

[Cite as *Lerner v. Giolekas*, 2016-Ohio-696.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102768

MELISSA LERNER

PETITIONER-APPELLEE

VS.

GEORGE GIOLEKAS

RESPONDENT-APPELLANT

JUDGMENT:
VACATED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-831263

BEFORE: Jones, A.J., S. Gallagher, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: February 25, 2016

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LARRY A. JONES, SR., A.J.:

{¶1} Respondent-appellant, George Giolekas, appeals from the trial court's judgments (1) granting petitioner-appellee's, Melissa Lerner, petition for a civil stalking protection order, and (2) denying his motion to vacate, or alternatively, motion for a new trial. We vacate the civil stalking protection order and remand the case to the trial court for a new hearing.

I. Procedural History

{¶2} Lerner filed her petition for a civil stalking protection order on August 14, 2014. On that same date, the trial court granted a temporary ex parte order, and Giolekas was served with the petition. A hearing was scheduled for August 27, 2014, but continuances were granted and the temporary order was extended. In the judgment granting one of the continuances, filed on October 6, 2014, the trial court specifically ordered the parties from having contact with one another, and warned that failure to abide by the no contact order could result in a contempt of court finding.

{¶3} The hearing on the petition went forward on November 10, 2014. Lerner and her supervisor at work testified in Lerner's case-in-chief. Giolekas presented five witnesses on his behalf, all of whom were neighbors in the Olmsted Township development where the incidents giving rise to this case occurred. Lerner called an Olmsted Township police officer as a rebuttal witness.

{¶4} After the hearing, the trial court issued a judgment entry granting Lerner's petition. The order is effective until November 2016, and as part of the order, Giolekas is

prohibited from being within 500 feet of Lerner and from possessing and/or purchasing firearms or other weapons; he was ordered to turn over his carrying concealed weapon license and any firearms and weapons he had in his possession.

{¶5} Giolekas filed a motion to vacate, or in the alternative, a motion for a new hearing. Giolekas contended the following in his motion: (1) the protection order was unduly restrictive and impinged on his ability to travel because he must pass Lerner's house in order to get to the main road that provides access into and out of the development; (2) the protection order deprived him of his Second Amendment constitutional right to bear arms; and (3) the court's judgment was against the manifest weight of the evidence.

{¶6} Giolekas filed a supplemental motion, in which he included an affidavit from his trial counsel. In the affidavit, counsel averred that after the court issued the protection order, he contacted Lerner's trial counsel to discuss a "mutually agreeable resolution of this matter that would involve dissolution of the Order of Protection and also allow the parties to avoid post-Hearing Motions and a potential appeal to the Eighth District Court of Appeals." Counsel averred that Lerner's attorney responded that Lerner would dissolve the protection order in exchange for Giolekas paying her \$10,000.

{¶7} Giolekas also alleged in the supplemental pleading that, since the order had been granted in November 2014, Lerner had made a false report about him on December 21, 2014 to the Olmsted Township Police Department, which found her allegation "unfounded."

{¶8} Lerner filed a brief in opposition to Giolekas’s supplemental motion and a motion to strike his trial attorney’s affidavit. In the response, Lerner contended that after the trial court granted her petition she was first contacted by Giolekas’s attorney with an offer to settle the case for \$1,000. The motion to strike was never ruled on and, therefore, is deemed denied.¹

{¶9} The trial court set a January 26, 2015 hearing date for Giolekas’s motion. Giolekas subpoenaed the police officer who responded to Lerner’s December 21, 2014 police call. The “hearing” took place in chambers, off the record, and, therefore, the officer did not testify. After the hearing, the trial court granted Giolekas leave to file supplemental evidence in support of his motion² and scheduled another hearing for February 20, 2015.

{¶10} On February 9, 2015, Giolekas filed his supplemental pleading, which included the incident report from Lerner’s December 21, 2014 call to the police, and Giolekas’s affidavit. Lerner did not file a response to the pleading.

{¶11} Giolekas represents, and we take judicial notice, that the Cuyahoga County Court of Common Pleas was closed on February 20, 2015 due to inclement weather. The hearing did not, therefore, go forward as scheduled. On February 27, 2015, the trial court denied the motion without a hearing.

