STATE OF MICHIGAN

COURT OF APPEALS

HEATHER GRIMES, Petitioner-Appellee,	UNPUBLISHED October 16, 2012
v	Nos. 306297; 309228 Wayne Circuit Court
PHILLIP PEAKE, Respondent-Appellant.	LC No. 11-107575-PP

Before: MURRAY, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

In Docket No. 306297, respondent appeals as of right the order denying his motion to terminate a personal protection order (PPO). In Docket No. 309228, respondent appeals by leave granted the order denying his emergency motion for relief from judgment/reconsideration. We affirm.

I. DOCKET NO. 306297

A. CONTINUATION OF PPO

Respondent contends that the trial court abused its discretion in continuing the ex parte PPO and clearly erred in its factual findings. "We review for an abuse of discretion a trial court's determination whether to issue a PPO because it is an injunctive order." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). We also review a trial court's decision to continue a PPO for an abuse of discretion. See *id.* at 329. "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Id.* at 325. "We review a trial court's findings of fact for clear error." *Id.*

"Under MCL 600.2950(4), the trial court must issue a PPO if it finds 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).'" *Hayford*, 279 Mich App at 326. "The petitioner bears the burden of establishing reasonable cause for issuance of a PPO . . . and of establishing a justification for the continuance of a PPO at a hearing on the respondent's motion to terminate the PPO[.]" *Id.* (citations omitted). "The trial court must consider the testimony, documents, and other evidence proffered and whether the respondent had previously engaged in the listed acts." *Id.* The acts listed in subsection (1) are:

(a) Entering onto premises.

(b) Assaulting, attacking, beating, molesting, or wounding a named individual.

(c) Threatening to kill or physically injure a named individual.

(d) Removing minor children from the individual having legal custody of the children, except as otherwise authorized by a custody or parenting time order issued by a court of competent jurisdiction.

(e) Purchasing or possessing a firearm.

(f) Interfering with petitioner's efforts to remove petitioner's children or personal property from premises that are solely owned or leased by the individual to be restrained or enjoined.

(g) Interfering with petitioner at petitioner's place of employment or education or engaging in conduct that impairs petitioner's employment or educational relationship or environment.

(h) Having access to information in records concerning a minor child of both petitioner and respondent that will inform respondent about the address or telephone number of petitioner and petitioner's minor child or about petitioner's employment address.

(i) Engaging in conduct that is prohibited under section 411h or 411i of the Michigan penal code, 1931 PA 328, MCL 750.411h and 750.411i.

(j) 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).]

Under MCL 600.2950(12):

> An ex parte personal protection order shall be issued and effective without written or oral notice to the individual restrained or enjoined or his or her attorney if it clearly appears from specific facts shown by verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a personal protection order can be issued.

Respondent contends that petitioner failed to present any evidence supporting the continuance of the PPO at the June 20, 2011, hearing, yet the trial court continued the order for an additional week. Respondent also contends that the trial court denied his motion based on the unreliable text messages, which were not provided to him before the hearing, and, thus, there was no reasonable cause to believe respondent committed one of the prohibited acts under the statute.

At the July 20, 2011, hearing, petitioner indicated she had text messages showing that respondent threatened her, but because her phone would not turn on, the trial court continued the hearing to July 27, 2011, and instructed petitioner to bring the text messages. Although the trial court did not find reasonable cause to continue the PPO on July 20, 2011, respondent never objected to adjourning or continuing the hearing to June 27, 2011, and there is no legal reason why the trial court was not permitted to adjourn the hearing and continue it a week later. Respondent does not argue that the trial court violated any rule pertaining to adjournments, and MCR 2.503(C)(2) permits an adjournment when evidence is unavailable if the court finds that the evidence is material and diligent efforts have been made to produce the evidence. Thus, the trial court did not err in adjourning the hearing.

At the July 27, 2011, hearing, petitioner testified that respondent had followed her on the way home from work, yelling expletives and blocking her in her driveway. Petitioner also produced text messages she claimed were from respondent. According to the messages read into the record by petitioner, respondent sent text messages to plaintiff stating that she "better not go to sleep" and that he would kill her. Respondent claimed that some of the messages were actually sent by petitioner. However, the trial court found that respondent threatened petitioner, and in light of petitioner's testimony and the text messages read by the court, this finding was not clearly erroneous. See *Hayford*, 279 Mich App at 325. Threatening to kill is an act listed in subsection (1). MCL 600.2950(1). Therefore, the trial court did not abuse its discretion in continuing the PPO. See *Hayford*, 279 Mich App at 329.[1]

Respondent argues that there was a question regarding the authenticity and reliability (but not admissibility) of the text messages. However, respondent fails to provide authority to support his argument, and the trial court apparently found that the text messages were similar to testimony, and were credible in light of the parties' answers to questions about those messages. We defer to the trial court's credibility determinations. See *Pickering v Pickering*, 253 Mich App 694, 702; 659 NW2d 649 (2002). The trial court did not abuse its discretion in denying the motion to terminate the PPO. See *Hayford*, 279 Mich App at 329.

Contrary to respondent's argument, the issuance of the ex parte PPO was not in violation of MCL 600.2950a(7) and MCR 3.705(A)(2). The PPO was issued under MCL 600.2950, rather than MCL 600.2950a. Therefore, MCL 600.2950(7) applies which provides:

> If the court refuses to grant a personal protection order, it shall state immediately in writing the specific reasons it refused to issue a personal protection order. If a hearing is held, the court shall also immediately state on the record the specific reasons it refuses to issue a personal protection order.

[1] Respondent argues that petitioner never provided the text messages to him before the hearing, but provides no support for the argument that the text messages were required to be provided to him in advance of the hearing, other than that the trial court requested her to do so and she promised to do so. While petitioner indicated that she would provide the text messages in advance, the trial court instructed petitioner to bring the cell phone to court if her carrier would not allow her to download and email the text messages.

Unlike MCL 600.2950a(7), MCL 600.2950(7) does not require the court to state in writing its reasons for issuing a PPO. Because the trial court issued a PPO, it did not violate MCL 600.2950(7).

MCR 3.705(A)(2) provides:

> If it clearly appears from specific facts shown by verified complaint, written petition, or affidavit that the petitioner is entitled to the relief sought, an ex parte order shall be granted if immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a personal protection order can be issued. In a proceeding under MCL 600.2950a, the court must state in writing the specific reasons for issuance of the order. A permanent record or memorandum must be made of any nonwritten evidence, argument, or other representations made in support of issuance of an ex parte order.

The trial court did not state in writing the specific reasons for issuing the PPO. However, as noted, the proceedings were not under MCL 600.2950a. Therefore, the trial court was not required to comply with the portion of MCR 3.705(A)(2) requiring that it state in writing the reasons for issuing the order. And, respondent has not shown that there was any "nonwritten evidence, argument, or other representations made in support of issuance of" the ex parte PPO that needed to be memorialized in writing. MCR 3.705(A)(2). Thus, there was no error.

Respondent also argues that the trial court violated MCR 3.703(D)(1)(b) by failing to contact Oakland County. Under MCR 3.703(D)(1)(b):

> (1) The petition must specify whether there are any other pending actions in this or any other court, or orders or judgments already entered by this or any other court affecting the parties, including the name of the court and the case number, if known.
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> * * *
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> (b) If there are pending actions in another court or orders or judgments already entered by another court affecting the parties, the court should contact the court where the pending actions were filed or orders or judgments were entered, if practicable, to determine any relevant information.

Petitioner alleged that there was another pending action between the parties before the 46th District Court in Oakland County. In denying respondent's motion for relief from judgment/reconsideration, the trial court implicitly admitted that it did not contact the 46th District Court. Because it was required to do so under MCR 3.703(D)(1)(b), this was error. However, at the July 20, 2011, hearing, respondent's counsel informed the court of the prior order relating to the parties and that petitioner had been put on probation as the result of assaultive and domestic matters. Although the trial court did not contact the other jurisdiction before issuing the PPO, it obtained the relevant information before continuing the PPO. Because it continued the PPO even after acquiring this information, any error was harmless. See MCR 2.613(A).

B. FAILURE TO HOLD PETITIONER IN CONTEMPT

Respondent contends that the trial court abused its discretion in not holding petitioner in contempt of court. We disagree.

Respondent raised this issue at the hearing on his motion to terminate the PPO and in his motion for relief from judgment/reconsideration. However, the trial court did not address the issue. "[W]here the lower court record provides the necessary facts, appellate consideration of an issue raised before, but not decided by, the trial court is not precluded." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005).

"We review a trial court's issuance of a contempt order for an abuse of discretion, but we review its underlying factual findings for clear error, and we review questions of law de novo." *Davis v Detroit Fin Review Team*, __ Mich App __; __ NW2d __ (Docket Nos. 309218, 309250 & 309482, issued May 21, 2012), slip op, p 31. "Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

MCL 600.2950(24) provides: "An individual who knowingly and intentionally makes a false statement to a court in support of his or her petition for a personal protection order is subject to the contempt powers of the court."[2] Contrary to respondent's assertion, MCL 600.2950(24) does not *require* a court to hold a person in contempt. Instead, it merely provides that a person who commits such acts is "subject to" the court's contempt powers. *Id*.

Even if the court was required to hold a party in contempt for committing such acts, the trial court did not find that petitioner knowingly and intentionally made a false statement. See MCL 600.2950(24). Therefore, the trial court was not required to hold petitioner in contempt.[3]

Respondent also contends that petitioner violated MCR 2.114 and should have been subject to sanctions. MCR 2.114(D) provides:

> **(D) Effect of Signature.** The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
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> (1) he or she has read the document;

[2] Although respondent cites MCL 600.2950a(24), MCL 600.2950(24) applies. MCL 600.2950(24) and MCL 600.2950a(24) are identical.

[3] Although petitioner did not specifically mention her conviction, she did inform the trial court that another proceeding between the parties was pending in the 46th District Court. However, it is not clear that the case listed by petitioner is the case involving her conviction for assault. The case number written on the petition is 11-27429. The case number written on the register of actions/judgment is 10-S-00573. Petitioner also omitted that there was an order/judgment.

> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Under MCR 2.114(E):

> If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

Also, under MCR 2.114(F), "[i]n addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)."

Although it appears that sanctions under MCR 2.114(E) are mandatory, the trial court never found that petitioner violated the rule. Similarly, the trial court did not find that petitioner's claim was frivolous. See MCR 2.114(F). Therefore, the trial court was not required to impose sanctions or costs.

II. DOCKET NO. 309228

A. MOTION FOR RELIEF FROM JUDGMENT

"A trial court's decision on a motion to set aside a prior judgment is discretionary and will not be reversed on appeal absent an abuse of discretion." *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999). "A trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion." *Tinman v Blue Cross & Blue Shield of Mich*, 264 Mich App 546, 556-557; 692 NW2d 58 (2004). "[T]his Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented[.]" *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). Alternatively, "[r]eview of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette*, 278 Mich App at 328.

Although respondent claims that he presented new evidence in support of the motion for relief from judgment under MCR 2.612(C)(1)(b), the trial court properly denied the motion on procedural grounds. First, the trial court did not have jurisdiction to amend its order while the appeal was pending. "[T]he filing of a claim of appeal typically divests the circuit court of its jurisdiction to amend its final orders and judgments." *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 542; 730 NW2d 481 (2007) remanded 480 Mich 910 (2007). See also MCR 7.208(A). Second, respondent's motion was 25 pages, in violation of

MCR 2.119(A)(2). Third, respondent's motion was filed on January 3, 2012, more than 21 days after entry of the order denying respondent's motion to terminate the PPO, in violation of MCR 2.119(F)(1). Fourth, respondent's motion listed several rules and allegations in the statement of facts section, but failed to state with particularity the grounds on which it was based, in violation of MCR 2.119(A)(1)(b). Therefore, the trial court did not abuse its discretion in denying respondent's motion for relief from judgment/reconsideration. See *Tinman*, 264 Mich App at 556-557; *Heugel*, 237 Mich App at 478.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens