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19-P-1674

Appeals Court

VERA V. vs. SEYMOUR S.¹

No. 19-P-1674.

Norfolk. June 12, 2020. - August 28, 2020.

Present: Massing, Shin, & Ditzkoff, JJ.

Abuse Prevention. Protective Order.

Complaint for protection from abuse filed in the Stoughton Division of the District Court Department on August 20, 2019.

A hearing to extend an abuse prevention order was had before Daniel W. O'Malley, J.

Stephanie L. Curtin for the plaintiff.

Aaron R. Lazar for the defendant.

DITKOFF, J. The plaintiff, Vera V., appeals from an order of a District Court judge denying her request for an extension of an ex parte abuse prevention order pursuant to G. L. c. 209A, § 3. It appears that the judge based the denial, at least in part, on the conditions of pretrial release placed on the

¹ The parties' names are pseudonyms.

defendant, Seymour S., in the related criminal case. Concluding that this was not a proper basis for denying the extension of an abuse prevention order, we vacate the order and remand the matter for further proceedings.

1. Background. At the hearing on the extension of the abuse prevention order, the plaintiff testified as follows. After the parties had been married for nearly one year, the plaintiff gave birth to the parties' daughter in July 2019. The child was born prematurely, and apparently, the defendant was extremely concerned about the baby's weight, taking her to the pediatrician "almost every other day."

The defendant squeezed the plaintiff's breasts, causing her pain, "[m]ultiple times." The first time occurred when the baby was two days old. The defendant came into the bedroom where she was nursing, and "he went to the breast that [the baby] wasn't nursing off of and tried to squeeze milk out of it. And it was painful." He told her that it was her fault that the baby was born prematurely and that she "was a horrible mother because [she] wasn't fat enough and wasn't eating enough."

When the baby was twenty-six days old, the defendant pushed the plaintiff while taking the baby out of her arms. He then rushed out of the room with the baby. The plaintiff asked the defendant "if he was going to hurt her," and the defendant "didn't say anything." Later, he shoved the plaintiff while she

was holding the baby, causing her to lose her balance and to think she was going to drop the baby.

The defendant told the plaintiff that she could not leave the apartment with the baby and that, if she did, "he would make [her] and the baby suffer." He also said that, if they separated, "he would make [her] life and the baby's life miserable." He said that "he knew that the way to hurt [her] was by hurting the baby." He had already isolated her from her family.

The plaintiff went into another room with baby, and the defendant followed her. As she tried to nurse the baby, the defendant painfully grabbed at her breast.² She told him to stop, but he did not. "And it made the baby come off the breast and cry and then he took the baby away from [the plaintiff] and held her away so that [she] couldn't nurse her."

When the defendant fell asleep, the plaintiff left with the baby and went to her brother's home. The next day, the plaintiff obtained an ex parte abuse prevention order against the defendant.³ A few days later, the plaintiff went to the

² The defendant tried to impeach the testimony about the breast grabbing by eliciting the fact that the plaintiff had not reported this information to the police.

³ The parties lived in Boston, but the plaintiff, having left the residence to avoid abuse, filed for an abuse prevention order in the District Court division serving her brother's home.

Boston police and filed a report. The police then arrested the defendant and charged him with assault and battery on a family or household member, G. L. c. 265, § 13M (a). At arraignment, a Boston Municipal Court judge ordered the defendant not to abuse the plaintiff and to abide by the abuse prevention order. See G. L. c. 276, § 42A.⁴

At the hearing on the extension of the abuse prevention order, the defendant declined to testify in light of the pending criminal charges.⁵ After the plaintiff's counsel argued, the judge asked whether the Department of Children and Families (DCF) had been contacted, and the defendant's counsel confirmed that it had. The defendant's counsel then argued that this was "an isolated event," and she stated, "This case is going to be in the divorce court for a long time. We still have to face charges in West Roxbury District Court. I would ask you to deny the extension of the Restraining Order."

See G. L. c. 209A, § 2; M.B. v. J.B., 86 Mass. App. Ct. 108, 112 (2014).

⁴ Several months after the denial of the extension of the abuse prevention order, the criminal case was disposed with an order of pretrial probation for nine months. The defendant was ordered to stay away from and have no contact with the plaintiff, to complete a parenting program, and to participate in counseling with a focus on anger management.

⁵ The judge gave no indication whether he drew an adverse inference against the defendant on this basis. See M.G. v. G.A., 94 Mass. App. Ct. 139, 143 (2018).

The judge stated that he was certain the conditions of release in the criminal case included "a no abuse condition." The defendant's counsel incorrectly stated that it was "[s]tay away no contact." The judge said that this was "even stronger" and told the defendant that, if he violated that condition, he would go to jail for up to ninety days without bail. The judge then said, "I'm glad DCF is in it. You're young people with a brand new baby with issues. And I'm glad they have that intervention. . . . I'm not going to extend it." This appeal followed.

2. Discussion. "The inquiry at an extension hearing is whether the plaintiff has shown by a preponderance of the evidence that an extension of the order is necessary to protect her from the likelihood of 'abuse' as defined in G. L. c. 209A, § 1." Iamele v. Asselin, 444 Mass. 734, 739 (2005). Usually a plaintiff shows entitlement to an abuse prevention order by showing "a reasonable fear of imminent serious physical harm." S.V. v. R.V., 94 Mass. App. Ct. 811, 813 (2019), quoting MacDonald v. Caruso, 467 Mass. 382, 386 (2014). Where the plaintiff has "already been subject to physical harm," however, an extension is warranted if "there is a continued need for the order because the damage resulting from that physical harm affects the victim even when further physical attack is not reasonably imminent." Callahan v. Callahan, 85 Mass. App. Ct.

369, 374 (2014).⁶ We review "for an abuse of discretion or other error of law." G.B. v. C.A., 94 Mass. App. Ct. 389, 393 (2018), quoting E.C.O. v. Compton, 464 Mass. 558, 562 (2013). Accord S.V., supra at 814.

"[W]here we are able to discern a reasonable basis for the order in the judge's rulings and order, no specific findings are required." G.B., 94 Mass. App. Ct. at 396. Where, however, the record reflects that the judge based his decision on an improper standard, we will not hesitate to remand for further findings. For example, in Iamele, 444 Mass. at 740-741, the Supreme Judicial Court for the first time established the standard for extending an abuse prevention order. There, the plaintiff's testimony -- that the defendant broke her ankle and shoulder, struck her in the face, and punched out her teeth -- unquestionably reached the level of physical harm. Id. at 735. Under those facts, the court was unable to discern whether the judge had applied the correct standard when he denied the plaintiff's request for an extension, and therefore the court remanded the case for further proceedings. Id. at 741.

⁶ The same rule applies when the plaintiff seeks protection from the effects of past sexual abuse. See Yahna Y. v. Sylvester S., 97 Mass. App. Ct. 184, 187 (2020), quoting McIsaac v. Porter, 90 Mass. App. Ct. 730, 733-734 (2016) (abuse prevention order properly extended where judge found "the defendant had sexually abused the plaintiff in the past, that the plaintiff was 'still "suffering from" that abuse,' and 'that [she] reasonably remain[ed] in fear of the abuser'").

Similarly, in the analogous harassment prevention order context, we remanded for further findings where the judge's statements demonstrated that she considered the wrong factors. F.A.P. v. J.E.S., 87 Mass. App. Ct. 595, 598, 601-602 (2015). Accord O'Brien v. Borowski, 461 Mass. 415, 430 (2012) (where appellate court cannot discern basis for order, "we would generally remand the case to the judge for further factual findings").

Here, the plaintiff argues that the defense attorney's misstatement about the conditions of pretrial release in the criminal case requires the reversal of the denial of the extension. That argument, however, raises the question whether it was proper for the judge to rely on the conditions of pretrial release, correctly stated or not.

When a defendant violates an abuse prevention order, the defendant may be prosecuted criminally and is subject to incarceration for up to two and one-half years in a house of correction. G. L. c. 209A, § 7. That abuse prevention order may not be vacated without notice to the plaintiff. See Guidelines for Judicial Practice: Abuse Prevention Proceedings § 6:04 (Sept. 2011). Further, a motion by a defendant to terminate an order must be supported by "a significant change in circumstances" and "clear and convincing evidence that . . . it is no longer equitable for the order to continue because the protected party no longer has a reasonable fear of imminent

serious physical harm." Cordelia C. v. Steven S., 95 Mass. App. Ct. 635, 639 (2019), quoting MacDonald, 467 Mass. at 382-383.

By contrast, a person violating a condition of pretrial release can be ordered held for ninety days⁷ and only if, in addition to the violation, the judge finds "that there are no conditions of release that will reasonably assure the person will not pose a danger to the safety of any other person or the community; or the person is unlikely to abide by any condition or combination of conditions of release." G. L. c. 276, § 58B. See Commonwealth v. Lougee, 485 Mass. 70, 79-80 (2020).⁸

Conditions of pretrial release are within a judge's broad discretion, and the civilian victim has no right to be heard on the matter. Furthermore, conditions of pretrial release are terminated automatically when the criminal case is disposed.

For these reasons, conditions of pretrial release, even if they encompass the same conditions as an abuse prevention order, are no substitute for an abuse prevention order. The same

⁷ The judge may extend the time period for good cause or where there are periods of excludable time under Mass. R. Crim. P. 36 (b) (2). See Commonwealth v. Lougee, 485 Mass. 70, 72-73, 80 (2020).

⁸ The order of pretrial probation, see note 4, supra, makes the orders in the criminal case even less protective of the plaintiff. The only remedy for a violation of an order of pretrial probation is the return of the prosecution to the trial calendar. Commonwealth v. Rodriguez, 441 Mass. 1002, 1003 (2004).

reasoning applies to DCF involvement. DCF has no power to incarcerate a person for engaging in abuse of a household or family member. At most, DCF can take custody of a child and refer the matter to law enforcement. G. L. c. 119, § 51B. DCF involvement is no substitute for an abuse prevention order.

Rather than rely on these factors, a judge should simply determine whether the plaintiff has shown "a reasonable fear of imminent serious physical harm." S.V., 94 Mass. App. Ct. at 813, quoting MacDonald, 467 Mass. at 386, or whether the plaintiff has "suffered physical abuse" or "past sexual abuse" and "an order [i]s necessary to protect her from the impact of that abuse." Yahna Y. v. Sylvester S., 97 Mass. App. Ct. 184, 186-187 (2020).

3. Conclusion. Regardless of whether the judge was correctly informed about the conditions of pretrial release, he appeared to consider those conditions and the involvement of DCF as a basis for not extending the abuse prevention order. As this was error, we vacate the order and remand the matter for further proceedings.⁹

So ordered.

⁹ The defendant's motion for attorney's fees is, of course, denied.