STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINA ARNOLD, Petitioner-Appellee,	UNPUBLISHED January 19, 2017
v	No. 329529 Jackson Circuit Court
DERRY PETTY, Respondent-Appellant.	LC No. 15-002182-PP

Before: O'CONNELL, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

Respondent appeals as of right an order denying his motion to terminate the ex parte personal protection order (PPO) entered against him on August 13, 2015 at the request of petitioner. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Petitioner sought a PPO against respondent to prohibit him from stalking her, as defined by MCL 750.411h and MCL 750.411i, and from threatening to kill or physically injure her. The parties had a daughter in 2003, but never married, never lived together, and had not been together as a couple since that time. In support of her request for a PPO, petitioner stated that in February 2015, when their daughter had to appear in front of a judge, respondent approached petitioner outside the courtroom and began "screaming and threatening" her and their daughter, which he continued to do in the courtroom itself. Petitioner reported that the judge "asked him repeatedly to calm down" and that, after the proceeding, the bailiff had to escort her and her daughter out of the courtroom.

Petitioner further stated that respondent would "constantly text my phone all times of the day and night not concerning our child but saying how I am the devil and I may be safe in court but the streets can't save me." According to petitioner, respondent would harass their daughter at her school, which caused the school to ban him from the premises. Petitioner further alleged that respondent would take videos of her house that he would then post on social media.

According to petitioner, on August 12, 2015, as the parties were leaving a court hearing regarding child support, respondent followed her to her car, yelling that she was the devil, that everything was her fault, and that "I will get mines [sic]." Petitioner stated that respondent then

approached their daughter, who was sitting in the car, and threatened to rip her clothes off because he believed someone else had paid for them. Petitioner reported that respondent had texted their common acquaintances, instructing them to tell petitioner to say goodbye to her friends. Petitioner testified that she was afraid for her own safety and that of her daughter.

The court granted the petition and issued an ex parte PPO on August 13, 2015, which prohibited respondent from, among other things, following petitioner; appearing on her property; stalking her, as defined in MCL 750.411h and MCL 750.411i; harassing her by telephone, text, or e-mail; and threatening to kill or physically injure her.

Respondent moved to terminate the PPO on August 24, 2015, on the ground that petitioner's statements were "not accurate and truthful" and were "exaggerated." Respondent asserted that petitioner requested the PPO in order to prevent him from having parenting time with his daughter and to establish a custodial environment in the parties' ongoing custody case. Respondent stated that he "never screamed" at petitioner or his daughter as petitioner alleged, and he also denied hitting or attempting to assault petitioner, explaining that he was "afraid of her because I was a victim of domestic violence from her in 2003." The court denied respondent's motion.

II. ANALYSIS

A. STANDARD OF REVIEW

Defendant raises two challenges to the court's denial of his motion to terminate the PPO. First, he argues that the findings the court made were insufficient to support issuing a PPO. Second, he raises a First Amendment challenge to the issuance of the PPO. We review a trial court's denial of a motion to rescind an ex parte PPO for an abuse of discretion. *Pickering v Pickering*, 253 Mich App 694, 700-701; 659 NW2d 649 (2002). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). We review constitutional issues de novo. *Brandt v Brandt*, 250 Mich App 68, 72; 645 NW2d 327 (2002).

B. EVIDENCE OF STALKING

A trial court has the authority to issue a PPO against an individual with whom a petitioner has a child in common under MCL 600.2950(1). Under MCL 600.2950(4), the court "shall issue" a PPO "if the court determines that there is reasonable cause to believe that the individual to be restrained or enjoined may commit one or more of the acts listed" in MCL 600.2950(1). These acts include "threatening to kill or physically injure a named individual," MCL 600.2950(1)(c), and "engaging in conduct that is prohibited under" MCL 750.411h or MCL 750.411i, which address stalking and aggravated stalking, respectively, MCL 600.2950(1)(*i*).

The Legislature has defined "stalking" as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL

750.411h(1)(d); MCL 750.411i(1)(e). A "course of conduct" is "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose." MCL 750.411h(1)(a); MCL 750.411i(1)(a). "Harassment" is defined as "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress." MCL 750.411h(1)(c); MCL 750.411i(1)(d). It "does not include constitutionally protected activity or conduct that serves a legitimate purpose." MCL 750.411h(1)(c); MCL 750.411i(1)(d). Thus, to establish the type of harassment that constitutes stalking, "there must be two or more acts of unconsented contact that actually cause emotional distress to the victim and would also cause a reasonable person such distress." *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 723; 691 NW2d 1 (2005) (footnote omitted).

