STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1691

Curtis Foss,
Respondent,

vs.

Alan Robert Vaughn,
Appellant.

Filed September 16, 2008
Affirmed
Peterson, Judge

Koochiching County District Court
File No. 36-C1-06-000623

David G. Kuduk, Legal Aid Service of Northeastern Minnesota, 201 Northwest Fourth Street, Central Square Mall, Grand Rapids, MN 55744 (for respondent)

Alan R. Vaughn, 3361 Cottonwood Road Northwest, Baudette, MN 56623 (pro se appellant)

Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal from a harassment restraining order, appellant argues that he did not receive adequate notice of the hearing, the district court judge was disqualified for bias, and the evidence does not support the order. We affirm.

FACTS

Respondent Curtis D. Foss petitioned for a harassment restraining order (HRO) against appellant Alan R. Vaughn. The district court granted an ex parte temporary HRO. Appellant was personally served with a copy of the temporary HRO and requested a hearing, which was scheduled for January 9. At the January 9 hearing, appellant filed a notice to remove the judge who had been assigned to the case. The district court granted the request for removal, and a substitute judge was assigned on January 17. The hearing was rescheduled for February 6, and notice of the hearing was mailed to the parties on February 1.

Appellant did not appear for the hearing on February 6. A staff person from court administration informed the district court that (1) she had received a phone call that morning on behalf of appellant, stating that appellant was out of the state and had been trying to fax information to the court, but (2) no fax had been received as of the time of the hearing. Appellant did not request a continuance. On June 29, 2007, the district court entered an HRO, ordering appellant not to harass respondent, to have no contact with respondent, and to stay away from respondent's residence. This appeal followed.

D E C I S I O N

I.

Appellant argues that he was unaware of the time and date of the hearing scheduled for February 6. But the transcript reveals that Sandra Harju, whom appellant calls his domestic partner, called the district court the morning of the scheduled hearing to inform the court that appellant was out of the state and had been attempting to fax something to the court. This phone call and evidence in the court file that a notice of the hearing was mailed to appellant support the district court's finding that appellant had actual knowledge of the date and time of the rescheduled hearing.

Appellant also argues that the district court failed to "timely and properly" notify him of the date, time, place, and identity of the presiding judicial officer for the hearing. The record shows that a notice of the date and time of the rescheduled hearing was placed in the mail to appellant five days before the hearing. This satisfies the requirements of Minn. Stat. § 609.748, subd. 4(d) (2006). *See also* Minn. R. Civ. P. 5.02 ("Service by mail is complete upon mailing."). Appellant's constitutional and federal statutory claims have no legal merit.

II.

A party may prevent a judge from presiding over a matter by filing a notice to remove within ten days of receiving notice that the judge is assigned to preside over the trial or hearing. Minn. Stat. § 542.16, subd. 1 (2006); Minn. R. Civ. P. 63.03. After a party has once disqualified a presiding judge as a matter of right, that party may

disqualify the substitute judge, but only by making an affirmative showing of prejudice. Minn. Stat. § 542.16, subd. 2 (2006); Minn. R. Civ. P. 63.03.

Appellant exercised his right to disqualify the judge originally assigned to this case by filing a notice to remove. Appellant alleges he attempted to disqualify the substitute judge for bias. He claims to have faxed a notice of removal of the substitute judge.

While filing by fax is permitted, it is not completed until the fax is received by the court. Minn. R. Civ. P. 5.05. The record shows that district court administration did not receive a fax from appellant. While the record contains a document entitled "fax transmission," dated January 30, 2007, and signed by appellant, this document was filed with the court on August 31, 2007. Appellant was mailed notice of the substitute judge assigned to the case on January 17, and notice of the rescheduled hearing on February 1. The hearing was held February 6. The record contains no proof of appellant's claimed objection to the assignment until August 31–more than six months after the hearing, which was clearly untimely.

Appellant also suggests that the judge and/or court administration should have known that the judge was disqualified from presiding over the hearing. Because the record does not substantiate appellant's prejudice claim, there was no basis for the district court to sua sponte disqualify the substitute judge. *See State v. Yaeger*, 399 N.W.2d 648, 652 (Minn. App. 1987) (stating that a judge's familiarity with a party is not sufficient to show prejudice and affirming denial of motion to disqualify when record did not substantiate appellant's claim that judge had made a derogatory remark about appellant).

III.

A court may grant an HRO when "the court finds at the hearing that there are reasonable grounds to believe that the respondent has engaged in harassment." Minn. Stat. § 609.748, subd. 5(a)(3) (2006). Harassment is defined as "repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security or privacy of another." *Id.*, subd. 1(a)(1) (2006).

> An appellate court reviews a district court's grant of [an HRO] under an abuse-of-discretion standard. A district court's findings of fact will not be set aside unless clearly erroneous, and due regard is given to the district court's opportunity to judge the credibility of witnesses. But this court will reverse the issuance of a restraining order if it is not supported by sufficient evidence.

Kush v. Mathison, 683 N.W.2d 841, 843-44 (Minn. App. 2004) (citations omitted), *review denied* (Minn. Sept. 29, 2004).

Appellant argues that the district court erred in issuing the HRO in this case because respondent's testimony was false. But it is for the district court to determine the credibility of a witness. Minn. R. Civ. P. 52.01. We note that appellant's affidavit corroborates several of respondent's allegations. Specifically, appellant admits to threatening respondent, taking video footage of appellant, and attempting to photograph appellant. Finally, appellant complains that the district court relied on an exhibit that appellant had not seen before the appeal. But the exhibit was offered and received at the hearing that appellant did not attend. Nothing in the record indicates that appellant requested a copy of the exhibit, and he cites no authority that requires respondent or the

district court to provide it to him in the absence of a request. The district court did not err in issuing the HRO.

Affirmed.