STATE OF MICHIGAN

COURT OF APPEALS

KALLIE ROESNER,

Petitioner-Appellee,

v

WILBERT HUTCHINGS,

Respondent-Appellant.

UNPUBLISHED
May 6, 2010

No. 289187
Oakland Circuit Court
LC No. 2007-741238-PH

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

Respondent appeals as of right an order granting petitioner's petition for a personal protection order (PPO) against him. We affirm.

This case arises out of several incidents in the late summer and fall of 2007, which led to petitioner's filing of a petition for a personal protection order (PPO), to restrain respondent from engaging in stalking under MCL 750.411h or MCL 750.411i.[1] MCL 750.411h(1)(d) defines "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, harassed, or molested." "Harassment" is defined in MCL 750.411h(1)(c) as, "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose." In addition, MCL 750.411h(1)(e) provides that "unconsented contact"

> means any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that

[1] We note that petitioner previously filed and received a one-year PPO, now expired, against respondent originating out of Lapeer County. Petitioner and respondent are neighbors; petitioner also has applied for and received a number of PPOs against other neighbors.

the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

(i) Following or appearing within the sight of that individual.

(ii) Approaching or confronting that individual in a public place or on private property.

(iii) Appearing at that individual's workplace or residence.

(iv) Entering onto or remaining on property owned, leased, or occupied by that individual.

(v) Contacting that individual by telephone.

(vi) Sending mail or electronic communications to that individual.

(vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual.

MCL 750.411h(1)(a) further defines "course of conduct" as, "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose." Thus, to find a person guilty of stalking, there must be evidence of "two or more acts of unconsented contact that actually cause emotional distress to the victim and would also cause a reasonable person such distress." *Nastal v Henderson & Assos Investigations, Inc*, 471 Mich 712, 723; 691 NW2d 1 (2005). MCL 750.411h(4) provides that if the victim asked a defendant to refrain from the unconsented contact, but the defendant continued to engage in repeated unconsented contact, a rebuttable presumption arises that such conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

The trial court initially denied petitioner's request for an ex parte PPO, finding the factual allegations to be insufficient. However, the trial court allowed petitioner to schedule a hearing in order for the trial court to make factual determinations. Respondent filed a written response to the petition. The trial court held four hearings on this matter, beginning in January 2008 and concluding in October 2008. At the conclusion of the final hearing, the trial court issued a PPO against respondent, valid for one year, noting that it found petitioner to be a credible witness and that, while respondent was credible to some extent, he was not credible as to a number of issues the trial court found crucial to the petition.[2] The PPO prohibited respondent from having contact with petitioner and from being in her presence. The trial court did not prohibit respondent from being "within [petitioner's] sight" because respondent could come into petitioner's view accidentally; however, respondent could not come by or approach petitioner, he could not go to petitioner's residence or workplace, he could not go to any property that was owned, leased, or occupied by petitioner, he could not send petitioner mail or other communications, he could not

[2] That PPO has since been extended; it is now set to expire on October 31, 2010.

contact her by phone or any other manner, he could not place any object on or deliver any object to property which she owned, leased, or occupied, and he could not threaten to kill or physically injure petitioner in any way.

This Court reviews a trial court's determination whether to issue a PPO for an abuse of discretion. *Pickering v Pickering*, 253 Mich App 694, 700; 659 NW2d 649 (2002); MCL 600.2950(30)(c). An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). This Court reviews a trial court's findings of fact for clear error. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006). A finding is clearly erroneous when, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Respondent first argues that the trial court abused its discretion when it granted petitioner the PPO because (1) the trial court findings of fact that established that stalking occurred were clearly erroneous; (2) the trial court improperly granted the PPO based in part upon an alleged incident, in April 2008, involving respondent's conduct while on a golf cart, which was not contained in the original PPO petition nor in any subsequent amendment; and (3) the trial court did not articulate specific findings of fact on the record or in writing as required by MCR 3.705(B)(6). We disagree.

We first note the trial court expended significant time on this matter, holding four hearings over nearly nine months. The trial court heard witness testimony and viewed video and photographs relevant to the alleged incidents of harassment underlying the PPO. The trial court's findings of fact, supporting its conclusion that stalking had occurred, were based, almost entirely, on its assessment of the credibility of the testimony offered by petitioner and respondent. This Court must give "special deference to the trial court's findings when they are based on its assessment of the witnesses' credibility." *H J Tucker & Assoc, Inc v Allied Chucker & Eng'g Co*, 234 Mich App 550, 563; 595 NW2d 176 (1999); MCR 2.613(C). See also, *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). The trial court sat at the hearings in this case and saw the witnesses testify first-hand. It heard detailed testimony regarding each alleged incident from respondent, petitioner and other witnesses. As a result, the trial court was in a better position to weigh each witness's credibility and to resolve the factual disputes presented by that testimony. Further, determining the weight to be afforded to evidence is the responsibility of the fact-finder, and it is well settled that this Court will not interfere with the fact-finder's role in that regard. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007); *Strzelecki v Blaser's Lakeside Indus of Rice Lake, Inc*, 133 Mich App 191, 198; 348 NW2d 311 (1984). Therefore, we find no merit in respondent's complaints that the trial court gave insufficient weight to the video and photographic evidence presented, instead overvaluing certain witness testimony. Having reviewed the lower court record, and giving appropriate deference to the trial court's superior position to judge witness credibility and weigh the evidence presented, we find no clear error in the trial court's factual findings. And, based on those findings of fact, the trial court did not abuse its discretion by granting petitioner a PPO.

