[Cite as *Whalen v. Kasicki*, 2014-Ohio-150.]

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

Brad Whalen

Appellant

v.

Ray Kasicki
Joan Kasicki

Appellees

Court of Appeals Nos. OT-13-009
OT-13-010

Trial Court Nos. 11CV674
11CV673

DECISION AND JUDGMENT

Decided: January 17, 2014

* * * * *

Paul L. Geller, for appellant.

James W. Hart, for appellees.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Brad Whalen, appeals the judgment of the Ottawa County Court of Common Pleas, dismissing his petition for a civil stalking protection order (CSPO) filed against appellees, Raymond and Joan Kasicki. We affirm.

A. Facts and Procedural Background

{¶ 2} The parties in this action have known one another for many years. They are next door neighbors and members of Nugent's Canal Association. The parties were, at one point, "good friends" with one another. However, sometime in 2009 or 2010, their friendship quickly dissolved when Raymond accepted the association's invitation to fill an unexpired term of one of the trustees. Raymond's acceptance of the position created strife between the parties because appellant's wife, Mona, was interested in the position. Mona ultimately decided to run against Raymond in the following election.

{¶ 3} Sometime after their falling out, a property dispute arose between Joan and Mona. As they were outside arguing, Raymond overheard screams outside his kitchen window. Raymond was not able to hear the details of the argument from inside the kitchen because he did not have his hearing aid turned on at the time. However, he was able to vaguely hear Joan screaming. Raymond quickly went outside to check on Joan.

{¶ 4} On his way outside, Raymond grabbed his handgun, which was in its holster at the time. He picked up the gun, took it out of its holster, and held it at his side as he confronted appellant, who had already made his way outside to assist Mona. A brief verbal confrontation ensued. Eventually, the parties went back into their homes, and Mona called the police. This was one of at least 12 times that the Whalens contacted the police regarding the Kasickis.

{¶ 5} When the police arrived, they questioned the parties regarding the incident. Although appellant claimed that Raymond threatened to kill him, Raymond was adamant

that he had made no such threat. Finding no direct evidence to substantiate appellant's version of the story, the police decided that charges would not be filed.

{¶ 6} Another incident occurred in August 2011. The parties disagree on the details of this incident. As they were cruising around Nugent's Canal property in their golf carts, the parties approached one another. Appellant insists that the Kasickis proceeded to "give him the finger" as they passed one another. However, while Raymond acknowledges giving appellant the finger, he stated that Mona "flipped them off first."

{¶ 7} In addition to the foregoing incidents, appellant also claimed that Raymond threw fireworks onto his property on several occasions. Having served in Vietnam, Raymond testified that he "never threw any fireworks on anyone's property. * * * I don't like fireworks at all * * * they remind me too much of war and combat." Further, Raymond established that he was out of town on one alleged occasion. Appellant contacted the police, but no evidence of any fireworks was found.

{¶ 8} The final incident prompting the CSPO occurred in December 2011. The Whalens, who are permanent residents of Michigan, travelled to their home in Nugent's Canal on Christmas day, and discovered two pellet holes in one of their windows. While he had no evidence to support his claim, appellant suspected that Raymond was responsible. Notably, the Kasickis submitted an exhibit demonstrating that their property was similarly vandalized.

{¶ 9} Three days after discovering the pellet holes, appellant filed his petition for a CSPO. A temporary protection order was issued, and a hearing was held before a magistrate on February 21, 2012, and April 30, 2012. Following the hearing, the magistrate found that appellant failed to establish that he was in immediate and present danger. Consequently, the magistrate recommended that the court dismiss appellant's CSPO and allow the temporary order to expire.

{¶ 10} Appellant objected to the magistrate's decision on May 29, 2012. The trial court overruled appellant's objections on January 22, 2013, effectively dismissing the CSPO. Appellant's timely appeal followed.

B. Assignment(s) of Error

{¶ 11} On appeal, appellant assigns the following error for our review:

> It was error on the trial court by failing to grant the Civil Protection Order.