On appeal, respondent claims that petitioner's allegations in support of the petition were untrue. However, petitioner testified that everything in the petition was accurate, and the trial court had the opportunity to observe both witnesses at the hearing on respondent's motion to terminate the PPO, and it concluded that petitioner "established both in her petition and by her testimony" that there was "reasonable cause for there to be a PPO." See MCR 3.310(B)(5); *Pickering*, 253 Mich App at 699 (establishing that the petitioner has the burden of persuasion in a hearing held on a motion to terminate an ex parte PPO). We must defer to the trial court's credibility determinations. *In re LaFrance Minors*, 306 Mich App 713, 723; 858 NW2d 143 (2014).

Respondent also claims that petitioner's statements could not be true because she testified that she had not talked to him in five years. Respondent bases this argument on the following exchange:

> *The court*: Okay. What kinds of things does he say? Are they directed to you?
>
> *Petitioner*: The streets can't help you; this ain't over. Just threats. Like, I'm not afraid, no, but I'm—this is for my protection. I can't—like—it's getting strange now, okay, and as far as him, all this extra stuff, since when? Since when do I . . . talk to you? You haven't talked to me physically or on a text message in about five years. I can't talk to you. I don't want to talk to you.

While it is not clear what petitioner is referring to, it seems apparent from the context that she is speaking rhetorically about the fact that the parties had not been on speaking terms, not contradicting herself by asserting that respondent literally had not said the things she alleged in her petition.

Respondent also argues that petitioner could not have been afraid of him because she admitted having "a little anger problem" and had allegedly committed domestic violence against him in 2003. Whether petitioner was violent toward respondent more than a decade ago and whether she currently has a temper have no bearing on whether she actually felt "terrorized, frightened, intimidated, threatened, harassed, or molested" by respondent's conduct. MCL 750.411i(1)(e). MCL 750.411h(4), which respondent invokes to support this argument, is not

relevant because it applies to rebuttable presumptions in a criminal prosecution, which a proceeding to issue or revoke a PPO is not.

Additionally, respondent argues that petitioner's testimony regarding his text messages to her friends was inadmissible hearsay. However, respondent offers no authority to support this argument and has thus abandoned it. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

C. FIRST AMENDMENT CHALLENGE

A person's right to speak freely is protected coextensively by the First Amendment to the United States Constitution and Const 1963, art 1, § 5. *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 526; 569 NW2d 841 (1997). Respondent cites an abundance of cases for the proposition that the First Amendment protects the right to political expression and to speak freely on matters of public concern, even when that speech is upsetting, offensive, or controversial. However, it is well established that not all speech receives the same level of protection under the First Amendment, see *Burns v Detroit (On Remand)*, 253 Mich App 608, 622; 660 NW2d 85 (2002), and that political speech is the area in which the level of First Amendment protection is " 'at its zenith,' " *In re Chmura*, 464 Mich 58, 65; 626 NW2d 876 (2001), quoting *Meyer v Grant*, 486 US 414, 425; 108 S Ct 1886; 100 L Ed 2d 425 (1988).

The cases respondent cites do not apply to his conduct, which, at best, involved apolitical communication on a matter that was only of private concern. At worst, his conduct consisted of threats of violence, which are outside the protection of the First Amendment. See *RAV v City of St Paul*, 505 US 377, 388; 112 S Ct 2538; 120 L Ed 2d 305 (1992).

Furthermore, even in the context of political speech, "the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it." *Hill v Colorado*, 530 US 703, 716; 120 S Ct 2480; 147 L Ed 2d 597 (2000). As the Supreme Court explained, there is a "privacy interest in avoiding unwanted communication" that "varies widely in different settings." *Id.* at 716. This interest is "an aspect of the broader 'right to be let alone' that one of our wisest Justices characterized as the most comprehensive of rights and the right most valued by civilized men.' " *Id*. at 716-717, quoting *Olmstead v United States*, 277 US 438, 478; 48 S Ct 564, 72 L Ed 944 (1928) (BRANDEIS, J., dissenting). "The right to avoid unwelcome speech has special force in the privacy of the home and its immediate surroundings, but can also be protected in confrontational settings," including going to and from a place of employment or a medical facility. *Id.* at 717. Thus, the mere restriction of respondent's right to express himself to petitioner, an unwilling listener, does not violate the First Amendment.

Respondent correctly notes that the United States Supreme Court "has rejected 'the intent to inflict emotional distress' as a basis for regulating otherwise protected speech." *City of Owosso v Pouillon*, 254 Mich App 210, 219; 657 NW2d 538 (2002) (involving the right to protest), citing *Hustler Magazine v Falwell*, 485 US 46, 52-57; 108 S Ct 876; 99 L Ed 2d 41 (1988) (involving the right to satirize a public figure). These cases, which involved categories of speech that receive the highest degree of First Amendment protection, do not apply to respondent's communications, which were not only apolitical and private but also threatening.

Affirmed.

/s/ Peter D. O'Connell
/s/ Jane E. Markey
/s/ Christopher M. Murray