STATE OF MICHIGAN

COURT OF APPEALS

PLT,

Petitioner-Appellee,

v

JBP,

Respondent-Appellant.

UNPUBLISHED
December 26, 2019

No. 346948
Genesee Circuit Court
LC No. 18-111722-PH

Before: TUKEL, P.J., and SAWYER and RIORDAN, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's issuance of an amended personal protection order (PPO), arguing that the issuance of any PPO would overly burden his First Amendment speech rights. We disagree that, under the facts presented, the issuance of a PPO violated respondent's rights, but agree that the scope of the actual PPO entered may have infringed upon respondent's rights under the First Amendment. However, because by its own terms the PPO has expired, we do not consider whether the scope of the PPO violated respondent's First Amendment rights, nor do we remand to the trial court to modify the PPO's terms to protect respondent's free speech rights, because at this point any violation of respondent's First Amendment rights would be retrospective only; by definition, respondent is not bound to comply with an expired PPO in the future. Because respondent is not required to comply with an expired PPO, it cannot affect his First Amendment rights prospectively, and thus is moot. Therefore, we simply affirm the issuance of the PPO, and decline to further consider, on mootness grounds, the scope of the relief ordered.

I. BACKGROUND

Petitioner is an operations manager at a women's health clinic that performs abortions. Respondent is a self-described "peaceful non-violent abortion protestor/counselor." Respondent began protesting at the clinic in May 2017. The clinic is located in a strip mall. About 125 feet from the front door of the clinic is a grassy area where respondent and other protestors generally gathered. There is an alley next to an inclined area with trees and shrubs behind the clinic. At the time respondent began his protests, there were no-trespassing signs posted around the strip

mall. Respondent generally stayed on the grassy area in front of the clinic with other protestors. On several occasions, however, respondent went to the alley behind the building to engage in conversation with petitioner and other clinic workers. When respondent approached petitioner at the back of the building in May 2017, petitioner called the police, who told respondent to comply with the no trespassing signs by restricting his presence to the grassy area in front of the building.

The strip mall was sold in July 2018. After the strip mall was sold, the no trespass signs were removed and respondent began to protest in the parking lot itself on occasion. In October 2018, respondent began to target petitioner directly, but apparently did not target any other employee or any patient of the clinic.

Specifically, on October 8, 2018, when petitioner and a coworker were leaving work for the day, respondent was sitting in his car in the parking lot two spaces over from petitioner's car. A video of this interaction was taken by respondent and is part of the record. Petitioner got out of his car, telling petitioner that he was going to a store next to the clinic. But respondent did not continue on to the store. Instead, he turned back to his car in the direction of where petitioner was standing, claiming that he was putting a camera back in his car and locking the car. As he did so, he started talking to petitioner about her "blood lust." When petitioner stated that respondent was "scaring the sh—out of her," respondent laughed and accused her of approaching him. Petitioner also asked respondent to leave her alone. Throughout, respondent's focus was on petitioner only, even though she was with a coworker from the clinic.

Then on October 10, 2018, respondent hid in the shrubbery behind the clinic prior to petitioner coming outside. He again began exhorting petitioner to stop providing abortions, alternating between expressing moral outrage and concern and care for petitioner's well-being. When petitioner told respondent he was scaring her and to get away from her, he told her that she was lying. That afternoon, respondent was again waiting for petitioner when petitioner was leaving work, this time in his car which was parked two spaces from where petitioner had parked. Respondent asked petitioner why she never talked to him, and she told him to leave her alone. The following day, respondent spoke to petitioner while walking from the grassy area toward where she was in the parking lot.

Petitioner applied for an ex parte PPO on October 11, 2018, and the trial court issued the PPO the same day. The PPO prohibited respondent from approaching petitioner within 125 feet and prohibited him from confronting her within that same distance; the PPO also prohibited petitioner from approaching or confronting petitioner in a public place or on private property and from entering onto or remaining on property occupied by petitioner. The PPO permitted respondent to continue to protest on the grassy area abutting the parking lot, which as noted is about 125 feet from the clinic entrance.

