STATE OF MICHIGAN

COURT OF APPEALS

LORETTA ANN MULLIGAN, Petitioner-Appellee, v KENNETH WINKIE, Respondent-Appellant.	UNPUBLISHED September 27, 2016 No. 327565 Oakland Circuit Court LC No. 2014-818481-PH

Before: BORRELLO, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Respondent Kenneth Winkie appeals as of right[1] the trial court's entry of a second amended personal protection order ("PPO") in May 2015, after petitioner Loretta Mulligan filed a motion to extend the PPO originally entered against respondent in April 2014. We affirm.

I. FACTUAL BACKGROUND

[1] In filing his claim of appeal, it appears that respondent mischaracterized or misunderstood the PPO entered by the trial court on May 12, 2015. The order from which respondent appeals is a "2nd amended" PPO, which was entered after (1) petitioner filed a motion to extend the original PPO and (2) the trial court specifically held a hearing on that motion. Likewise, the lower court record shows that the "2nd amended" PPO was entered at the same time that the trial court entered an order granting petitioner's motion to extend the existing PPO. As such, the May 12, 2015 PPO is neither a new PPO entered after a hearing pursuant to MCR 3.705(B)(6)—despite the fact that the trial court held a hearing before it entered the order—nor a ruling following a respondent's first motion to rescind or modify an ex parte PPO, as respondent never filed such a motion in this case. See MCR 3.709(B)(1). Accordingly, respondent was not entitled to appeal as of right, and this appeal only should have been granted following an application for leave to appeal. Nevertheless, we have decided to exercise our discretion in this case to "treat [respondent's] claim of appeal as an application for leave to appeal, grant leave, and address the . . . issue presented." *Wardell v Hincka*, 297 Mich App 127, 133 n 1; 822 NW2d 278 (2012), citing *In re Investigative Subpoena Regarding Homicide of Morton*, 258 Mich App 507, 508; 671 NW2d 570 (2003); see also *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 354; 833 NW2d 384 (2013).

Petitioner and respondent are neighbors who have resided next door to each other for approximately 10 years in West Bloomfield, Michigan. On April 2, 2014, petitioner filed a petition for the entry of an ex parte, nondomestic PPO against respondent on the basis of stalking, as defined under MCL 750.411h and MCL 750.411i. In an attached explanation, she identified several events that served as the basis of her petition, most of which involved issues related to respondent's acts of placing or blowing objects onto her property and her hostile confrontations with respondent following these occurrences. The police were called during several of the incidents identified in the petition.

On April 2, 2014, the trial court denied petitioner's petition for an ex parte order, but it held a hearing on the petition later that month. After hearing the parties' testimony and arguments, the trial court held that a PPO related to property violations was warranted in this case, noting the numerous times that the police were called to address respondent's recurring conduct, and the fact that the police "have a million more important things to do." Under these circumstances, the trial court believed that respondent would continue his conduct in the future if a PPO were not entered. Additionally, the trial court found that respondent's actions were intentional, as demonstrated by descriptions in the police reports regarding his defensive and uncooperative responses to the police officers. In light of the police reports, the trial court found, "[T]here is [a] sufficient basis for an ongoing concern that this behavior is going to continue. So [petitioner has] met her burden of proof. There's reasonable cause to believe that she's entitled to the order." Consistent with its ruling on the record, the trial court entered a PPO against respondent on April 29, 2014, finding that "[r]espondent has committed 2 or more acts of unconsented contact."

On April 24, 2015, petitioner filed a motion to extend the PPO. Petitioner noted the events that transpired before the PPO was entered and expressed her suspicion that respondent broke her mailbox in January 2015. She was concerned, given respondent's "history of threats against [her]," that he would "engage in his terrorizing course of conduct again and seek retribution against [her] for requiring him to abide by a PPO over the past year" if the PPO were allowed to expire. In sum, she asked the trial court to extend the PPO "based on the recent incident [involving the mailbox] and the specific past incidents that support [her] continuing fear of the [r]espondent[.]" That day, the trial court entered an ex parte PPO against respondent, finding that "[r]espondent has committed 2 or more acts of willful unconsented contact." A handwritten label at the top of the PPO indicates that it was a "1st amended" order. The order was set to expire on May 18, 2015.

However, on May 12, 2015, the trial court held a hearing on petitioner's motion to extend the PPO. Consistent with her motion, petitioner's counsel requested an extension based on (1) the events that transpired before the original PPO was entered, (2) petitioner's concern that similar incidents would resume after the PPO expired, destroying the sense of peace that she felt during the year that the PPO was in effect, and (3) the fact that her mailbox, but not any of her neighbors' mailboxes, was knocked over in January 2015. In response, respondent's counsel emphasized that there were no allegations of any contact between the parties during the year that the PPO was in effect, except for petitioner's claim that her mailbox was pushed over, and there were no police reports involving the parties. Respondent's counsel also refuted petitioner's claims regarding the mailbox, arguing that other mailboxes had fallen over and required repairs during the same time period. Additionally, respondent's counsel emphasized the possible

negative effects of a PPO on respondent's reputation in personal and professional settings. Thus, respondent argued that the PPO should be terminated because peace has been restored and there was no reasonable expectation of behavioral issues or other harm in the future.

After reiterating its earlier frustration that police resources were repeatedly expended on this conflict before the PPO was imposed and reviewing portions of April 29, 2014 hearing, the trial court granted petitioner's motion to extend the PPO. It noted its previous findings that respondent's conduct was ongoing and intentional, the fact that the police had responded to petitioner's property on multiple occasions, and petitioner's testimony regarding each incident. It also noted its former "findings of fact with regard to the police officers' interaction, [*i.e.*,] police had been out at least a half dozen times and on each occasion had tried to resolve this by talking to both of the parties," and the fact that most of the police reports noted "their frustration with an inability to get [respondent] to understand that he had to adjust some of his behavior or else problems were going to be ongoing." The court also stated:

> [I]n my findings of fact[,] I did articulate frustration with the fact that the police are there, everybody wants to get this thing resolved, he says that he can do it and he can do it right then and then leaves and says I'm not dealing with this nonsense, and doesn't engage in an effort to try and resolve it with the police officers being present.
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> So I am finding that I could . . . have put it in place for a year, two years, three years when I originally put the Personal Protection Order in place. I put it in place for a year, but I am relying on those original findings of fact. I'm not making findings of fact with regard to the damage to the mailbox. I believe that there is a reasonable cause to believe that ongoing [sic] this is going to continue. The day that this thing expires, there's going to be an issue with cutting the lawn or there being some grass that is up along the side of her wall. So in light of the fact that it has -- there has been peace during the last year, that it gives the Petitioner some level of peace of mind, in light of the fact that the police officers on at least a half dozen occasions where they are trying to resolve this and [respondent] was not . . . open to a resolution, I don't know that that's changed. And I'm going to err on the side of caution and continue the Personal Protection Order for a period of one year.

The trial court emphasized that it was making no findings of fact regarding anything that occurred in January 2015 or the allegations in petitioner's motion to extend. It also explained that it was not holding a full hearing on petitioner's motion because she did not see who damaged her mailbox and did not call the police, so those claims were irrelevant to the court's determination as to whether the PPO against respondent should be extended. Finally, the court repeated its belief that "there is going to be a problem the day after this thing expires in light of what happened at the original Personal Protection Order hearing," and its finding that the issues between the parties would continue in the absence of a PPO based on respondent's "approach" at the first hearing.

Consistent with its ruling on the record, the trial court entered an order granting petitioner's motion to extend the PPO on May 12, 2015. In the order, the trial court found that

"[c]ircumstances continue to exist that would require extension/modification of the order." Additionally, on the same day, the trial court also entered a "2nd amended" PPO, which stated that respondent committed "two or more acts of willful unconsented contact." The extended order had an expiration date of May 12, 2016.[2]

II. SCOPE OF THE INSTANT APPEAL

As an initial matter, respondent expressly states in his brief on appeal that the original PPO, entered on April 29, 2014, "is not specifically on appeal." See MCR 3.709(B)(1)(a). Nevertheless, respondent raises multiple claims concerning whether the trial court's entry of the

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[2] At the time that this opinion was authored, the "2nd amended" PPO already had expired. As such, it is important to address whether this case is moot.

