

FILED: August 15, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

C. J. P.,
Petitioner-Respondent,

v.

MICHAEL TODD LEMPEA,
Respondent-Appellant.

Clatsop County Circuit Court
115014

A147965

Philip L. Nelson, Judge.

Submitted on January 17, 2012.

Marshall Dunst filed the brief for appellant.

No appearance for respondent.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

WOLLHEIM, J.

Reversed.

1 WOLLHEIM, J.

2 Respondent appeals an order continuing a restraining order that petitioner
3 obtained against him under the Family Abuse Prevention Act (FAPA), ORS 107.700 to
4 107.735. Respondent contends that petitioner failed to present sufficient evidence to
5 support continuation of the order. Petitioner did not file a brief or appear on appeal. We
6 agree with respondent and therefore reverse.

7 The notice of appeal in this matter was filed after June 4, 2009;
8 consequently, and in the absence of any request pursuant to ORAP 5.40(8)(a) that we
9 exercise our discretion to review this matter *de novo*, we decline to exercise our discretion
10 to engage in *de novo* review. [*Holbert and Noon*](#), 245 Or App 328, 330, 260 P3d 836
11 (2011). We review to determine whether "any evidence" establishes the requisites for the
12 court's issuance of the FAPA restraining order. *Id.*

13 Consistent with that standard of review, the relevant facts are as follows.
14 Respondent and petitioner lived together from March 2009 to December 2010. A
15 restraining order of January 4, 2011, prevented respondent from entering petitioner's
16 property, but allowed a third party to pick up respondent's property. The January 4
17 restraining order was dismissed on January 13, 2011. On the morning of Sunday, January
18 23, petitioner looked out her window and saw a man in her backyard. She was scared, but
19 when she looked closer, she recognized the man as respondent's son. Petitioner went
20 outside and noticed that respondent was with his son, on her property. Petitioner asked
21 respondent what he was doing on her property, and he said, "I'm getting my things."

1 Petitioner went immediately in the house, locked the door, and called 911. Respondent
2 and his son left.

3 On January 25, petitioner sought an *ex parte* FAPA restraining order against
4 respondent. The court held a hearing that day. At the hearing, the court asked petitioner
5 what respondent had said or done that made her feel threatened. Petitioner responded that
6 "he squished me in a doorway." The court stated that the previous judge had made
7 specific findings about that incident, reminding petitioner that the January 4 restraining
8 order had been dismissed, and asked if there was anything else. Petitioner said that
9 respondent "has told [a mutual friend] many a threat about how he's going to get me," but
10 that the friend would not disclose the threats to her.

11 Petitioner told the court that respondent had three weapons. The court
12 asked petitioner if respondent had ever threatened her with weapons and she said,
13 "Never." The court entered the restraining order and stated, "Really, the only thing that
14 has swayed me is that when you began talking about your own mental state and physical
15 state, how this behavior is having a very negative [effect on] you, and it seems like he's
16 enjoying the process of pushing you to the limit here."

17 Respondent requested a hearing on the *ex parte* FAPA order, and the
18 hearing took place on February 17. At that hearing, both petitioner and respondent
19 testified. Petitioner testified that respondent had pulled his vehicle onto her property
20 without permission and took his things. Respondent testified, "I didn't lay a hand on this
21 woman. I didn't do anything for her to be afraid of anything." The court continued the

1 restraining order, and stated:

2 "Respondent going to petitioner's property to pick up his effects without
3 prior notice to petitioner and without [a] third party present would place
4 petitioner in fear of imminent bodily injury in light of prior actions between
5 the parties and directions by petitioner to respondent and respondent's
6 attorney not to go onto petitioner's property. Respondent did not touch
7 petitioner, did not cause petitioner bodily injury and did not attempt to
8 cause petitioner bodily injury."

9 ORS 107.718(1) allows the court to issue a restraining order upon a
10 showing that "the petitioner has been the victim of abuse committed by the respondent
11 within 180 days preceding the filing of the petition, that there is an imminent danger of
12 further abuse to the petitioner and that the respondent represents a credible threat to the
13 physical safety of the petitioner * * *." See also [Hannemann v. Anderson](#), 251 Or App
14 207, 212, ___ P3d ___ (2012). In turn, ORS 107.705(1) provides in pertinent part:

15 "'Abuse' means the occurrence of one or more of the following acts
16 between family or household members:

17 "(a) Attempting to cause or intentionally, knowingly or recklessly
18 causing bodily injury.

19 "(b) Intentionally, knowingly or recklessly placing another in fear of
20 imminent bodily injury."

21 The petitioner has the burden of proving a claim under FAPA by a preponderance of the
22 evidence. ORS 107.710(2).

23 Thus, the question on appeal is whether there is any evidence in the record
24 that (1) that respondent abused petitioner within 180 days preceding the filing of the
25 petition by attempting to cause or causing bodily injury to petitioner or by placing her in
26 fear of imminent bodily injury, (2) there is an imminent danger of further abuse to

1 petitioner, and (3) respondent represents a credible threat to the physical safety of
2 petitioner. On this record, we conclude that there is no evidence to support the second
3 and third requirements.

4 The only evidence that respondent had caused petitioner bodily harm was
5 her statement that "he squished me in a doorway."¹ We assume for the sake of discussion
6 that that incident constituted abuse under ORS 107.705 within the relevant time period.

7 The only evidence put forth by petitioner to prove that she was in imminent
8 danger of further abuse and that respondent represents a credible threat to petitioner's
9 safety is that he went to her house to retrieve his property. Immediately after petitioner
10 saw respondent, he left. Petitioner stated that she was afraid, but she said that it was
11 seeing a man on her property--whom she later identified as respondent's son--that made
12 her afraid. "[E]ven if a petitioner makes subjective assertions of fear, a FAPA restraining
13 order will not be upheld when there is insufficient evidence that the alleged conduct
14 creates an imminent danger of further abuse and a credible threat to the physical safety of
15 the petitioner." *Hubbell v. Sanders*, 245 Or App 321, 326, 263 P3d 1096 (2011).
16 Objectively, there is no evidence that respondent posed an imminent danger of further
17 abuse to the petitioner and represents a credible threat to her physical safety. Under the
18 totality of the circumstances, we conclude that the trial court erred in continuing the
19 restraining order.

¹ As noted, the court stated that the previous judge had made specific findings about that incident, when the previous judge dismissed that petition.

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Reversed.