

[Cite as *Delaine v. Smith*, 2016-Ohio-5250.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 103860**

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**LATOYIA DELAINE**

PETITIONER-APPELLEE

vs.

**GREGORY SMITH**

RESPONDENT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-11-757671

**BEFORE:** E.T. Gallagher, J., Jones, A.J., and Keough, J.

**RELEASED AND JOURNALIZED:** August 4, 2016

**FOR APPELLANT**

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**FOR APPELLEE**

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EILEEN T. GALLAGHER, J.:

{¶1} This cause came to be heard on the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Respondent-appellant, Gregory Smith (“Smith”), appeals the denial of a motion to terminate a civil stalking protection order (“CPO”). He raises the following two assignments of error for review:

1. A full hearing was not provided before the judge upheld the judgment.
2. The judge did not allow defendant to present facts for his review before making judgment.

{¶2} There is no merit to the appeal, and the trial court’s judgment is affirmed.

### **I. Facts and Procedural History**

{¶3} In June 2011, petitioner-appellee, Latoyia Delaine (“Latoyia”), filed a petition for a CPO against Smith, alleging that Smith (1) verbally harassed her in the presence of her child; (2) physically assaulted her husband, Terence Delaine (“Terence”); (3) made verbal threats against her and her family, and (4) placed dead squirrels on her driveway on two separate occasions.

{¶4} The court held a hearing on the petition in August 2011. Latoyia testified that she and Terence (collectively “the Delaines”) live on Fairlawn Road in Lyndhurst, Ohio. Smith is the Delaines’ next-door neighbor. The Delaines and Smith had a cordial relationship when the Delaines first moved into the neighborhood in 2008. However,

their relationship changed after Smith allegedly took the Delaines' daughter, Mikayla, for a play date with one of his children without the Delaines' permission.

{¶5} Latoyia testified that she and her husband began distancing themselves from Smith. The apparent rejection angered him, and Smith began throwing debris in the Delaines' yard and piles of leaves and grass on their driveway. One day, in November 2008, Terence returned home from work and found a pile of debris on the driveway. He confronted Smith and asked him to stop dumping things on his driveway. During the confrontation, which became physical, Smith spit on Terence. Consequently, Terence punched Smith in the face and fractured an orbital bone.

{¶6} Terence lost his car keys in the fray. Two days later, at approximately 3:00 a.m., the car alarm on Terence's car went off, and the doors repeatedly locked and unlocked for some period of time. The noise and commotion terrified Mikayla. (Tr. 7.)

{¶7} A neighbor on the other side of Smith's house had previously filed a petition for a CPO against Smith. Latoyia and Terence testified at the hearing on the neighbor's petition. Shortly after the hearing, Smith approached the Delaines' car as they were pulling into their driveway and threatened: "You're going to get yours. You have yours coming." Smith became loud and aggressive, saying: "You f—ing p—y, you know, call the cops now, you little b—ch." (Tr. 9.) Mikayla was in the car and was frightened by Smith's conduct.

{¶8} On another day, Smith called Latoyia “a scumbag” and “a slut,” while she was walking home from a park with Mikayla, who heard the comments. His angry words frightened Mikayla and made her cry. (Tr. 8.)

{¶9} Following the incident, Mikayla was too scared to sit on the front porch or play in her backyard. (Tr. 9.) Latoyia testified she felt Smith was a threat to her family.

She explained that before taking out the trash, she always peeked outside to make sure Smith was not there.

{¶10} Smith testified that during the physical altercation where Terence fractured his eye socket, Terence also threw his wife on the ground. Smith denied ever spitting on Terence and maintained he “did not lay a hand on him.” Smith explained that Terence was convicted of disorderly conduct as a result of the fight. Smith also denied ever taking Mikayla for a play date. According to Smith, Mikayla often appeared at his house at night, and he took her home on two separate occasions.