In general, appellate courts will not decide moot issues. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). "An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief," *id*., but it is not moot if the issue "may have collateral legal consequences" for an individual. *Mead v Batchlor*, 435 Mich 480, 486; 460 NW2d 493 (1990), abrogated on other grounds by *Turner v Rogers*, ___ US ___; 131 S Ct 2507; 180 L Ed 2d 452 (2011). "[I]ssues relating to [an] extension[] of [a] personal protection order (PPO) are moot [when] there is no relief that can be granted, and the respondent has failed to identify any collateral consequences arising solely out of the length of time that the PPO was in effect." *Visser v Visser*, 495 Mich 862, 862-863; 836 NW2d 693 (2013) (citation omitted).

Both parties, including petitioner, expressly or implicitly acknowledge that a wrongfully issued PPO may result in collateral consequences that endure even after the PPO has expired. Additionally, a PPO must be entered into the Law Enforcement Information Network ("LEIN"). MCL 600.2950a(16), (17), (19), (20). Although there is no statutory provision providing for the removal of a PPO from the LEIN after it expires, MCL 600.2950a(19)(b) and (20) provide that the LEIN must be updated when a PPO is "rescinded, modified, or extended by court order." Accordingly, because it appears that this Court could provide a legal remedy if it were to vacate the trial court's extension of the PPO, in that the LEIN would be updated if the extension were rescinded or modified, it appears that this appeal is not automatically moot simply because the amended PPO has expired. Additionally, respondent identified, both in the lower court and on appeal, several adverse collateral consequences arising from the length of time that the PPO was in effect, including negative consequences related to his previous employment and applications for new employment, concern expressed by a police officer during a traffic stop, and negative effects of the PPO on the reputation of himself and his family in their neighborhood. See *Hayford*, 279 Mich App at 325 (holding that an appeal of a trial court's decision to issue and continue a PPO was not moot following the expiration of the PPO because the respondent could permanently lose his federal firearms license and livelihood).

Thus, because it appears that dismissing this appeal on the basis of mootness would be inappropriate in light of the Michigan Supreme Court's reasoning in *Visser*, 495 Mich at 862-863, we conclude that this appeal is not necessarily moot.

PPO was proper. "[I]ssues relating to the initial granting of [a] PPO [are] not properly before the Court of Appeals where the respondent failed to seek appellate review of the original PPO." *Visser v Visser*, 495 Mich 862, 863; 836 NW2d 693 (2013). Accordingly, respondent's claims regarding the trial court's entry of the original PPO are not properly before this Court because they are related to a prior final order that he was entitled to appeal as of right under MCR 3.709(B)(1)(a). See *Visser*, 495 Mich at 863 (vacating the portion of the Court of Appeals opinion that considered issues concerning the trial court's initial granting of the PPO). See also *Surman v Surman*, 277 Mich App 287, 294; 745 NW2d 802 (2007) ("When a final order is entered, a claim of appeal from that order must be timely filed. A party cannot wait until the entry of a subsequent final order to untimely appeal an earlier final order."); *McDonald v Stroh Brewery Co*, 191 Mich App 601, 609; 478 NW2d 669 (1991) ("Because plaintiffs did not file claims of appeal with regard to [an earlier] order, this Court is without jurisdiction to review the issue [related to that order].").

Thus, we will not consider respondent's arguments regarding the trial court's initial entry of the PPO on April 29, 2014.

III. RESPONDENT'S CLAIMS RELATED TO THE MAY 12, 2015 HEARING AND ORDER

Respondent's challenges to the trial court's extension of the PPO are properly before this Court. Nevertheless, for the reasons stated below, we reject his claims.

