STATE OF MICHIGAN

COURT OF APPEALS

DORIS JEAN GIFFORD,

Petitioner-Appellee,

v

LOUIS EUGENE KELLEY,

Respondent-Appellant.

UNPUBLISHED
May 17, 2018

No. 338778
Gratiot Circuit Court
LC No. 17-003948-PH

Before: METER, P.J., and GADOLA and TUKEL, JJ.

PER CURIAM.

Respondent appeals as of right the order of the Gratiot Circuit Court denying his motion to terminate a personal protection order (PPO) that prohibited him from owning or possessing any dogs at his residence other than a Cocker Spaniel and a Miniature Pinscher. We affirm.

This case arose out of a 2015 dog attack in which respondent's Rottweilers attacked petitioner's minor child, EN, and inflicted numerous injuries. Throughout these proceedings, the parties were neighbors. Following the attack, petitioner obtained PPOs for herself and EN against respondent. The PPOs prohibited respondent from being within 500 feet of petitioner or EN. In July 2015, respondent was found to have violated the PPOs following an incident in which he parked next to petitioner's vehicle—when EN was inside of the vehicle—with two Rottweilers in the back of his pickup truck. The court then modified the PPO to forbid respondent from having any dogs on his property other than a Miniature Pinscher and a Cocker Spaniel.

Respondent pleaded guilty to another PPO violation in July 2016 after he admitted to petitioner's allegations that on approximately June 30, 2016, he had a Rottweiler on his property. At the sentencing hearing, respondent's attorney argued that respondent had been diagnosed with post-traumatic stress disorder (PTSD) and that respondent's Rottweiler was a registered emotional support dog. Respondent's position was that the Rottweiler made him "want to live."

On April 14, 2017, the trial court granted petitioner's ex parte PPO petition,[1] and respondent filed a motion to terminate the ex parte PPO. Petitioner then filed a complaint for criminal contempt, alleging that respondent had been arrested for violating the PPO on May 6, 2017, by possessing a Rottweiler at his residence. At the May 9 violation hearing, respondent admitted to possessing a Rottweiler during May 2017. He asserted that he brought the Rottweiler home after receiving notice in April 2017 that a prior PPO had expired. During cross-examination, however, respondent affirmed that at the time of the violation, he knew that there was a valid PPO against him. The trial court found that respondent had had knowledge of the conduct prohibited by the PPO and had nevertheless engaged in that prohibited conduct. Ultimately, after additional proceedings, respondent was sentenced to 93 days in jail.

At the June 1, 2017, hearing on respondent's motion to terminate the existing PPO, respondent asserted, in essence, that the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*., permitted him to possess the Rottweiler due to his purported PTSD, irrespective of the PPO. Respondent's mother testified that his Rottweiler had been trained and certified as a service animal, but respondent did not present any documentation of its certification. The trial court denied the motion, indicating that respondent's conduct demonstrated a continuing need for the PPO and that he failed to establish that circumstances existed that would require modification of the PPO. The court also granted petitioner's oral motion to modify the PPO to "include language with respect to [her] minor children."[2]

Respondent argues on appeal that he was deprived of his constitutional right to procedural due process of law. No person may be deprived of life, liberty, or property without due process of law. US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17. The fundamental requisite of due process is the opportunity to be heard. *Bullington v Corbell*, 293 Mich App 549, 556; 809 NW2d 657 (2011). Due process enforces the rights enumerated in the Bill of Rights and includes both substantive and procedural due process. *Kampf v Kampf*, 237 Mich App 377, 381-382; 603 NW2d 295 (1999). The concept of due process is flexible, and its essence is "to ensure fundamental fairness." *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). "Procedure in a particular case is constitutionally sufficient when there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker." *Id*.

With respect to respondent's assertion that he did not have adequate notice regarding the prospective addition of petitioner's children to the PPO, this claim lacks merit in light of the history and nature of these proceedings, which were instituted to protect EN after he was attacked. Moreover, petitioner expressly indicated in her ex parte petition that she was requesting "protection for MYSELF AND MINOR CHILDREN" (capitalization in original). Any failure of petitioner to give special, advance notice of her intent to request the addition of

[1] It appears from the record submitted before this Court that petitioner sought the ex parte order because the prior PPOs had expired.

[2] In her ex parte petition, petitioner had expressly requested that her children be protected by the PPO.

her children to the order following the hearing on respondent's motion to terminate did not invade the concept of due process: "to ensure fundamental fairness." *Id*.

