

STATE OF MICHIGAN
COURT OF APPEALS

DRC,

Petitioner-Appellee,

v

JG,

Respondent-Appellant.

UNPUBLISHED

December 17, 2020

No. 351783

Kent Circuit Court

LC No. 19-007103-PH

Before: SWARTZLE, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

A party seeking a personal protection order (PPO) under MCL 600.2950a(1) bears the burden of proving the existence of statutory grounds for issuing the PPO. And to issue the PPO, the court must find the necessary elements satisfied. Neither the referee nor the circuit court in this case made sufficient factual findings on the record for this Court’s review. We vacate and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Petitioner is dating respondent’s ex-wife (KG). Petitioner sought an ex parte PPO against respondent, claiming that respondent assaulted him, made threats against him, and interfered with his business. Petitioner described that on August 10, 2019, respondent deliberately drove his off-road vehicle across a double yellow line toward petitioner and KG, pulled up next to their vehicle and grabbed petitioner by the arm. In June 2017, respondent sent a series of emails to Cannon Township accusing petitioner of operating an unlicensed business on his residential property and seeking to have the business shut down. Petitioner alleged that respondent told a third party that if respondent saw petitioner fly over respondent’s lake in petitioner’s “float plane,” respondent would shoot petitioner down. Petitioner stated that he was aware that respondent possessed firearms and could make good on that threat. Petitioner further alleged that respondent told a third party that respondent would punch petitioner if he ever saw him. Petitioner also cited text

messages from respondent sent in 2017, threatening petitioner's family and friends if petitioner continued his relationship with KG.¹

The circuit court granted petitioner's ex parte request for a PPO by checking the prepared options on the motion form and without identifying any particular "acts of willful, unconsented contact" in the space provided on the form.

Respondent filed a motion to modify or terminate the PPO and requested an evidentiary hearing. A hearing on this motion was held on October 7, 2019 before a circuit court referee. No witnesses were sworn, nor was any evidence taken. At the hearing as in his motion, respondent contended that petitioner actually caused the confrontations between the parties by going out of his way to cross paths with petitioner and "brag" about stealing his wife.

The referee ignored respondent's request for an evidentiary hearing and denied the motion to terminate or modify the PPO. The referee took notice that respondent pleaded nolo contendere to assault in relation to the August 2019 roadside incident. The referee described respondent's emails to the township regarding petitioner's business as "targeted" and "problematic." This was especially troublesome, in the referee's estimation, as respondent was the president of a company with 600 employees and was "trying to use that power and influence to destroy someone else according to these emails." The referee found that these two incidents met the definition of harassment. But the referee made no mention of the other incidents alleged by petitioner.

The referee ultimately ruled that the PPO would remain in effect:

There has been a physical violation . . . and battery is an intentional touching the other person finds offensive that meets it. So, we got that.

We got a background of intensive - - going after this gentleman.

And maybe if he's going after him in certain ways, you can get a [PPO] against him.

* * *

But at this point, this [PPO] stands.

* * *

. . . I have, to rule if the statute has been violated. The statute has been violated.

¹ Although petitioner attached the email thread between respondent and the township, he never presented the threatening text messages he allegedly received from respondent, the police report connected with the August 10, 2019 incident, or affidavits from the third parties who related respondent's alleged threats.

What I am gonna do is this. The two of them need to settle down and stay away from each other and I'm only gonna limit this to its time of expiration. It cannot be extended.

Respondent subsequently filed a motion for circuit court reconsideration of the referee's order. The circuit court affirmed. In doing so, the court acknowledged respondent's argument that during the August 2019 incident, he simply touched petitioner's arm and claimed that this incident did not rise to the level of harassment. However, the court concluded, "[s]everity of intentional, unwanted touching is not a defense to battery." The court stated its belief that "a PPO is necessary to ensure the petulance of the parties does not escalate."

Respondent now appeals.

II. ANALYSIS

Respondent challenges both the initial order granting petitioner's ex parte PPO, as well as the referee's and circuit court's denials of his motion to terminate the PPO.

"The burden of proof in obtaining the PPO, as well as the burden of justifying continuance of the order, is on the applicant for the restraining order." *Pickering v Pickering*, 253 Mich App 694, 701; 659 NW2d 649 (2002), citing *Kampf v Kampf*, 237 Mich App 377, 385-386; 603 NW2d 295 (1999); MCR 3.310(B)(5).

Because a PPO is an injunctive order, a trial court's decision whether to rescind a PPO is reviewed for an abuse of discretion. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). The trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.* "A trial court necessarily abuses its discretion when it makes an error of law." *Pirgu v United Services Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016). The trial court's findings of fact are reviewed for clear error. *Hayford*, 279 Mich App at 325. A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). [*Berryman v Mackey*, 327 Mich App 711, 717-718; 935 NW2d 94 (2019).]

MCL 600.2950a(1) sets forth the criteria under which a trial court may issue a nondomestic PPO, in relevant part, as follows:

Except as provided in subsections (27), (28), and (30), by commencing an independent action to obtain relief under this section, . . . an individual may petition the family division of circuit court to enter 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]. A court shall not grant relief under this subsection unless the petition alleges facts that constitute stalking as defined in [MCL 750.411h or MCL 750.411i], or conduct that is prohibited under [MCL 750.411s]. Relief may be sought and granted under this subsection whether or not the individual to be restrained or enjoined has been charged or convicted under . . . MCL 750.411h, 750.411i, and 750.411s[] for the alleged violation.

The acts underlying petitioner's ex parte PPO request stem from alleged violations of MCL 750.411h. MCL 750.411h proscribes "stalking." " 'Stalking' 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)(d). "Course of conduct" is defined 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). To show harassment, petitioner needed to establish

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. [MCL 750.411h(1)(c).]

"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 the contact be avoided or discontinued." MCL 750.411h(1)(e). MCL 750.411h(1)(e) further provides:

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.

In this case, the referee and the circuit court continued the PPO without resolving the credibility dispute between the parties and without making sufficient factual findings of record for our review. Although the parties were present at the court hearing, they were not sworn in and their statements were argument, not evidence. Absent testimony and the police report regarding the August 2019 roadside incident, no evidence supported that an unconsented contact occurred. Rather, the record consists of bare allegations contained in a petition, and no factual findings by a judicial officer.

The referee also erred by relying on the emails to the township supervisor to establish a second instance of stalking under MCL 750.411h. “Harassment” is defined in part 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.” MCL 750.411h(1)(c) (emphasis added). The referee looked no further than to the emails to find that respondent targeted petitioner. However, there was no conduct directed *toward* petitioner. The emails were sent to the township supervisor, not petitioner. Similarly, the emails do not amount to “unconsented contact” under MCL 750.411(1)(e). MCL 750.411h(1)(e)(vi) provides that unconsented contact includes “[s]ending mail or electronic communications *to that individual.*” (Emphasis added.) Because no email was sent to petitioner, there was no unconsented contact.²

Given the referee’s and circuit court’s lack of record findings, we must vacate the order denying respondent’s motion to terminate the PPO and remand to allow the court to make reviewable findings. As the record now stands, it appears that both petitioner and respondent presented a slew of unsupported allegations and accusations. We are highly skeptical that even with the benefit of testimony petitioner will be able to establish “stalking” as the term is statutorily defined. In any case, evidence must be presented and sworn testimony received to determine whether petitioner is entitled to a PPO.

We vacate and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher

² As the emails were improperly considered under the statute, we need not address respondent’s argument that the emails were constitutionally protected speech.