STATE OF MICHIGAN

COURT OF APPEALS

RHONDA M. ZUSCHNITT,

Petitioner-Appellee,

v

JOHN M. PFEIFFENBERGER,

Respondent-Appellant.

UNPUBLISHED
February 13, 2007

No. 266611
Lenawee Circuit Court
Family Division
LC No. 05-028927-PP

Before: Kelly, P.J., and Davis and Servitto, JJ.

PER CURIAM.

Respondent appeals as of right the trial court order denying his motion to terminate petitioner's personal protection order (PPO). We affirm.

Petitioner and respondent were divorced in July 2000, after ten years of marriage. There were two daughters born of the marriage, ages 13 and ten. Four days before petitioner filed the petition for the PPO, the parties were in court in Traverse City for a hearing regarding visitation of their children. However, at the hearing, petitioner did not make any allegations that respondent had stalked or threatened her.

Respondent argues that the PPO should never have been entered because petitioner made false allegations of stalking in the petition and failed to disclose that her prior PPO's were terminated by court action. In addition, respondent claims the trial court should not have given weight to respondent's fiancé, Lisa Robertson's, prior PPO against him because it was also dismissed. We disagree. A trial court's decision regarding the termination of a PPO is reviewed for an abuse of discretion. *Pickering v Pickering*, 253 Mich App 694, 700; 659 NW2d 649 (2002). This Court defers to the trial court's judgment when the trial court chooses an outcome that falls within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

A person may file a request for a PPO in the family division of the circuit court to restrain another person, such as a former spouse, from engaging in specified acts. *Pobursky v Gee*, 249 Mich App 44, 46; 640 NW2d 597 (2001). The trial court must issue a PPO if there is reasonable cause to believe that the individual may commit one or more of the enumerated acts, which includes any act that "imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence." *Pickering*, *supra*, p 701; MCL 600.2950(4); MCL 600.2950(1)(j).

The court considers all evidence offered in support of the request and whether the individual has previously committed or threatened to commit any of the listed acts. *Pickering*, *supra*, p 701; MCL 600.2950(4)(a) and (b). "[T]he court must make a positive finding of prohibited behavior by the respondent before issuing a PPO." *Kampf v Kampf*, 237 Mich App 377, 386; 603 NW2d 295 (1999).

An ex parte PPO shall be issued if the petitioner shows "immediate and irreparable injury, loss, or damage will result" if the issuance of the PPO is delayed for the purpose of giving the respondent notice. *Id*., pp 383-384; MCL 600.2950(12). The respondent then has the right to bring a motion to rescind the PPO within 14 days of being served with notice or receiving actual notice of the PPO, and the court must schedule a hearing on the motion within 14 days of the filing of the motion. *Kampf*, *supra*, p 384; MCL 600.2950(13) and (14). When a PPO is granted ex parte, the burden of justifying its continuation remains on the petitioner for the PPO. *Pickering*, *supra*, p 699.

In this case, petitioner's petition for a PPO set forth several allegations of conduct by respondent that interfered with her personal liberty or caused a reasonable apprehension of violence. The trial court found that some of petitioner's allegations were unsupported by the evidence, and others caused some concern.

First, petitioner's allegations that respondent was stalking her on the three dates in question have no merit. Robertson and respondent both testified that respondent, Robertson, and Robertson's children drove back from turkey hunting in Alpena on May 1, 2005, and pictures from the trip were admitted into evidence. Respondent got a flat tire on the way from Alpena to Traverse City, and he had the tire repaired on May 2, 2005 in Traverse City. Bob Densel, a friend of both petitioner and respondent, testified that respondent was at the Mesick Mushroom Festival in Wexford County on May 8, 2005. Respondent introduced a history of his debit card transactions during the week in question, and it showed several transactions in Traverse City throughout the week. In response to petitioner's allegation that she saw respondent's white Jeep Wagoneer in Adrian on May 1, 2005, respondent introduced evidence that he traded it in and cancelled the insurance in April 2004.

The second problem with petitioner's petition was that she claimed to have received two prior PPO's against respondent in another county but failed to disclose that they were dismissed. In fact, petitioner actually testified that she voluntarily withdrew the first PPO once the divorce was final and she moved out of the marital home, and the second PPO was terminated because the court believed the police already informed respondent he could not have contact with petitioner or the children, so it was unnecessary. However, the transcript of the hearing for the first PPO was admitted into evidence to show that petitioner did not withdraw it. Petitioner not only lost credibility but put herself at risk for being held in contempt of court. "An individual who knowingly and intentionally makes a false statement to the court in support of his or her petition for a personal protection order is subject to the contempt powers of the court." MCL 600.2950(24).

Petitioner testified that respondent started calling within the last few months, since he wanted to reestablish parenting time, and has left threatening messages. Respondent testified that he only called petitioner to set up visitations with the children and was not threatening in any manner. Respondent called his daughter, Casey's, school one time to talk to the counselor

regarding why Casey's grades were falling. However, neither side presented any material evidence regarding this allegation.

The factors the court found against respondent were his history of drug use, coupled with possession of firearms and violent behavior. Respondent admitted that he went through a two-week drug rehabilitation program for cocaine use in June 2003, and has not used drugs since that time. Respondent has a gun collection of 25 to 30 guns and has hunted for many years. The guns are locked in cabinets with the ammunition stored separately. Respondent testified that he does not have any automatic weapons, but he does have some semi-automatic weapons.

Robertson testified that she obtained a PPO against respondent in June 2003. Respondent started acting strangely, and she found out he was on drugs. Robertson filed the petition for the PPO to induce respondent into entering a rehabilitation program and agreed to drop the PPO if he completed the program successfully. Robertson spoke with petitioner regarding respondent's threatening behavior toward Robertson and petitioner, and Robertson became fearful. After respondent completed the rehabilitation program, Robertson asked the court to drop the PPO, and the court did. Robertson testified that she has not seen respondent use drugs since that time. Contrary to respondent's assertion that the trial court should not have considered Robertson's PPO, it is an indication of whether respondent has previously committed or threatened to commit any of the listed acts. *Pickering*, *supra*, p 701; MCL 600.2950(4)(b).

The trial court discredited respondent's candor because he claimed to go through the rehabilitation program because he wanted to, rather than to get Robertson's PPO dismissed, it was only a two-week program with no follow-up, so it was not likely that respondent was completely successful in breaking his addiction, and respondent did not disclose his problem with prescription pain medications. In the opinion, the court invited respondent to file a motion for reconsideration, so respondent would have the opportunity to present evidence that he no longer uses drugs. *Zuschnitt v Pfeiffenberger*, unpublished opinion of the Lenawee Circuit Court, issued August 18, 2005 (Docket No. 05-28927-PP). Unfortunately, respondent did not take advantage of this invitation to bolster his credibility.

This is a close case where both parties lacked credibility, as acknowledged by the trial court. However, the court ultimately determined that respondent's issues with drug use outweighed petitioner's false allegations, and this Court defers to the trial court's determination of who was less credible. *Pickering*, *supra*, p 702. "[A]n appellate court may not weigh the evidence or the credibility of witnesses." *Brandt v Brandt*, 250 Mich App 68, 74; 645 NW2d 327 (2002). Upholding the PPO fell within the range of reasonable and principled outcomes, so the trial court did not abuse its discretion.

Second, respondent argues that the trial judge, sua sponte, took judicial notice in his opinion of evidence that was unfairly prejudicial to respondent and amended the petition to rationalize ruling against respondent. We disagree. Decisions regarding the amendment of pleadings are reviewed for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

A petition for a PPO is a pleading for commencing a personal protection action. MCR 3.702(2). Pleadings are required to have sufficient specificity to reasonably inform the

respondent of the nature of the claims he must defend. *Id*., p 654; MCR 2.111(B)(1). However, a pleading may be amended to conform to the evidence:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment. [MCR 2.118(C)(1); see also *Belobradich v Sarnsethsiri*, 131 Mich App 241, 248; 346 NW2d 83 (1983), and *Berwald v Kasal*, 102 Mich App 269, 274; 301 NW2d 499 (1980).]

Therefore, when evidence not within the issues raised by the pleadings is not objected to at trial, there is no error in its admission because it could have been added by amendment under MCR 2.118(C)(1). *Belobradich*, *supra*, p 248. If there is an objection, then an amendment is not allowed unless the party desiring amendment shows that the admission of such evidence would not prejudice the objecting party. *Berwald*, *supra*, p 274; MCR 2.118(C)(2). If a remand for amendment of the complaint would be a mere formality, this Court may elect to deem the pleadings to be amended. *Browder v International Fidelity Ins Co*, 413 Mich 603, 609; 321 NW2d 668 (1982).

Respondent objects to the following section of the trial court's opinion:

> A petition for a PPO is a pleading, within the definitions of the Michigan Court Rules. (MCR 2.110) The Court on its own motion (MCR 2.118(C)) amends the pleadings to conform to the proofs; specifically: That Mr. Pfeiffenberger has had an ongoing history of threatening, delusional and paranoid behavior, which continues to the present; that he has a collection of fire arms, including semi-automatic weapons along with ammunition for all the weapons; that he has had a history of addiction to cocaine, for which he has sought only minimal treatment, and has had no aftercare and no professional testing to support the conclusion that the addiction is under control; and, that his threatening behavior also has occurred when he is not under the influence of illegal drugs. [*Zuschnitt v Pfeiffenberger*, unpublished opinion of the Lenawee Circuit Court, issued August 18, 2005 (Docket No. 05-28927-PP).]

Respondent contends that he did not have notice of the allegations in the amendment and was unfairly surprised. However, petitioner's original petition alleged that respondent started calling and leaving threatening messages, he had a long history of drug abuse, his behavior led petitioner to believe he was using drugs again, and he had an extensive collection of automatic assault rifles. This was sufficient to put respondent on notice that his history of drug use, threatening behavior, and gun collection were at issue. In addition, respondent did not object to the testimony regarding these issues at trial, so there was no error in its admission. *Belobradich*, *supra*, p 248. The trial court did not abuse its discretion in amending the petition to conform to the proofs because it was a mere formality. *Browder*, *supra*, p 609.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Alton T. Davis
/s/ Deborah A. Servitto