A. STANDARD OF REVIEW

Most of respondent's claims are preserved for appeal. See *Detroit Leasing Co v City of Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). We review a trial court's determination regarding a PPO, an injunctive order, for an abuse of discretion. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Id*. A trial court's findings of fact are reviewed for clear error. *Id*.

"Interpretation of a statute or court rule constitutes a question of law that is . . . reviewed de novo." *Silich v Rongers*, 302 Mich App 137, 143; 840 NW2d 1 (2013).

> Court rules are interpreted using the same principles that govern statutory interpretation. The Court gives the language of court rules their plain and ordinary meaning. If the language poses no ambiguity, this Court need not look outside the rule or construe it, but need only enforce the rule as written. "Shall" indicates a mandatory provision. [*Lamkin v Engram*, 295 Mich App 701, 709; 815 NW2d 793 (2012) (quotation marks and citations omitted).]

However, respondent did not raise a due process challenge to the trial court's failure to hold an evidentiary hearing on petitioner's motion to extend the PPO. See *Detroit Leasing Co*, 269 Mich App at 237. We review this unpreserved claim for plain error affecting substantial rights. *Demski v Petlick*, 309 Mich App 404, 426-427; 873 NW2d 596 (2015). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

B. NATURE OF THE MAY 12, 2015 HEARING

Respondent first argues that the trial court erred in entering the May 12, 2015 extension of the PPO without first holding a full evidentiary hearing and taking testimony from the parties. Because the hearing was on petitioner's *motion to extend* an existing PPO, and was not a hearing on a petition to enter a new PPO, we reject respondent's claims.

Pursuant to MCR 3.701, "[e]xcept as provided by this subchapter and the provisions of MCL 600.2950 and 600.2950a, actions for personal protection for relief against domestic violence or stalking are governed by the Michigan Court Rules. Procedure related to personal protection orders against adults is governed by this subchapter." Respondent appears to rely on MCL 600.2950a for the procedural and substantive requirements applicable to a motion to extend a PPO, but that statute does not expressly address motions to extend other than noting that law enforcement agencies must be notified immediately if a PPO is extended by court order. MCL 600.2950a(19)(b). Rather, MCR 3.707(B)(1) provides:

> **(B) Extension of Order.**
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> (1) *Time for Filing*. The petitioner may file an ex parte motion to extend the effectiveness of the order, without hearing, by requesting a new expiration date. The motion must be filed with the court that issued the personal protection order no later than 3 days before the order is to expire. The court must act on the motion within 3 days after it is filed. Failure to timely file a motion to extend the effectiveness of the order does not preclude the petitioner from commencing a new personal protection action regarding the same respondent, as provided in MCR 3.703.[3]

Notably, the court rule provides for the filing of an *ex parte* motion to extend an existing PPO, on which the trial court must act within three days. MCR 3.707(B)(1). An ex parte motion is "[a] motion made to the court without notice to the adverse party; a motion that a court considers and rules on without hearing from all sides." *Black's Law Dictionary* (10th ed), pp 1168-1169. Because the court rule specifically contemplates an extension of a PPO without notice to the respondent, it is implicit in the plain language of the rule that a hearing is not required before a PPO is extended. See *Lamkin*, 295 Mich App at 709.

This conclusion is supported by the text of MCR 3.707(A), which pertains to motions to modify or terminate PPOs. MCR 3.707(A)(1) discusses the time at which a petitioner or a respondent may file a motion to modify or terminate a PPO. Then, MCR 3.707(A)(2) expressly provides:

> The court *must* schedule and hold a hearing on a motion to modify or terminate a personal protection order within 14 days of the filing of the motion, except that if the respondent is a person described in MCL 600.2950(2) or 600.2950a(2), the

[3] MCR 3.707(B)(2) addresses the notice requirements applicable to an extension of a PPO.

> court *shall* schedule the hearing on the motion within 5 days after the filing of the motion. [Emphasis added.]

The last subsection, MCR 3.707(A)(3), addresses the way in which notice of a modification or termination of a PPO must be provided using language similar to that in MCR 3.707(B)(2). In considering side by side the language of both MCR 3.707(A) and (B), which both apply to motions that may be filed to change existing PPOs, it is clear that both subsections include largely identical provisions in the same sequence, except for the fact that the mandatory language requiring a court to hold a hearing on a motion is not included under MCR 3.707(B) with regard to motions to extend PPOs. The hearing requirement only is included under MCR 3.707(A) with regard to motions to modify or terminate PPOs. When language is included in one portion of a court rule but omitted from another, we presume that the omission was deliberate. *In re Keyes Estate*, 310 Mich App 266, 272; 871 NW2d 388 (2015); see also *Lamkin*, 295 Mich App at 709 (stating that the principles that apply to statutory interpretation also apply to the interpretation of court rules). Accordingly, there is no basis for concluding that respondent was entitled to a hearing, or entitled to testify, before the trial court *extended* the PPO. See also *Casa Bella Landscaping, LLC v Lee*, ___ Mich App ___, ___; ___ NW2d ___ (2016) (Docket No. 326237), p 2 ("When considering a Michigan Court Rule, [t]he principles of statutory construction apply[.] We begin by considering the plain language of the court rule in order to ascertain its meaning. The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole.") (quotation marks and citations omitted).

We recognize that the procedure utilized by the trial court in this case in response to petitioner's motion to extend the PPO was different from that specified by the applicable court rule, as it (1) entered an ex parte order which amended the original PPO and extended the expiration date of the order, (2) subsequently held a hearing on petitioner's motion to extend the PPO, and (3) then entered, at the same time, an order granting petitioner's motion to extend and a second amended order extending the expiration date of the PPO. In light of this procedure, respondent may have believed that he was entitled to a more comprehensive hearing before the trial court extended the PPO, as this procedure may have appeared similar to that required prior to the entry of a new PPO. See MCR 3.705(B) (discussing when a hearing must be held prior to the issuance of a PPO); *Lamkin*, 295 Mich App at 711-712.

Nevertheless, a plain reading of MCR 3.707 indicates that respondent still retained the right to file a motion to modify or terminate the PPO after the trial court extended the order. See *Lamkin*, 295 Mich App at 709. Correspondingly, the first amended, ex parte PPO, entered on April 24, 2015, and the second amended PPO, entered on May 12, 2015, both expressly state that "[r]espondent may file a motion to modify or terminate this order. For ex parte orders, the motion must be filed within 14 days after being served with or receiving actual notice of the

order." But respondent never filed a motion to modify or terminate either of the amended orders. See MCR 3.707(A)(1)(b).[4]

Given these procedural safeguards, as well as the clear arguments of respondent's counsel that were, in fact, presented at the hearing on petitioner's motion, we also reject (1) respondent's claim that he had no opportunity to respond to or refute petitioner's reasons for requesting an extension of the PPO and (2) his claim that the trial court's failure to hold a full evidentiary hearing—and failure to hear testimony from the parties—before it entered the May 12, 2015 order violated his due process rights. In *IME v DBS*, 306 Mich App 426, 434-435; 857 NW2d 667 (2014), we summarized the following principles in considering whether a respondent received due process in a case involving a PPO issued under MCL 600.2950a:

> Before the state may deprive persons of liberty or property, due process requires that the person be given notice of the proceedings and an opportunity to be heard in a meaningful time and manner. *Any additional procedural protections required by due process are flexible and depend on the particular situation.* Generally, three factors will be considered when determining what is required by due process: (1) the private interest affected by the official action, (2) the risk of erroneous deprivation of the interest through the procedures used, and (3) the probable value, if any, of additional or substitute procedural safeguards. [Citations omitted; emphasis added.]

