STATE OF MICHIGAN

COURT OF APPEALS

CONSTANCE CONKLIN PETERSON, Petitioner-Appellee,	UNPUBLISHED June 17, 2008
v	No. 283188 Ingham Circuit Court
LARRY MICHAEL PETERSON, Respondent-Appellant.	LC No. 07-004002-PP

Before: Gleicher, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Respondent appeals as of right the circuit court order denying his motion to terminate the ex parte personal protection order (PPO or "the order") requested by petitioner, his wife. The court refused to hear the presentation of respondent's case after questioning respondent and finding that he violated the provision of the PPO prohibiting him from contacting petitioner. We affirm in part, reverse in part, and remand for a hearing on respondent's motion to terminate the PPO.

I

Respondent argues that the trial court abused its discretion by granting the ex parte PPO. We disagree.

Pursuant to MCR 3.703(G), a petition for an ex parte order "must set forth specific facts showing that immediate and irreparable injury, loss, or damage will result to the petitioner from the delay required to effect notice or from the risk that notice will itself precipitate adverse action before an order can be issued." See also MCR 3.705(A)(2); MCL 600.2950a(9). Respondent contends that petitioner's statement failed to set forth the specific facts required by the court rule to obtain an ex parte order.

MCL 600.2950(4) states that

> The court shall issue a personal protection order under this section if the court determines that there is reasonable cause to believe that the individual to be restrained or enjoined may commit 1 or more of the acts listed in subsection (1).

> In determining whether reasonable cause exists, the court shall consider all of the following:
>
> (a) Testimony, documents, or other evidence offered in support of the request for a personal protection order.
>
> (b) Whether the individual to be restrained or enjoined has previously committed or threatened to commit 1 or more of the acts listed in subsection (1).

As pertinent to this case, petitioner sought a PPO prohibiting respondent from:

> a. Entering onto the property where I live.
>
> b. Entering onto the property at 419 Jackson Avenue, Harrison, Michigan.
>
> c. Assaulting, attacking, beating, molesting, or wounding Constance Peterson.
>
> e. Stalking as defined under MCL 750.411h and MCL 750.411i which includes but is not limited to: following me or appearing within my sight, appearing at my workplace or residence, sending mail or other communications to me, contacting me by telephone, approaching or confronting me in a public place or on private property, entering onto or remaining on property owned, leased, or occupied by me, placing an object on or delivering an object to property owned, leased, or occupied by me.
>
> g. Threatening to kill or physically injure Constance Peterson.
>
> h. Interfering with me at my place or employment or education or engaging in conduct that impairs my employment or educational relationship or environment.
>
> j. Purchasing or possessing a firearm.
>
> k. Not be allowed to cancel joint accounts.

We presume that in issuing the PPO, Judge R. George Economy relied on petitioner's handwritten statement, as the record does not reveal that the court considered any other documents or testimony. In the statement, petitioner recounts a recent incident in which respondent apparently left a note for her on her office door that stated that "he knew about some things" that she had done and that he did not want to see her for the rest of the week. However, the parties did see each other at the marital house when petitioner returned home from work, and she stated that she "believe[d] he had been drinking." According to petitioner, respondent told her that their car insurance had been canceled, and he "wanted [her] drivers license." Petitioner refused and asked respondent to leave. Although he initially refused, respondent apparently left after petitioner threatened to call the police. Petitioner also wrote in her statement that she was "afraid of [respondent's] impulsive behavior, especially if he has been drinking. He drinks every day." Petitioner also recounted respondent's past abusive treatment of herself and her son, and

stated that respondent was "hostile" in other ways, including failing to advise her of financial decisions he had made. In addition, according to the statement, respondent had called her repeatedly on the morning of November 27, 2007, at her place of employment. Petitioner's statement also informed the court that respondent owned guns, and that she was afraid that he would "get drunk and hurt me."

On November 28, 2007, the court issued the PPO, prohibiting respondent from engaging in items a, c, g, h, and j. With regard to item e, the PPO prohibited respondent from "stalking as defined under MCL 750.411h and MCL 750.411i which includes but is not limited to: following petitioner, appearing at petitioner's workplace or residence, sending mail or other communications to petitioner, and contacting petitioner by telephone.

