STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 23, 2004
v	No. 249340 Wayne Circuit Court
GORDON ROBERT LOGAN, Defendant-Appellant.	LC No. 01-007847-01

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for aggravated stalking, MCL 750.411i, for which he was sentenced to five years' probation. We affirm.

On appeal, defendant challenges the sufficiency of the evidence to support his conviction and also claims that he received the ineffective assistance of both his trial counsel and his first appellate counsel for their failure to challenge the sufficiency of the evidence against him. Specifically, defendant contends that the prosecution failed to establish that defendant had "actual notice" of the personal protection order against him, and therefore, defendant could not be guilty of violating the PPO or of aggravated stalking.

I

Claims of insufficient evidence are reviewed de novo, and viewing the evidence in a light most favorable to the prosecution, we must determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

"Aggravated stalking consists of the crime of 'stalking,' MCL 750.411h(1)(d), and the presence of an aggravating circumstance specified in MCL 750.411i(2)." *People v Threatt*, 254 Mich App 504, 505; 657 NW2d 819 (2002). "Stalking" is defined as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(d). The aggravating circumstance that the trial court found to be present was "[a]t least 1 of the actions constituting the offense is in violation of a

restraining order and the defendant has received actual notice of that restraining order or at least 1 of the actions is in violation of an injunction or preliminary injunction." MCL 750.411i(2)(a).

II

Here, defendant does not challenge the trial court's finding that his actions constituted stalking under MCL 750.411h(1)(d), but rather, defendant argues that he never received "actual notice" of the PPO against him, as required by MCL 750.411i(2)(a). Although defendant was told over the telephone by a police investigator that there was a PPO taken out against him and that he was not to contact complainant again, defendant argues that his conversations with the investigator do not constitute "actual notice" under the statute.

Although MCL 750.411i(2)(a) does not define "actual notice," this Court has addressed the issue and determined that "actual notice" does not require "service," but rather, that a defendant's knowledge of the PPO may be reasonably inferred. *Threatt*, *supra* at 506-507. This Court looked to the PPO issuance provisions of MCL 600.2950a for guidance. In support of its ruling, this Court stated:

> [W]ere we to examine MCL 600.2950a to determine what is required to demonstrate "actual notice" under the aggravated stalking statute, we would find that it does not support defendant's claim that "actual notice" must be equated with service. MCL 600.2950a(8)(g), and (10) refer to "receiv[ing] actual notice" and "be[ing] served" in the alternative. These references indicate that, under MCL 600.2950a, "actual notice" is not the equivalent of service. [*Id*.]

Defendant counters by arguing that *Threatt* does not apply to the circumstances of this case because *Threatt* merely addressed the distinction between "actual notice" and "service" but did not address the difference between "actual notice" and "constructive notice." Defendant also argues that MCL 600.2950a(19) requires an officer giving oral notice to also give a defendant an opportunity to comply with the order before effecting an arrest. Defendant argues that, because the investigator did not inform him of the specific conduct enjoined or of the penalties for violating the PPO as required by MCL 600.2950a(19), he merely had "constructive notice" of the PPO, and thus, had no opportunity to comply with it. Defendant's argument fails for three reasons.

First, MCL 600.2950a(19) only requires an officer to inform a defendant of the specific conduct enjoined and the penalties for violating the order when the officer is responding to a call alleging a violation of the PPO and the defendant has not been served. MCL 600.2950a(19) provides in part that:

> If the individual restrained or enjoined *has not been served*, the law enforcement agency or officer *responding to a call alleging a violation of a personal protection* order shall serve the individual restrained or enjoined with a true copy of the order *or* advise the individual restrained or enjoined about the existence of the personal protection order, the specific conduct enjoined, the penalties for violating the order, and where the individual restrained or enjoined may obtain a copy of the order. The law enforcement officer shall enforce the personal

> protection order and immediately enter or cause to be entered into the L.E.I.N. that the individual restrained or enjoined has *actual notice* of the personal protection order. The law enforcement officer also shall file a proof of service or proof of oral notice with the clerk of the court issuing the personal protection order. [Emphasis added.]

This section of the statute constitutes one way, but not the only way, to comply with the actual notice requirement. Under this Court's holding in *Threatt*, defendant's "actual notice" of the PPO in the present case clearly "could reasonably be inferred" given the fact that the investigator actually informed him of its existence and that it required him to cease contact with complainant. *Threatt, supra* at 507.

Second, the requirement that an officer give a defendant the opportunity to comply before effecting an arrest only applies where the defendant has received no notice of the PPO. MCL 600.2950a(19) continues:

> If the individual restrained or enjoined has not received notice of the personal protection order, the individual restrained or enjoined shall be given an opportunity to comply with the personal protection order before the law enforcement officer makes a custodial arrest for violation of the personal protection order. Failure to immediately comply with the personal protection order is grounds for an immediate custodial arrest.

Significantly, the opportunity to comply only applies where an individual had not received "notice" of the PPO, not "actual notice." In any event, the trial court found, and the evidence supports the conclusion, that defendant had actual notice before he committed the acts which violated the order.

Third, defendant did have an opportunity to comply with the order. The investigator informed defendant of the existence of the PPO and that he was to cease all contact with complainant the day before defendant was seen in his car outside complainant's residence. Still, defendant continued to call complainant's cell phone and then went to complainant's residence at her mother-in-law's house. MCL 600.2950a(19) requires defendant's *immediate* compliance upon receiving *notice* of the PPO from an officer, not waiting until actually being served before coming into compliance.

We are not persuaded by defendant's attempts to distinguish *Threatt*. Defendant clearly knew of the PPO against him, but he continued to contact complainant. This Court's holding in *Threatt* is, therefore, controlling. Defendant's knowledge of the restraining order against him is sufficient to establish his "actual notice" of the PPO under MCL 750.411i(2)(a). *Threatt*, *supra*.

III

Next, defendant argues that his trial counsel and first appellate counsel were ineffective because they failed to clearly raise the issue of a lack of "actual notice," as opposed to mere "constructive notice." We disagree.

> To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). [*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).]

Here, defendant has not shown that his trial counsel's or first appellate counsel's performance was deficient for failing to raise defendant's alleged lack of actual notice because the record does not support that argument. The trial court held that the investigator's conversation with defendant informing him that there was a PPO against him was sufficient to constitute "actual notice" of the PPO, and any argument to the contrary is without merit. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Nonetheless, even if defense counsel's failure to advance the argument that defendant only received "constructive notice" was deficient, such failure does not constitute ineffective assistance of counsel unless it deprives defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; ___ NW2d ___ (2004). "A defense is substantial if it might have made a difference in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac'd in part on other grds 453 Mich 902 (1996). The trial court concluded that defendant "did, in fact, have actual knowledge of the Personal Protection Order on [May] 28th, as well as on the 29th [2001]." Therefore, even if this argument had been raised at trial, the outcome would have been the same because the trial court found actual notice. Additionally, defendant has not been prejudiced by his trial counsel's or first appellate counsel's alleged deficiencies in their failure to raise the issue of a lack actual notice because defendant was permitted to raise the issue before this Court.

The trial court correctly concluded that defendant's knowledge of the PPO against him was sufficient to establish defendant's "actual notice" of the PPO. Defendant has failed to show that counsels' performance was deficient in failing to argue that defendant lacked "actual notice," and defendant was not prejudiced by counsels' performance.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff