

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

James Bower Court of Appeals No. L-12-1022

Appellee Trial Court No. CI0201105704

V.

Eric J. Long

DECISION AND JUDGMENT

Appellant

Decided: December 13, 2013

* * * *

Thomas P. Kurt, for appellant.

* * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from an order of protection issued by the Lucas County Court of Common Pleas, after petitioner-appellee, James Bower, filed a request for a civil stalking protection order (“CSPO”). Respondent-appellant, Eric Long, now challenges that order through the following assignments of error:

First Assignment of Error: The judgment of the trial court is not supported by sufficient evidence.

Second Assignment of Error: The trial court abused its discretion in suspending appellant's concealed carry permit as a term of its protection order.

{¶ 2} The facts of this case are as follows. On September 28, 2011, appellee filed a petition for a CSPO on behalf of himself and his wife, Teri Bower, pursuant to R.C. 2903.214. In the petition, appellee described the pattern of conduct that caused him to believe that appellant would cause him physical harm or has caused him mental distress, as follows: "Eric Long (Respondent) threatened to [sic] bodily harm to Petitioner upon leaving family court 9/28/11; Lauren Long step daughter as witness & Dr. Bernardo Martinez witness. Has been menacing via text messages for months to step daughter – 9/18/11 12:45p 'stated I've better have eyes in the back of my f***king head.'"

{¶ 3} The court held an ex parte hearing that same day, granted the ex parte CSPO and set the matter for a full hearing. The case proceeded to that hearing on December 30, 2011, at which appellant, appellee, and Lauren Long testified.

{¶ 4} Appellee stated that appellant is married to his step-daughter, Lauren Long, who filed for divorce in February 2011. Appellant and Lauren had been living in a house in Maumee, Ohio, that was owned by appellee. Appellee testified that shortly after Lauren told appellant that she wanted a divorce, appellant threatened to kill himself and left the house with a loaded handgun. Appellant has a permit to carry a concealed

weapon. Lauren then called appellee, hysterical. Appellee testified that he instructed Lauren to call the Maumee police and that subsequently appellant was taken into custody and placed in Rescue Crisis for four days. Thereafter, issues between appellant and Lauren escalated, with appellant swearing at and abusing Lauren. Appellee testified that appellant blamed him for the divorce, so whenever appellee had to go to the Maumee home, he took a Maumee police officer with him so that he would feel protected. On September 28, 2011, appellee accompanied Lauren to the Domestic Relations Court for a hearing. Appellee testified that following the hearing, when the parties were outside of the courthouse, appellant told him “you better have eyes in the back of your f***king head.” Following that statement, appellee filed the petition for the CSPO. Appellee admitted that the threatening text messages were between appellant and Lauren. On cross-examination, appellee further admitted that this incident at the courthouse was the only contact that he had with appellant that induced him to file the petition.

{¶ 5} Lauren testified that during the course of her marriage to appellant, appellee would often try to mediate disputes between her and appellant, which caused problems between appellant and appellee. Although she stated that the two had arguments in the past, the only threat appellant made to appellee was the statement he made outside of the courthouse. She also confirmed the incident when appellant threatened to kill himself, but further confirmed that appellee was not present during that incident.

{¶ 6} Finally, appellant testified in his own defense. Appellant admitted warning appellee that he better have eyes in the back of his head, but testified he made the

statement in response to antagonizing actions made by appellee. Appellant further admitted that he had threatened to kill himself and was taken into custody for evaluation. He agreed that appellee was not present during that incident. Appellant admitted owning multiple weapons, including shotguns and a handgun. He also testified that he has a license to carry a concealed weapon.

{¶ 7} At the conclusion of the hearing, the court granted the CSPO and expressly found “that there was one or more threats as it relates to the petitioner,” and that appellant’s conduct had caused mental distress as it relates to appellee. The court further found that because no evidence had been presented with regard to appellee’s wife, the order would only be granted for the protection of appellee. On December 30, 2011, the court issued the full CSPO for a period of one year. In a separate order of the same date, the court suspended appellant’s concealed carry permit on the grounds that appellant had improperly used a handgun and that appellant is a danger to himself and others, including appellee.

{¶ 8} In his first assignment of error, appellant asserts that the trial court’s order granting the CSPO was not supported by sufficient evidence. Specifically, appellant contends that the evidence presented at the trial below did not establish that appellant engaged in a pattern of conduct necessary to constitute the crime of menacing by stalking.

{¶ 9} A CSPO is preventative in nature, allowing a court to act before an alleged stalker can harm his or her victim. *Gruber v. Hart*, 6th Dist. Ottawa No. OT-06-011,

2007-Ohio-873, ¶ 13, citing *Short v. Walker*, 12th Dist. Preble No. CA2000-08-009, 2001 WL 32808, *2 (Jan. 16, 2001). Appellee filed his petition pursuant to R.C. 2903.214, which reads in relevant part:

(C) A person may seek relief under this section for the person * * * by filing a petition with the court. The petition shall contain or state all of the following:

(1) An allegation that the respondent * * * engaged in a violation of section 2903.211 of the Revised Code against the person to be protected by the protection order * * * including a description of the nature and extent of the violation[.]

{¶ 10} For a trial court to grant a CSPO, the petitioner must show, by a preponderance of the evidence, that the complained of conduct violates the menacing by stalking statute. *Striff v. Striff*, 6th Dist. Wood No. WD-02-031, 2003-Ohio-794, ¶ 10. When reviewing the issuance of a CSPO on appeal we apply the civil manifest weight of the evidence standard. *Gruber, supra*, at ¶ 17. Accordingly, “[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.”

C.E. Morris v. Foley Const. Co., 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶ 11} R.C. 2903.211(A)(1) proscribes menacing by stalking and reads “No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental

distress to the other person.” As used in R.C. 2903.211, “‘pattern of conduct’ means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents.” R.C. 2903.211(D)(1). The statute, however, does not define “closely related in time.” Accordingly, “the temporal period within which the two or more actions or incidents must occur * * * [is a] matter to be determined by the trier of fact on a case-by-case basis.” *Ellet v. Falk*, 6th Dist. No. L-09-1313, 2010-Ohio-6219, ¶ 22. “In determining what constitutes a pattern of conduct for purposes of R.C. 2903.211(D)(1), courts must take every action into consideration even if * * * ‘some of the persons actions may not, in isolation, seem particularly threatening.’” *Middletown v. Jones*, 167 Ohio App.3d 679, 2006-Ohio-3465, 856 N.E.2d 1003, ¶ 10 (12th Dist.), quoting *Guthrie v. Long*, 10th Dist. Franklin No. 04AP-913, 2005-Ohio-1541, ¶ 12; *Miller v. Francisco*, 11th Dist. Lake No. 2002-L-097, 2003-Ohio-1978, ¶ 11.

{¶ 12} The culpable mental state for the issuance of a CSPO is “knowing.” A person acts knowingly when, regardless of his purpose, “he is aware that his conduct will probably cause a certain result or will probably be of a certain nature.” R.C. 2901.22(B). “A person has knowledge of circumstances when he is aware that such circumstances probably exist.” *Id.*

{¶ 13} Finally, “mental distress” is defined under R.C. 2903.211(D)(2) as either of following:

- (a) Any mental illness or condition that involves some temporary substantial incapacity;
- (b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services.

{¶ 14} The statute, however, “does not require that the victim actually experience mental distress, but only that the victim believes the stalker would cause mental distress or physical harm.” *Bloom v. Macbeth*, 5th Dist. Ashland No. 2007-COA-050, 2008-Ohio-4564, ¶ 11, citing *State v. Horsley*, 10th Dist. Franklin No. 05AP-350, 2006-Ohio-1208. Moreover, the testimony of the victim as to his or her fear is sufficient to establish mental distress. *Horsley* at ¶ 48.

{¶ 15} Upon a thorough review of the record below, we must conclude that there was insufficient evidence to establish that appellant engaged in a “pattern of conduct” as that phrase is defined by R.C. 2903.211(D). The only “incident” to which appellee testified, which arguably led him to believe that appellant would cause him physical harm, was the statement appellant made to appellee outside of the courthouse. Although the testimony reveals acrimony between the parties, for the court to issue a CSPO, R.C.

2903.214 and 2903.211 demand proof by a preponderance of the evidence, of a “pattern of conduct,” meaning more than one “incident” or “action,” on the part of appellant.

State v. Scruggs, 136 Ohio App.3d 631, 737 N.E.2d 574 (2d Dist.2000). The incidents between appellant and Lauren, in which appellee was not present, and from which there is no evidence that any threats were made regarding appellee, do not suffice, to create a pattern of conduct.

{¶ 16} The first assignment of error is well-taken.

{¶ 17} In his second assignment of error, appellant challenges the lower court’s order suspending his permit to carry a concealed weapon.

{¶ 18} Following a hearing on a petition for a CSPO, R.C. 2903.214(E)(1)(a) permits a trial court to issue any order of protection “that contains terms designed to ensure the safety and protection of the person to be protected.” Because the lower court had insufficient evidence to issue the CSPO, we further find that the court abused its discretion in suspending appellant’s permit to carry a concealed weapon. The second assignment of error is well-taken.

{¶ 19} On consideration whereof, the court finds that substantial justice has not been done the party complaining and the judgments of the Lucas County Court of Common Pleas are reversed and vacated. Pursuant to App.R. 13(B), judgment is hereby rendered for appellant. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

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A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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