STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ROBERT SIGAFOOSE.

AMY MURPHY,

Petitioner-Appellee,

v

ROBERT SIGAFOOSE,

Respondent-Appellant.

UNPUBLISHED
January 12, 2010

No. 292183
Saginaw Circuit Court
Family Division
LC No. 09-003876-PP

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

Respondent, Robert Sigafoose, appeals as of right from the circuit court's order finding him in criminal contempt of court and ordering him to serve seven days in jail and 30 days on a tether. We affirm. We decide this appeal without oral argument.[1]

I. Basic Facts And Procedural History

On January 23, 2009, petitioner Amy Murphy obtained a domestic relationship personal protection order (PPO) against Sigafoose. The order broadly prohibited Sigafoose from contacting Murphy, including by way of stalking as defined by MCL 750.411h and MCL 750.411i, and specified that this included, but was not limited to, "following [Murphy] or appearing within his/her sight."

Sigafoose resisted the order, and after a hearing, the trial court issued a modified order on February 19, 2009. The differences between the orders include that (1) the second order left unchecked the box indicating that Sigafoose posed a credible threat to the physical safety of Murphy, (2) the words expressly prohibiting Sigafoose's "appearing within his/her sight" were crossed out of the second order, and (3) the expiration date was changed from January 2010 to July 2009.

[1] MCR 7.214(E).

A contempt hearing on a violation of the PPO took place on May 7, 2009. The trial court summarized the evidence:

> The claims in the PPO is that [Sigafoose] has been stalking [Murphy] by following her around in her home town of St. Charles, Michigan. [Sigafoose] resides in two towns Manistee and or Ithaca which is approximately 20 miles west of the town of St. Charles.
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> [Murphy] testified that she saw him while approaching a light at 52 and the area of Belle in St. Charles and he passed, and as she came out, he was driving around the gas station located on that corner.
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> She also testified on March 27, 2009, a Friday, that she saw him again in St. Charles as he drove passed [*sic*] the rental house that she had at 602 Cole Street which she said that he had been there before and [Sigafoose] admitted he knew the house there . . . .
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> On Saturday, March 28, she testified she saw him in St. Charles again in the Bear's Sporting Goods parking lot on M-52, a block north of the intersection of M-52 . . . . She was headed north up there to the pharmacy which is located on the other side of the street. As she was returning from the pharmacy, heading back south towards the Bear's lot, she saw the police station and pulled in there as an officer was there.
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> She . . . testified they did have a relationship with each other. Testified that he did know where she lived, or at least the Cole address, and saw him after he circled around the gas station and didn't go to the police on the same day.
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> On the 28th, she saw him driving through St. Charles again . . . and talked to the police officer.
>
> Patrick Eward testified that he was in St. Charles on the 26th and saw the vehicle pass him. On the 27th was at 602 Cole doing work on the house when the vehicle came by. He followed the vehicle and identified the vehicle as the one he'd seen before . . . . He also testified that he has a relationship with [petitioner].
>
> Officer Daniel Jonoshies testified indicating after he had received a report that there was a possible PPO violation, did see this particular pickup truck off 52. He followed it along various neighborhoods and made a traffic stop and he was told . . . the reason why he was in St. Charles that day was to get an oil change and did produce a receipt for that oil change on the 28th . . . and also to buy some meat. However, the receipt for the Meat was on March 27, of 2009, the day before. He was told . . . that it would be in his best interest to leave town and he did quietly. [T]he police officer[] also testified that as he followed the pickup, he weaved through all the streets in the subdivision of St. Charles.

Sigafoose also testified, variously providing denials of, or innocent explanations for, the accounts of his presence in St. Charles, but the trial court found Sigafoose's testimony to lack

credibility. The trial court concluded that, "the prosecutor proved this violation beyond a reasonable doubt and that [Sigafoose] is in contempt of court."

On appeal, Sigafoose does not contest the propriety of the issuance of either PPO, but argues that the trial court erred in assessing his behavior against the requirements of the January 2009 PPO instead of the modified one of a month later, that defense counsel was ineffective for failing to bring this error to light, that the trial court improperly shifted the burden of proof to Sigafoose, and that proceedings denied him his right to trial by jury.