{¶11} Smith was charged with aggravated menacing as a result of a different incident and was convicted of a lesser included offense of disorderly conduct. The temporary restraining order that was issued in Smith’s criminal case expired on the day of trial, but the Lyndhurst Municipal Court maintained a no-contact order that was still in effect at the time of the hearing in this case.

{¶12} The trial court found Latoyia’s testimony more credible than Smith’s. The court’s CPO indicates the court found, by preponderance of the evidence, that (1) Smith knowingly engaged in a pattern of conduct that caused Latoyia to believe Smith would

cause harm or mental distress, and (2) the CPO was necessary to protect Latoyia and her family. Following a hearing in August 2011, the court granted Latoyia's petition, and issued a CPO, which is scheduled to expire on August 9, 2016.

{¶13} In October 2015, Smith sent a letter to the trial court requesting termination of the CPO. The court treated the letter as a motion and scheduled a hearing on the matter for November 4, 2015. Smith never properly filed the letter in the common pleas court, and it is not part of the record. Smith asserts that although he appeared in court as scheduled on November 4, 2015, the trial court failed to hold a hearing. The court's journal entry denying Smith's motion to terminate the CPO states, in its entirety:

Based upon the evidence submitted at the full hearing of this matter, the court's prior findings, and respondent's request to terminate civil protection order, the civil stalking protection order entered by this court on 08/09/2011 remains effective until 08/09/2016.

Smith now appeals the trial court's judgment.

## **II. Law and Analysis**

{¶14} In the first assignment of error, Smith argues the trial court erroneously failed to hold a full hearing on his motion to terminate the CPO. In the second assignment of error, Smith argues the trial court erred by not allowing him to present facts before the court made its judgment. Smith also argues he was not provided a full hearing on August 9, 2011, and therefore was not afforded an opportunity to defend himself.<sup>1</sup> We discuss these arguments together because there are interrelated.

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<sup>1</sup> The doctrine of res judicata bars claims that were or could have been raised on direct appeal. *M & T Bank v. Steel*, 8th Dist. Cuyahoga No. 101924, 2015-Ohio-1036, ¶ 13. Normally

{¶15} Smith cites no authority requiring the court that issued a CPO to hold a hearing on a motion to terminate it. The trial court issued the CPO pursuant to R.C. 2903.214, which governs CPOs issued to protect victims of menacing by stalking. If a court issues an ex parte CPO under R.C. 2903.214, the court must schedule a full hearing within ten court days after the ex parte hearing, and the court must give notice of the full hearing to the respondent. R.C. 2903.214(D)(2)(a). Moreover, the respondent must be given an opportunity to be heard. *Id.*

{¶16} However, there are no provisions in R.C. 2903.214 mandating that a trial court must hold a hearing on a respondent's motion to terminate a CPO. Trial courts have discretion in deciding whether or not to grant a motion to terminate a CPO, and our review is limited to an abuse of that discretion. *Hayberg v. Tamburello*, 5th Dist. Tuscarawas No. 2013 AP 02 0011, 2013-Ohio-3451, ¶ 25, citing *Jones v. Rose*, 4th Dist. Hocking No. 09CA7, 2009-Ohio-4347.

{¶17} The trial court based its decision not to terminate the CPO on the evidence presented at the August 2011 hearing. To obtain a civil protection order under R.C. 2903.214, a petitioner must show, by a preponderance of the evidence, that the respondent engaged in conduct constituting “menacing by stalking” as defined in R.C. 2903.211. *Wulf v. Opp*, 12th Dist. Clermont No. CA2014-10-074, 2015-Ohio-3285, ¶ 8. R.C.

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we would be precluded from reviewing the propriety of the August 9, 2011 hearing as barred by res judicata because Smith could have filed a direct appeal of the CPO. However, because the trial court based its denial of Smith's motion to terminate the CPO on the findings it made during the August 2011 hearing, we review the hearing solely as it relates to the judgment appealed in this case.