Moreover, contrary to his assertions, respondent was not deprived of a meaningful opportunity to defend the case against him. Respondent called five witnesses at the hearing on his motion to terminate the PPO, and the court did not refuse to view other relevant evidence. For example, at the May 9, 2017, violation hearing, the court permitted respondent's attorney to make an offer of proof and play extended portions of a deputy's body-camera recordings in order to determine their relevance to respondent's defense. Respondent's own admissions—e.g., his knowledge of a valid PPO against him and his possession of a Rottweiler in spite of such knowledge—left the trial court with mostly legal conclusions to make regarding the alleged PPO violation and the implications concerning respondent's need for a service animal. Even if it were true that the trial court should have afforded respondent more process at the May 9 hearing, his admissions left the court with little germane findings of fact to make, and respondent was otherwise permitted to call witnesses at the subsequent motion hearing, e.g., his mother, who testified about his Rottweiler's service-animal status, and his friends, who provided testimony concerning his emotional frustration. Finally, we note that respondent's claim that he was not permitted to present evidence that his Rottweiler was a service animal contradicts the record, because respondent *did* present such evidence.

Respondent asserts that the ADA shelters his conduct with respect to the repeated PPO violations. This issue concerns the application of the ADA, a question of law that is reviewed de novo. *Bertrand v Mackinac Island*, 256 Mich App 13, 28; 662 NW2d 77 (2003). We need not address the extent to which the ADA might apply—if at all—to this kind of proceeding, because respondent failed to establish fundamental prerequisites for his claim.

The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 USC 12132. "Disability" is defined, in pertinent part, as "a physical or mental impairment *that substantially limits one or more major life activities* of such individual[.]" 42 USC 12102(1)(A) (emphasis added).

Assuming that respondent has established that he has PTSD, he has not established that he has a *disability* within the meaning of the ADA, i.e., that his PTSD "substantially limits one or more major life activities . . . ." *Id*. Regarding that assertion, the court was left only with respondent's testimony that he was disabled and required a Rottweiler as a service animal. This failed to demonstrate a disability within the meaning of the ADA.[3] Respondent failed to establish that he was entitled to violate a validly-issued PPO based on the assertion that he was protected under the ADA, because did not establish that he had a disability as defined in the ADA.

[3] We note, too, that respondent's credibility was damaged in that he admitted lying to a detective when he was confronted in May 2017 for violating the existing PPO.

Respondent argues that the trial court erroneously issued the 2017 PPO (and subsequently failed to rescind it) based on former matters and without making findings on new evidence. Respondent also contends that the trial court was biased against him, and that it erroneously took judicial notice of adjudicative facts. We disagree.

"The granting of injunctive relief is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion," *Pickering v Pickering*, 253 Mich App 694, 700; 659 NW2d 649 (2002), and "[a] PPO is an injunctive order," *Id.* This standard "acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion occurs when the trial court elects an outcome falling outside the principled range of outcomes. *Id.*

The trial court authorized the 2017 PPO against respondent pursuant to MCL 600.2950a(1), which authorizes a court to restrain "stalking" conduct prohibited, in relevant part, by MCL 750.411h and MCL 750.411i. "Stalking" is defined 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 two or more separate noncontinuous acts evidencing a continuity of purpose." MCL 750.411h(1)(a); MCL 750.411i(1)(a).

"[A] petitioner seeking a PPO bears the burden of proving reasonable cause for the issuance of a PPO." *Lamkin v Engram*, 295 Mich App 701, 711; 815 NW2d 793 (2012). "When making that determination, the circuit court is not limited to the four corners of the petition itself; rather, it must consider the testimony, documents, and other evidence proffered to determine whether a respondent engaged in harassing conduct." *Id.*

> An ex parte personal protection order shall not be issued and effective without written or oral notice to the individual enjoined or his or her attorney unless it clearly appears from specific facts shown by verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will precipitate adverse action before a personal protection order can be issued. [MCL 600.2950a(12); see also MCR 3.705.]

"In cases in which an ex parte order is sought, the petitioner must show that the danger is imminent and that the delay to notify the respondent is intolerable or in itself dangerous." *Kampf*, 237 Mich App at 385.

The PPO prohibited respondent from possessing any dogs on his property other than a Cocker Spaniel or a Miniature Pinscher, based on "[r]epeated violations of prior PPO, and permitting large dogs on the property despite prior dog attack which gave rise to previously issued PPO."

The trial court's issuance of the 2017 PPO was well within its sound discretion, considering the events that occurred throughout these proceedings. Respondent committed a PPO violation in July 2015 after the incident with his Rottweilers in his truck at the local store, and again on approximately June 30, 2016, when he had a Rottweiler on his property. We also note that the court's finding that respondent permitted a large dog on his property before the filing of the ex parte petition was subsequently confirmed at the hearing on respondent's motion to terminate. Indeed, respondent's friend, Greg Bellinger, testified that on approximately April 7, 2017, he brought his French Mastiff to respondent's residence, and petitioner drove by the residence and yelled that she had seen the dog.

