[Cite as *J.K. v. D.F.A.*, 2018-Ohio-4424.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106625

J.K.

PETITIONER-APPELLEE

vs.

D.F.A.

RESPONDENT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-17-884961

BEFORE: McCormack, P.J., S. Gallagher, J., and Blackmon, J.

RELEASED AND JOURNALIZED: November 1, 2018

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TIM McCORMACK, P.J.:

{¶1} Respondent-appellant D.F.A. appeals from the trial court's journal entry granting petitioner-appellee J.K.'s request for a civil stalking protection order ("CSPO.") For the reasons that follow, we affirm.

Procedural and Factual History

{¶2} This case concerns a CSPO that was requested and ordered after approximately a decade of conflict between the parties. In 2008, D.F.A. sought treatment for prostate cancer at the Cleveland Clinic ("the Clinic"). D.F.A. underwent a surgical procedure at the Clinic and suffered from serious complications, including impotence and incontinence. D.F.A. subsequently became a zealous advocate for patients' rights and is actively involved in several organizations promoting patient safety. D.F.A.'s dissatisfaction with his treatment at the Clinic

and, in particular, his treatment by his urologist J.K., prompted a series of actions over the last decade, including posting numerous negative reviews of J.K. online, investigating J.K.'s credentials, and initiating complaints and investigations into J.K. and his work at the Clinic.

{¶3} Throughout July and August 2017, D.F.A. sent J.K. six emails at his work email address that, according to J.K., were threatening escalations of his earlier conduct. The emails primarily consisted of attachments in the form of news articles dealing with fraudulent medical research and its consequences for doctors and patients. Upon receiving these emails, J.K. contacted his local police department and his employer and installed a new home security system. At the suggestion of Hunting Valley police detective Eric Hall ("Hall"), J.K. filed a request for a CSPO that is the subject of this appeal.

{¶4} On August 23, 2017, J.K. filed a request for a CSPO against D.F.A. in the Cuyahoga County Court of Common Pleas. The court granted the request and issued an *ex parte* CSPO that day. On November 17, 2017, the court held a full hearing on the matter. During the hearing, the court heard testimony from J.K., D.F.A., and Hunting Valley detective Eric Hall. Following the hearing, the court granted J.K.'s request and issued a corresponding opinion and order. It is from this order D.F.A. appeals, presenting the following assignments of error for our review:

> I. The evidence in this case does not present a pattern of threatening behavior.
>
> II. The conflicting language of the orders entered by the trial court makes the orders unconstitutionally vague.
>
> III. The protective order constitutes an unconstitutional prior restraint on D.F.A.'s protected speech.

Law and Analysis

I. Granting of the Protection Order

{¶5} D.F.A.'s first assignment of error argues that the evidence in this case does not constitute a pattern of threatening behavior as required by the statute.

{¶6} R.C. 2903.214(C) authorizes individuals to seek relief in the form of a civil protection order against a person alleged to have violated R.C. 2903.211, Menacing by Stalking. R.C. 2903.211(A)(1) provides in relevant part that:

> 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 a family or household member of the other person or cause mental distress to the other person or a family or household member of the other person.

"'"The decision whether or not to grant a civil protection order is well within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion."'" *McWilliam v. Dickey*, 8th Dist. Cuyahoga No. 99277, 2013-Ohio-4036, ¶ 22, quoting *Rufener v. Hutson*, 8th Dist. Cuyahoga No. 97635, 2012-Ohio-5061, ¶ 12, quoting *Bucksbaum v. Mitchell*, 5th Dist. Richland No. 2003-CA-0070, 2004-Ohio-2233, ¶ 14. "An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Berk v. Matthews*, 53 Ohio St. 3d 161, 169, 559 N.E. 2d 1301, (1990).

{¶7} For a court to grant a petition for a CSPO, it must find by a preponderance of the evidence that the petitioner has shown the respondent committed an act against the petitioner that would constitute menacing by stalking under R.C. 2903.211. *Vega v. Tomas*, 8th Dist.

Cuyahoga No. 104647, 2017-Ohio-298, ¶ 10, citing *Lewis v. Jacobs*, 2d Dist. Montgomery No. 25566, 2013-Ohio-3461, ¶ 9. D.F.A. specifically argues that J.K. failed to show that the emails at issue were threatening, and therefore they could not have constituted a pattern of conduct as required by R.C. 2903.211(A)(1). This argument confuses the elements of the statute. It is not necessary for a petitioner to show a "threatening pattern of conduct"; rather, there must be a pattern of conduct whereby the offender knowingly caused another to believe that the offender will cause physical harm to the other person or cause mental distress to the other person.

