[Cite as *D.G. v. M.G.G.*, 2018-Ohio-5394.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

D.G.,

Petitioner-Appellant,

v.

M.G.G.,

Respondent-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0165

Domestic Relations Appeal from the
Court of Domestic Relations of Mahoning County, Ohio
Case No. 16 DV 493

BEFORE:
Gene Donofrio, Cheryl L. Waite, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed

Darla Gergel, *Pro-se,*113 Green Bay Drive, Youngstown, Ohio 44512, for Petitioner-Appellant and

Atty. David Betras, Betras, Kopp & Harshman, LLC, 6630 Seville Drive, Canfield, Ohio 44406, for Respondent-Appellee.

Dated:
December 27, 2018

Donofrio, J.

{¶1} Petitioner-appellant, D.G., appeals a Mahoning County Common Pleas Court judgment denying her motion for contempt and her motion to renew a consent agreement and domestic violence civil protection order against respondent-appellee, M.G.G.

{¶2} Appellant and appellee are sister and brother respectively and co-own a house in Boardman, Ohio. Only appellant lives in this home, appellee resides in the Cleveland area. But appellee has multiple pieces of property at the home, including a car. Appellee visited the home on occasion in order to work on his car. In July of 2016, appellee was at the home to work on his car. While appellee was at the home, an altercation between the parties took place. This altercation resulted in appellee raising his arm in anger towards appellant and spitting in appellant's face.

{¶3} On August 5, 2016, appellant filed a petition for a domestic violence civil protection order against appellee based on the incident where appellee spit in her face. The trial court issued an ex parte order of protection against appellee the same day and scheduled a full hearing on the petition. The full hearing on the petition was eventually held on October 20, 2016.

{¶4} After the hearing, the court issued a consent agreement and domestic violence civil protection order. This order was effective until October 20, 2017. This protection order contained three provisions that are relevant to this appeal: appellee was to not permitted to be within 500 feet of appellant, appellee was not permitted to have any contact with appellant, and appellee was permitted to be at the house where appellant lived with 24 hours of prior notice so that appellee could work on the car he kept there.

{¶5} On July 24, 2017, appellant filed a motion for contempt of the domestic violence protection order against appellee and a motion to modify the protection order. The basis of these motions was that appellant and appellee were both present at a funeral for their aunt. Appellant believed appellee's presence at the funeral was a

violation of the protection order. As part of the motion to modify, appellant was seeking an extension of the protection order for an additional four years.

{¶6} On August 23, 2017, a magistrate held a hearing on these motions. Both appellant and appellee testified about the events at their aunt's funeral. Appellee testified that he received three emails from appellant about the funeral. The emails included the date and time of the funeral. Appellee also testified that at the time he never went to the house to work on his car. Appellant testified that the reason she sent three emails was due to a technical error with her computer. Appellant also testified that, due to appellee's presence at the funeral, she was again fearful of him.

{¶7} In a judgment entry dated August 25, 2017, the magistrate denied appellant's motion for contempt because appellant was the one who contacted appellee via email three times about the funeral. The emails contained a link to their aunt's obituary, funeral details, and calling hours. Moreover, appellee never responded to the emails nor did appellee initiate contact with appellant at the funeral.

{¶8} The magistrate granted appellant's motion to modify in part. Specifically, the magistrate ordered that appellee was allowed to keep his car in appellant's garage but appellee was not allowed to come onto the property to work on the car. No other parts of the original order were modified. Regarding appellant's request to extend the duration of the order, the magistrate denied that request on the basis that no new threat of domestic violence had occurred since the issuance of the protection order.

{¶9} On September 7, 2017, appellant filed an objection to the magistrate's decision arguing that appellee violated the terms of the protection order by being at the funeral and not immediately leaving the funeral once appellant arrived. Appellant also objected to the magistrate's decision denying the extension of the protection order on the basis that appellant still feared appellee due to the initial altercation despite no new instances of domestic violence since the protection order was issued.

{¶10} Before the trial court issued a ruling on appellant's objection, on October 4, 2017, appellant filed a motion to renew the consent agreement and domestic violence civil protection order. In this motion, appellant argued that appellee violated the terms of the protection order by being at the funeral the same time appellant was at the funeral. This motion also referenced testimony given at the August 23, 2017 hearing where

appellee testified that he would return to the home when the protection order expired in order to retrieve all of his property. Additionally, this motion argued that the protection order should have been granted due to a birthday card appellant received in the mail from appellee's girlfriend. Appellant maintained that the protection ordered should be renewed because she still feared appellee.

{¶11} In a judgment entry dated October 17, 2017, the trial court overruled appellant's objection. In a judgment entry dated October 19, 2017, the magistrate dismissed appellant's motion to renew the consent agreement and domestic violence civil protection order on the basis of res judicata due to the October 17, 2017 judgment entry overruling appellant's objection. Appellant timely filed a notice of appeal on November 16, 2017. Appellant now raises four assignments of error.

{¶12} Appellant's first assignment of error states:

> THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO FIND THE APPELLEE/* * * [M.G.G.] IN CONTEMPT OF COURT FOR VIOLATING THE CONSENT AGREEMENT AND DOMESTIC VIOLENCE CIVIL PROTECTION ORDER OF THE APPELLANT/* * * [D.G.]

{¶13} Appellant argues that the evidence at the contempt and modification hearing showed that appellee violated the protection order. Appellant argues that the trial court's judgment denying the motion for contempt was error.

{¶14} Contempt is defined as a disregard for or disobedience of an order or command of judicial authority. *First Bank of Marietta v. Mascrete, Inc.*, 125 Ohio App.3d 257, 263, 708 N.E.2d 262 (4th Dist. 1998). Failure to abide by a court order may be indirect contempt, as it occurs outside the presence of the court but demonstrates a lack of respect for the court. *Byron v. Byron*, 10th Dist. No. 03 AP 819, 2014–Ohio–2143 at ¶ 11. We review a trial court's contempt finding for abuse of discretion. *State ex rel. Celebrezze v. Gibbs*, 60 Ohio St.3d 69, 75, 573 N.E.2d 62 (1991). An abuse of discretion is more than an error of law or judgment; it implies that the trial court's judgment was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶15} Appellant's overall argument is that, as the beneficiary of a protection order, it was inappropriate for the trial court to consider any of her actions when it denied her motion for contempt. Appellant argues that because the protection order restricted appellee's actions and not hers, the trial court abused its discretion when it considered appellant emailing appellee about the funeral.

{¶16} Appellant cites two subsections of R.C. 3113.31 in support of her argument. First, appellant cites R.C. 3113.31(E)(4) for the notion that a court may not issue a protection order that requires a petitioner to do or refrain from doing an act that the court may require a respondent to do or refrain from doing. Second, appellant appears to cite R.C. 3113.31(E)(7)(a) for the notion that a protection order cannot be waived or nullified by invitation to the respondent from the petitioner.

{¶17} Appellant argues that when the trial court considered her emails to appellee during the motion for contempt hearing, the trial court essentially ruled that appellant invited appellee to violate the protection order. In support of this argument, appellant cites *State v. Bombardiere*, 3d Dist. No. 14-06-27, 2007-Ohio-1537, for the notion that a reckless violation of a civil protection order is still sufficient for a motion for contempt. This argument does not have merit.

{¶18} First, *Bombardiere* is distinguishable because it was a criminal proceeding and the assignments of error challenged the sufficiency of the evidence, the manifest weight of the evidence, and the constitutionality of the statute the appellant was charged with violating. Second, there is no evidence in the record that appellee responded to the three emails from appellant. There is also no evidence in the record that appellant attempted to contact appellee in any way. Moreover, while appellant was at the funeral at the same time appellee was, appellee arrived first and made no contact with appellant when she arrived.

{¶19} Appellant also argues that *State v. Stoner*, 2d Dist. No. 2008 CA 83, 2009-Ohio-2073 applies. In *Stoner*, the Second District held a conviction of violating a domestic violence protection order was valid where the defendant went to a house two doors away from the victim's house and knew or had a reason to know the victim would be home. *Id.* at ¶ 30-37. *Stoner* is also inapplicable because it was a criminal charge of

violating a domestic violence protection order and the appellant was challenging the sufficiency of the evidence against him.

{¶20} In its judgment entry dated October 17, 2017, the trial court held that "[w]hile [appellee's] attendance at the funeral of a family member that [appellant] attended may technically be a violation of the terms of the protection order, there are mitigating circumstances that justify not finding him in contempt." The mitigating circumstances the trial court relied on were: appellant sent appellee three emails with the information about the funeral, the parties did not talk to each other and no incidents were had at the funeral, and appellant previously agreed to allow appellee onto her property so he could check on his car. The trial court interpreted that last circumstance to mean that appellant was comfortable being in appellee's presence.

{¶21} The trial court also cited several cases where a technical violation of a protection order is not automatically grounds for contempt. The Tenth District in *Meyer v. Meyer*, 10th Dist. No. 16AP-253, 2016-Ohio-5806, the Fourth District in *McLead v. McLead*, 4th Dist. No. 06CA67, 2007-Ohio-4624, and the Fifth District in *Kilcoyne Properties, LLC v. Fischbach*, 5th Dist. No. 03CA072, 2004-Ohio-7272, have all held that a trial court does not abuse its discretion by not holding a party in contempt despite evidence that a court order was violated.

{¶22} We agree with the Tenth, Fourth, and Fifth District's that a technical violation of a protection order is not automatically grounds for contempt when mitigating factors are present. Moreover, the trial court is in the best position to assess the weight of the mitigating factors. Because there were several mitigating factors in this case, the trial court's ruling was not an abuse of discretion.

{¶23} Accordingly, appellant's first assignment of error lacks merit and is overruled.

{¶24} Appellant's second assignment of error states:

> THE TRIAL COURT ERRED AS A MATTER OF LAW AND WITH RESPECT TO THE MANIFEST WEIGHT OF THE EVIDENCE IN NOT GRANTING THE RENEWAL OF THE CONSENT AGREEMENT AND DOMESTIC VIOLENCE CIVIL PROTECTION ORDER OF THE APPELLANT/* * * [D.G.]

{¶25} Appellant argues that the original basis for the protection order, appellee's presence at the funeral, and appellant's continued fear of appellee warranted a renewal of the original protection order.

{¶26} "Any protection order issued or consent agreement approved pursuant to this section may be renewed in the same manner as the original order or agreement was issued or approved." R.C. 3113.31(E)(3)(c). The decision on whether to grant a civil protection order lies within the sound discretion of the trial court. *Morton v. Pyles*, 7th Dist. No. 11 MA 0124, 2012-Ohio-5343, ¶ 8.

{¶27} In its October 17, 2017 judgment entry, the trial court denied appellant's motion to renew on the basis that there was no new threat of domestic violence by appellee against appellant. Citing *Lundin v. Niepsuy*, 9th Dist. No. 28223, 2017-Ohio-7153, the trial court concluded that a new finding of domestic violence or threat thereof is necessary to justify the issuance of a new protection order.

{¶28} As previously stated, other than the funeral incident, there is no evidence of any contact between the parties after the original protection order went into effect.

{¶29} But appellant cites *Woolum v. Woolum*, 131 Ohio App.3d 818, 723 N.E.2d 1135 (12th Dist.1999), for the prospect that past abuse that gave rise to the original protection order is sufficient to justify an extension on the protection order. This argument does not have merit.

{¶30} The appellant in *Woolum* argued that a renewal of a protection order required new evidence of domestic violence. *Id.* at 822. While the Twelfth District agreed, the Twelfth District concluded that past evidence of domestic violence coupled with new threats of domestic violence was a sufficient basis for a renewed protection order. *Id.* Specifically, the appellant in *Woolum* threatened to make the appellee's life miserable and to kidnap the appellee's children. *Id.* In this case, there is no evidence of any threat or any event of domestic violence between appellant and appellee after the original protection order was issued.

{¶31} Appellant also relies on *Eichenberger v. Eichenberger*, 82 Ohio App.3d 809, 613 N.E.2d 678 (10th Dist.1992), for the notion that past events and fear of the respondent are a sufficient basis to renew a protection order. *Eichenberger* is also

distinguishable because there was a threat of future domestic violence. Specifically, the petitioner in *Eichenberger* testified that the respondent threatened to kill her. *Id.* at 815.

{¶32} Because there is no evidence of any new events of domestic violence or any threat by appellee towards appellant, the trial court's judgment denying appellant's motion to renew the protection order was not an abuse of discretion.

{¶33} Accordingly, appellant's second assignment of error lacks merit and is overruled.

{¶34} Appellant's third assignment of error states:

> THE TRIAL COURT ERRED AS A MATTER OF FACT IN ITS OCTOBER 17, 2017 JUDGMENT ENTRY CONCERNING THE FACTS OF THE CASE, THE FACTS OF THE PREVIOUS AUGUST 25, 2017 JUDGMENT ENTRY OF THE MAGISTRATE AND FACTS CONCERNING CASE LAW REFERENCED.

{¶35} Appellant alleges that the following errors are found in the trial court's judgment entries: the reason for the 24-hour notice provision in the original protection order; the judgment entry dated October 17, 2017 incorrectly identifies the disposition stated in the judgment entry dated August 25, 2017; and that appellee did actually make threats towards appellant at the September 12, 2017 hearing to satisfy *Woolum*.

