S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

DAWN OTTEVAERE, Petitioner-Appellee,	UNPUBLISHED December 20, 2005
v	No. 255776 Ingham Circuit Court
ANDREW MICHAEL TWEDDLE, Respondent-Appellant.	LC No. 04-001101-PP

Before: Fitzgerald, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Respondent appeals as of right from the April 30, 2004, entry of a personal protection order (PPO) against him and the May 14, 2004, criminal contempt order sentencing him to four days in jail for violation of the PPO. This is one of two cases being heard by this Court involving respondent's alleged violation of this PPO.[1] As in the other appeal, we affirm.

Petitioner and respondent were divorced after a six-year marriage that produced two children. Subsequent to their divorce, petitioner alleged that respondent physically threatened her, made harassing and intimidating phone calls, repeatedly threatened to not return the children after visitation, and battered her during a visitation exchange. Petitioner sought a PPO, and a hearing on the matter was held during which she testified that her preferred method of communication with respondent was through e-mail or letters. Respondent testified that he would like to be able to speak to his children over the phone, but agreed that the parenting time order did not currently address such contact. Nonetheless, both parties agreed that respondent should be allowed to talk on the phone with his children during pre-arranged times.

The court issued the PPO, which, among other restrictions, prohibited respondent from contacting petitioner by telephone, with the exception that "respondent may call children at a prescheduled time at petitioner's house."[2] Nonetheless, three days after the PPO was issued and

[1] *Ottevaere v Tweddle*, unpublished opinion per curiam of the Court of Appeals, issued _____ (Docket No. 259078). Docket No. 259078 involves a second violation of the PPO, for which respondent served thirty days in jail and was fined $500. *Id.*

[2] Docket No. 259078 involves the PPO's prohibition against appearing at petitioner's home. *Id.*

with no telephone schedule in place, respondent called petitioner's residence and left the following message: "Hi, it's me, Daddy, just calling to talk to Shoey and Baggy. I'll call back around seven." The next day respondent replied to petitioner's e-mail regarding parenting time for the July Fourth weekend. A few minutes after sending the e-mail, he called petitioner and requested to speak to the children. Petitioner contacted the police and a show cause hearing took place a few weeks later. Respondent testified at the hearing that he misunderstood the PPO and was merely calling in an attempt to pre-schedule telephone visitation with his children. Respondent testified that he believed the PPO allowed him to contact petitioner via telephone to make such arrangements. The court held respondent in criminal contempt for violation of the PPO and ordered that he serve four days in jail, which respondent served in July 2004.

Upon motion of the parties, the Oakland Circuit Court (which had jurisdiction over custody and parenting time issues) subsequently issued an order which stated in relevant part, "In furtherance of the Personal Protection Order entered by the Ingham County Circuit Court[,] . . . [respondent] . . . shall have telephone contact with the minor children by calling them on Mondays and Thursdays . . . between 8:00 a.m. and 8:20 a.m. . . . The parties shall not speak to each other during these telephone calls."

Respondent first argues that the Ingham Circuit Court erred by failing to contact the Oakland Circuit Court before issuing the PPO as required by MCR 3.706(C). However, respondent has failed to provide any evidence demonstrating that the Ingham Circuit Court failed to comply with the requirements of MCR 3.706(C).[3] Therefore, this issue is without merit.

Next, respondent argues that the PPO was so vague that it was impossible to comply with. We disagree because a reasonable person could easily understand that the phone calls would violate the order, but respondent nevertheless "refused or neglected to reasonably endeavor to comply with the order." *Butler v Butler*, 80 Mich App 696, 700; 265 NW2d 17 (1978). The language of the PPO clearly indicates that respondent could only call the children at pre-arranged times. The PPO did not prohibit respondent from contacting petitioner by e-mail or in writing or even by means of a third-party intermediary. Respondent, in fact, understood the relevant directives of the PPO. Respondent admitted that he heard petitioner express her preference for e-mail communication during the hearing to enter the PPO. Respondent also admitted to knowing that other forms of communication were available to him. And when pressed by the circuit court about the phone message referencing "Shoey and Baggy," respondent stated, "I wanted to leave a message for the children, not Dawn, because I knew I wasn't supposed to have a call to Dawn."

---

[3] Respondent asserts that when the Oakland Circuit Court issued the order to schedule telephone contact, the presiding judge stated that to the best of his knowledge, the Ingham Circuit Court never contacted him. The transcript respondent cites has not been provided. In any event, this transcript is not part of the record of the lower court, in which this issue should have been raised initially, so respondent fails to substantiate this claim of error. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).

Next, respondent argues that the trial court erred by failing to apply the proper burden of proof. We disagree. "A trial court's findings in a contempt proceeding must be affirmed on appeal if there is competent evidence to support them. However, the issuance of an order of contempt rests in the sound discretion of the trial court, and is reviewed only for an abuse of discretion." *Brandt v Brandt*, 250 Mich App 68, 73; 645 NW2d 327 (2002) (citations omitted). To support a finding of criminal contempt, "an alleged contemnor's 'willful disregard or disobedience' of a court order and a clearly contemptuous act must be proved beyond a reasonable doubt." *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 714; 624 NW2d 443 (2000), quoting *People v Boynton*, 154 Mich App 245, 248, 397 NW2d 191 (1986); see also MCR 3.708(H)(3). Contrary to respondent's assertion, there is no indication in the record that the court disregarded the appropriate burden of proof. The fact that the court reached a conclusion at odds with respondent's position does not indicate that the court applied the wrong burden of proof.

The finding that respondent willfully disregarded the order is supported by competent evidence. As noted above, the PPO precluded respondent from "contacting the petitioner by telephone." This provision was modified by a hand-written note, which provided that "respondent may call children at a prescheduled time at petitioner's house." Nevertheless, only days after the PPO was issued, respondent called and left a recorded message directed to his children. He called back the following day, after making acceptable e-mail arrangements regarding holiday plans, and asked petitioner to put the children on the line. At the time of these calls, a telephone visitation schedule was not yet in place. Respondent's excuse that he was calling to set the schedule was belied by his confessed knowledge that he was not to phone petitioner, his reference only to his children in his message, his e-mail contact with petitioner the following day, and his request to speak to the children in the second phone call. Accordingly, the circuit court's finding that respondent willfully disregarded and clearly violated the PPO beyond a reasonable doubt was supported by competent evidence. *Brandt*, *supra*.

Next, respondent argues on appeal that the court erred by failing to notify him of certain matters as required by MCR 3.708(D), including the alleged violation, the right to contest the violation or plead guilty, and the right to a lawyer. Because respondent failed to preserve this issue for appeal, he must show plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Any error in this regard did not affect respondent's substantial rights and was ultimately harmless. Respondent was clearly aware of the conduct constituting the violation, his right to an attorney, and his right to contest the charge, because he appeared at the contempt hearing to contest the charge and brought his attorney who ably argued the facts and law regarding the particular charge.

Finally, respondent argues that his four-day jail sentence was disproportionately high. However, respondent has already served his sentence, so the issue is moot. *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003). In any event, the sentence was proportionate under the circumstances.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly