STATE OF MICHIGAN

COURT OF APPEALS

JAMES M. BERRYMAN,

Petitioner-Appellee,

v

WENDELL SHANE MACKEY,

Respondent-Appellant.

FOR PUBLICATION
March 12, 2019
9:10 a.m.

No. 340879
Lenawee Circuit Court
LC No. 17-044270-PH

Before: O'BRIEN, P.J., and JANSEN and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent appeals as of right a modified personal protection order (PPO) entered in favor of petitioner. For the reasons set forth in this opinion, we vacate the modified PPO.

I. FACTS AND PROCEDURAL HISTORY

This case arises from an acrimonious relationship between petitioner—the former mayor of Adrian, Michigan—and respondent. Respondent is active in publicly commenting on and writing about the political landscape in Adrian, and, at the time of the events giving rise to the PPO, he was a candidate for the Adrian City Commission. Over 30 years earlier, in 1986, respondent was convicted of breaking into petitioner's flower shop in Adrian and sentenced to 6½ to 10 years' imprisonment. In the spring of 2017, respondent began writing a series of articles on an online blog—exposingadrian.com—that were critical of the way Adrian public officials governed the city.

On July 6, 2017, petitioner petitioned the trial court for an ex parte PPO against respondent. According to petitioner, this filing was prompted by a verbal exchange between petitioner and respondent at a city commission meeting and a later email that respondent sent to city officials on July 5, 2017. The relevant verbal exchange took place at a public meeting of the Adrian City Commission on June 19, 2017, after respondent commented on issues before the commission during the public comment portion of the meeting. Petitioner initiated the following verbal exchange:

[*Petitioner*]. Mr. Mackey, let me just, while you're there, ask you, are you the same Shane Mackey that robbed my flower shop back in 1986?

[*Respondent*]. I certainly am.

[*Petitioner*]. Are you?

[*Respondent*]. Yes, I am.

[*Petitioner*]. Okay. And then you wonder why --

[*Respondent*]. I'm also the same Shane Mackey who you put in prison because you conspired with Judge Glaser as a young teenager for stealing teddy bears out of your store. And then I went to law school, and here I am.

[*Petitioner*]. Okay. I just wanted to make sure that you're the same one that spent time in prison for that.

[*Respondent*]. I'm sorry?

[*Petitioner*]. You make those kind of accusations towards this commission, and yet -- and yet, you took your time --

[*Respondent*]. I was 19 years old. I'm 51 now. What else you got?

[*Petitioner*]. Yeah.

[*Respondent*]. What else you got? Because you're already dirty, so go ahead and get it out there. Because you're already dirty in this selection process.

[*Petitioner*]. Because you're the one that continues to bring -- to bring up things about this city commission and --

[*Respondent*]. Such as, [s]uch as you're into the law [sic], such as your criminal college deal?

[*Petitioner*]. I just --

[*Respondent*]. Follow the law, that's all I'm asking for. Because I did enough time in jail because of you, sir, because you broke the law.

[*Petitioner*]. Because you broke -- [b]ecause you broke into my store.

[*Respondent*]. And the guidelines were probation, and I went to prison because you had talked to Judge Glaser, that's what happened. And that's why I went to law school, because of you, sir, because you're a corrupt, dirty, crooked politician. You're a career politician. And so I'm here, I'm going to be a thorn in your side, and I'm not going away.

> And quite frankly, let me just say this: I've invested quite a bit of money into this community. And do you know why people don't invest downtown? Because it only works for three groups of people: Westfalls, Hickmans and Kapnicks are the only ones getting money out of you guys. I would gladly invest downtown, but I can't. You know why? Because you're crooked. You're crooked.
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> The sales pitch you gave tonight, it was pathetic, it's disingenuous. You sat there for seven years, and oh, suddenly, it's all about safety and saving the babies from bricks falling out of the sky, isn't it? Quite frankly, when I talked to your counsel about liability, do you know what she said to me? We have insurance. You have insurance. So who cares at all?
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> Anything else? Any other questions?
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> [*Petitioner*]. No, you answered it.
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> [*Respondent*]. Thank you. Have a good night.

Following this exchange, respondent sent an email to the Adrian city attorney on July 5, 2017, criticizing petitioner and the city commission for not adhering to rules of parliamentary procedure during its meetings. Petitioner and other members of the city commission were copied on this correspondence.