Under MCL 600.2950(4), a court may issue an ex parte PPO if, based on the available evidence or on the individual's prior conduct, there is reasonable cause to believe that the individual sought to be restrained may commit any of the actions prohibited by MCL 600.2950(1). Petitioner's statement was evidence that respondent had already engaged in at least two of the activities listed, including possessing a firearm and interfering with petitioner at her place of employment. MCL 600.2950(1)(e), (g). The court had reasonable cause, based on petitioner's statement, to believe that respondent intended to commit the actions sought to be enjoined by the PPO. It was also reasonable for the court to assume, pursuant to MCR 3.703(G), that "immediate and irreparable injury" could result to petitioner if respondent was given notice of petitioner's intent to try to obtain a PPO. See also *Pickering v Pickering*, 253 Mich App 694, 701-702; 659 NW2d 649 (2002). Therefore, it was not an abuse of discretion for the court to issue the ex parte PPO.

II

Respondent maintains that Judge Richard J. Garcia denied him the due process of law by refusing to hear the full presentation of his case during the joint hearing on respondent's motion to terminate the PPO and petitioner's motion to show cause for violating the PPO. Respondent's December 12, 2007, motion to terminate the PPO was accompanied by a written statement that provided:

> I feel the PPOs are not necessary, as I am more than willing to comply with Connie's wishes mediated through our mutual friend, Fred Clark.
>
> I had not been drinking on November 26, I do not drink at work and when I arrived at Fred Clark's house, after leaving our house, Fred will verify that. I don't drink everyday as my wife has accused me of.
>
> The one incident she cites of me hitting her happened over 22 years ago, any events that happened with my son Paul happened over 12 years ago. In fact the day the PPO was issued I was helping him work on the car.
>
> I love my wife and would never hurt her, and just as importantly, I would never do anything that would bring pain or any kind of hurt to my mother-in-law, Anna May Conklin, Connie will even swear to this.

> The numerous phone calls on Nov 27th were because the Lansing Community College voice mail was down, I finally got through and left one message, stating this and that the insurance was taken care of, cancelled because of our son Michael's tickets.
>
> Connie moved her money to a separate account. I was paying bills with money I had access to and I got a little behind. No utilities were shut off or tax liens issued, the bills were going to be paid.
>
> Before Paul left for Oregon, I had to change the locks on the house twice at the request of Connie.
>
> There have been NO acts of violence, threats, marital disturbances reported with any law enforcement office in the last 13 years, if ever.

On December 19, 2007, petitioner filed a motion to show cause for violating the PPO, asserting that respondent sent her an e-mail on December 11, 2007, and had a mutual friend deliver an e-mail joke to her on December 14, 2007. On December 12, 2007, she agreed to talk to respondent on the phone after being informed that he was depressed, and "we both cried, but then Larry went back to his old self and became angry and started accusing me of things. . . . I hung up on him."

At the January 4, 2008, joint hearing on the motions, petitioner's counsel told the court that respondent had given "an email to a . . . colleague of my client's that he's living with, to give to her. . . ." Respondent's counsel and respondent both acknowledged that respondent had given that document to a third party to give to petitioner. The court asked respondent whether he was "in any way unclear about the requirements of the court order," and respondent answered that he was not. The court found respondent to be in violation of the PPO and refused to hear the motion to terminate the PPO. The following colloquy occurred between the court and respondent's counsel:

> MR. ABOOD [Respondent's Counsel]: Well, is it possible that she initiated or engaged in communication with my client prior to this email?
>
> THE COURT: It doesn't matter. It doesn't restrain her. This PPO does not restrain her. It restrains your client, and he violated that, and it cost him $250. And if he does it again, he's going to jail. That simple, that's pretty straight forward.
>
> MR. ABOOD: So no matter what she does, and if she's communicated by email post-execution of the order - -
>
> THE COURT: What, what provision in this order, Mr. Abood, restrains her from doing anything?
>
> * * *
>
> THE COURT: . . . So this is a pretty broad order.

MR. ABOOD: All the more reason why we should have a hearing to see if you can terminate it.

THE COURT: I would have liked to have done that, but your client violated it.

MR. ABOOD: Okay. But, but maybe we won't have another violation if the Court hears the evidence and decides to terminate it.

THE COURT: Mr. Abood, that's interesting, but your client violated a personal protection order, which leads me to believe he doesn't know how to follow the rules. And I'm not going to hear the motion to set it aside because he violated it.