2903.211 provides that “[n]o 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.” R.C. 2903.211(A)(1).

{¶18} A “pattern of conduct” connotes “two or more actions or incidents closely related in time[.]” R.C. 2903.211(D)(1). A perpetrator acts “knowingly” when he is aware his conduct will probably cause a certain result. R.C. 2901.22(B). The phrase “mental distress” contemplates a mental illness or condition that either causes temporary substantial incapacity or would require treatment by a mental health professional, whether or not help was actually sought. R.C. 2903.211(D)(2).

{¶19} A petitioner need not actually suffer physical harm or mental distress in order to receive a CPO. *State v. Szloh*, 189 Ohio App.3d 13, 2010-Ohio-3777, 937 N.E.2d 168, ¶ 27 (2d Dist.). The plain language of the statute simply refers to conduct that “will” affect the other person. R.C. 2903.211(A)(1). The petitioner’s belief that the respondent will cause him physical harm or mental distress is sufficient. *Griga v. DiBenedetto*, 1st Dist. Hamilton No. C-120300, 2012-Ohio-6097, ¶ 21-22; *State v. Hart*, 12th Dist. Warren No. CA2008-06-079, 2009-Ohio-997, ¶ 31.

{¶20} Latoyia testified that Smith made angry threats to her and her husband in the presence of their small child. Circumstantial evidence suggested that Smith found the keys to Terence’s car and set off the alarm at 3:00 a.m. The sound of the alarm in the night scared Mikayla. Latoyia described the effect of Smith’s conduct on Mikayla as they walked home from a nearby park:



I'm almost into my driveway and there is Mr. Smith standing on his lawn saying, "Hey, scumbag; hey slut."

And my daughter was so scared and frightened she was crying. \* \* \* So, for months, a good year, she was frightened. She didn't want to go sit in the front yard or on the porch. She didn't want to go sit in the back and play with her toys. She was too scared of him.

{¶21} Latoyia also described Smith's behavior following the hearing on another neighbor's petition for a CPO against him:

He insulted us. He made a threat saying, "You're going to get yours. You have yours coming." \* \* \* We were rolling up to our house, just came from the grocery store. \* \* \* And we're minding our own business.

Mr. Smith all of a sudden starts shouting — like I said before — "You're going to get yours. You have yours coming," and just getting really loud and aggressive and saying, "You f—ing p—y," you know, "call the cops now, you little b—ch." And just saying all this stuff. Once again, my daughter is right there. And he threatened me. He threatened my daughter. He threatened my husband.

You're going to get yours; you got yours coming. I mean, I don't take that lightly, definitely not in this day and age. \* \* \* I don't want to live in fear \* \* \* not wanting to go outside. You know, have to watch our back, have to be in by a certain time. You know, we want to enjoy life. We want our children to enjoy life. \* \* \* So we have two children now. And we don't want them to live in that fear that we had to grow up and live through.

{¶22} Latoyia further testified she suspected Smith had lined up their garbage cans in front of the garage door such that anyone backing out would knock them over. Latoyia's testimony established that Smith knowingly engaged in a pattern of conduct that caused the Delaines, particularly Mikayla, to believe that he would cause them physical harm or mental distress. R.C. 2903.211(A)(1). Indeed, the fact that Mikayla was too afraid to play outside demonstrates a temporary, but substantial, incapacity.

{¶23} As previously stated, the court found Latoyia's testimony more credible than Smith's, and Latoyia's testimony established all the elements of a menacing by stalking offense. And since the court was not required to hold a hearing on Smith's request to terminate the CPO, the court was free to rely on the evidence and findings made during the August 2011 hearing. We find no abuse of discretion under these circumstances.

{¶24} Therefore, the first and second assignments of error are overruled.

{¶25} The trial court's judgment is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

LARRY A. JONES, SR., A.J., and  
KATHLEEN ANN KEOUGH, J., CONCUR