Additionally, respondent's admissions regarding the subsequent violation, in May 2017, discount any contention he makes on appeal that the trial court did not have proper grounds to issue the 2017 PPO, because the admissions evidence a disregard for the court's orders. At the May 9, 2017, violation hearing, respondent testified that he possessed a Rottweiler at his home on May 6, 2017, and affirmed that at that time, he knew there was a valid PPO against him. Thus, respondent continued to persist in his efforts to possess a Rottweiler at his residence in spite of his knowledge of the 2017 PPO forbidding such conduct.

Petitioner established "reasonable cause for the issuance of a PPO," *Lamkin*, 295 Mich App at 711, based on respondent's course of conduct in violating prior PPOs since 2015 by impermissibly having large dogs at his residence, which caused petitioner and EN to feel frightened. Therefore, the court's issuance of the 2017 PPO did not amount to an abuse of discretion.

Respondent argues that the trial judge was biased against him. Under MCR 2.003(C)(1), a judge may be disqualified for reasons that include the following:

> (a) The judge is biased or prejudiced for or against a party or attorney.
>
> (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

"[T]he party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality." *Cain v Michigan Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). "A showing of prejudice usually requires that the source of the bias be in events or information outside the judicial proceeding." *In re MKK*, 286 Mich App 546, 566; 781 NW2d 132 (2009).

"Disqualification on the basis of bias or prejudice cannot be established merely by repeated rulings against a litigant, even if the rulings are erroneous." *Id*. Moreover, a judge's opinions formed " 'on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.' " *Cain*, 451 Mich at 496, quoting *Liteky v United States*, 510 US 540,

555; 114 S Ct 1147; 127 L Ed 2d 474 (1994). "Likewise, judicial remarks during the course of a trial that are 'critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.' " *Schellenberg v Rochester Lodge No 2225 of the Benevolent & Protective Order of Elks*, 228 Mich App 20, 39; 577 NW2d 163 (1998), quoting *Cain*, 451 Mich at 497 n 30.

Respondent argues that the trial court was biased because it "had previous knowledge and experience regarding the Rottweilers," EN, and respondent, and also points to the trial court's remark that respondent exercised poor judgment and its comment, while sentencing respondent at the October 2016 sentencing hearing, that the court was "going to do that for this little boy." Moreover, respondent asserts that the court's taking of judicial notice of certain facts, on its own initiative, at the hearing on his motion to terminate the PPO "shows the judge clearly was not going to discard her previous views of the cases between the parties and was even considering her views favoring [EN]."

Respondent has failed to allege any grounds of actual bias or prejudice. Rather, respondent asserts as alleged grounds for bias the trial court's general opinions formed on facts and events that had occurred throughout the prior proceedings with respect to harm done to EN, *Cain*, 451 Mich at 496, and judicial remarks critical of respondent's repeated conduct, *Schellenberg*, 228 Mich App at 39. Respondent has failed to allege any instances suggesting "a deep-seated favoritism or antagonism that would make fair judgment impossible," *Cain*, 451 Mich at 496 (quotation marks and citation omitted), and he has failed to establish that the court was biased against him based on "events or information outside the judicial proceeding," *In re MKK*, 286 Mich App at 566. None of the evidence in the record supports the assertion that the trial court was personally biased against respondent and partial in reaching its decision. Respondent has not established any error with respect to the alleged grounds for judicial disqualification.

Finally, respondent contends that the trial court's taking of judicial notice of certain information was erroneous. However, respondent largely waived review of this issue. Waiver is "the intentional relinquishment or abandonment of a known right." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) (quotation marks and citation omitted). An issue may be waived when "counsel clearly expresses satisfaction with a trial court's decision . . . ." *Id*. At the May 9, 2017, violation hearing, upon the prosecution's motion for the court to take judicial notice of the pleadings and orders in this action and in some related, former matters, respondent's counsel expressly indicated, "[N]o objection, your Honor." Therefore, respondent waived much of his claim that the trial court erroneously took judicial notice. To the extent that respondent did not waive arguments relating to any other judicial notice taken (i.e., any notice aside from that referenced during the May 9 colloquy), we find that the court did not plainly err in sua sponte taking judicial notice of the various prior proceedings, the accuracy of which could easily be verified. See MRE 201.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael F. Gadola
/s/ Jonathan Tukel