STATE OF MICHIGAN

COURT OF APPEALS

HEIDI ELIZABETH LIPSCOMBE,

Petitioner-Appellee,

v

WILLIAM C. LIPSCOMBE, SR.,

Respondent-Appellant.

UNPUBLISHED
February 4, 2010

No. 287822
Ottawa Circuit Court
LC No. 08-061386-PP

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Following a hearing, respondent's motion to terminate the ex parte personal protection order (PPO) against him was denied and a modified PPO issued. Respondent appeals as of right, and for the reasons set forth in this opinion, we reverse the trial court's decision to grant the PPO and accordingly we vacate the issuance of the PPO. Additionally, we remand this matter to the trial court for a new order to update and remove reference to the PPO from the law enforcement information network (LEIN). This appeal has been decided without oral argument pursuant to MCR 7.214(E).

While filing divorce proceedings against respondent, petitioner sought an ex parte PPO against respondent. Petitioner was granted an ex parte PPO against respondent on May 8, 2008, which provided for the couple's children as well as petitioner. Respondent was served the next day and filed a timely motion to rescind. An evidentiary hearing was held, and both parties testified. The trial court found the incidents alleged by petitioner to be normal for couples experiencing marital difficulties. It found there had been no assaults and that neither petitioner nor her children were in danger from respondent. The court indicated that petitioner's fears were based on her perception, rather than reality. Specifically, the trial court stated:

> I didn't hear anything that says that [petitioner] is in imminent danger, I think clearly she feels that way and that's important . . . to deal with that. I think what we need to do is a modified [PPO] that will provide the comfort [petitioner]'s looking for as far as her personal safety is concerned. And it basically isn't going to order [respondent] to not to [sic] anything he isn't supposed to not do anyway.

Despite not finding legal grounds for the issuance of a PPO, the trial court ordered a modified PPO anyway, reasoning that the order did not prohibit respondent from committing any acts not already prohibited by law.

On appeal, respondent argues that the trial court erred by failing to terminate the PPO against him. We review a trial court's denial of a motion to rescind an ex parte PPO for abuse of discretion. *Pickering v Pickering*, 253 Mich App 694, 700-701; 659 NW2d 649 (2002). A trial court acts within its discretion when its decision results in an outcome within the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

A trial court is normally afforded great deference when addressing issues of witness credibility. MCR 2.613(C); *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999). Although the trial court found that petitioner believed her concerns were real, it also found that her concerns were unfounded. Therefore, the issue presented on appeal is not one of deference to the trial court on a matter of witness credibility, but rather whether the court erred when it continued the PPO despite petitioner's failure to overcome her burden of persuasion. The court's statements on the record indicate petitioner did not meet that burden, and accordingly, the trial court erred when it entered a PPO against respondent.

Initially, we note that while the PPO on which this appeal is based expired on May 8, 2009, the issue is not moot. An issue on appeal is moot when it becomes impossible for the court to grant the relief sought. *City of Warren v Detroit*, 261 Mich App 165, 166 n 1; 680 NW2d 57 (2004). However, "a question may not be moot if it will continue to have collateral legal consequences." *Mead v Batchlor*, 435 Mich 480, 486; 460 NW2d 493 (1990). This Court has held that an appeal from an expired PPO is justiciable where retention of a respondent's record on the LEIN poses future negative consequences. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008).

In cases of wrongful criminal convictions, adverse collateral consequences are presumed. *Spencer v Kemna*, 523 US 1; 118 S Ct 978; 140 L Ed 2d 43 (1998); *Sibron v New York*, 392 US 40, 55-56; 88 S Ct 1889; 20 L Ed 2d 917 (1968). One adverse collateral consequence recognized in the criminal context is the right to engage in certain businesses. *Spencer*, 523 US at 8. A PPO is not a criminal conviction, but may have criminal implications for individuals pursuing occupations that require a criminal background check or the carrying of a weapon. When a PPO issues, it is automatically entered into the LEIN, but there is no statutory provision to address removal from the LEIN upon its natural expiration. See MCL 600.2950a(17). Therefore, a wrongfully issued PPO could have collateral consequences for an individual well after the PPO has expired.

Respondent indicated that he has been seeking federal employment since he retired from the Coast Guard. Although the modified PPO did not specifically prohibit respondent from purchasing or possessing a firearm, he could have difficulty obtaining security clearances or passing a criminal background check required for certain law enforcement positions or other government employment because it would not be unreasonable for potential employers to presume a violent tendency on the part of respondent because of the issuance of the PPO. Because respondent has sufficiently demonstrated the potential for future adverse consequences to employment in his chosen field, this Court is not without a remedy to provide the requested relief. Consequently, this appeal is not moot.

MCL 600.2950 sets forth the criteria under which a trial court may issue a PPO. Under MCL 600.2950(4), the trial court is required to issue a PPO if it 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)." The acts listed in subsection 1 include "any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence." MCL 600.2950(1)(j). In determining whether good cause exists, the trial court is required to consider "testimony, documents, or other evidence" and "whether the individual to be restrained . . . has previously committed or threatened to commit 1 or more of the acts listed in subsection (1)." MCL 600.2950(4)(a) and (b). "The burden of proof in obtaining the PPO, as well as the burden of justifying continuance of the order, is on the applicant for the restraining order." *Pickering*, 253 Mich App at 701.

In this case, the trial court found that the alleged incidents petitioner made against respondent were "pretty commonplace" and "normal" for couples who were experiencing marital difficulties. The trial court then found that the testimony did not indicate a requirement for issuing " a whole lot of these orders," and further found there had been no assaults and that neither petitioner nor the boys were in danger. Review of the record indicates that the trial court never stated a basis under MCL 600.2950 for the issuance of a PPO. Rather, as previously indicated, the trial court issued the PPO as a means to "provide the comfort [petitioner was] looking for as far as her personal safety is concerned." Absent a legally justified rationale for the issuance of a PPO, the trial court's decision to issue the PPO constituted an abuse of discretion as it was outside the range of principled outcomes. *Maldonado*, 476 Mich at 388. Having found that the trial court erred by entering the modified PPO, we vacate the PPO and remand this matter to the trial court for a new order to update and remove reference to the PPO from the LEIN. We do not retain jurisdiction.

Respondent, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello