STATE OF MICHIGAN

COURT OF APPEALS

MARY HEWELT, Petitioner-Appellee, v JAMES HEWELT, Respondent-Appellant.	UNPUBLISHED January 8, 2019 No. 340170 Oakland Circuit Court Family Division LC No. 2016-839273-PP

Before: GLEICHER, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Respondent, James Hewelt, appeals as of right the trial court's four orders finding him in criminal contempt for violating a personal protection order (PPO) entered on behalf of petitioner. We affirm.

I. RELEVANT FACTS

Petitioner and respondent married in 1999, had two children, and divorced in December 2012. Petitioner has physical custody of the two children and lives with them in the former marital home. The record indicates that respondent initially had unsupervised overnight parenting time, but this was restricted at some point to supervised parenting time, and, on February 29, 2016, the trial court entered an order further restricting respondent's parenting time to daily phone calls between 7:00 p.m. and 8:00 p.m.[1]

Petitioner initially filed a petition for a PPO on February 12, 2016. She attached to her petition police reports indicating that items found in respondent's car during a traffic stop three days earlier had prompted police to conduct a welfare check of petitioner and the children[2] and a

[1] According to the July 13, 2017 hearing transcript in this case, on June 28, 2017, the trial court entered an order rescinding the February 29, 2016 order and indicating that respondent was to have no phone contact with the children.

[2] According to the police report petitioner attached to her PPO petition, respondent initially drew the attention of police officers because the registration sticker on his license plate had expired. When the officer checked the LIEN/SOS system, he discovered two outstanding warrants for respondent's arrest. The officer initiated a traffic stop and arrested respondent on the

police report from August 2015 describing the children's report of respondent's inappropriate behavior during unsupervised parenting time. She also attached a report from the supervisor of respondent's parenting time describing how respondent's aggressive behavior on January 29, 2016, made the children uncomfortable and the monitor fearful of an assault, which prompted an early end to the parenting time. The trial court entered an ex parte PPO on February 17, 2016.

On February 9, 2017, petitioner filed a motion to extend the PPO, alleging that respondent continued to try to contact her and to see the children in violation of the trial court's orders. She attached to her petition a police report recounting an incident in October 2016 when respondent attempted to enter her home through the back door around 9:15 p.m.[3] The report indicates that when he could not gain entrance, respondent went to the front, knocked on the window, and said, "Come on, let me in." The report states that when one of the responding officers spoke with the children, they were "distraught, crying and holding onto [petitioner]. The trial court granted the motion and entered a first amended PPO on February 9, 2017.

On June 7, 2017, petitioner filed four motions to show cause why respondent should not be held in contempt for violating the first amended PPO for sending cards to the children, driving by the marital home and attempting to talk to the children while they were playing in a neighbor's yard, texting petitioner, and attending one child's track meet uninvited. The trial court wrote, "DENIED," across the signature line of the motions alleging violations for sending cards and driving past the house. At a June 16, 2017 hearing, respondent pleaded guilty to the two remaining allegations. The trial court found respondent in criminal contempt for two separate violations and sentenced him to 45 days in jail, but held the sentence in abeyance.

On June 14, 2017, petitioner filed another motion to show cause for violating the PPO, this time alleging that respondent called her three times between June 7, 2017 and June 8, 2017. According to petitioner, respondent called her twice on June 7, 2017, shortly before 11:00 a.m., and once on June 8, 2017, around 7:30 p.m. The trial court scheduled a hearing on the motion for June 30, 2017.

On June 22, 2017, petitioner filed another motion to show cause, alleging that respondent violated the first amended PPO on June 19, 2017, by driving past her house. The parties' two children were playing in a neighbor's yard across the street from their home when the youngest child saw respondent's car, saw it slow down, and saw respondent wave at her. The child then

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outstanding warrants. Upon inventorying respondent's car prior to impound, officers discovered a fix-blade knife with a blade approximately 4-inches long and a black duffle bag containing a collapsible metal baton, a black mask, a glove, a partial roll of duct tape, and a head lamp. Further investigation revealed several reports to the Royal Oak Police Department of domestic incidents, most recently on October 7, 2015, two recent alcohol-related driving offenses, and that respondent's parental rights had been suspended and/or modified and a related hearing was pending. In light of this information and the items found in respondent's car, officers contacted petitioner by telephone to conduct a welfare check on her and the children.

[3] The police report indicates that the children were at home, but Mary was not; she arrived at the home after officers had responded to the call.

ran home to tell petitioner what had happened. Petitioner called the police, and two responding officers interviewed her and the children. The trial court scheduled this motion for June 30, 2017, to be heard with the motions arising from respondent's telephone calls to petitioner. Respondent did not appear for the June 30, 2017 hearing, and the court issued a bench warrant for his arrest. Respondent was arrested, the trial court arraigned him on the bench warrant on July 11, 2017, and then adjourned the PPO hearing to July 13, 2017, upon respondent's request for a contested hearing.

At the July 13, 2017 hearing, respondent admitted to driving past petitioner's house, but argued that this conduct did not violate the PPO because he did not enter petitioner's property, contact her, or even come within her sight. The trial court disagreed, reasoning as follows:

> I believe that the PPO . . . prohibiting appearing at petitioner's residence, while [respondent] certainly did not go in the residence, I think the fact that he drove by the house knowing that it was the residence of the – it was the former marital home. So he obviously knew. It wasn't just an accident [that] he happened to [be] there. He knew that this was where petitioner resided, that he drove by the house; that in the words of the children that he slowed, that he waved, he started, and while the car didn't stop . . . he was about to stop, and I believe that the – certainly all of that combined, the evidence certainly constitutes appearing at petitioner's residence such [as] to constitute a violation of the PPO.

Following the July 13, 2017 hearing, the trial court issued four orders finding respondent in criminal contempt for multiple violations of the first amended PPO. The court issued the first and second orders pursuant to respondent's guilty plea on June 16, 2017, for attempting to text petitioner and attending a child's track meet uninvited, and sentenced respondent to serve 45 days in jail for each violation, the sentences to run concurrently. In the third order, the trial court found respondent in criminal contempt for two PPO violations arising from his attempts to call petitioner on June 7, 2017,[4] and sentenced respondent to 186 days in jail, with two days' credit, to be served consecutive to the sentences in the first two orders. Finally, in the fourth order, the trial court found respondent in criminal contempt for violating the PPO by driving past petitioner's house on June 19, 2017, and sentenced respondent to 93 days in jail, to be served consecutive to the 45-day sentences in the first two orders and the 186-day sentence in the third order. Thus, the trial court sentenced respondent to a total of 324 days in jail, with credit for two days served. On appeal, respondent challenges the trial court's consecutive sentencing and its ruling that driving past petitioner's house constituted a violation of the first amended PPO.

[4] The trial court determined that the call on June 8, 2017, did not violate the PPO because respondent made it during the time allowed for his telephonic parenting time.

II. ANALYSIS

As an initial matter, we note that the prosecution[5] agrees with respondent that the trial court erred by ordering his sentences for criminal contempt to run consecutively. "In Michigan, 'concurrent sentencing is the norm,' and 'a consecutive sentence may be imposed only if specifically authorized by statute.' " *People v Ryan*, 295 Mich App 388, 401; 819 NW2d 55 (2012), quoting *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). The prosecution concedes, and we agree, that there is no statutory authority for the imposition of consecutive sentences for the trial court's finding of criminal contempt based on the facts of the case at bar. Because of the trial court's error, respondent was sentenced to a total of 324 days in jail, with two days' credit. If respondent served all 324 days, or less, the end date of his sentence would have been on or around May 31, 2018. However, because respondent has already served his sentence, there is no relief that this Court can grant at this time. Therefore, the issue of the trial court's sentencing error is moot.[6] *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004) (indicating that an issue is moot when an event occurs that makes it impossible for the reviewing court to grant relief). A court will not decide moot issues where its judgment will have no practical legal effect. See *People v Smith*, 502 Mich 624, 631; 918 NW2d 718 (2018). Because further consideration of the trial court's sentencing error will have no effect on the sentence respondent has already served, we decline to address this issue further. See *id*. This leaves as the sole issue on appeal respondent's challenge to the trial court's ruling that he violated the PPO when he drove past petitioner's house on June 19, 2017.

Respondent contends that driving by petitioner's house did not violate the first amended PPO because his conduct did not constitute "appearing at" petitioner's residence. This Court reviews issues of statutory interpretation de novo, *People v Miller*, 498 Mich 13, 16-17; 869 NW2d 204 (2015), and a trial court's decision to issue a contempt order for an abuse of discretion, *Brandt v Brandt*, 250 Mich App 68, 73; 645 NW2d 327 (2002). We review a trial court's findings in a contempt proceeding for clear error, and affirm such findings if there is competent evidence to support them. *In re Kabanuk*, 295 Mich App 252, 256; 813 NW2d 348 (2012). Clear error exists when the reviewing court is left with a definite and firm conviction that an error occurred. See *In re Contempt of Henry*, 282 Mich App 656, 669; 765 NW2d 44 (2009). Criminal contempt requires the petitioner or prosecuting attorney to prove beyond a reasonable doubt that the alleged contemnor disobeyed or disregarded a court order. *DeGeorge v Warheit*, 276 Mich App 587, 591; 741 NW2d 384 (2007).

Paragraph 5, section (e) of the first amended PPO prohibits respondent from, among other things:

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[5] Although not listed as a party in this case, the Oakland County prosecutor's office filed an appellate brief on behalf of petitioner. It also filed a "confession of error" pursuant to MCR 7.211(C)(7). MCR 7.211(C)(7) requires the prosecutor in a criminal case to file a confession of error when the prosecutor agrees with the relief requested by a defendant in a criminal case.

[6] The exception to this general rule is that an issue is not moot "if it will continue to affect a party in some collateral way." *Cathey*, 261 Mich App at 510. Respondent has not indicated to this Court that the trial court's sentencing error will affect him in some collateral way.

stalking as defined under MCL 750.411h and MCL 750.411i[,] which includes but is not limited to:

> following petitioner . . . .[7]
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> sending mail or other communications to petitioner.
>
> approaching petitioner in a public place or on private property.
>
> entering onto or remaining on property owned, leased, or occupied by petitioner.
>
> placing an object on or delivering an object to property owned, leased, or occupied by petitioner.
>
> appearing at petitioner's workplace or residence.
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> contacting petitioner by telephone.[8]

The dispositive issue in the case at bar is whether respondent's driving by petitioner's house constitutes "appearing at petitioner's . . . residence." Respondent contends that it does not because he did not enter onto petitioner's property and petitioner did not see him. In other words, respondent implies that "appearing at" petitioner's residence necessarily requires an additional action, such as entering onto petitioner's property or being seen by petitioner. This argument is unavailing.

Neither MCL 750.411h nor MCL 750.411i define "appearing." If the Legislature has not defined a statutory term, courts give it its plain and ordinary meaning. See MCL 8.3a; *People v Lee*, 447 Mich 552, 557; 526 NW2d 882 (1994). Courts may use a dictionary to ascertain a word's common meaning. *People v Laidler*, 491 Mich 339, 347; 817 NW2d 517 (2012). Further, a court may consider a dictionary published at the time the statute was enacted to ascertain the meaning of a term. *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 247; 697 NW2d 130 (2005).

The Legislature added both MCL 750.411h and MCL 750.411i to the penal code in 1992. 1992 PA 261, Eff. Jan. 1, 1993. *Random House Webster College Dictionary* (1992), p 66, lists among the relevant meanings of "appear," "to come into sight; to become visible," "to come

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[7] The rest of this phrase is "or appearing within my sight." These words were marked through on the first amended PPO.

[8] Both MCL 750.411h(1)(d) and MCL 750.411i(1)(e) define "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." The seven activities that the first amended PPO specifically mentions appear in MCL 750.411h(1)(e) and MCL 750.411i(1)(f) as examples of "unconsented contact."

before the public," and "to put in an appearance; to show up." Given the testimony of respondent's youngest child that she saw respondent drive by her house, saw him slow down, and saw him wave at her, coupled with respondent's admission that he drove by petitioner's house, it seems beyond serious dispute that respondent "be[a]me visible" at, "put in an appearance" at, and "show[ed] up" at petitioner's house.

Furthermore, when interpreting statutes, courts "must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Miller*, 498 Mich at 25 (citation and quotation marks omitted). Were this Court to accept respondent's argument and interpret "appearing at petitioner's . . . residence," MCL 750.411h(1)(e)(*iii*), MCL 750.411i(1)(f)(*iii*), as requiring respondent to appear in petitioner's sight, to approach her, or to enter onto her property, that would render MCL 750.411h(1)(e)(*iii*) and MCL 750.411i(1)(f)(*iii*) "surplusage or nugatory," because other provisions of the statute already explicitly forbid such conduct. See MCL 750.411h(1)(e)(*i*)-(*ii*) and (*iv*); MCL 750.411i(1)(f)(*i*)-(*ii*) and (*iv*). We cannot ignore the well-established rules of statutory interpretation that forbid such a result.

It is undisputed that respondent drove past petitioner's house on June 19, 2017. He admitted doing so and his youngest daughter saw him clearly. Respondent was fully aware that there was a valid PPO in place. In fact, he had pleaded guilty to two different PPO violations just three days before the incident at issue. Respondent's argument that "appearing at" petitioner's residence requires something more than showing up or becoming visible at her residence contradicts both the plain meaning of the word "appear" and violates the principles of statutory construction used to give meaning to every word of the statutes at issue. In addition, to accept respondent's positon would essentially mean that respondent could repeatedly drive by petitioner's house or park across the street and peer into the house, as long as he did not enter onto her property or she did not see him. Such conduct would seem contrary to a PPO's purpose of balancing a petitioner's need for protection with a respondent's liberty interest. See, e.g., *IME v DBS*, 306 Mich App 426, 443-444; 857 NW2d 667 (2014) (discussing the balancing of interests that factors into a trial court's decision to grant a PPO).

In light of the record before us, we conclude that the trial court did not clearly err by finding that respondent knew about the PPO, knew that he was driving past petitioner's house, and did so intentionally. Competent evidence supports these findings. See *In re Kabanuk*, 295 Mich App at 256. Respondent's admission that he drove past petitioner's house shows beyond a reasonable doubt that respondent violated the provision in the first amended PPO prohibiting him from "appearing at petitioner's . . . residence." Thus, we conclude that under the facts of this case, the trial court did not abuse its discretion in issuing a contempt order. *Brandt v Brandt*, 250 Mich App at 73.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Jane M. Beckering