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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2020 ND 135

Flavia Brown, Petitioner and Appellee

v.

Nathanael D. Brown, Respondent and Appellant

No. 20190390

Appeal from the District Court of Dunn County, Southwest Judicial District, the Honorable Rhonda R. Ehlis, Judge.

REVERSED AND REMANDED.

Opinion of the Court by Tufte, Justice.

Mark C. Sherer, Dickinson, N.D., for petitioner and appellee.

Thomas F. Murtha, Dickinson, N.D., for respondent and appellant.

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Tufte, Justice.

[¶1] Nathanael Brown appeals from a domestic violence protection order enjoining him from having contact with Flavia Brown and restricting his right to possess firearms. Because Nathanael Brown was denied a full hearing under N.D.C.C. § 14-07.1-02(4), we reverse the protection order and remand for a full hearing.

I

[¶2] In late September 2019, Flavia Brown petitioned the district court for a domestic violence protection order against Nathanael Brown. The court issued a temporary protection order and an order for hearing procedure which set a hearing for October 9, 2019. The order for hearing procedure stated evidence would be taken by affidavit only and a party seeking to cross-examine an affiant must notify the opposing party at least twenty-four hours before the hearing.

[¶3] On the day before the hearing, Nathanael Brown filed notice of appearance and a request to continue the hearing. On the day of the hearing, he filed notice of cross-examination. At the time scheduled for the hearing, the district court denied Nathanael Brown's requests for continuance and cross-examination because they were untimely under the order for hearing procedure.

[¶4] At the outset of the hearing, Nathanael Brown objected to the district court's affidavit procedure, arguing that it would deny him due process and a "full hearing" under N.D.C.C. § 14-07.1-02. The district court denied Nathanael Brown permission to cross-examine Flavia Brown about her affidavit or to present any of his own evidence. The court accepted Flavia Brown's affidavit and granted the domestic violence protection order preventing Nathanael Brown from having contact with Flavia Brown for two years. The protection order also included a provision preventing Nathanael Brown from possessing firearms. Nathanael Brown appeals.

II

[¶5] On appeal, Nathanael Brown argues the district court erred in granting the domestic violence protection order without a full hearing required under N.D.C.C. § 14-07.1-02(4). We review the district court's manner of conducting a trial or hearing for an abuse of discretion. *Wetzel v. Schlenvogt*, 2005 ND 190, ¶ 22, 705 N.W.2d 836. We reverse a district court for abusing its discretion only when it acts arbitrarily, capriciously, or unreasonably, or when it misapplies the law. *Peters-Riemers v. Riemers*, 2001 ND 62, ¶ 7, 624 N.W.2d 83.

[¶6] North Dakota law provides for two similar forms of injunctive relief by which a petitioner may seek a protective order barring contact with another. Section 12.1-31.2-01(5), N.D.C.C., provides for the issuance of a disorderly conduct restraining order ("DCRO"). Section 14-07.1-02, N.D.C.C., provides for issuance of a domestic violence protection order ("DVPO"). The two forms of relief vary in what facts the petitioner must establish, but have similar effect: that, when ordered, the respondent is prohibited from contacting the petitioner.

[¶7] For both kinds of relief, the respondent is entitled to a full hearing before a court may enter a protection order. *See* N.D.C.C. §§ 12.1-31.2-01(4), 14-07.1-02(4). In the context of a DCRO, we have defined a "full hearing" as follows:

> This Court has stated that the "full hearing" that must accompany a disorderly conduct restraining order is a "'special summary proceeding,' intended to 'quickly and effectively combat volatile situations before any tragic escalation.'" *Gullickson*, 2004 ND 76, ¶ 8, 678 N.W.2d 138 (quoting *Skadberg* [*v. Skadberg*], 2002 ND 97, ¶ 13, 644 N.W.2d 873). This Court also noted, because of the restraint and stigma that a restraining order places on the respondent, due process requirements must be met. *Id.* The petitioner must prove his petition through testimony, rather than by affidavits alone, with an opportunity for cross-examination. *Cusey v. Nagel*, 2005 ND 84, ¶ 15, 695 N.W.2d 697. Furthermore, petitions and affidavits themselves are inadmissible hearsay under N.D.R.Ev. 801(c). *Id.*

Wetzel, 2005 ND 190, ¶ 23, 705 N.W.2d 836.

[¶8] In contrast, our cases have set a much lower bar for what constitutes a "full hearing" in the context of a DVPO. In *Sandbeck v. Rockwell*, 524 N.W.2d 846 (N.D. 1994), a majority of this Court held that a hearing on affidavits alone may satisfy a DVPO respondent's right to a full hearing under N.D.C.C. § 14-07.1-02(4). There, the district court refused to allow the respondent to a domestic violence restraining order to present evidence because he did not submit an affidavit. *Id.* at 848. The respondent appealed, arguing, as Nathanael Brown does, that he was denied a full hearing under N.D.C.C. ch. 14-07.1. *Id.* The majority reasoned that an application for a domestic violence protection order is akin to an order to show cause and, relying on N.D.R.Civ.P. 43(e) and 81(a), concluded a full hearing could be had on affidavits alone. *Id.* at 849-50.

[¶9] The majority in *Sandbeck* relied on the fact that a DVPO is a "special statutory proceeding" under N.D.R.Civ.P. 81(a). *Id.* at 850. Rule 81(a), N.D.R.Civ.P., excludes special statutory proceedings from the Rules of Civil Procedure to the extent their statutory procedures are inconsistent or in conflict with the Rules. For example, DVPO cases proceed on an accelerated schedule because they are designed to quickly curb volatile situations. Therefore, in DVPO cases, the ordinary time limits set by the Rules of Civil Procedure give way to the time limits set forth in the DVPO statute. However, requirements not in conflict with any Rules of Civil Procedure are not excepted from the Rules by N.D.R.Civ.P. 81(a).

[¶10] We have also described a DCRO as a "special summary proceeding." *Gullickson*, 2004 ND 76, ¶ 8, 678 N.W.2d 138. Like DVPO proceedings, DCRO proceedings advance on an accelerated schedule to "quickly and effectively combat volatile situations before any tragic escalation." *Id.* However, with respect to DCRO proceedings, we have maintained that a "full hearing" provides the respondent with certain due process protections, including proof through testimony, not merely affidavits, and an opportunity for cross-examination. *Wetzel*, 2005 ND 190, ¶ 23, 705 N.W.2d 836. These two lines of cases are inconsistent in interpreting the identical term "full hearing" in very similar statutory schemes. We can discern no reason why a "full hearing" under N.D.C.C. § 14-07.1-02(4) would require less than a "full hearing" under

N.D.C.C. § 12.1-31.2-01(4). To the extent that *Sandbeck* held to the contrary, it is overruled.

[¶11] In *Gullickson*, 2004 ND 76, ¶ 16, 678 N.W.2d 138, we held the totality of several procedural errors denied a DCRO respondent a full hearing. There, the district court had the petitioner sworn from the counsel table rather than the witness stand, and the petitioner simply stated the affidavit was correct. *Id.* at ¶ 10. We concluded the respondent was denied a full hearing because he had no meaningful opportunity to cross-examine the affiant and much of the evidence in the affidavit was inadmissible hearsay. *Id.* at ¶ 12.

[¶12] Similarly here, we conclude the district court denied Nathanael Brown a full hearing under N.D.C.C. § 14-07.1-02 because the court relied solely on the hearsay in Flavia Brown's affidavit and gave Nathanael Brown no opportunity to present his own relevant evidence or cross-examine the affiant. The district court misapplied N.D.C.C. § 14-07.1-02(4) when it issued a DVPO without a full hearing. We reverse the protection order and remand for a full hearing consistent with this opinion.

III

[¶13] We reverse the domestic violence restraining order and remand for a new hearing consistent with this opinion.

[¶14] Jerod E. Tufte
Jon J. Jensen, C.J.
Daniel J. Crothers

I concur in the result.
Lisa Fair McEvers
Gerald W. VandeWalle