STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0279

In re the Matter of:
Nezha Boutlane, petitioner,
Respondent,

vs.

David John Harrison,
Appellant.

Filed October 1, 2018
Affirmed
Kirk, Judge

Hennepin County District Court
File No. 27-DA-FA-17-6358

Ahmed Bachelani, Bachelani Law Office, Bloomington, Minnesota (for respondent)

David John Harrison, Minnetonka, Minnesota (pro se appellant)

Considered and decided by Cleary, Chief Judge; Kirk, Judge; and Smith, Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

KIRK, Judge

On appeal from the district court's grant of an order for protection (OFP) to respondent-wife, pro se appellant-husband argues that he was denied procedural due process under the United States and Minnesota Constitutions because he did not receive

notice of a rescheduled initial OFP hearing and was denied an opportunity to be heard. We affirm.

FACTS

On September 28, 2017, respondent-wife Nezha Boutlane filed an affidavit and petition for an OFP against appellant-husband David John Harrison alleging domestic abuse. An emergency ex parte OFP was issued prohibiting appellant from entering or going within two blocks of respondent's residence, the upper unit of a duplex. The duplex was the marital home, and appellant lived in the lower unit. Because respondent sought monthly financial support in her OFP petition, a hearing was required and was scheduled for October 4. On October 1, appellant was personally served with respondent's affidavit and OFP petition, as well as the ex parte OFP, which noted the hearing scheduled for October 4.

On October 3, appellant requested a continuance due to illness and provided a doctor's letter. The district court granted the continuance and rescheduled the hearing for October 11 at 9:45 a.m. The order for continuance was mailed to appellant's address on record—the duplex—but the mailed notice was later returned to court administration as undeliverable. At 8:30 a.m. on October 11, appellant called court administration to inquire about the status of his request for continuance and was advised that the rescheduled hearing was that morning. Appellant said that he was unaware of the rescheduled hearing and asked for another continuance. Appellant was transferred to the hearing judge's chambers. Court staff in the chambers erroneously associated appellant with another case on the calendar that day and informed him that he could appear by phone.

Appellant did not appear in person at the October 11 hearing, and the district court did not call him at 9:45 a.m. Wife appeared at the hearing with an advocate. Due to appellant's failure to appear, the district court granted wife a two-year OFP against appellant, which precluded him from entering the upper apartment of the marital duplex, and granted respondent's request for health insurance and temporary spousal maintenance of $1,500 per month.

The court staff's miscommunication was discovered later that afternoon when court staff called appellant for the hearing on the unrelated case. On October 13, the district court issued an amended OFP, explaining appellant's failure to appear at the October 11 hearing and acknowledging court staff's erroneous advice that appellant could appear by phone. Nonetheless, the court upheld the OFP, and appellant was personally served with the amended OFP on October 17.

Appellant filed an affidavit and motion to modify the amended OFP, arguing that he was not properly served or notified of the October 11 hearing and requesting a full evidentiary hearing. A hearing was held, at which both parties appeared with counsel; respondent also had an advocate present. On November 9, the district court denied appellant's motion. Subsequently, appellant, acting pro se, filed a second affidavit and motion to modify the amended OFP, asking to vacate the spousal-maintenance provision. A hearing was held, and the district court denied the motion as untimely on January 23, 2018.

Appellant appealed the district court's January 23, 2018 order. This court construed the appeal as taken from the district court's October 11, 2017, October 13, 2017, November 9, 2017, and January 23, 2018 orders.

D E C I S I O N

I. Appellant did not establish prejudicial error affecting his substantial rights to warrant relief.

Appellant argues that the district court denied him due process under the Fourteenth amendment to the U.S. Constitution and article 1, section 7 of the Minnesota Constitution for two reasons: the district court failed to give him proper notice of the continued October 11 hearing, and denied him the opportunity to be heard on wife's petition for an OFP. "[Courts] do not decide constitutional questions except when necessary to do so in order to dispose of the case at bar." *State v. Hoyt*, 304 N.W.2d 884, 888 (Minn. 1981). "Interpretation and application of procedural rules are legal issues that are reviewed de novo." *Clark v. Clark*, 642 N.W.2d 459, 464 (Minn. App. 2002).