Four days after the PPO was issued, respondent filed a motion to terminate the PPO, arguing that it overly burdened his First Amendment right of free speech. The trial court ruled that respondent's behavior constituted stalking, and it continued the PPO. The trial court

explained that respondent "should not be approaching [petitioner] any closer than what was formerly . . . the case at the grassy strip."[1] However, the trial court did remove a provision in the PPO prohibiting respondent from "following or appearing within the sight of the petitioner." The PPO, by its own terms, expired on October 11, 2019.

II. DISCUSSION

" '[A]s a general rule, this Court will not entertain moot issues or decide moot cases.' A moot case presents 'nothing but abstract questions of law which do not rest upon existing facts or rights.' It involves a case in which a judgment 'cannot have any practical legal effect upon a then existing controversy.' " *TM v MZ*, 501 Mich 312, 317; 916 NW2d 473 (2018) (citations omitted). Here, the PPO expired during the pendency of the appeal, but "the mere fact that the instant PPO expired during the pendency of this appeal does not render this appeal moot." *Id*, at 320. A PPO must be entered into the Law Enforcement Information Network (LEIN) system, MCL 600.2950(16) and (17), but "if the Court concludes that the trial court should never have issued the PPO, respondent would be entitled to have LEIN reflect that fact." *TM*, 501 Mich at 319. "Thus, an appeal challenging a PPO, with an eye toward determining whether a PPO should be updated in LEIN as rescinded, need not fall within an exception to the mootness doctrine to warrant appellate review; instead, such a dispute is simply not moot." *Id*. at 319-320. As such, the issue of whether the PPO properly issued is not moot, and we thus address its merits.

A. STANDARD OF REVIEW

"This Court reviews for an abuse of discretion a trial court's decision whether to issue a PPO. A trial court abuses its discretion when its ruling falls outside the range of principled outcomes." *Patterson v Beverwyk*, 320 Mich App 670, 680; 922 NW2d 904 (2017) (citation omitted). "An error of law necessarily constitutes an abuse of discretion." *Denton v Dep't of Treasury*, 317 Mich App 303, 314; 894 NW2d 694 (2016). We review a trial court's factual findings for clear error. *In re Koehler Estate*, 314 Mich App 667, 673-674; 888 NW2d 432 (2016). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id*. (citation and quotation marks omitted). Finally, constitutional questions and matters of statutory interpretation are reviewed de novo. *Buchanan v Crisler*, 323 Mich App 163, 175; 922 NW2d 886 (2018). When the language of a statute is clear and unambiguous, this Court "will apply the statute as written and judicial construction is not permitted." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011).

B. HARASSMENT

[1] This was apparently a reference to the closest distance to which respondent could approach during the period when the previously-posted no trespassing signs had been on the property. As of the date of the issuance of the PPO, those signs were no longer present, following the sale of the strip mall to new owners.

MCL 600.2950a(31)(d) provides that a PPO is "an injunctive order . . . restraining or enjoining conduct prohibited under" §§ 2950a(1) and 2950a(3). Section 2950a(1) in turn provides that a petitioner may obtain a PPO "to restrain or enjoin an individual from engaging in conduct that is prohibited under" MCL 750.411h, MCL 750.411i, or MCL 750.411s. Pertinent to this appeal, MCL 750.411h(1)(d), the title of which includes the term "[s]talking," defines a number of important terms. "Stalking" is "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." "A course of conduct," one of the elements of stalking, is "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" is statutorily defined as "conduct directed toward a victim that includes . . . 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." MCL 750.411h(1)(c). Importantly for this case, however, "[h]arassment does not include constitutionally protected activity or conduct that serves a legitimate purpose." *Id*. Thus, if an allegation of stalking is based solely on "harassment," the statute itself also bars consideration of constitutionally protected activity in proving stalking. By importing the definition of "harassment" into the definition of "stalking," that same prohibition against using protected activity carries over into the "stalking" definition—if there is no harassment there can be no stalking. Finally, " 'Emotional distress' means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." MCL 750.411h(1)(b).