On July 7, 2017, the trial court granted petitioner's July 6 request for an ex parte PPO against respondent. After the court issued the PPO, respondent sent an email to the Adrian city attorney and the Adrian chief of police on July 8, 2017, advising them of his political campaign schedule, and asking that petitioner be informed of the schedule so that the two would not cross paths.

Respondent also filed a motion to rescind the ex parte PPO. The judge who issued the ex parte PPO thereafter recused herself, and the State Court Administrative Office reassigned the matter to a judge from a neighboring county. Following a three-day evidentiary hearing, the trial court denied respondent's motion to rescind the PPO, but modified it. The modified PPO prohibited respondent from directly contacting or confronting petitioner, but otherwise permitted him to "confront [petitioner] in the context of public speech and/or debate" and allowed him to contact petitioner by phone, if necessary, as part of the "political process."

Respondent now appeals as of right, arguing that the trial court erred by refusing to rescind the PPO.

II. STANDARD OF REVIEW

Because a PPO is an injunctive order, a trial court's decision whether to rescind a PPO is reviewed for an abuse of discretion. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). The trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id*. "A trial court necessarily abuses its discretion when it makes an error of law." *Pirgu v United Services Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257

(2016). The trial court's findings of fact are reviewed for clear error. *Hayford*, 279 Mich App at 325. A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008).

III. ANALYSIS

Respondent argues that the trial court erred by entering a modified PPO rather than rescinding the PPO because his conduct did not meet the statutory requirements of MCL 750.411h. We agree.

The trial court's modified PPO was entered under MCL 600.2950a, which in pertinent part provides:

> (1) Except as provided in subsections (27), (28), and (30), by commencing an independent action to obtain relief under this section, by joining a claim to an action, or by filing a motion in an action in which the petitioner and the individual to be restrained or enjoined are parties, an individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin an individual from engaging in conduct that is prohibited under . . . MCL 750.411h, 750.411i, and 750.411s. A court shall not grant relief under this subsection unless the petition alleges facts that constitute stalking as defined in section 411h or 411i, or conduct that is prohibited under section 411s, of the Michigan penal code, 1931 PA 328, MCL 750.411h, 750.411i, and 750.411s.

An individual against whom an ex parte PPO has been entered may petition to rescind the PPO. See MCL 600.2950a(13) and (14).

The individual petitioning the trial court for a PPO "bears the burden of proof." *Lamkin v Engram*, 295 Mich App 701, 706; 815 NW2d 793 (2012). Because petitioner's petition for an ex parte PPO was based on MCL 750.411h, he was required to demonstrate that respondent's conduct amounted to stalking as defined by the statute. See *id*. In determining whether to issue a PPO, the trial court is not limited to the petition itself, but may consider additional testimony, documents, and "other evidence proffered to determine whether a respondent engaged in harassing conduct." *Id*., citing MCL 600.2950a.

MCL 750.411h(1) defines harassment and stalking in the following manner:

> (c) "Harassment" means 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. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.
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> (d) "Stalking" means 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) defines "course of conduct" and "unconsented contact" in the following manner:

> (a) "Course of conduct" means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose.
>
> * * *
>
> (e) "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. . . .

When the trial court here ruled to modify rather than rescind petitioner's PPO against respondent, it reasoned as follows:

> So this is certainly an unusual case . . . . Technically, very interesting. Personally, having been through a campaign, I understand both of your positions in this. However, that's not really kind of -- that's not my inquiry. My inquiry is whether or not there has been a pattern of behavior, communication, contact that a reasonable person would take as threatening.
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> So I do find that there's cause to maintain the personal protection order. I am, however, going to modify it.
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> Just to put it on the record, although the lengthy social media reporting posts about Mr. Berryman's political dealings and/or his history in the community may, in fact be a framework, I think, for how he may feel singled out, I've already stated, I believe on the record during prior testimony, that alone would not have been cause for me to issue a PPO. But I think that gets to a reasonable person question in whether or not [petitioner] personally felt threatened based on other actions.
>
> However, I do believe that the June [19th], I think is the date of the public meeting, whereby Mr. [Mackey] identified that Mr. Berryman was the reason, along with Judge Glaser, that he went to prison, and even subsequent in the commentary, that "I will remain a thorn in your side," I've already told you that that was the most concerning thing that I heard in terms of the statements made; and that, to me, I do believe was something that a reasonable person could feel threatened by.
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> Moving forward in a timeline, there were two other instances that caused me concern. While I would agree, Mr. Mackey, that the e-mail from July [5th] was tedious in its analysis of Robert's Rules of Order, I do, in my review of that email, would note that all of the criticism about the misappropriation or misuse of the parliamentary procedure was identified as Mr. Berryman's fault. So I do also

