Opinion issued December 14, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00630-CV

KENNEDY RICHARDSON, Appellant

V.

HARLIE EARLE, Appellee

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Case No. 2020-33435

MEMORANDUM OPINION

Appellant, Kennedy Richardson, challenges the trial court's default family-violence protective order[1] issued in favor of appellee, Harlie Earle, with whom Richardson was previously in a dating relationship. In his sole issue, Richardson

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1 *See* TEX. FAM. CODE § 85.006 (authorizing default protective order).

argues that the trial court's order should be set aside because his failure to appear at the virtual hearing on Earle's application for the order was unintentional. He asserts that he was not afforded "Due Process notice of the Zoom Hearing instructions."

We affirm the protective order.

Background

On June 3, 2020, Earle filed an application for a protective order against Richardson, alleging that, while she and Richardson were in a dating relationship and members of the same household, he engaged in acts of violence that were intended to result in her physical harm, which she detailed in her attached affidavit. Earle argued that she was entitled to a protective order because Richardson had previously committed similar acts and there was a clear and present danger of further violence, for which she had no other adequate remedy.

In her attached affidavit, Earle testified that, in September 2019, while she was pregnant with Richardson's child, she confronted him about cheating. Richardson, who was aware that she was pregnant, became angry, grabbed her neck, pushed her down on a bed, got on top of her, and screamed at her.

Earle testified that, on November 9, 2019, while friends were visiting at the apartment she shared with Richardson, he became upset when he thought that one of Earle's male friends was "looking at" her. Richardson made Earle's friends leave and then pushed Earle to the floor, bruising her and causing her to "bust[] her chin."

Earle further testified that, on March 21, 2020, after she and Richardson had ended their relationship, he called while she had friends visiting. He was crying and yelling, and he threatened to come to her apartment and "fight" her friends. When Richardson arrived and Earle went outside to calm him, he pushed her to the ground and ran into her apartment. When Earle got up and chased after him, Richardson threw a skateboard at Earle, missing her. He then threw a second skateboard at Earle, which struck her foot. And, he threw a wine bottle at her, shattering the bottle. Earle noted that Richardson "tried to fight" one of her friends. Police were called, and Earle was treated at a hospital. She sustained a broken toe from being hit with the skateboard and required surgery.

Earle testified that Richardson had refused to accept that their relationship had ended, was controlling and jealous, and abused drugs and alcohol. She testified that she was afraid for her safety and believed that the violence would continue if a protective order were not granted.

On June 4, 2020, the trial court signed a temporary protective order.[2] In its order, it set a hearing on Earle's application for 9:00 a.m. on August 12, 2020. It also stated: "Respondents are ORDERED to contact the Court at least 24 hours in advance of the hearing for further instructions on appearing in Court via Zoom. Respondents shall review and comply with all court procedures as outlined on the

[2] *See id.* §§ 82.043(d), 83.001.

court's website." It is undisputed that Richardson was served with Earle's application and the trial court's temporary order containing the notice of the hearing. Service issued on June 8, 2020, Richardson was served on June 11, 2020, and the return was filed on June 16, 2020.

On August 11, 2020, the day before the hearing, Richardson hired counsel, Charles Guidry, who filed an answer, generally denying the allegations.

On August 12, 2020, the trial court, which was not conducting in-person hearings due to the ongoing COVID-19 pandemic, held a virtual hearing on Earle's application. Neither Richardson nor Guidry appeared. At the commencement of the hearing, the trial court stated:

> [L]et the record reflect we're conducting this proceeding via Zoom. All of our Zoom procedures apply. . . . Also, let the record reflect that [Richardson] was duly and properly served with this protective order on June the 11th, 2020 at 10:04 a.m. . . . . The return of service has been on file since June the 16th, 2020.
>
> [Richardson] was ordered to appear here today on the Court's 9:00 . . . docket. It is now 10:18 a.m. In addition, [he] was ordered to contact the court and notify the court that—or at least contact the court so we could provide the respondent with any Zoom protocols. [Richardson] never contacted the court. However we received an email at our [address] from an attorney by the name of Charles Guidry. He was not an attorney of record. He had not filed a notice of appearance nor an answer. And he stated in the email that he had been retained and that he was on vacation and that he wanted our Zoom protocol.
>
> It is the policy of this court that we do not give out any information unless—to any attorney unless they have filed a notice of appearance and or an answer because of the confidentiality and the issues this court deals with. We did not receive a follow-up from the attorney via email, period.

> [Y]esterday, which was one day before this hearing, at 12:54 p.m., the attorney Guidry filed [an] answer and notice of appearance. At 2:42 p.m., [the trial court coordinator] sent [Guidry] our Zoom protocols and procedures and informed him we were not holding any [in-person] hearings. In addition, he was asked to reach out to the district attorney's office to begin any negotiations or to have any discussion.
>
> [Neither Guidry] nor his client appeared on the docket this morning. They have yet to appear. I made a courtesy call to [Guidry] to find out why he didn't appear since he filed his notice and answer yesterday. He informed me that he had a vacation letter on file. I informed him no vacation letter was efiled with the court, nor was a motion for continuance, nor has he contacted the court. In addition, it is my understanding through [Earle] that she did not receive any information . . . from [Guidry] in an attempt to get a reset of this matter.
>
> Therefore, as a result, we are going to go ahead and proceed with a default. . . .

Earle testified at the hearing that she was in a dating relationship with Richardson for eight to nine months, which ended at some point between December 2019 and March 2020. She noted that they do not have children together. She testified that she sustained injuries to her chin when Richardson pushed her to the floor in November 2019. And, as a result of Richardson hitting her with a skateboard in March 2020, she sustained injuries to ligaments in her left foot and a toe, which required her to undergo surgery and to incur over $50,000 in medical expenses. In addition, Richardson damaged her car windows. The trial court admitted into evidence photographs of Earle's injuries and damaged car.

At the close of the hearing, the trial court found that Earle and Richardson were in a prior dating relationship; that Richardson had committed family violence

and was likely to do so in the future; and that a protective order was necessary for Earle's safety and welfare. The trial court also found that Richardson had caused Earle serious bodily injury and that his conduct "would be a felony if charged."[3] It granted a "no contact protective order" for a "permanent duration."

On August 14, 2020, the trial court issued a written protective order, in which it reiterated its findings above and prohibited Richardson from:

> (a) Committing family violence against [Earle];
>
> (b) Communicating with [Earle] in any manner except through [her] attorney of record a person appointed by the Court;
>
> (c) Communicating a threat through any person to [Earle];
>
> (d) [F]rom coming within 200 feet of [Earle's] place of residence . . . or any future residential and employment addresses . . . .
>
> (e) Possessing a firearm . . .
>
> (f) Engaging in conduct directed specifically toward [Earle], including following [her], that is likely to harass, annoy, alarm, abuse, torment, or embarrass [Earle];
>
> (g) Harming, threatening, or interfering with the care, custody, or control of a pet, companion animal, or assistance animal. . . .

In its order, the trial court stated that it "shall continue in effect for the lifetime of [Richardson]." The trial court also ordered that Richardson pay restitution to Earle in the amount of $20,000 for her medical bills.

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[3] *See id.* §§ 85.001(d), 85.025 (authorizing rendition of protective order exceeding two years' duration if trial court finds that subject committed act constituting felony offense involving family violence, regardless of whether charged or convicted, or caused serious bodily injury to applicant).

Richardson filed a motion to vacate the protective order on the ground that his counsel, Guidry, did not receive instructions for the virtual hearing. At a hearing on the motion, Guidry argued that the trial court coordinator sent the instructions to him at an incorrect email address. The State, representing Earle,[4] argued that it was undisputed that Richardson was served with notice of the hearing set for 9:00 a.m. on August 12, 2020 and that it was incumbent upon Richardson, or his counsel, to obtain instructions for participation. Further, the State noted, instructions for participation in the virtual hearing were on the trial court's website.

Also at the hearing on the motion to vacate, the trial court noted that its coordinator had sent instructions to Guidry at the email address on file with the court and that Guidry had admitted that he had not used that email address in ten years. The trial court explained:

> Mr. Guidry, it is your responsibility as an attorney to follow up with the Court. You did not do that. You didn't send an email back to the 280th late email saying, hello, I don't have the Zoom instructions. I filed my notice of appearance. Can somebody please send them to me and verify your email. We're not gonna go around comparing this email with that email. That's not our job. That's your job. Your job as the attorney is to make sure that whatever email is on file in DEEDS is the correct email. We simply don't have time to do that.
>
> I, as a courtesy, called you because you had just filed your notice of appearance. And during our phone call, I informed you that we were going to go ahead and proceed. I did not ask you to come down to the court. You did that on your own. Okay? You told me on the phone that

[4] *See id.* § 81.007.

> you had a vacation letter on file as well. I don't have time to go and look and search and see whether or not attorneys have vacation letters on file.
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> Finally, your client was served with this protective order back in June. Our Zoom protocols and procedures have been up on the website since the pandemic began. And you would have had not just the court . . . late email but you also had my court reporter's email and you also had my email. So if for some reason you weren't getting responses from anyone else, you could have emailed the court reporter or you could have emailed me and said, hey, I haven't received the Zoom instructions. Can someone please find out what's going on. You did not do that.
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> Finally, aside from all of that, you could have appeared here in the court and said, Judge, I did not get the Zoom instructions; therefore, my client and I are here and we are ready to go.

In conclusion, the trial court stated to Guidry, "You didn't do any of that. You did nothing." The trial court denied the motion to vacate the protective order.

On September 6, 2020, Richardson filed a notice of "restricted appeal" from the trial court's August 14, 2020 protective order.

Protective Order

In his sole issue, Richardson argues that the trial court erred in rendering a default family-violence protective order against him because his failure to appear at the virtual hearing on Earle's application was unintentional. He argues that he was not afforded "Due Process notice of the Zoom Hearing instructions" because the trial court failed to send the instructions to him in accordance with Texas Rule of Civil Procedure 21a(b)(3). Rather, the trial court sent the instructions to his counsel at an

incorrect email address. He further asserts that the trial court erred in "refusing to acknowledge" his appearance in person on the day of the hearing.

A. *Procedural Posture*

As a threshold matter, we consider the nature of this proceeding. Richardson, in his notice of appeal, characterized his filing as a restricted appeal, and the parties focus their arguments in their briefs on whether Richardson met the elements of a restricted appeal.

We note that a protective order issued outside the context of a pending suit for divorce or suit affecting the parent-child relationship is a final appealable order when, as here, it disposes of all parties and issues. *See* TEX. FAM. CODE § 81.009; *Lancaster v. Lancaster*, No. 01-12-00909-CV, 2013 WL 3243387, at *1 n.4 (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet.) (mem. op.); *Vongontard v. Tippit*, 137 S.W.3d 109, 110 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *see also Ulmer v. Ulmer*, 130 S.W.3d 294, 296–27 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (discussing prior split of authority).

Generally, a notice of appeal must be filed within 30 days after a judgment is signed, when no timely post-judgment motion is filed. *See* TEX. R. APP. P. 26.1. The deadline is extended to 90 days after the judgment is signed if an appropriate post-judgment motion is timely filed. *See* TEX. R. APP. P. 26.1(a). The deadline to

file such post-judgment motion is 30 days after the judgment is signed. TEX. R. CIV. P. 329b(a).

Rule of Appellate Procedure 30, authorizing restricted appeals, provides that:

> A party who did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of and who did not timely file a post–judgment motion or request for findings of fact and conclusions of law, or a notice of appeal within the time permitted by Rule 26.1(a), may file a notice of appeal within the time permitted by Rule 26.1(c).

TEX. R. APP. P. 30. Rule 26.1(c) allows a party to file a notice of restricted appeal up to six months after a judgment is signed. TEX. R. APP. P. 26.1(c). A restricted appeal is not available to a party who timely files a post-judgment motion within 30 days after the judgment. *See Aero at Sp. Z.O.O. v. Gartman*, 469 S.W.3d 314, 315 (Tex. App.—Fort Worth 2015, no pet.). Further, Rule 30 excepts from its scope a party who timely files a notice of appeal. *Barrett v. Westover Park Cmty. Ass'n, Inc*., No. 01-10-01112-CV, 2012 WL 682342, at *2 n.1 (Tex. App.—Houston [1st Dist.] Mar. 1, 2012, no pet.) (mem. op.).

Here, because the record shows that Richardson timely filed a motion to set aside the trial court's default judgment on August 13, 2020, the day after the hearing on the protective order and the day before the trial court's written order issued, a restricted appeal is not available. *See* TEX. R. APP. P. 30; *Lab. Corp. of Am. v. Mid–Town Surgical Ctr., Inc*., 16 S.W.3d 527, 528 (Tex. App.—Dallas 2000, no pet.)

(holding that timely filed motion to set aside default judgment precluded restricted appeal).

In addition, the record shows that, on September 8, 2020, Richardson filed a notice of appeal from the trial court's August 14, 2020 protective order. Because he filed his notice of appeal 25 days after the trial court signed the protective order at issue, his appeal was timely filed. *See* TEX. R. APP. P. 26.1, 26.1(a). And, because Rule 30 excepts from its scope matters in which a party has timely filed a notice of appeal, this is not a restricted appeal and we do not apply the attendant analytical framework. *See* TEX. R. APP. P. 30; *Barrett*, 2012 WL 682342, at *2 n.1.

B. ***Standard of Review and Governing Legal Principles***

A trial court may render a protective order that is binding on a respondent who does not attend a hearing if the respondent received service of the application and notice of the hearing, and proof of service was filed with the court before the hearing. TEX. FAM. CODE § 85.006. Notice of the application must be served in the same manner as citation under the Texas Rules of Civil Procedure, excluding publication. *Id.* § 82.043; *see* TEX. R. CIV. P. 106. The contents of the notice must include the date, time, and place of the hearing, inter alia, and include the statement: "If you do not attend the hearing, a default judgment may be taken and a protective order may be issued against you." TEX. FAM. CODE § 82.041. If a respondent is served within

48 hours before the time set for the hearing, and makes a request for a continuance, the respondent is entitled to have the hearing reset. *Id.* § 84.004.

Whether service of notice complies with the governing rules is a question of law that we review de novo. *See Johnson v. Simmons*, 597 S.W.3d 538, 540 (Tex. App.—Fort Worth 2020, pet. denied).

C. *Analysis*

Here, it is undisputed that Richardson was served on June 11, 2020 with Earle's application and notice of the August 12, 2020 hearing. Richardson retained counsel and filed an answer on August 11, 2020. At the August 12, 2020 hearing, the trial court found, and Richardson does not dispute, that the return of service was filed on June 16, 2020. Thus, the record reflects that Richardson was afforded the requisite notice of the hearing on the application for the protective order. *See* TEX. FAM. CODE §§ 82.043, 85.006.

On appeal, Richardson complains that the trial court coordinator failed to send him the procedural instructions for participating in the virtual hearing, "in compliance with Texas Rule[] of Civil Procedure 21a(b)(3)."

Rule 21 requires that "[e]very pleading, plea, motion, or application to the court for an order . . . must be served on all other parties." TEX. R. CIV. P. 21(a). An "application to the court for an order and notice of any hearing thereon . . . must be served upon all other parties not less than three days before" the hearing. *Id.* 21(b).

Rule 21a, on which Richardson relies, as emphasized below, states:

> (a) . . . Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record in the manner specified below:
>
> > (1) Documents Filed Electronically. A document filed electronically under Rule 21 must be served electronically. . . .
> >
> > (2) Documents Not Filed Electronically. A document not filed electronically may be served in person, mail, by commercial delivery service, by fax, by email . . . .
>
> (b) When Complete.
>
> > . . . .
> >
> > (3) *Electronic service is complete on transmission of the document to the serving party's electronic filing service provider.* The electronic filing manager will send confirmation of service to the serving party.

TEX. R. CIV. P. 21a(a), (b) (emphasis added). Thus, Rule 21a governs, as pertinent here, methods in which notices "required by" the Rules of Civil Procedure, other than citation, may be "served." *See id.* And, Rule 21a(b)(3) governs when "electronic service" is complete. *Id.*

Rule 21a does not support Richardson's argument that procedural rules for participating in a hearing constitute a notice "required by" the Rules of Civil Procedure or that he was entitled to be "served" with such instructions. He directs us to no other supporting authority.

Richardson complains that the trial court coordinator failed to send the instructions to Guidry at his proper email address. However, as the trial court noted during the hearing on Richardson's motion to vacate the protective order, it was incumbent upon Richardson or Guidry to have followed up with the trial court when they did not receive the instructions, which they did not do. In addition, the trial court noted that Richardson was served with Earle's application for a protective order and notice of the hearing in June and that the trial court's "Zoom protocols and procedures ha[d] been up on the website since the pandemic began." And, the notice stated: "Respondents are ORDERED to contact the Court at least 24 hours in advance of the hearing for further instructions on appearing in Court via Zoom. Respondents shall review and comply with all court procedures as outlined on the court's website."

Further, the trial court noted that Guidry not only had the "280th late email" address, but also those of the trial court judge and court reporter, but he did not contact them for instructions. And, it noted, Richardson "could have appeared here in the court" and stated that he did not receive the instructions. Although Guidry and Richardson appeared in the trial court on August 12, 2020, they did so after the hearing had concluded.

We conclude that Richardson was afforded the requisite notice of the hearing on Earle's motion for a protective order and that he was not entitled to additional

service of the procedural instructions for participating in the hearing. *See* TEX. FAM. CODE §§ 82.043, 85.006. We hold that the trial court did not err in rendering the default family-violence protective order against Richardson on ground he presents.

We overrule Richardson's sole issue.

Conclusion

We affirm the trial court's protective order.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Rivas-Molloy and Guerra.