Respondent does not challenge the trial court's factual findings that he engaged in a course of conduct consisting of two or more "separate noncontinuous acts of unconsented conduct evidencing a continuity of purpose," MCL 750.411h(1)(a). Those factual findings meant that absent "constitutionally protected activity or conduct that serves a legitimate purpose," MCL 411h(1)(c), respondent's conduct constituted "harassment." *Id*. Respondent also fails to make any argument why, in the absence of "constitutionally protected activity or conduct that serves a legitimate purpose," his behavior would not have caused "a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested," the first portion of the definition of stalking. MCL 750.411h(1)(c) and (d). However, the second portion of the definition of stalking requires not only that a reasonable person would feel frightened or terrorized (an objective standard), but also that the particular person in fact felt "terrorized, frightened, intimidated, threatened, harassed, or molested," MCL 750.411h(1)(d), a subjective standard. Respondent takes issue with petitioner's claim that she was afraid of him, and asserts that it is untrue. Respondent also argues that he could not harass petitioner because his conduct was constitutionally protected and served a legitimate purpose.

Accordingly, we only address the issues raised by respondent, viz., whether (1) respondent's conduct was constitutionally protected and serving a legitimate purpose, and (2) whether petitioner subjectively feared respondent, in order to determine whether the trial court erred by issuing the PPO on the basis that respondent was stalking petitioner.

1. CONDUCT FOR A LEGITIMATE PURPOSE

Respondent argues that his anti-abortion protest was constitutionally protected conduct serving a legitimate purpose, which does not constitute harassment. "[T]he phrase 'conduct that serves a legitimate purpose' means conduct that contributes to a valid purpose that would otherwise be within the law irrespective of the criminal stalking statute." *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 723; 691 NW2d 1 (2005). Examples of conduct serving a legitimate purpose include "labor picketing or other organized protests." *People v White*, 212 Mich App 298, 310; 536 NW2d 876 (1995).

"The rights to free speech under the Michigan and federal constitutions are coterminous." *City of Owosso v Pouillon*, 254 Mich App 210, 213-214; 657 NW2d 538 (2002). Accordingly, "federal authority construing the First Amendment may be used in construing Michigan's constitutional free speech rights." *Id*. at 214. As stated by the United States Supreme Court, "[n]o form of speech is entitled to greater constitutional protection" than political speech. *McCullen v Coakley*, 573 US 464, 489; 134 S Ct 2518; 189 L Ed 2d 502 (2014) (quotation marks and citation omitted; alteration in original).

In contrast to an individual's right to free speech, the "right to be let alone" has been characterized by the United States Supreme Court as "the most comprehensive of rights and the right most valued by civilized men." *Hill v Colorado*, 530 US 703, 717; 120 S Ct 2480; 147 L Ed 2d 597 (2000) (citation and quotation marks omitted). While individuals do have the contrary "right to persuade," " 'no one has a right to press even 'good' ideas on an unwilling recipient.' " *Id*. at 717-718 (citation omitted). When balancing these competing rights, "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Id*. at 718 (citation and quotation marks omitted).

Public protests regarding abortion, whether in support or opposition, serve legitimate political purposes; however, respondent's conduct exceeded the permissible scope of that activity. The interaction on the afternoon of October 8, 2018, is particularly telling. Respondent had parked his car two spaces away from petitioner's car. When petitioner and a coworker left the clinic, respondent exited his vehicle and told petitioner that he was walking to another store in the mall. But he did not continue on to the store. Instead, he turned back to his car in the direction of where petitioner was standing, claiming that he was putting a camera back in his car and locking the car. As he did so, he started talking to petitioner about her "blood lust." When petitioner stated that respondent was "scaring the sh—out of her," respondent laughed and accused her of approaching him. Throughout, respondent's focus was solely on petitioner even though she was with a coworker from the clinic. These circumstances supported petitioner's belief that respondent was starting to go beyond his political message and instead targeting her personally. Additionally, on October 11, 2018, while walking from the grassy area toward where she was in the parking lot, respondent spoke to petitioner about her need for religious salvation. Although there were other protestors, he was the only one who approached her. Respondent also repeatedly talked to petitioner from behind the clinic while she was on her breaks, and again was the only protestor to talk to any worker at that spot.

