STATE OF MICHIGAN

COURT OF APPEALS

FELICIA LIPSCOMB,

Petitioner-Appellant,

v

TIMOTHY MORAN,

Respondent-Appellee.

UNPUBLISHED
July 1, 2014

No. 314520
Wayne Circuit Court
Family Division
LC No. 12-114548-PH

Before: MURRAY, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Petitioner, *in propria persona*, appeals as of right an order denying her request for a personal protection order ("PPO"). The order was rendered following a hearing on petitioner's underlying petition, at which the court found that "[r]espondent has not committed two or more acts of willful, unconsented contact," and thus, denied the issuance of the requested PPO because the evidence "does not meet the statutory basis." We affirm.

This case arises out of two admitted encounters between petitioner and respondent on November 28, 2012, and two phone calls allegedly placed by respondent to petitioner on December 1 and 2, 2012, respectively, which led to petitioner's filing of the petition. Petitioner argues that she presented sufficient evidence in support of her application for a PPO, in that respondent admitted the physical encounters at the hearing, and therefore the trial court abused its discretion in denying the issuance of the PPO.

A trial court's decision regarding the issuance of a PPO is reviewed for an abuse of discretion. *Pickering v Pickering*, 253 Mich App 694, 700-701; 659 NW2d 649 (2002). 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). A trial court's findings of fact are reviewed for clear error, while questions of statutory interpretation are reviewed de novo. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

A petitioner seeking a PPO bears the burden of proving reasonable cause for its issuance. *Lamkin v Engram*, 295 Mich App 701, 711; 815 NW2d 793 (2012); *Hayford v Hayford*, 279 Mich App 324, 326; 760 NW2d 503 (2008); *Kampf v Kampf*, 237 Mich App 377, 385-386; 603 NW2d 295 (1999). When making that determination, the circuit court is not limited to the four corners of the petition itself; rather, it must consider the testimony, documents, and other

evidence proffered to determine whether a respondent engaged in harassing conduct. *Lamkin*, 295 Mich App at 711. "Nothing in the statute or court rule suggests that the circuit court is limited to considering the incidents alleged in the PPO petition. Instead, our court rules specifically *require* the circuit court to go beyond the PPO petition and either interview the petitioner or provide an evidentiary hearing." *Id.* (Emphasis in original.)

Petitioner sought the PPO under the statutory authority of MCL 600.2950a. Subsection (1) of that statute, MCL 600.2950a(1), governs the issuance of PPOs in the nondomestic circumstances here, and provides, in pertinent part:

> [A]n 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 [MCL 750.]411h, 411i, or 411s. . . . Relief under this subsection shall not be granted unless the petition alleges facts that constitute stalking as defined in section 411h or 411i, or conduct that is prohibited under section MCL 411s. . . .

Petitioner based her claim on alleged violations of MCL 750.411h. To obtain a PPO under MCL 600.2950a(1), she therefore had to show that respondent engaged in behavior that constituted "stalking." "Stalking" is defined 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." MCL 750.411h(1)(d). MCL 750.411h(1)(a) 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." To find a person guilty of stalking, then, 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 & Assoc Investigations, Inc*, 471 Mich 712, 723; 691 NW2d 1 (2005). Further, "the stalking statutes address a wilful [sic] pattern of conduct, including, but not limited to, following or confronting the victim or calling the victim (i.e., conduct combined with speech), that would cause a reasonable person to feel terrorized, threatened, or harassed, and would cause a reasonable person in the victim's position to suffer emotional distress." *People v White*, 212 Mich App 298, 310; 536 NW2d 876 (1995). "Unconsented contact" is that which is "initiated or continued without the victim's consent or in disregard of the victim's desire to discontinue the contact." *Id.*

Here, the record shows that the court first complied with the requirement that an evidentiary hearing be held. *Lamkin*, 295 Mich App at 711. The trial court's factual findings were also not clearly erroneous. Indeed, the record shows that, while petitioner and respondent did indeed have "two contacts" on November 28, 2012, the interaction did not meet the standard that they "actually cause emotional distress to the victim and would also cause a reasonable person such distress." *Nastal*, 471 Mich at 723. As the trial court found, by any reasonable measure both instances of respondent's interaction with petitioner on November 28, 2012, were innocuous. Respondent's mention to petitioner that "he [knew] of [her] meeting with" another professor and question about "how things were going in that particular course," are not the kind of statements that "would cause a reasonable person to feel terrorized, threatened, or harassed, and would cause a reasonable person in the victim's position to suffer emotional distress."

White, 212 Mich App at 310. The record is also devoid of evidence that respondent's November 28, 2012, interactions with petitioner were "initiated or continued . . . in disregard of the [petitioner's] desire to discontinue the contact." *Id.* Petitioner's stated response to respondent's inquiries, that she felt "intimidated and harassed," and like she was being "interrogated," are likewise not the reactions of a "reasonable person," as the trial court found:

> The situation that you described on November 28th, I do not feel would cause a reasonable person to feel threatened, intimidated, or harassed based on the testimony provided by yourself let alone the countering testimony offered by Mr. Moran and the witnesses that were presented in court today.

With regard to the phone calls on December 1 and 2, 2012, the court properly recognized that the burden of proof was on petitioner, *Lamkin*, 295 Mich App at 711, and applied that standard[1] in making its ruling with regard to the phone calls:

> In addition, you have not sustained your burden of proof that it was Mr. Moran who made any telephone calls to you on December 1st or December 2nd. Obviously, if you could meet your burden of proof that he, in fact, was the one that made those phone calls, that would be a different situation.
>
> You have not met that burden of proof. This PPO is denied.

In making its determination, the court considered all the evidence and found that "[r]espondent has not committed two or more acts of willful, unconsented contact," and thus, denied the issuance of the requested PPO, concluding that petitioner had not set forth sufficient evidence to meet the standard required to obtain a PPO under MCL 600.2950a(1). The court did not abuse its discretion in denying petitioner's request for a PPO because there was insufficient evidence to justify the issuance of a PPO based on the evidence presented by petitioner at the hearing. *Pickering*, 253 Mich App at 700-701.

Affirmed.

/s/ Christopher M. Murray
/s/ Douglas B. Shapiro

[1] We do not contest that petitioner's testimony was an appropriate way to authenticate a voice on a phone call. But that it was the correct form does not mean that the trial court must *believe* petitioner's testimony that it was respondent's voice. A trial court is free to reject as not credible even unrebutted testimony, *Schneider v Pomerville*, 348 Mich 49, 57; 81 NW2d 405 (1957), and here the trial court either disbelieved petitioner's version of the facts based upon her entire testimony, or based on respondent's denials in his testimony. Under either scenario, the trial court did not err in finding that petitioner did not sustain her burden of proof. Additionally, its findings were sufficiently detailed for us to reach this conclusion. MCR 2.517(A).

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JANSEN, J. (*dissenting*).

I respectfully dissent because I conclude that the circuit court clearly erred in its decision to deny petitioner's request for a personal protection order ("PPO").

Pursuant to MCL 600.2950a(1), petitioner's request for a PPO was predicated on respondent's alleged violation of MCL 750.411h, the stalking statute. Under that statute, "[s]talking" is defined 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." MCL 750.411h(1)(d). In turn, the statute defines "[c]ourse of conduct" as "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose." MCL 750.411h(1)(a). "Harassment" encompasses "repeated or continuing unconsented contact," MCL 750.411h(1)(c), which includes contact by telephone, MCL 750.411h(1)(e)(*v*).

In my opinion, the circuit court clearly erred by finding that "[r]espondent has not committed two or more acts of willful, unconsented contact." The evidence established that petitioner received two particularly disturbing telephone calls on December 1, 2012, and December 2, 2012, respectively. According to petitioner, during the first call the speaker told her that "he was going to catch [her] and burn [her]" and used a racial slur. Further according to petitioner, during the second call the speaker told her that he knew where she parked her car and that he had access to her personal information. Petitioner testified that she felt threatened and intimidated by these telephone calls. Petitioner believed that both calls were placed by respondent because she recognized his voice each time. Petitioner had previously taken courses

from respondent, a university teaching assistant, and testified that she was very familiar with his voice.

The circuit court ruled that petitioner had not "carried or sustained [her] burden of proof that it was, in fact, Mr. Moran who made any phone calls to [her] on December 1st or December 2nd." The court continued, "Obviously, if you could meet your burden of proof that he, in fact, was the one that made those calls, that would be a different situation." The circuit court clearly erred by determining that petitioner had not satisfied her burden of proof with respect to the identity of the telephone caller during these two calls. The recognition of a telephone caller's voice is sufficient to authenticate the identity of the speaker. MRE 901(b)(5); *Miller v Kelly*, 215 Mich 254, 257; 183 NW 717 (1921). Petitioner testified under oath that she was familiar with Mr. Moran's voice and that he was the caller on both occasions. This was sufficient. Petitioner's testimony, if believed, was sufficient to prove respondent's identity as the caller.

I acknowledge that petitioner has made numerous similar police reports in the past. However, the circuit court did not find petitioner to be incredible or unworthy of belief based on her prior actions. Instead, the court found merely that petitioner had not presented evidence of Mr. Moran's identity. This constituted clear error. If the circuit court intended to deny the PPO on the basis of its credibility determinations, it certainly did not say so. Only the orders, judgments, and transcripts are available to this Court for review. I simply cannot divine from the circuit court's pronouncement that petitioner had not "carried or sustained [her] burden of proof" that the court was, in actuality, denying petitioner's request on the basis of a credibility determination. I note that the circuit court's findings of fact must be "pertinent." MCR 2.517(A)(2). Here, the circuit judge did not set forth any findings pertaining to petitioner's credibility; the judge did not even mention the credibility of the witnesses. It is axiomatic that this Court cannot defer to credibility findings that were never made.

In sum, I conclude that the circuit court's findings were clearly erroneous and therefore constituted improper grounds on which to deny petitioner's request for a PPO. I would vacate the circuit court's order denying petitioner's request for a PPO and remand to the circuit court for additional findings concerning whether a PPO should issue in this case.

/s/ Kathleen Jansen