¹ *Maust v. Palmer*, 94 Ohio App.3d 764, 769, 641 N.E.2d 818 (10th Dist. 1994).

²The court also granted leave to Lerner to file a response within ten days after Giolekas filed his supplemental pleading.

II. Facts

Lerner's Case in Chief

Background

{¶12} The following background facts will be helpful to put this case in context. The events giving rise to this case took place in a residential development where both Lerner and Giolekas lived as previously mentioned, and involved instances when Lerner was walking her dog. Lerner testified that there was an area in the development that many residents with dogs would take their dogs for exercise and socialization. Lerner and Giolekas lived approximately 20 houses apart and she had to walk past Giolekas's house to get to the dog area. Further, there was only one way to access the main road to get into or out of the development.

{¶13} Giolekas lived with his girlfriend, Heidi, and her children. Prior to the two incidents at issue in this case, one of Heidi's children was bitten by another dog in the neighborhood; a neighbor named Tiffany was the owner of that dog. Lerner had been bitten by the same dog a year or two before the incidents giving rise to this case, and had been compensated under Tiffany's homeowner's insurance policy.

{¶14} Lerner testified that a few days after Heidi's son was bitten, she was walking her dog and Heidi stopped her to show Lerner her son's bite wounds. Lerner testified that Giolekas was not home at the time and Heidi was scared to call the police on her own, so she (Lerner) and a few other neighbors who were there as well, called the police to report the incident.

{¶15} According to Lerner, prior to the incidents relative to this case, Giolekas had had an affair with a neighbor, Kelly, who lived across the street from Lerner. Lerner described her relationship with Kelly as “friendly neighbors.” She denied that she and Kelly have had a falling out.

{¶16} Lerner testified to two specific encounters she had with Giolekas that led her to seek a protection order: the first occurred on July 6, 2014, and the second occurred on July 15, 2014.

July 6, 2014 Incident

{¶17} Lerner testified that she was walking her dog to the dog area and as she approached Giolekas’s house, he “got in [her] face,” and profanely yelled at her, ostensibly to stay out of his business about his relationship with Kelly. Lerner testified that Giolekas told her she was “going to get mine,” and that she had “bothered the wrong person.” Lerner testified that she told Giolekas that she did not care because she was “not part of their love triangle,” which caused him to yell and scream more and get closer to her. She testified that she was scared and Kelly, with whom she had been on her cell phone, drove to get her and the dog. Lerner called the police. Lerner, Giolekas, and Kelly gave written statements to the police. Giolekas and Heidi’s statements to the police said that Kelly threatened them. Kelly was charged with menacing and disorderly conduct; neither Lerner nor Giolekas were charged.

{¶18} Lerner’s statement reads in its entirety as follows:

I was walking my dog and Heidi was outside w/ her kids & boyfriend. The kids wanted to pet the dog & Heidi told them not to talk to me. I asked

Heidi about why she would tell Tiffiany I made you make the police report. She started calling me all kinds of [profane names] for being friends w/ Kelly. I told her I had nothing to do w/ that affair. I'm just trying to talk to you about dog stuff. I had been texting already w/ Kelly. Then she came to get me. [Giolekas] and Heidi started calling me all kinds of [profane names] for being her friend. Kelly came to get me. Then [Giolekas] & Kelly & Heidi all started making words back & forth. Very bad name calling was coming from all directions. There was nothing threatening between the 3 of them, it was all very bad & vulgar. I put Kelly back in the car & we came home. This is all resulting in an affair between Kelly & [Giolekas].

{¶19} Lerner testified that she felt threatened by Giolekas as a result of that incident, but even more so after the July 15 incident.

July 15, 2014 Incident

{¶20} Lerner testified that she was walking her dog early in the morning, and when she walked by Giolekas's house, he was outside apparently loading up his car. Lerner was across the street from Giolekas's house. According to Lerner, Giolekas spoke profanely to her; she did not respond. Lerner testified that Giolekas went into his house and came back outside with a gun, which was on his hip in a holster. Giolekas stared at Lerner and put his hand on the gun; according to Lerner, Giolekas made sure that she saw the gun. Lerner ran home and called the police. She told the police that she was scared that Giolekas was now using a gun to intimidate her.