Respondent's conduct violated petitioner's right to be let alone. Petitioner repeatedly told respondent that he was scaring her and to get away from her. Respondent ignored these requests. Accordingly, respondent was aware that his conduct was having a negative impact on petitioner. Despite this knowledge, respondent continued to approach petitioner. Consequently,

the trial court could reasonably find, as it did, that respondent was no longer simply seeking to share his political viewpoint with someone who might be receptive to his beliefs. Instead, respondent was antagonizing an individual who knew his views, did not share them, did not wish to hear them, and had repeatedly asked him to stop because he was scaring her. Such conduct was no longer constitutionally protected because respondent violated petitioner's right to be let alone when he repeatedly attempted to press his "ideas on an unwilling participant." See *Hill*, 530 US at 717-718. Respondent's conduct no longer served a legitimate purpose because it exceeded the scope of his general anti-abortion protest, having moved from advocacy to threatening conduct. Accordingly, respondent's behavior instead became that of an individual continually accosting someone who repeatedly asked him to stop and told him that he was scaring her. Thus, because respondent's conduct did not serve a legitimate purpose, it was not constitutionally protected.

Petitioner argues that "[b]y expressly basing the reason for the injunction on the alleged direct impact of the speech or the listener's reactions of offense or discomfort, the Trial Court's injunction could not be considered content neutral." We disagree. In *Schenck v Pro-Choice Network of Western New York*, 519 US 357, 375; 117 S Ct 855; 137 L Ed 2d 1 (1997), the Supreme Court expressly noted that "[i]n making their First Amendment challenge, petitioners focus solely on the interests asserted by respondents in their complaint. But in assessing a First Amendment challenge, a court looks not only at the private claims asserted in the complaint, but also inquires into the governmental interests that are protected by the injunction, which may include an interest in public safety and order." Here, in determining whether to issue a PPO (an injunction), the trial court thus was permitted to consider petitioner's reaction to the speech, which was directed solely and repeatedly at her, and, as the trial court found, was made with an intention to harass her. See also *Hill*, 530 US at 716-718 ("None of our decisions has minimized the enduring importance of 'a right to be free' from persistent 'importunity, following and dogging' after an offer to communicate has been declined. While the freedom to communicate is substantial, 'the right of every person "to be let alone" must be placed in the scales with the right of others to communicate.' It is that right, as well as the right of 'passage without obstruction,' that the Colorado statute legitimately seeks to protect.") (citation omitted). It is that same right, to be let alone after the offer to communicate has been declined, that the Michigan PPO statute seeks to protect, by criminalizing stalking except where the conduct is constitutionally protected. Because the speech here lost its protected character by being continually pushed on petitioner, an unreceptive audience of one, the trial court properly considered petitioner's reaction in determining whether the speech was protected and whether the PPO was content neutral. And as in *Hill*, "Once again, it is worth reiterating that only attempts to address unwilling listeners are affected," *id*. at 727, as the PPO did not limit the right of respondent to advocate to a general audience, as it prohibited only stalking, approaching petitioner, or entering onto land occupied by petitioner. Finally, as *Hill* further noted, "It is also important when conducting this interest analysis to recognize the significant difference between state restrictions on a speaker's right to

address a willing audience and those that protect listeners from unwanted communication. This statute deals only with the latter." *Id*. at 715-716.[2]