II. The Wrong Order

A. Standard Of Review

Sigafoose argues that his conviction should be reversed because he was tried and convicted based on the wrong personal protection order and his conduct did not violate the specific provisions of the actual controlling order. This Court's review of the nature of the contempt order is de novo.[2] This Court reviews for clear error a trial court's findings in a contempt proceeding and those findings must be affirmed on appeal if there is competent evidence to support them.[3] This Court reviews for an abuse of discretion a trial court's decision to hold a party or individual in contempt.[4]

B. Analysis

More specifically, Sigafoose points out that the trial court's statements from the bench included a reference to the January 2009 PPO, instead of the February 2009 order that superceded it, and a statement that the allegations of violations included "that he would be following [Murphy] or appearing within her sight, or appearing at work place or residence, or in the sight of." Sigafoose emphasizes that the modified PPO crossed out the specific prohibition of his appearing within Murphy's sight and argues that the trial court's references to that stricken language confirms that the trial court decided this case under the wrong PPO.

We conclude that this inadvertence on the part of the trial court does not warrant reversal of the criminal contempt finding. The February 2009 PPO order retained the references of the January 2009 order to MCL 750.411h and MCL 750.411i. Although the latter order struck the specific prohibition concerning appearing within Murphy's sight, it did not grant Sigafoose open-ended permission to do so.

MCL 750.411h(1)(d) and MCL 750.411i(1)(e) both define "stalking" as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened,

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[2] *In re Auto Club Ins Ass'n*, 243 Mich App 697, 714; 624 NW2d 443 (2000).

[3] *In re Contempt of Henry*, 282 Mich App 656, 668; 765 NW2d 44 (2009).

[4] *In re Auto Club Ins Ass'n*, 243 Mich App at 714.

harassed, or molested." MCL 750 411h(1)(e)(*i*) and MCL 750 411i(1)(f)(*i*) both define "unconsented contact" to include "[f]ollowing or appearing within the sight of" the unconsenting person.

The trial court had a reasonable evidentiary basis for concluding that Sigafoose had stalked Murphy as the statutes define that action. Sigafoose had maintained a far greater presence in Murphy's residential area than any normal course of business would have required, resulting in several sightings on her part that she could well have found menacing. The order actually in effect, that of February 2009, retained the incorporation by reference of the statutes setting forth stalking criteria as set forth in the January 2009 order. Therefore, the fact that the trial court referred to the earlier order instead of the later one was harmless error. The statutes cited prohibited appearing with the sight of the unconsenting person among the criteria for establishing the existence of stalking. Thus, the trial court did not err in taking into account that Sigafoose had indeed repeatedly appeared in the sight of Murphy, even though that specific language had been stricken from the February 2009 order.

III. Assistance of Counsel

A. Standard Of Review

Sigafoose argues that he was denied the effective assistance of counsel because his trial counsel failed to object to his being tried and convicted based on the wrong order and because his trial counsel failed to make "obvious arguments" based on the controlling order that would have corrected the "fundamentally unfair" result of being convicted based on his alleged violation of a superseded order. Our review of this issue is limited to mistakes apparent on the record.[5]

B. Applicable Legal Standards

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance."[6] Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different.[7]

C. Applying The Standards

Above we have concluded that the trial court's apparent reference to the January 2009 order, instead of the February 2009 order was mere inadvertence and that the evidence supported a contempt finding under the February 2009. In light of this, we conclude that had Sigafoose's

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[5] *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

[6] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[7] *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

counsel called attention to that error, the result would have been no different. Accordingly, reversal on grounds of ineffective assistance of counsel is not warranted.[8]

IV. Burden Shifting

A. Standard Of Review

Sigafoose argues that because the trial court referred to the January 2009 PPO, which expressly prohibited him from appearing within Murphy's sight, instead of the February 2009 PPO, where that restriction was penciled out, and then commented disapprovingly on his repeated presence in the area of Murphy's residence, the trial court improperly shifted the burden of proof to the defense. Sigafoose bears the burden of establishing that a plain error occurred hat affected his substantial rights.[9]

B. Analysis

We note that the trial court found Sigafoose in contempt not because he happened innocently to be in St. Charles, but because he was seen there repeatedly, and under circumstances that suggested that he was stalking Murphy in violation of the February 2009 order. Again, the trial court's reference to the January 2009 order was harmless inadvertence, in that the evidence well supported the conclusion that Sigafoose violated the order actually in effect. For these reasons, we reject this claim of error.

V. Jury Trial

Sigafoose nowhere suggests that he asserted any right to a jury trial before the matter was adjudicated. Further, it is well established that there is no right to a jury trial in contempt proceedings for violation of personal protection orders.[10] Sigafoose's argument that he was denied his right to a jury trial in the matter is therefore without merit.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck

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[8] *Id.*

[9] *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[10] MCR 3.708(H)(1); *Brandt v Brandt*, 250 Mich App 68, 72; 645 NW2d 327 (2002).