"[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal . . . [and] the burden of showing error rests upon the one who relies upon it." *Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (Minn. 1944); *see White v. Minn. Dep't of Nat. Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997) (stating that error is never presumed on appeal), *review denied* (Minn. Oct. 31, 1997). To prevail on appeal, an appellant must show both error and resultant prejudice. *Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 237 N.W.2d 76, 78 (Minn. 1975). Further, for prejudice to constitute reversible

error, it must be significant. *See* Minn. R. Civ. P. 61 (noting that we must ignore harmless error not affecting substantial rights).

Notice of the October 11 continued hearing was mailed to appellant's last-known address, which was the duplex that appellant was prohibited from entering. Appellant had not updated his mailing address with court administration or provided a forwarding address as required by Minn. R. Gen. Prac. 13.01. Thus, it was reasonable for court administration to mail the continuance notice to the duplex. *See Goldsworthy v. State, Dep't of Pub. Safety*, 268 N.W.2d 46, 48 (Minn. 1978) ("Due process requires only that notice be reasonably calculated to reach interested parties."); *Hoff v. Nw. Elevator Co.*, 139 N.W. 153, 154 (Minn. 1913) (explaining that service is complete when properly mailed and risk "is on the person to whom it is addressed"). The mailed continuance notice was sufficient.

The notice informed the parties that no further continuance requests would be granted and that they were required to appear in person for the rescheduled hearing on October 11 at 9:45 a.m. Appellant failed to appear in person, and respondent's OFP petition was granted by default. In later upholding the default OFP and the October 13 amended OFP, the district court found that appellant's request for a continuance around 8:30 a.m. on the morning of the rescheduled October 11 was untimely. Had the court staff who spoke to appellant that day simply repeated the district court's order that no further continuances would be granted and told him to appear in person by 9:45 a.m., there would be no question of error on appeal.

However, the record shows that appellant was transferred to the hearing judge's chambers, and court staff expressly and erroneously told him that he could appear by phone

and that they would call him for the 9:45 a.m. hearing. Because the district court never called appellant, the OFP was entered by default. The district court's October 13 amended OFP order explicitly acknowledged these unusual circumstances before finding, nonetheless, that the October 11 continuance request was untimely. In doing so, the district court's order conflated a request for a continuance with the court staff's approval to appear by phone. Appearing by phone at the time of the scheduled hearing would not have been a continuance.

It is somewhat concerning that the district court found that, despite the express representation of court staff, appellant should have known to disregard the advice and should have appeared in person based on the court's prior order (which appellant claims he never received). In the criminal context, there is a "long-established rule that a government may not officially inform an individual that certain conduct is permitted and then prosecute the individual for engaging in that same conduct." *State v. McKown*, 475 N.W.2d 63, 68 (Minn. 1991).

Nonetheless, a review of the record shows that the court staff's erroneous advice was, in this case, harmless. *See De Losier v. Metcalf*, 80 N.W.2d 57, 58 (Minn. 1956) ("It has long been the rule in this state, and we have repeatedly held, that errors occurring upon the trial are harmless where the verdict is right as a matter of law."). On appeal, appellant merely asserts that the lack of notice and lack of an opportunity to be heard denied him procedural due process. But in doing so, he does not argue any actual resultant prejudice.

Although appellant was not present for the October 11 hearing, he later filed two motions to modify the amended OFP and two hearings were held. At the first motion

hearing, where appellant was represented by counsel, appellant had an opportunity to argue for a modification to the OFP and to argue why an evidentiary hearing was necessary. At the second motion hearing, he had an opportunity to raise a challenge to the spousal-maintenance provision, but he failed to provide any evidence of his income or financial documentation. Instead, he simply argued that he did not have the money to pay spousal maintenance and that the district court should "take [his] word for it." Thus, while a full evidentiary hearing was never held on the OFP, appellant has failed to show how the denial of this procedure prejudiced his rights or the outcome of the OFP.

Even if we assumed that appellant was denied procedural due process here, appellant has failed to show any resultant prejudice or how remand would change the result in this case. Indeed, appellant already had the opportunity to argue for a modification of the OFP and the district court indicated that the result would not have been any different. As such, appellant has not raised a challenge entitled to appellate relief, and we must affirm.

Affirmed.