STATE OF MICHIGAN

COURT OF APPEALS

CAROLINE ZORAN, Petitioner-Appellee,	UNPUBLISHED October 11, 2012
v	No. 306912 St. Clair Circuit Court
BENJAMIN MCGUIRE, III, Respondent-Appellant.	LC No. 11-001770-PH

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

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

I. BASIC FACTS AND PROCEDURAL HISTORY

On July 25, 2011, petitioner filed a petition for a PPO against stalking by respondent, who was her next door neighbor. Petitioner attached a seven-page document to her petition, averring that respondent "has continually harassed me multiple times." As an example, petitioner explained that on July 9, 2011, the parties had a heated argument near their property line. According to petitioner, respondent pushed her to the ground. Petitioner's son, who was mowing the lawn nearby, immediately intervened. Respondent and her son then had a physical altercation that resulted in extensive bruising to her son's back. When respondent pushed petitioner to the ground, she suffered injuries to her foot that required medical treatment. Petitioner also averred that she has called 911 multiple times because of respondent's threats and reckless use of firearms. The trial court entered the requested ex parte PPO against stalking. The PPO would expire on January 25, 2012.

On August 23, 2011, respondent filed a motion to terminate the PPO, attaching a six-page addendum to his motion recalling his version of the July 9 events. Respondent denied ever harassing petitioner and explained that petitioner has repeatedly harassed him by calling law enforcement to report false accusations. He claimed that a PPO should be issued against petitioner.

On September 8, 2011, the trial court held a brief hearing on respondent's motion. The trial court explained that the fact that petitioner is annoyed by respondent does not warrant a PPO. Petitioner testified that "[e]very time we go out in our yard there's a confrontation." The

trial court asked petitioner to be more specific about the events giving rise to the PPO. Petitioner testified that respondent makes threats that "[h]e's going to kick our ass." Petitioner stated, "I'm in fear to go out" to the yard. The trial court asked petitioner about the July 9 event. At the conclusion of petitioner's testimony, the trial court stated, "You can have a seat. Mr. McGuire [respondent], I'll listen to you." Respondent alleged that petitioner's summary of the July 9 event was false. Respondent explained that petitioner's son instigated the physical altercation. The trial court then asked, "Anything else?" Respondent noted that the incident report contradicted petitioner's testimony, after which the trial court instructed respondent to "[h]ave a seat." The trial court then denied respondent's motion to terminate the PPO.

On September 2, 2011, respondent (represented by counsel) filed a motion for reconsideration, arguing that an anti-stalking PPO requires evidence of more than one stalking incident, and petitioner provided evidence of only one such incident. Respondent also argued that the trial court effectively acted as an advocate for petitioner during the hearing.

The trial court denied respondent's motion in an October 26, 2011, order; thus, "the existing personal protection order will expire on the date of that order." Respondent appeals as of right from the order denying reconsideration.

On November 30, 2011, respondent sought peremptory reversal, arguing that, after the trial court denied respondent's motion to terminate the PPO, both parties retained counsel and stipulated to dismiss the restraining order. The proposed stipulation states that "the parties agree the Personal Protection Order in this case should be set aside and shall be removed from LEIN forthwith and the Court should enter the required order." However, the stipulation to dismiss was apparently given to another judge in open court in another matter and not the judge who issued the original PPO. The non-assigned judge refused to enter the stipulation.

On January 13, 2012, this Court denied respondent's motion for peremptory reversal "for failure to persuade the Court of the existence of manifest error requiring reversal and warranting peremptory relief without argument or formal submission." *Zoran v McGuire III*, unpublished order of the Court of Appeals, entered January 13, 2012 (Docket No. 306912).

We note that the PPO expired on January 25, 2012. Thus, this Court would ordinarily dismiss this appeal as moot. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). However, "a question is not moot if it will continue to affect a party in some collateral way." *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004). Respondent sets forth no argument as to how he is collaterally affected by the existence of an expired PPO; however we note that the PPO expired while the appeal was pending and that respondent has not been asked to address the issue. When an anti-stalking PPO is issued, it is automatically entered into the Law Enforcement Information Network (LEIN). See MCL 600.2950a(17). The parties' proposed stipulation included language that the PPO would be "removed from LEIN forthwith." Thus, for purposes of this appeal, we will assume without deciding that retention of the PPO on LEIN may be considered a collateral consequence, see *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008), and we will address the merits of respondent's appeal. We note, however, that, even if respondent had successfully argued to set aside the PPO, the only relief would have been a law enforcement agency inputting the relevant information (modification,

termination, etc.) into the LEIN, not the actual removal of the PPO from the system. See MCL 600.2950(19)(b). The existence of a PPO is a historical fact that remains in the LEIN system.

