

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
NOBLE COUNTY

IN THE MATTER OF:

D.R.B.,
BY K.G.B.,
NEXT FRIEND,

Petitioner-Appellee,

v.

G.T.B,

Respondent-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 NO 0452

Civil Appeal from the
Court of Common Pleas of Noble County, Ohio
Case No. 217-0072

BEFORE:

Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:

Affirmed.

K.G.B., Caldwell, Ohio 44313 for *pro se.*, Petitioner-Appellee and
G.T.B., Mount Vernon, Ohio 43050 for *pro se.*, Respondent-Appellant

Dated: June 25, 2018

ROBB, P.J.

{¶1} Respondent-Appellant G.T.B. appeals the decision of Noble County Common Pleas Court granting a civil sexually oriented offense protection order to Petitioner-Appellee K.G.B., next of friend to D.B., her daughter. The issue raised in Appellant's pro se brief is whether the trial court should have granted the petition for a protection order. For the reasons expressed below, the granting of the protection order is affirmed.

Statement of the Case

{¶2} On June 27, 2017 Appellee filed a petition for a civil sexually oriented offense protection order pursuant to R.C. 2903.214. The protection order was sought to protect Appellee's daughter.

{¶3} The petition described the following acts of Appellant that caused Appellee to seek a protection order. Appellant and Appellee have three sons together. Appellee's daughter is from a prior relationship. On December 29, 2010, while Appellant and Appellee were still in a relationship, Appellant put his phone under the bathroom door and videotaped Appellee's daughter getting undressed and into the shower. This occurred in Missouri. Appellee discovered the video on the phone. She confronted Appellant and then she took her children and left Appellant returning to Ohio. Once in Ohio, Appellee contacted the Missouri authorities. Appellant later pled guilty to a Peace Disturbance, allegedly a reduced charge and was ordered to serve probation. Part of his probation was no contact with Appellee's daughter, D.B. Appellant abided by the terms of his probation and had no contact with D.B., even when he exercised visitation with his sons. Appellant would wait at the end of the Appellee's driveway for his sons to come to his car for visitation. After his probation was over, Appellant began approaching Appellee's house where her daughter resided with her. Appellee asked Appellant to keep his distance from the house. He allegedly refused because he was no longer on probation. This resulted in Appellee seeking a protection order for D.B.

{¶4} A civil sexually oriented offense protection ex parte order was ordered the same day the petition was filed. 6/27/17 J.E. The court ordered the exchange for visitation with his sons to occur at the Noble County Sheriff's Office. 6/27/17 J.E.

{¶5} A full hearing on the petition occurred on August 21, 2017. Appellant was represented by counsel. Appellee appeared pro se. Both Appellant and Appellee testified. Following the hearing, the trial court issued a civil sexually oriented offense protection order pursuant to R.C. 2903.214. 8/21/17 J.E. The protection order was to remain effective until June 27, 2022. 8/21/17 J.E. The order indicated visitation exchanges would still occur at the Noble County Sheriff's Office and parties would make reasonable efforts for Appellant to attend a school function of one or more of the boys at least once a month. 8/21/17 J.E.

{¶6} Appellant timely appealed the protection order.

Appellant's Argument

{¶7} Although Appellant does not set forth an assignment of error in his brief, he is asserting the trial court should not have granted the petition for a protection order.

{¶8} When the issue is whether the protection order should have been granted, a manifest weight of the evidence standard of review applies. *Rehfus v. Smith*, 7th Dist. No. 14 CA 897, 2015-Ohio-2145, ¶ 21 (addressing a civil sexually oriented offense protection order). As set forth by the Ohio Supreme Court, the manifest weight of the evidence standard set forth in *Thompkins*, a criminal case, also applies in civil cases. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17-23. The Court explained the manifest weight of the evidence standard as:

Weight of the evidence concerns "the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*." (Emphasis sic.) [*State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541], quoting Black's at 1594.

Eastley at ¶ 12.

{¶9} R.C. 2903.214 governs civil stalking protection orders and civil sexually oriented offense protection orders. We have recently explained a civil stalking protection order sought under R.C. 2903.214 where it is alleged the respondent menaced by stalking in violation of R.C. 2903.211 requires the petitioner to prove the elements of menacing by stalking by a preponderance of the evidence. *R.G. v. R.M.*, 2017-Ohio-8918, 88 N.E.3d 1027, ¶ 11 (7th Dist.), citing *Felton v. Felton*, 79 Ohio St.3d 34, 41–42, 679 N.E.2d 672 (1997) (General Assembly intended to apply the usual preponderance of the evidence standard to civil domestic violence protection order where it failed to specify another standard). The Twelfth Appellate District has indicated the preponderance of the evidence standard also applies to the issuance of a sexually oriented offense protection order. *Weismuller v. Polston*, 12th Dist. No. CA2011-06-014, 2012-Ohio-1476, ¶ 18 (using same analysis that this court applied to determine preponderance of the evidence standard applies to civil stalking protection order).

{¶10} R.C. 2903.214(C) states the requirement for a sexually oriented offense civil protection order:

* * * [A]ny parent or adult household member may seek relief under this section on behalf of any other family or household member, by filing a petition with the court. The petition shall contain or state all of the following: (1) An allegation that the respondent is eighteen years of age or older and * * * committed a sexually oriented offense against the person to be protected by the protection order, including a description of the nature and extent of the violation[.]

R.C. 2903.214(C)(1). See also *Rehfus*, 2015-Ohio-2145 at ¶ 19.

{¶11} Appellant begins his argument by continually referring to the protection order as a civil stalking protection order and arguing there is no evidence he followed, harassed, or stalked Appellee's daughter. He asserts although he may have been asked to leave the property, he was not given the opportunity to comply with the request.

{¶12} Appellant is incorrect in referring to the petition and order as a civil stalking protection order. Appellee sought a civil sexually oriented offense protection order and that is the order granted. There is no requirement Appellee had to prove Appellant harassed, followed, or stalked Appellee's daughter to obtain this type of protection

order. Rather, Appellee must prove by a preponderance of the evidence Appellant committed a sexually oriented offense as defined by R.C. 2950.01 against Appellee's daughter.

{¶13} Appellant did not dispute the allegation that he videotaped Appellee's daughter getting into the shower or that he pled guilty in Missouri to an offense stemming from that incident. The incidents as described could constitute at least two sexually oriented offenses as defined by R.C. 2950.01 – Voyeurism or Illegal Use of a Minor in Nudity-Oriented Material or Performance. Voyeurism is defined as “No person, for the purpose of sexually arousing or gratifying the person's self, shall commit trespass or otherwise surreptitiously invade the privacy of another to videotape, film, photograph, otherwise record, or spy or eavesdrop upon the other person in a state of nudity if the other person is a minor.” R.C. 2907.08(C). A person who violates this section of the statute commits a fifth-degree felony. R.C. 2907.08(E)(5). Illegal Use of a Minor in Nudity Orient-Material or Performance is defined as:

(A) No person shall do any of the following:

(1) Photograph any minor who is not the person's child * * * in a state of nudity * * * unless both of the following apply:

(a) The material or performance is, or is to be, sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance;

(b) The minor's parents, guardian, or custodian consents in writing to the photographing of the minor, to the use of the minor in the material or performance, or to the transfer of the material and to the specific manner in which the material or performance is to be used.

* * *

(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

R.C. 2907.323.

{¶14} Appellee's statements at the hearing and statements in the petition, if believed, could at least prove by a preponderance of the evidence Appellant perpetrated either of those sexually oriented offenses against Appellee's daughter. The trial court determined the evidence met the standard. Decisions regarding credibility fall within the province of the trier of fact. *Nguyen v. Chaffee*, 7th Dist. No. 08 CO 35, 2009–Ohio–3352, ¶ 8. A reviewing court, "may not simply substitute its judgment for that of the trial court so long as there is some competent, credible evidence to support the lower court findings." *State ex rel. Celebrezze v. Environmental Enterprises, Inc.*, 53 Ohio St.3d 147, 154, 559 N.E.2d 1335 (1990). Consequently, given the evidence and Appellant's failure to dispute the evidence of a sexually oriented offense, there was a basis to order a civil sexually oriented offense protection order.

{¶15} Furthermore, despite Appellant's insistence to the contrary, there was evidence Appellant did not comply with Appellee's request to immediately leave the property when asked. Appellant admitted during the hearing that after his probation was over he approached Appellee's house where her daughter resides. Tr. 18-19. He acknowledged Appellee told him to back away from the house and go to the driveway. Tr. 18-20. He admitted he argued with Appellant for about three minutes and then went

to the driveway. Tr. 18-19. He acknowledged during this argument he said to Appellee, "I'm off my probation so what's the problem." Tr. 20. Given the testimony the trial court could have believed Appellant did not comply with the request to wait in the driveway for his children.

{¶16} Next Appellant argues the issuance of the protection order was not supported by the evidence because he is no longer on probation, and therefore, he is no longer required to have no contact with Appellee's daughter. Also, he argues the alleged incident happened a long time ago and he successfully completed probation without a violation.

{¶17} The fact that he successfully finished his probation does not mean a civil sexually oriented protection order could not be issued. Likewise, the fact that the offense occurred in 2010 does not prohibit the trial court from ordering a civil sexually oriented offense protection order. We have previously explained that civil protection orders exist as a "remedy in addition to, not in lieu of, other available remedies such as a criminal case and its bond conditions." *Zawrotuk v. Zawrotuk*, 7th Dist. No. 14 MA 13, 2014-Ohio-5225, ¶ 43 (involving a domestic violence civil protection order). We have also indicated compliance with a previous order does not preclude the granting of a protection order. See *id.* at ¶ 44 (discussing compliance with ex parte protection order). Furthermore, the statute states, "Any protection order issued pursuant to this section may be renewed in the same manner as the original order was issued." R.C. 2903.214(E)(2)(b). This language indicates time between the offense and the order and/or compliance with a previous order does not necessarily preclude the issuance of the protection order or the renewal of the protection order. Consequently, although Appellant is no longer on probation and has successfully completed probation does not mean the trial court could not legally issue a civil sexually oriented offense protection order if the elements required for the issuance of the protection order were met.

{¶18} In conclusion, for the above stated reasons, the trial court's issuance of the civil sexually oriented offense protection order is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Noble 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.