{¶8} "Pattern of conduct" is defined as "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). "'Closely related in time'" is not further defined in the statute, and therefore, whether incidents are closely related in time is a question best resolved by the trier of fact "'considering the evidence in the context of all the circumstances of the case.'" *Middletown v. Jones*, 167 Ohio App.3d 679, 2006-Ohio-3465, 856 N.E.2d 1003, ¶ 10 (12th Dist.), quoting *State v. Honeycutt*, 2d Dist. Montgomery No. 19004, 2002-Ohio-3490, ¶ 26. Notably, the incidents that constitute a pattern of conduct need not be independently and inherently threatening. Courts "'"must take everything into consideration when determining if a respondent's conduct constitutes a pattern of conduct, even if some of the person's actions may not, in isolation, seem particularly threatening."'" *William v. Dickey*, 8th Dist. Cuyahoga No. 99277, 2013-Ohio-4036, ¶ 30, quoting *Guthrie v. Long*, 10th Dist. Franklin No. 04AP-913, 2005-Ohio-1541, ¶ 12, quoting *Miller v. Francisco*, 11th Dist. Lake No. 2002-L-097, 2003-Ohio-1978, ¶ 11. The emails at issue in this case were each sent on a different date over an approximate two-month period. This establishes by a preponderance of the evidence that D.F.A. engaged in a pattern of conduct.

{¶9} In addition to a pattern of conduct, there must be competent and credible evidence showing that the respondent knowingly caused another to believe that the offender will cause physical harm to the other person or cause mental distress to the other person. A person acts knowingly when, "regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22. Mental distress is "any mental illness or condition that involves some temporary substantial incapacity" or "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" such treatment or services. R.C. 2903.211(D)(2).

{¶10} The evidence in the record is sufficient to establish these elements. First, although D.F.A. testified that he did not intend to threaten J.K. with the emails, he also testified that he was "sure [J.K.] would have an opinion about a post of mine and find something very threatening about anything I would send." This testimony shows that D.F.A. acted knowingly when he sent emails to J.K. Second, the record contains ample evidence that D.F.A.'s conduct caused J.K. to fear for his physical safety. J.K. testified that he was "terrified" upon receiving the emails because, unlike previous negative feedback from D.F.A., the emails referred to death and pain and suffering. Further, J.K. was compelled to alert both his employer and local law enforcement to what he perceived as threatening emails from D.F.A., and he installed a security system at his home. Additionally, Detective Hall testified that J.K. seemed to have a "very deep concern" about the emails. After discussing the emails with J.K. and reviewing them himself, Hall treated J.K.'s concerns as legitimate by placing J.K.'s home on the Hunting Valley Police Department's security watch list, initiating a criminal investigation, and advising J.K. to request a protection order. All of this satisfies the final element of the statute. Based on the foregoing,

we cannot conclude that the trial court abused its discretion in granting J.K.'s request for a protection order.

II. Constitutionality

{¶11} In D.F.A.'s second assignment of error, he argues that the conflicting language of the orders entered by the trial court render them unconstitutionally vague. In his third assignment of error, he argues that the order constitutes an unconstitutional prior restraint on his protected speech. Because both assignments of error deal with the constitutionality of the protection order, we will address them together.

{¶12} D.F.A.'s argument as to the conflicting language of the orders is based on a confusion of the protection order with the corresponding written opinion from the court. The court stated in its opinion that "[t]his order will not prevent" D.F.A. "from posting negative statements about [J.K.]." The actual protection order states that D.F.A.

> shall not initiate or have any contact with the protected persons named in this order or their residences, businesses, places of employment, schools, day care centers, or child care providers. Contact includes, but is not limited to, landline, cordless, cellular or digital telephone; text; instant messaging; fax; e-mail; voice mail; delivery service; social networking media; blogging; writings; electronic communications; or communications by any other means directly or through another person.

{¶13} D.F.A. argues that the alleged discrepancy between the court's written opinion and the protection order renders the order unconstitutionally vague. We are not persuaded by this argument. To the extent that these two statements may be contradictory, the language of the actual protection order is controlling. Pursuant to the Rules of Superintendence for the Courts of Ohio, the court issued a protection order using Form 10.03-F. Sup.R. 10.03 mandates the use of such form, and the allegedly contradictory language is contained in this form.

{¶14} With respect to the scope of the order, D.F.A. alleges that the order at issue here "seeks to restrain any defamatory, reckless or false statement about" J.K., and therefore is an unconstitutional prior restraint on his protected speech. As discussed above, the order prohibits D.F.A. from having any contact, including written indirect contact, with J.K., and it achieves this prohibition with the language on form 10.03-F mandated by the Ohio Supreme Court. The order is not designed to distinguish between defamatory statements and truthful accusations regarding J.K. Rather, the order is designed to be an "equitable, fair, and necessary [way] to protect the persons named * * * from stalking offenses." Form 10.03-F. For purposes of this appeal, it is irrelevant whether any statements D.F.A. has made or would make about J.K. are defamatory. What is relevant, however, is that D.F.A.'s past conduct has caused J.K. to believe that D.F.A. will cause him physical harm. Because the trial court found that D.F.A. knowingly engaged in conduct that caused J.K. to believe he would suffer physical harm, it imposed a CSPO pursuant to R.C. 2903.214.

{¶15} We note that D.F.A. asserts that he is not challenging the constitutionality of the statute, but is instead challenging the order issued by the court pursuant to the statute. As discussed above, the language of the protection order is form language that is mandated by the statute. As such, we interpret D.F.A.'s argument as a challenge to the constitutionality of the statute. We find this argument similarly unpersuasive. Conduct that may be constitutionally protected speech is subject to restraint if it causes another to believe he will suffer physical harm.

{¶16} For these reasons, we affirm the judgment of the trial court.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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TIM McCORMACK, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
PATRICIA ANN BLACKMON, J., CONCUR