We have concluded that MCL 600.2950a, the statute applicable to nondomestic PPOs—which specifically states that an individual restrained or enjoined under an ex parte PPO may file a motion to modify or rescind the PPO and request a hearing—"provides sufficient procedural safeguards to satisfy due process." *IME*, 306 Mich App at 437. Although MCL 600.2950a(13) and (14) only discuss a respondent's opportunity to file a motion to modify or terminate an *ex parte* PPO, it is apparent from the court rule that a respondent may file such a motion to challenge any other PPO entered after a hearing if good cause is shown. See MCR 3.707(A).[5] Thus, as discussed *supra*, respondent retained the right to file a motion to modify or terminate the PPO after it was extended under the trial court's May 12, 2015 order, and he failed to pursue this remedy. See *id*.

Further, despite respondent's arguments to the contrary, "the opportunity to be heard" component of due process "does not mean a full trial-like proceeding." *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). Instead, it requires "a hearing to allow a party the chance to know and respond to the evidence." *Id*. It is clear from the record that respondent was aware of petitioner's claims and the evidence against him at the May 12, 2015 hearing, and

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[4] If respondent had filed a motion to modify or terminate the second amended PPO, he would have been required to make "a showing of good cause." MCR 3.707(A)(1)(b).

[5] The form approved by the State Court Administrative Office for motions to modify, extend, or terminate PPOs and the form's instructions confirm this conclusion. See SCAO Form CC 379 (3/12), Motion to Modify, Extend, or Terminate Personal Protection Order.

that he had an opportunity, through his attorney, to respond to petitioner's claims and the trial court's findings. Moreover, petitioner did not testify at the hearing on her motion to extend the PPO, and the trial court expressly rejected her new allegations regarding her mailbox. As such, there is no basis for concluding that respondent was prejudiced by his inability to cross-examine petitioner or present evidence specifically concerning the mailbox issue. See *Duray Dev, LLC*, 288 Mich App at 150.

Thus, contrary to respondent's claims, the trial court neither violated MCL 600.2950a nor his due process rights.

C. FACTUAL BASIS OF THE EXTENSION

Finally, respondent argues that the trial court extended the PPO without a sufficient factual basis, as the allegations in petitioner's April 24, 2015 motion to extend the PPO did not allege facts that constituted stalking under MCL 750.411h, MCL 750.411i, or MCL 750.411s. We disagree.

Because a petitioner carries the burden of proof in obtaining a PPO, as well as the burden of persuasion in justifying a continuance of the PPO after the respondent files a motion to modify or terminate the order, we presume that a petitioner has the burden of proof when she moves to extend a PPO. See *Pickering v Pickering*, 253 Mich App 694, 697-700; 659 NW2d 649 (2002). Cf. MCR 3.310(B)(3) (stating that a temporary restraining order may be extended if good cause is demonstrated, and the reasons for the extension are stated either on the record or in a filed document).

As petitioner argued, and the trial court specifically emphasized during the hearing on her motion, the PPO clearly served its purpose in this case, as demonstrated by the fact that respondent did not continue to commit conduct that fulfilled the statutory definition of stalking after the PPO was entered. Additionally, petitioner and the trial court both believed that respondent's conduct would resume when the PPO expired. Contrary to respondent's claims, the ongoing nature of his prior conduct before the PPO was entered and his apparent unwillingness to alter his behavior, despite numerous interactions with the police, sufficiently demonstrate that a PPO was necessary in order to halt respondent's offensive conduct. Accordingly, under these circumstances, the trial court did not clearly err in finding that there was no indication that respondent was open to an alternative resolution of the situation; that the dispute between respondent and petitioner would continue once the PPO expired; and that such an order was necessary to stop respondent's conduct. See *Hayford*, 279 Mich App at 325. Respondent has not identified any authority indicating that the trial court was not permitted to consider its previous findings of fact concerning his conduct when it extended the PPO, and we have found none.

Thus, the trial court's extension of the PPO was not outside the range of principled outcomes. See *id*.

IV. CONCLUSION

Respondent's claims related to the trial court's initial entry of the PPO are not properly before this Court, and he has failed to demonstrate any error in the trial court's extension of the PPO.

Affirmed.

/s/ Stephen L. Borrello
/s/ Jane E. Markey
/s/ Michael J. Riordan