2. PETITIONER'S SUBJECTIVE FEAR

Respondent argues that petitioner lied about her encounters with respondent because the version of events in her brief in opposition to his motion to terminate the ex parte PPO was different from what she testified to at the hearing to terminate the PPO. At the hearing, however, petitioner stated that the dates listed in her brief in opposition to respondent's motion to terminate the ex parte PPO were incorrect. Her brief stated that certain events occurred on October 8, 2018, but at the hearing she testified that they actually occurred on October 10 and 11, 2018. The trial judge had an opportunity to hear this testimony and clearly viewed petitioner as a credible witness because it ordered the PPO. This Court defers to a trial court's assessment of a witness's credibility. *Patel v Patel*, 324 Mich App 631, 635; 922 NW2d 647 (2018) (holding that "where testimony conflicts, we must afford deference to the trial court's superior ability to judge the credibility of the witnesses who appear before it"); accord MCR 2.613(C) ("Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it."). We see no authority, let alone a reason to deviate from that doctrine here. While the discrepancy between petitioner's brief in opposition to respondent's motion to terminate the ex parte PPO and her testimony at the hearing potentially raised some credibility questions, we are not definitely and firmly convinced that the trial court erred by crediting petitioner's testimony that she was subjectively afraid of respondent.

Furthermore, respondent faults petitioner for failing to take a video of the October 8, 2018 encounter between the parties, stating that she "suspiciously and conveniently [] claims she pushed the wrong button and no video was ever taken." Petitioner testified that she attempted to record the interaction, but "never hit the part of" her cell phone to do so because she was "flustered." Petitioner further testified about her emotional state in general and the fear she felt as respondent began approaching her more closely in October 2018.

Respondent fails to explain why petitioner's failure to record their October 8, 2018 interaction was suspicious and somehow showed petitioner was making up lies about their interactions. In any event, respondent himself had video he had taken of that encounter. Petitioner testified about the incident, and submitted into evidence respondent's video to show how closely respondent came to her. The trial court had the opportunity to assess the video which was taken and determine for itself what it showed about petitioner's truthfulness and whether she was fearful of respondent. After reviewing the video in question ourselves, we are not definitely and firmly convinced that the trial court erred in finding that petitioner was

[2] However, as discussed later, the PPO did improperly restrict the distance from the clinic in which such advocacy to a general audience, as opposed to the consistent attempts to engage petitioner only, could take place.

subjectively fearful of respondent. Thus, we decline to set aside the trial court's conclusion that respondent harassed and stalked petitioner.

3. IRREPARABLE HARM

Respondent argues that the trial court erred by failing to make a finding of irreparable harm when it issued the amended PPO. Respondent asserts that irreparable harm is a required showing for issuance of an injunction. At the start of the evidentiary hearing, the trial court made clear that it was ruling on a PPO, not a restraining order. Respondent is correct that a PPO is a type of injunctive relief. See *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008) ("We review for an abuse of discretion a trial court's determination whether to issue a PPO because it is an injunctive order."). Neither the statutory procedure for granting a PPO nor the definition of stalking, however, require a showing of irreparable harm before issuing a PPO when the enjoined party has notice of the proceeding. Respondent had notice of the PPO proceeding. Thus, the trial court was not required to make any finding of irreparable harm.

C. CONSTITUTIONALLY OF THE SCOPE OF THE PPO

Governmental restrictions on speech fall into two broad categories: content-neutral restrictions and content-based restrictions. See *Madsen v Women's Health Ctr, Inc*, 512 US 753, 762-764; 114 S Ct 2516; 129 L Ed 2d 593 (1994). The "principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech without reference to the content of the regulated speech." *Id*. at 763 (citation and quotation marks omitted). Accordingly, courts should "look to the government's purpose as the threshold consideration." *Id*. Furthermore, as the United States Supreme Court stated in *McCullen*, 573 US at 480 (citations omitted; alteration in original):

> a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics. On the contrary, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." The question in such a case is whether the law is " 'justified without reference to the content of the regulated speech.' "

The PPO here prohibited respondent from "approaching or confronting the petitioner within 125 feet of her" without reference to any specific type of speech. The trial court's intent when it issued the PPO was to return petitioner and respondent to the status quo which existed before the change of ownership of the strip mall in which the abortion clinic is located. In doing so, the trial court created a 125-foot floating buffer zone around petitioner that applied in all circumstances except when respondent was on the grassy area between Flushing Road and the strip mall's parking lot. Respondent argues that the 125-foot zone impinges his First Amendment rights.

Assuming without deciding that the PPO was content-neutral, any restriction on respondent's speech "still must be narrowly tailored to serve a significant governmental interest." *McCullen*, 573 US at 486 (citation and quotation marks omitted).

> For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not burden substantially more speech than is necessary to further the government's legitimate interests. Such a regulation, unlike a content-based restriction of speech, need not be the least restrictive or least intrusive means of" serving the government's interests. But the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." [*Id*. (citations and quotation marks omitted).]

We find that the question of the actual relief which should have been afforded under the PPO, rather than the propriety of the issuance of a PPO itself, is a moot question. As noted earlier, *TM* held that the propriety of the issuance of a PPO does not become moot merely upon the expiration of the PPO: a respondent's interest in "identifying an improperly issued PPO as rescinded is a live controversy and thus not moot. A judgment here *can* have a 'practical legal effect' . . . because if the Court concludes that the trial court should never have issued the PPO, respondent would be entitled to have LEIN reflect that fact." *TM*, 501 Mich at 319.

We find that the narrow question of the scope of the relief (a 125-foot buffer zone, or some lesser distance) does not survive the PPO's expiration, however, even though the PPO statute requires a clerk of the court to "advise law enforcement if '[t]he [PPO] is rescinded, modified, or extended by court order,' and the law enforcement agency 'shall enter the [updated] information or cause the information to be entered into the L.E.I.N.' " *TM,* 501 Mich at 316 (citations omitted; alterations in original). The rationale for *TM*'s holding (that a ruling finding that a PPO never should have issued is not rendered moot by the expiration of the PPO) does not extend to a ruling that the terms of the PPO should have been somewhat narrower than what the trial court ordered. The scope of the PPO could only present a live controversy if we determined that the PPO had not expired. If the PPO had not expired, then determining the proper Constitutional boundaries would have been proper because it would have been possible for the PPO to violate respondent's First Amendment rights by burdening substantially more speech than necessary to further the government's legitimate interests. But here the PPO has expired, so even if the 125-foot boundary was unconstitutional, that boundary is no longer in effect. As the 125-foot boundary is not in effect, it cannot in any way burden respondent's right to free speech, let alone do so in a manner which burdens substantially more speech than necessary to further the government's legitimate interests.

Moreover, the rationale of *TM* does not preclude a finding of mootness here. There is a fundamental difference in finding that a legal question has not become moot when its resolution will determine whether LEIN creates a public record stating that someone did not engage in stalking, compared to a resolution by which LEIN states that someone did engage in stalking but that the remedy should have been somewhat narrower than that imposed. *TM* was the first type of case; this case falls in the second category. Given the expiration of the PPO, the minor difference in the remedy which perhaps should have been imposed compared to that which was imposed is a clear example of a situation in which "a judgment 'cannot have any practical legal effect upon a then existing controversy.' " *TM*, 501 Mich at 317. The remedy which was at issue here would be prospective in nature, looking to future activity and the exercise of future free-speech rights. However, given the expiration of the PPO, this Court's views on what the proper scope of an expired PPO should have been can have no "practical legal effect" on future

activity because it cannot be incorporated into a valid PPO; our views on that question, in the present context, are without legal force and thus could not obligate respondent to conform his conduct to them. As such, we hold that respondent's challenge to terms of the PPO is moot, and we thus decline to consider the question.

III. CONCLUSION

Respondent harassed and stalked petitioner. Accordingly, the trial court did not err by issuing a PPO. In the present procedural context, however, the scope of the PPO presents a purely academic question because the PPO already has expired. We therefore decline to consider that question. Accordingly, we affirm the issuance of the PPO, and decline to consider any other issue, as any other issue is moot.

/s/ Jonathan Tukel
/s/ David H. Sawyer
/s/ Michael J. Riordan