Call to Lerner's Employer after the July 15 Incident

{¶21} At the time at issue here, Lerner was a county social worker. Her work supervisor testified that in August 2014 she received a phone call from a female named "Heidi" who had complaints about Lerner. The caller wanted Lerner reprimanded or investigated. Lerner testified that she believed the "Heidi" who called was Giolekas's

girlfriend and she was trying to get Lerner fired.

Incidents Since the Granting of the Ex Parte Protection Order

{¶22} Lerner testified that she had walked her dog past Giolekas's house one time since the ex parte order had been granted because she believed that once it had been granted Giolekas was prohibited from coming out of his house if she was near it. She testified that she had requested that as a condition of the order on the advice of a victim advocate.

{¶23} According to Lerner, the one time she walked past Giolekas's house since she filed the petition was the day after she was granted the ex parte order. She testified that Giolekas videotaped her and told her "oh, you've made this easy for me." She testified that Giolekas called her dog in an attempt to get both the dog and Lerner closer to him. Lerner denied going by Giolekas's house again after that incident.

Other Incidents in the Neighborhood

{¶24} Lerner testified that because of her problems with Giolekas and Heidi, much of the neighborhood "turned" against her. Specifically, Lerner testified that she had suffered the following: (1) neighbors videotaped her and watched her with binoculars; (2) neighbors told her that they have been advised not to have contact with her for fear that she will call the police on them; and (3) one neighbor attempted to spit on her.

{¶25} According to Lerner, because of the problems, law enforcement officials advised her to keep a log of "good" people and "bad" people. The log was colored-coded and identified "bad" people in green. In addition to Giolekas and Heidi, Lerner testified

about five other “bad” neighbors. Lerner testified that a sixth neighbor listed on the log was not “bad,” but was just a “mean old lady.”

{¶26} Additionally, Lerner testified that after her problems with Giolekas began, she had to call the police to her home several times because of the ensuing problems with other neighbors. She filed a complaint against an Olmsted Township police officer who responded to her home when she called the police on one occasion. Lerner testified that she filed the complaint against him because he was “very nasty and inappropriate” toward her.

{¶27} Lerner testified that all of this caused her mental distress.

Giolekas’s Case

{¶28} The defense’s position was that Lerner instigated incidents with neighbors to cause friction, and that it was she who menaced and harassed Giolekas, Heidi, and other neighbors. The defense intimated that Lerner did this for financial gain.

{¶29} Giolekas presented five witnesses who were all from the parties’ neighborhood. Four of the witnesses were neighbors who Lerner had on her “bad” people log. Three of the witnesses testified that they did not know Giolekas prior to these proceedings.

{¶30} Tiffany and her husband, Joseph, testified. Tiffany testified that she was friends with Heidi; Joseph testified that he was “friendly” with Heidi, but barely knew Giolekas. According to Joseph, he saw Lerner by Giolekas’s house “several times” after the protection order was first entered against Giolekas. He testified that, given the order,

he found it “bizarre” that Lerner would be by Giolekas’s house. Joseph also testified that Lerner has called the police on him or Tiffany several times, and that he is now scared of what he believes Lerner is capable of.

{¶31} Tiffany also testified that she saw Lerner by Giolekas’s house after the protection order had first been granted, and testified to one occasion in particular where she was outside of Giolekas’s house with Heidi. According to Tiffany, Heidi was nervous because Lerner was by the house, and Heidi called the police. Tiffany testified that she is scared of Lerner.

{¶32} Another neighbor, Cheryl, testified that she used to be friends with Lerner and the two would walk their dogs together. Cheryl ended her friendship with Lerner, however, after learning from other neighbors that Lerner said she (Cheryl) was stalking Lerner. Cheryl testified that after their relationship soured, she was involved in an incident with Lerner whereby their respective dogs’ leashes got tangled up together and Lerner accused her of kicking Lerner’s dog in the process of untangling them. Cheryl testified that after that incident Lerner began “intimidating” her. She testified to the following encounter that happened on Halloween 2014, approximately one week before the final hearing.

{¶33} According to Cheryl, she was walking home with her dog when she saw Lerner. Cheryl testified that Lerner saw her coming and “just stood there.” Not wanting to get involved in an incident with Lerner, Cheryl called the police. When the police arrived, Lerner was still standing there, and the police escorted Cheryl home.