II. Analysis

{¶ 12} In his sole assignment of error, appellant argues that the trial court erred in dismissing his CSPO.

{¶ 13} In reviewing objections to a magistrate's decision, Civ.R. 53 instructs the trial court to conduct an independent review of the facts and conclusions contained in the magistrate's report and enter its own judgment. *Kovacs v. Kovacs*, 6th Dist. Erie No. E-03-051, 2004-Ohio-2777, ¶ 6. Thus, the trial court's standard of review of a magistrate's decision is de novo. *Howard v. Wilson*, 186 Ohio App.3d 521, 2010-Ohio-1125, 928

N.E.2d 1180, ¶ 7 (2d Dist.). However, "[w]hen 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." *Palmer v. Abraham*, 6th Dist. Ottawa No. OT-12-029, 2013-Ohio-3062, ¶ 10. An abuse of discretion 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).

{¶ 14} 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. Wood No. WD-02-031, 2003-Ohio-794, ¶ 10. 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." A "pattern of conduct" is two or more actions or incidents closely related in time. R.C. 2903.211(D)(1).

{¶ 15} Here, appellant argues that "there have been many incidents, which give rise for [appellant] to fear for his safety." Despite claiming that his fear was developed over the course of "many incidents," appellant supports his argument by pointing to only one incident—the argument between the parties in which Raymond brandished his handgun. In providing only one instance in which appellees allegedly caused him to fear

for his safety, appellant has failed to establish that appellees engaged in a "pattern of conduct" under R.C. 2903.211. *See Nguyen v. Chaffee*, 7th Dist. Columbiana No. 08 CO 35, 2009-Ohio-3352, ¶ 5 ("There must be more than one incident to establish a 'pattern of conduct' under [R.C. 2903.211].").

{¶ 16} Further, we note that the magistrate disagreed with appellant's version of the handgun incident. Additionally, we recognize that appellees presented contradictory evidence on every relevant issue in this case. While appellant testified that Raymond pulled a gun on him, Raymond's testimony presented the argument in a different light. The magistrate, upon hearing the parties' testimony, concluded that Raymond did not pull a gun on appellant, but, rather, held his weapon toward the ground during the entire argument. As to the remaining incidents, including the fireworks, the pellet holes in appellant's window, and the golf cart encounter, the magistrate stated: "This Magistrate finds Respondent-Raymond's testimony to be more credible than that of Petitioner-Brad, his wife (Mona) and [Mona's friend], Sarah Roenigk." Ultimately, the magistrate simply did not believe the accusations being made by appellant.

{¶ 17} It is well-settled that "[t]he weight to be given to the evidence and the credibility of the witnesses is primarily a matter for the trier of fact." *Jenkins v. Jenkins*, 10th Dist. Franklin No. 06AP-652, 2007-Ohio-422, ¶ 14. "This is because the trier of fact is in the best position to view the witnesses and consider their demeanor and truthfulness." *Id.* A reviewing court, "may not simply substitute its judgment for that of the trial court so long as there is some competent, credible evidence to support the lower

court findings." *State ex rel. Celebrezze v. Environmental Ents., Inc.*, 53 Ohio St.3d 147, 154, 559 N.E.2d 1335 (1990).

{¶ 18} Here, the magistrate found, and the record confirms, that appellant has presented no direct evidence to substantiate many of his claims. On the contrary, the evidence that was presented reveals that Raymond was out of town on the day appellant contacted police complaining that Raymond threw fireworks in his yard. Moreover, Raymond testified that he did not shoot appellant's window. In fact, Raymond stated that he does not own a pellet gun. The fact that appellees' garage was vandalized in a similar manner suggests that Raymond was telling the truth when he denied shooting appellant's window.

{¶ 19} In light of the foregoing, we decline to substitute our judgment for that of the trial court in this case. We are not persuaded that the trial court abused its discretion in dismissing appellant's CSPO. Accordingly, appellant's sole assignment of error is not well-taken.

III. Conclusion

{¶ 20} For the foregoing reasons, the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay the 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

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.

_____
JUDGE