The petitioner bears the burden of proving reasonable cause for the issuance of a PPO. *Hayford v Hayford*, 279 Mich App 324, 326; 760 NW2d 503 (2008). MCL 600.2950a(1) states

that a circuit court may grant a PPO if the "petition alleges facts that constitute stalking" as defined by MCL 750.411h or 750.411i. When making that determination, the trial court must consider the testimony, documents, and other evidence proffered and whether the respondent had previously engaged in the listed acts. MCL 600.2950(4)(a) and (b). Nothing in MCL 600.2950(4) suggests the trial court is limited to incidents alleged in the PPO petition. Rather, pursuant to MCL 600.2950(4), the trial court must consider all the testimony and evidence proffered. Thus, contrary to respondent's assertion otherwise, the trial court did not abuse its discretion by considering petitioner's testimony regarding the subsequent golf cart incident when determining whether petitioner had established that respondent had engaged in stalking, so as to warrant issuance of the PPO.

Respondent asserts that the trial court did not properly credit his testimony regarding the alleged golf cart incident. However, we again note that this Court must give "special deference to the trial court's findings when they are based on its assessment of the witnesses' credibility." *H J Tucker*, 234 Mich App at 563; MCR 2.613(C). The trial court found petitioner's testimony to be more credible as to these events. The trial court sat at the hearings in this case and saw the witnesses testify before the court first-hand. Giving appropriate deference to the trial court's superior position to judge witness credibility, we find no clear error in the trial court's factual findings regarding this incident.

Further, we find that the trial court articulated sufficient findings of fact to permit it to conclude that issuance of the PPO was warranted. MCL 600.2950a[3] sets forth the statutory procedures for the issuance of a PPO for stalking, so this statute applies in this case. MCL 600.2950a(7) states that when a hearing is held, "the court shall also immediately state on the record the specific reasons for issuing or refusing to issue a personal protection order." At the final hearing, the trial court specifically referenced multiple occasions of harassing conduct by respondent, as testified to by petitioner, supporting the issuance of the PPO. Thus, the trial court complied with MCL 600.2950a(7). Respondent is correct that the trial court failed to provide a writing that gave specific reasons for issuing the PPO, as required by MCR 3.705(B)(6). However, an error by the trial court in a ruling or order is not a ground for granting a new hearing or disturbing an order unless refusal to take action appears to be inconsistent with substantial justice. *Zdrojewski v Murphy*, 254 Mich App 50, 64; 657 NW2d 721 (2002); MCR 2.613(A). We do not find this ministerial error to be grounds for disturbing the trial court's order because the error is not inconsistent with substantial justice. Thus, reversal is not warranted.

For the reasons articulated above, we conclude that the trial court did not abuse its discretion by denying respondent's motion for rehearing and reconsideration. The trial court was presented with sufficient testimony and evidence by petitioner, which it credited, to warrant

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[3] MCL 600.2950a(1) states, "by commencing an independent action to obtain relief under this section . . . an individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin an individual from engaging in conduct that is prohibited under section 411h or 411i of the Michigan penal code. . . . Relief . . . shall not be granted unless the petition alleges facts that constitute stalking as defined in section 411h or 411i of the Michigan penal code…."

issuance of the PPO. The trial court's resolution of the factual issues was premised almost entirely on its assessment of the relative credibility of the testimony offered by petitioner and respondent. The trial court found petitioner more credible, and as a result, determined that "stalking" had occurred under the relevant statutes. As previously noted, this Court gives "special deference to the trial court's findings when they are based on its assessment of the witnesses' credibility." *H J Tucker*, 234 Mich App at 563; MCR 2.613(C).

Finally, respondent asserts that the trial court violated his right to due process by issuing a PPO that contained terms that differed from the court's oral ruling at the final hearing. We disagree.

The constitutional sufficiency of the lower court's procedure may be tested by the balancing test set forth in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976):

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail.

See also *In re AMB*, 248 Mich App 144, 209; 640 NW2d 262 (2001) (Whether procedures are adequate depends on the factors enunciated in *Mathews v Eldridge*[, 424 US at 335].) MCR 2.613(A) states:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

Assuming that the PPO contained clerical errors, in that it contained terms not part of the trial court's oral ruling, we do not find the trial court's refusal to reissue or vacate the granted PPO to be inconsistent with substantial justice in this case. The mere fact that the PPO had additional conditions checked that were not part of the trial court's oral decision does not infringe on respondent's due process rights because respondent received notice and a hearing before the PPO was issued. The trial court acknowledged in its order denying respondent's motion for reconsideration that respondent objected to the conditions placed in the PPO, but reasoned that the elimination of the objected-to conditions would not have resulted in a different disposition of the petition. Additionally, respondent's belief that a witness's testimony was "simply untrue" does not amount to a failure in due process. As noted before, several times, this Court must give "special deference to the trial court's findings when they are based on its assessment of the witnesses' credibility." *H J Tucker*, 234 Mich App at 563; MCR 2.613(C). Because the issuance of the PPO was not inconsistent with substantial justice, the trial court did not abuse its discretion in denying respondent's motion for reconsideration on the basis of due process considerations.

We affirm. Petitioner, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Richard A. Bandstra
/s/ Stephen L. Borrello

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SHAPIRO, J., (*concurring*).

After review of the entire lower court record, including the videos, as well as the materials presented by petitioner at oral argument before this Court, I believe there are abundant reasons to question petitioner's credibility. However, I agree with my colleagues that we must defer to the trial court as to credibility, particularly in light of the extensive hearing that the trial court held. Given this deference, I concur.

/s/ Douglas B. Shapiro