MR. ABOOD: Well, then, when can I get a motion to set it aside?

THE COURT: You can't. It's denied.

MR. ABOOD: Ever.

THE COURT: That's all.

On that same date, the court entered an "order after hearing on show cause for violating valid personal/foreign personal protection order" that ordered respondent to pay $250 to petitioner's attorney. The court also entered an order denying respondent's motion to terminate the PPO.

MCR 3.707(A)(2) states, in pertinent part, that "[t]he court must schedule and hold a hearing on a motion to modify or terminate a personal protection order within 14 days of the filing of the motion . . . ." Based on this language, respondent argues that the trial court was required to hold the hearing and to "allow [respondent] a meaningful opportunity to challenge the merits of the Ex Parte PPO." We agree, and conclude that respondent was denied a "meaningful opportunity" to present his defense to the issuance of the ex parte PPO.

Under MCR 3.310(B)(5) the burden of justifying continuation of a PPO granted ex parte is on the applicant for the restraining order. Hence, the petitioner will have the burden of persuasion in a hearing held on a motion to terminate or modify an ex parte PPO. *Pickering, supra* at 699. Here, the trial court relied solely on respondent's violation of a term of the PPO in refusing to hear respondent's motion to terminate the PPO, and did not allow respondent the opportunity to present evidence to be considered by the court in determining whether there were sufficient facts to justify the earlier entry of the ex parte PPO. While violation of a PPO can justify finding a respondent in contempt of the PPO, it does not warrant the denial of an opportunity to be heard with regard to the validity of the initial issuance of the ex parte PPO. Under these circumstances, respondent was essentially denied any right to be heard with regard to whether the ex parte PPO was entered erroneously. Respondent is entitled to a hearing on the motion to terminate the PPO. The trial court is to hold the hearing within 14 days of the issuance of this opinion.

III

Finally, respondent argues on appeal that the PPO violated his constitutional right to freedom of speech. Because this issue was not preserved below our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Respondent has not established any plain error as to this issue.

Initially, contrary to respondent's argument that the trial court erred in holding him in contempt of court for violating the PPO, the trial court properly held him in contempt regardless of whether the underlying restriction of the PPO on his communications with petitioner was consistent with constitutional guarantees of freedom of speech. In *In re Contempt of Dudzinski*, 257 Mich App 96, 107; 667 NW2d 68 (2003), this Court stated that the trial court erred in ordering the appellant to remove a shirt with a political message or leave the courtroom because the statement on the shirt was constitutionally protected political speech. However, this Court also concluded that the trial court did *not* abuse its discretion by finding the appellant in contempt of court for violating that order. *Id*. at 107-108. This Court described the appellant as having "elected to willfully disobey a valid albeit erroneous court order" and explained that one "may not disregard a court order simply on the basis of his subjective view that the order is wrong or will be declared invalid on appeal." *Id*. at 111. In this regard, a person risks being found in contempt of court for violating a court order even if the order is ultimately ruled incorrect. *Id*. In the present case, respondent admittedly had a third party send a communication to petitioner at a time when the PPO was in force and expressly forbade him from doing so. Thus, the trial court was justified in sanctioning him for committing a contempt of court by disobeying the PPO regardless of whether the content of the PPO infringed his right to freedom of speech, because if respondent questioned the constitutionality of the PPO his recourse was to appeal it, not simply violate it.

However, because respondent does not seek merely to reverse the contempt finding but also to terminate the PPO we must reach the merits of this unpreserved issue. It is not plain that the provision of the PPO barring respondent from sending communications to petitioner violates his First Amendment right to freedom of speech. "The rights of free speech under the Michigan and federal constitutions are coterminous." *In re Contempt of Dudzinski, supra* at 100. Accordingly, if it is not plain under controlling law that the PPO's prohibition on respondent sending communications to petitioner violated the First Amendment, then it is not plain that it violated the right to free speech under the Michigan Constitution. In addressing a First Amendment challenge to a state statute, the United States Supreme Court has stated that "[t]he unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases." *Hill v Colorado*, 530 US 703, 716; 120 S Ct 2480; 147 L Ed 2d 597 (2000). Accordingly, it is not plain that the provision of the PPO barring respondent from sending communications to petitioner violates the constitutional right to freedom of speech where in obtaining the PPO petitioner effectively made clear that she did not wish to receive communications from respondent.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra