, he did witness many confrontations between Dorothy and appellant. He testified that during the incident when appellant was discharging his mower into the Fondessys’ pond, Dorothy was highly upset, and was crying and shaking. Wayne further witnessed the incident when appellant ran his mower into Dorothy’s. Wayne testified that when Dorothy was mowing the lawn, he saw appellant exit his garage with his mower, head straight for Dorothy and bump into her at the property line. Wayne also

testified as to a recent incident (within two months of the date of the hearing below) in which appellant was blowing leaves onto the Fondessys' property. Wayne stated that when appellant was blowing leaves and approaching the Fondessys' property, Wayne looked at appellant but did not say anything. Appellant then called Wayne "a black mother f***ing n***er" and gave him the finger. Wayne testified that he was very upset by the incident and that all of the incidents are upsetting. He further stated that he is concerned for his health because of the stress that all of the confrontations have caused him, that both he and Dorothy have been distressed by the confrontations, and that his doctor told him that the stress is bad for his blood pressure.

{¶ 10} Appellant also testified at the hearing below. Appellant admitted that he had discharged grass clippings, sticks and debris into the Fondessys' pond and he had used his leaf blower to blow leaves onto the Fondessys' property. He also agreed that it was reasonable that his actions would upset the Fondessys. He further admitted using profanities and vulgarities in his confrontations with the Fondessys, admitted to "flipping them off," and admitted that the confrontations were "heated" and upsetting to all three of them. He denied, however, the name calling to which the Fondessys testified and denied saying he wished Wayne would have another heart attack and die.

{¶ 11} On November 2, 2011, the lower court issued the CSPO that is before us on appeal. The court entered the order for the protection of both Dorothy and Wayne for a period of five years, ordered appellant to stay away from the Fondessys and not be present within 25 feet of them, ordered appellant to not initiate or have any contact with

the Fondessys, and ordered appellant to not enter or cause any item or thing to enter the Fondessys' property. It is from that judgment that appellant appeals.

{¶ 12} Appellant's assignments of error are related and will be discussed together. Appellant asserts that the CSPO entered by the lower court was not supported by sufficient evidence and was against the manifest weight of the evidence.

{¶ 13} Appellee filed her petition for a CSPO pursuant to R.C. 2903.214. That statute reads in relevant part:

(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:

(1) An allegation that respondent is eighteen years of age or older and engaged in a violation of section 2903.211 of the Revised Code against the person to be protected by the protection order * * *, including a description of the nature and extent of the violation[.]

{¶ 14} For a trial court to grant a CSPO, the petitioner must show, by a preponderance of the evidence, that the complained of conduct violates the menacing by stalking statute. *Striff v. Striff*, 6th Dist. Wood No. WD-02-031, 2003-Ohio-794, ¶ 10. "Similarly, where the petitioner seeks protection of a 'family or household member' under a CSPO, the petitioner must show by a preponderance of the evidence that the respondent engaged in a violation of R.C. 2903.211 against the 'family or household

member’ to be protected.” *Retterer v. Little*, 3d Dist. Marion No. 9-11-23, 2012-Ohio-131, ¶ 25. When reviewing the issuance of a CSPO on appeal, we apply the civil manifest weight of the evidence standard. *Gruber v. Hart*, 6th Dist. Ottawa No. OT-06-011, 2007-Ohio-873, ¶ 17. Accordingly, “[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *C.E. Morris v. Foley Const. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶ 15} R.C. 2903.211(A)(1) proscribes menacing by stalking and reads: “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.” As used in R.C. 2903.211, “‘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.” R.C. 2903.211(D)(1). The statute, however, does not define “closely related in time.” Accordingly, “the temporal period within which the two or more actions or incidents must occur * * * [is a] matter to be determined by the trier of fact on a case-by-case basis.” *Ellet v. Falk*, 6th Dist. Lucas No. L-09-1313, 2010-Ohio-6219, ¶ 22. As the court in *Middletown v. Jones*, 167 Ohio App.3d 679, 2006-Ohio-3465, 856 N.E.2d 1003, ¶ 10 (12th Dist.) explained,

Because the statute does not specifically state what constitutes incidents “closely related in time,” whether the incidents in question were “closely related in time” should be resolved by the trier of fact “considering

the evidence in the context of all the circumstances of the case.” *State v. Honeycutt*, Montgomery App. No. 19004, 2002-Ohio-3490, 2002 WL 1438648, ¶ 26, citing *State v. Dario* (1995), 106 Ohio App.3d 232, 238, 665 N.E.2d 759. In determining what constitutes pattern of conduct for purposes of R.C. 2903.211(D)(1), courts must take every action into consideration even if, as appellant argues, “some of the person’s actions may not, in isolation, seem particularly threatening.” *Guthrie v. Long*, Franklin App. No. 04AP-913, 2005-Ohio-1541, 2005 WL 737402, ¶ 12; *Miller v. Francisco*, Lake App. No. 2002-L-097, 2003-Ohio-1978, 2003 WL 1904066, ¶ 11.

{¶ 16} The culpable mental state for the issuance of a CSPO is “knowing.” A person acts knowingly when, regardless of his purpose, “he is aware that his conduct will probably cause a certain result or will probably be of a certain nature.” R.C. 2901.22(B). “A person has knowledge of circumstances when he is aware that such circumstances probably exist.” *Id.*

{¶ 17} Finally, “mental distress” is defined under R.C. 2903.211(D)(2) as either 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.

{¶ 18} The statute, however, “does not require that the victim actually experience mental distress, but only that the victim believes the stalker would cause mental distress or physical harm.” *Bloom v. Macbeth*, 5th Dist. Ashland No. 2007-COA-050, 2008-Ohio-4564, ¶ 11, citing *State v. Horsley*, 10th Dist. Franklin No. 05AP-350, 2006-Ohio-1208. Moreover, the testimony of the victim herself as to her fear is sufficient to establish mental distress. *Horsley* at ¶ 48.

{¶ 19} Upon a review of the record, we find that trial court’s order granting the CSPO was supported by competent, credible evidence. The record demonstrates that appellant engaged in a pattern of confrontational behavior over a four to five year period during which he used racial epithets and vulgar terminology toward the Fondessys. Appellant knew that the Fondessys were both in their seventies, and that Wayne had a history of heart trouble. Nevertheless, he blew debris and leaves onto their property knowing that it would upset them, yelled profanities at them knowing it would upset them, directed his lawn mower toward Dorothy, bumping into her for no apparent reason other than to call her a vulgar name, and expressed to the Fondessys his wish that Wayne would have another heart attack and die. What possible reason could he have had to make that statement other than to cause the Fondessys mental distress? While we recognize that “mental distress for purposes of the menacing by stalking statute is not mere mental stress or annoyance,” *Caban v. Ransome*, 7th Dist. Mahoning No.

08 MA 36, 2009-Ohio-1034, ¶ 29, the Fondessys both testified that because of appellant's behavior toward them and fits of rage, they were afraid of him and were afraid of how his actions were affecting Wayne's health. Indeed, a rational trier of fact could conclude that because appellant knew that the Fondessys were aging and that Wayne was in poor health, he knew that his actions and behavior would cause the Fondessys mental distress.

{¶ 20} We therefore conclude that the trial court did not err in granting the petition for a CSPO and the two assignments of error are not well-taken.

{¶ 21} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to 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

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