{¶36} Addressing the 24-hour notice provision of the original protection order, appellant argues that the reason for the 24-hour notice provision was to allow her to leave the home so she would not be near appellee whenever he came to check on his car. Appellant argues because that was the reason for the notice provision, the trial court erred when it concluded that because appellee was permitted to be at the home, it was not reasonable that appellant feared appellee when she saw him at the funeral.

{¶37} The protection order dated October 20, 2016 provides, at paragraph 17: "As a limited exception to paragraphs 5 & 6, respondent is permitted to check on his 1989 Pontiac Trans Am upon 24 hour notice & to use his tools." This provision does not specify a reason as to why the 24-hour notice provision was included. There is no evidence in the record to support appellant's argument that this provision was included so that she could vacate the home before appellee's arrival.

{¶38} Addressing the incorrect disposition in the October 17, 2017 judgment entry, appellant argues this judgment entry omits that her motion to modify the protection order was granted in part and denied in part. Appellant misstates this judgment entry. What this entry states is that appellant objected to the magistrate denying her motion for contempt and motion to renew the protection order. The court overruled the objections. The slight modification had to do with appellant no longer being permitted to work on his car at the residence as part of the protection order. After reviewing the relevant judgment entries, there is no error.

{¶39} Addressing potential threats appellee made towards appellant at the August 23, 2017 hearing, appellant contends that appellee threatened to make her life miserable at this hearing. Appellant argues that because appellee made such a threat, *Woolum* is satisfied and protection order should have been renewed.

{¶40} Appellant does not cite a specific portion of the August 23, 2017 hearing transcript in which any such threat was made by appellee. Appellant may be referring to where appellee stated that he would be interested in removing several pieces of property he has in the home including the refrigerator, the television, and the washer and dryer. (Tr. 47-48). This is not a threat of domestic violence pursuant to *Woolum*. Appellee testified that he wanted to take the furniture that he purchased out of the home. (Tr. 48). There is no reference to making appellant's life miserable.

{¶41} Accordingly, appellant's third assignment of error lacks merit and is overruled.

{¶42} Appellant's fourth assignment of error states:

> THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF ANOTHER POTENTIAL CONTEMPT VIOLATION OF THE CONSENT AGREEMENT AND DOMESTIC VIOLENCE CIVIL PROTECTION ORDER OF THE APPELLANT/* * * [D.G.] IN ITS OCTOBER 17, 2017 JUDGMENT ENTRY AND IN DECLARING THE ISSUE BARRED BY THE DOCTRINE OF RES JUDICATA IN THE OCTOBER 19, 2017 JUDGMENT ENTRY/ORDER OF THE MAGISTRATE.

{¶43} Appellant argues that the trial court erred when it failed to consider another potential violation of the protection order where appellant allegedly received a birthday card from appellee's girlfriend.

{¶44} The admission of evidence is within the discretion of the trial court and the court's decision will only be reversed upon a showing of abuse of discretion. *State ex rel. Sartini v. Yost*, 96 Ohio St. 3d 37, 2002-Ohio-3317, 770 N.E.2d 584.

{¶45} The birthday card incident occurred on or around appellant's birthday in April of 2017. Appellant received a birthday card in the mail from appellee's girlfriend. But appellant's motions for contempt and to modify the protection order dated July 24, 2017, do not specifically reference this incident.

{¶46} Pursuant to Loc.R. 12.01(B) of the Court of Common Pleas of Mahoning County, Domestic Relations Division, all motions shall contain specific facts or an affidavit setting forth specific facts that form the basis of the motion. Because the birthday card incident was not raised in the July 24, 2017 motion for contempt, the trial court's exclusion of this evidence was not an abuse of discretion.

{¶47} Even though appellant's October 4, 2017 motion to renew the consent decree and protection order specified facts regarding this birthday card incident, it was still not an abuse of discretion for the trial court to dismiss this motion. First, this motion is barred by res judicata because appellant could have and should have raised these facts in her July 24, 2017 motion. Second, this motion was denied by the magistrate on October 19, 2017 and appellant did not file an objection to this decision. Civ.R. 65.1(G) requires a party to a civil protection order to file a timely objection to a magistrate's decision with the trial court judge prior to filing an appeal. Because appellant did not file an objection, this court lacks jurisdiction to review this ruling.

{¶48} Accordingly, appellant's fourth assignment of error lacks merit and is overruled.

{¶49} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

Bartlett, J., concurs.

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For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Domestic Relations of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.