Cheryl testified that she fears what Lerner is capable of doing. Cheryl testified that she did not know Giolekas or Heidi prior to this case.

{¶34} Another neighbor, Kim, who was friendly with Heidi, but who did not know Giolekas prior to this case, testified that shortly before the final hearing in this case, on October 27, 2014, she saw Lerner by Giolekas's house. She remembered the date because she was running late for work that day.

{¶35} The neighbor who Lerner testified attempted to spit on her, Chris, testified. He denied ever attempting to spit on her. According to Chris, Lerner "harasses" him and his wife. Chris testified about an incident where Lerner called the police on him and said that he had attempted to run over her dog, which he denied. According to Chris, Lerner's dog ran out in the street and he told her to get the dog out of the street. Chris also testified that he saw Lerner by Giolekas's house about one week prior to the final hearing.

Chris testified that he is afraid of Lerner.

Lerner's Rebuttal Witness

{¶36} Lerner presented the testimony of Sergeant Robert Samsell of the Olmsted Township Police Department as a rebuttal witness. His testimony, however, was not rebuttal testimony. Instead, he testified about responding to Giolekas's house on July 15, 2014, and finding weapons there. The defense's objections to his testimony as not being rebuttal testimony were overruled.

III. Law and Analysis

{¶37} Giolekas raises the following three assignments of error for our review:

I. The trial court committed reversible error in granting petitioner Melissa Lerner's petition for a civil stalking protection order against the manifest weight of the evidence.

II. The trial court committed reversible error in denying the motion to vacate judgment pursuant to Civ.R. 60(B), or in the alternative, motion for new hearing under Civ.R. 59 filed by respondent Giolekas.

III. The trial court's order of protection unduly infringes upon appellant's Second Amendment right to bear arms by requiring him to turn over all deadly weapons and conceal carry weapon licenses.

{¶38} We find Giolekas's second assignment of error relating to the trial court's denial of his motion to vacate judgment under Civ.R. 60(B), or alternatively, motion for a new hearing under Civ.R. 59, dispositive.

{¶39} In order to prevail on a Civ.R. 60(B) motion for relief from judgment, a movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1)-(5); and the motion is made within a reasonable time. *GTE Automatic Elec. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976). If any of the three requirements are not met, the motion should be denied. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988). An appeal from a denial of a Civ.R. 60(B) motion is reviewed pursuant to an abuse of discretion standard. *Fifth Third Mtge. Co. v. Whittington*, 6th Dist. Lucas No. L-13-1010, 2013-Ohio-2815, ¶ 7-8.

{¶40} Giolekas contends that he has a meritorious defense — that being, that he did not engage in any wrongdoing. He also claims, and we agree, that his motion was timely made. The point of contention between the parties regarding the Civ.R. 60 (B) motion is

whether Giolekas was entitled to relief under one of the grounds set forth in Civ.R. 60(B)(1)-(5). Giolekas contends that he is entitled to relief under Civ.R. 60(B)(2) and (5), which provide relief, respectively, for newly discovered evidence and any other reason justifying relief from judgment.

{¶41} Lerner's objection to Giolekas's motion is that the evidence Giolekas submitted in his supplemental pleadings was not "newly discovered since [Giolekas] was available for testimony at the first hearing and declined to testify." Lerner further contends that the "[s]ubsequent acts alleged to have been committed were not relevant to the instant matter."

{¶42} Newly discovered evidence is that "which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B)." Civ.R. 60(B)(2). The statements given to the police from the two July 2014 incidents, along with part of Giolekas's affidavit,³ did not constitute newly discovered evidence. But the alleged December 2014 incident, which occurred after the final hearing and issuance of the judgment granting Lerner a protective order, was newly discovered evidence. We disagree with Lerner that the alleged incident is not relevant to this matter. Giolekas's allegation that Lerner came by his house and then called the police on him is relevant to whether Giolekas engaged in menacing by stalking behavior, which is required under R.C. 2903.214 in order for a person to get an order of protection. Because the alleged incident

³Giolekas averred to the July 2014 incidents and the alleged December 2014 incident. The averments relative to the July 2014 incidents were not newly discovered evidence.

occurred so close after the trial court granted the protection order, we find that it constituted newly discovered evidence relative to this case.

{¶43} Further, we find the allegations that the parties attempted to settle this matter with financial compensation to be new evidence and concerning, especially Giolekas's allegation that Lerner countered with a \$10,000 settlement offer. The purpose of seeking a civil stalking protection order is for protection, not financial gain.

{¶44} Moreover, we find that Giolekas's allegation that his right to travel and his Second Amendment rights have been unduly impinged upon are at least operative facts that would support relief under the catchall provision of Civ.R. 60(B)(5).

{¶45} In light of the above, the trial court abused its discretion by denying Giolekas's Civ.R. 60(B) motion.

{¶46} Furthermore, Giolekas's alternative request for a new hearing was made under several grounds set forth in Civ.R. 59(A), including the following:

(A) A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

* * *

(8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial.

{¶47} Giolekas reiterates the same evidence discussed above regarding new evidence, and we likewise find, that for the same reason relative to his Civ.R. 60(B) motion, he alleged sufficient facts that would warrant a rehearing on this matter.

{¶48} Thus, in light of the above, appellant's second assignment of error is

sustained. The trial court's November 10, 2014 judgment is vacated and the case is remanded to the trial court for a new hearing. The first assignment of error is therefore moot.

{¶49} In his third assignment of error, Giolekas contends that the trial court's order relative to his weapons unduly infringed upon his Second Amendment right to bear arms. Giolekas asks us to hold the trial court to a higher burden than preponderance of the evidence in order to infringe on his constitutional right.⁴

{¶50} Under R.C. 2903.04, after a hearing, a trial court “may issue any protection order * * * that contains terms designed to ensure the safety and protection of the person to be protected by the order * * *.” The right to bear arms is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *District of Columbia v. Heller*, 554 U.S. 570, 626, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). Restrictions on a person's Second Amendment rights have been upheld as valid exercises of police power as it relates to civil stalking protection orders. *See Elkins v. Reed*, 5th Dist. Stark No. 2013CA0091, 2014-Ohio-1217; *Clementz-McBeth v. Craft*, 3d Dist. Auglaize No. 2-11-16, 2012-Ohio-985. We decline to alter the “preponderance of evidence” standard required for granting a civil stalking protection order as it relates to restrictions on the right to bear arms.

⁴In order to be granted a civil stalking protection order, the petitioner must show, by a preponderance of the evidence, that the respondent's conduct violates the menacing-by-stalking statute. *Stausser v. White*, 8th Dist. Cuyahoga No. 92091, 2009-Ohio-3597, ¶ 30, citing *Felton v. Felton*, 79 Ohio St.3d 34, 42-43, 679 N.E.2d 672 (1997).

{¶51} But, even though restricting the right to bear arms may be a constitutionally valid exercise of police power in these types of cases, it is axiomatic that such a restriction in a protection order must be related to specific conduct that the restriction seeks to prevent. And although the trial court has broad discretion when imposing restrictions under a protection order, its discretion is not limitless. *Newhouse v. Williams*, 167 Ohio App.3d 215, 223, 2006-Ohio-3075, 854 N.E.2d 565 (3d Dist.) citing *Maag v. Maag*, 3d Dist. Wyandot No. 16-01-16, 2002-Ohio-1401. “[R]estrictions must bear a sufficient nexus to the conduct that the trial court is attempting to prevent.” *Newhouse* at *id.*, citing *Maag* at ¶ 16.

{¶52} Thus, on remand, the preponderance of the evidence standard remains the burden of proof, but should the trial court issue another protection order, there must be competent, credible evidence that prohibiting Giolekas from having firearms or weapons bears a “sufficient nexus to the conduct that the trial court is attempting to prevent.” *Id.*

IV. Conclusion

{¶53} The trial court’s November 10, 2014 civil stalking protection order entered against Giolekas is vacated and the case is remanded for a new hearing on Lerner’s petition.

It is ordered that appellant recover of appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas 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.

LARRY A. JONES, SR., ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
SEAN C. GALLAGHER, J., CONCURS IN JUDGMENT
ONLY