II. IMPARTIAL DECISION-MAKER

Respondent first argues that the judge who refused to set aside the PPO failed to act as an impartial decision-maker; instead, the judge acted as an advocate for petitioner by asking petitioner specific questions intended to elicit a legal foundation to maintain the PPO. By assuming the role of advocate for petitioner, respondent argues, the trial judge abandoned his role as a neutral, impartial presiding judge. We disagree.

A party "is entitled to expect a 'neutral and detached magistrate.'" *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996) quoting *People v Moore*, 161 Mich App 615, 619; 411 NW2d 797 (1987). Under the rules of evidence, a trial court is permitted to question witnesses. MRE 614(b). However, "[w]hile a trial court may question witnesses to clarify testimony or elicit additional relevant information, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *Cheeks*, 216 Mich App at 480. In *In re Moore*, 464 Mich 98, 132; 626 NW2d 374 (2001), our Supreme Court explained:

> A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but the judge should bear in mind that undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on the judge's part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of truth in respect thereto. [Quoting the Code of Judicial Conduct, Canon 3(A)(8).]

In this case, the trial court did not assume the role of advocate. A review of the transcript indicates that the trial court exercised tight control over the hearing to obtain direct, relevant responses. The trial court's exercise of control was apparently necessary because neither party was represented by counsel. While a reading of the transcript does suggest that the trial court was somewhat strict with respondent, the trial court was equally strict with petitioner. For example, the trial court interrupted petitioner four separate times on page five of the transcript. The trial court did not show bias in favor of petitioner or against respondent.

It is apparent that the trial court's questioning was intended to place legally relevant information on the record without unnecessary delay. There is nothing in the record to suggest that the trial court was biased against respondent.

III. ANTI-STALKING PPO

Respondent next argues that the trial court erred in denying his motion to set aside the PPO because the evidence failed to show more than one incident between the parties. We disagree. A trial court's denial of a motion to set aside a PPO is reviewed for an abuse of discretion. *Pickering v Pickering*, 253 Mich App 694, 700; 659 NW2d 649 (2002).

A person may seek an ex parte PPO pursuant to MCL 600.2950a(1) to restrain another person from engaging in conduct prohibited under MCL 750.411h (stalking) or MCL 750.411i (aggravated stalking). *Pobursky v Gee*, 249 Mich App 44, 46; 640 NW2d 597 (2001).

MCL 750.411h(1)(d) provides that "'[s]talking' means 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." MCL 750.411h(1)(a) provides that "'[c]ourse of conduct' means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose." "[T]wo or more separate noncontinuous acts are acts distinct from one another that are not connected in time and space." *Pobursky*, 249 Mich App at 47. MCL 750.411i has identical definitions for "stalking" and "course of conduct."[1] When a trial court issues an ex parte PPO, the trial court has necessarily made "a positive finding of prohibited behavior by the respondent[.]" See *Kampf v Kampf*, 237 Mich App 377, 386; 603 NW2d 295 (1999).

Here, respondent's argument is meritless because the trial court was not limited to a consideration of the testimony presented at the September 8 hearing. By originally issuing the ex parte order on July 25, the trial court affirmatively found that the July 25 petition established stalking behavior by respondent. In particular, the July 25 petition stated that respondent had harassed or threatened petitioner on multiple occasions. The July 25 petition included five separate dates when respondent allegedly "intimidate[d] and frighten[ed]" petitioner. The July 25 petition also stated, "There have been two occasions where five men stood with Mr. Benjamin McGuire III while he continuously said 'I'm gonna kill you!'" By issuing the ex parte PPO, the trial court necessarily found that some or all of the allegations reflected in the July 25 petition constituted "stalking" under MCL 750.411h or MCL 750.411i. MCL 600.2950a(1). Respondent has not identified any authority suggesting that the trial court must ignore the original petition and findings when deciding to maintain or terminate a PPO. When petitioner's testimony is considered in concert with the July 25 petition, the trial court had a sufficient factual basis from which it could find that respondent engaged in a "course of conduct" of two or more stalking acts. MCL 750.411h(1). Accordingly, the trial court did not abuse its discretion by refusing to terminate the PPO.

IV. PROPOSED STIPULATED ORDER

Finally, respondent argues that, because it is clear that both parties wanted to terminate the PPO, the trial court's refusal to sign the stipulated order was erroneous.

As noted, it is not clear from the record that the trial judge refused to enter the stipulation to set aside the PPO. There is absolutely nothing in the lower court record to indicate that the trial court judge that entertained petitioner's ex parte motion for PPO and respondent's motion to set aside the PPO was ever presented with such a request. Thus, there is no error to review.

[1] MCL 750.411i(2)(a)-(d) explains aggravated stalking. For the purposes of this appeal, the difference between MCL 750.411h and MCL 750.411i is irrelevant.

Respondent, as appellant, had the burden of filing a complete record on appeal, and the failure to present record support for a proposition is fatal to a claim. *Band v Livonia Associates*, 176 Mich App 95, 103-104, 439 NW2d 285 (1989).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Deborah A. Servitto