> feel that in conjunction with the statements at the meeting from June [19th], that that e-mail would continue or perpetuate Mayor Berryman's concern about personal matters being transcended from the political stage. So I do think that [that] is also a further indication close in time that there was behavior that Mr. Berryman could have felt threatened by.
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> And then we get into what -- This is a little bit without statutory analysis. But the July 8th e-mail is equally or more concerning to the Court. It has not been brought to my attention, or there's been no request to have that be a violation of a personal protection order, an order to show cause why you should not be held in contempt for violating a PPO, but the content of that July 8th e-mail is actually more concerning to me than the content of the July [5th] e-mail. But taken in conjunction with the statements made on June [19th], I do find that Mr. Berryman has a legitimate cause for concern.
>
> So based on those instances, I am maintaining this personal protection order. I am modifying it accordingly. I'm actually not reading from the first one, so I'm just going to state, in a way, that I've modified it, [in a way] that I believe would accomplish your political candidacy.

In arguing that the trial court should have rescinded the PPO, respondent focuses on whether the evidence supports that he engaged in conduct prohibited by MCL 750.411h, thereby justifying the PPO. Respondent challenges the trial court's conclusion that he engaged in "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts," MCL 750.411h(1)(a) (defining "course of conduct), that "would cause a reasonable individual to suffer emotional distress," MCL 750.411h(1)(c) (defining "harassment"), and therefore stalked petitioner under MCL 750.411h(1)(d). He contends that he did not stalk petitioner by (1) responding to petitioner's questioning during the June 19, 2017 city commission meeting, and (2) sending emails (a) to the city commission on July 5, 2017, discussing the commission's apparent lack of compliance with rules of parliamentary procedure, and (b) to the city attorney and chief of police on July 8, 2017, to inform them about respondent's political campaign schedule.[1]

First addressing the contact at the June 19, 2017 meeting, the trial court never found that respondent and petitioner's exchange constituted "unconsented contact" under MCL 750.411h(1)(e). See MCL 750.411h(1)(c) (defining "harassment" as including "repeated or continuing unconsented contact"). And it is difficult to see how this contact could be

[1] We note that MCL 600.2950a states that "[a] court shall not grant relief under this subsection unless *the petition* alleges facts that constitute stalking as defined in [MCL 750.411h]," (emphasis added), and that the July 8 email was sent *after* the petition was filed and was thus not alleged in the petition. Nonetheless, for purposes of this appeal, we will assume without deciding that the July 8 email could constitute harassment under MCL 750.411h(1)(c) so as to support a finding of stalking under MCL 750.411h(1)(d) and satisfy the requirements of MCL 600.2950a.

unconsented. The June 19 meeting was open to the public and included a portion for public comment. Petitioner, as a public official, was at the meeting in an official capacity. Respondent, as a member of the community, gave public comment at the meeting. Respondent's comments may have been critical of petitioner in his official capacity, but no one contends that they were inappropriate or otherwise constituted unconsented contact. The only possible unconsented contact came after respondent was done giving his comment. But this contact was precipitated by *petitioner* asking respondent to answer questions unrelated to the public meeting or other official business. While respondent's response to petitioner may have been, as petitioner worded it, "unnerving," that does not make the contact unconsented. "Unconsented contact" means "any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued." MCL 750.411h(1)(e). The June 19 contact was not "initiated" by respondent. Nor was the contact continued without petitioner's consent. Petitioner had numerous opportunities to end the contact after he asked his question and got his answer. Indeed, when respondent twice asked, "What else you got?" petitioner continued conversing with respondent and never indicated that he wished for the contact to end. It was not until respondent asked petitioner a third time if he had any other questions that petitioner said, "No," at which point the contact ended. For similar reasons, respondent's contact with petitioner was not continued "in disregard of [petitioner's] expressed desire that the contact be avoided or discontinued." Petitioner initiated the contact and never expressed a desire for the contact to be discontinued during the course of the contact. When petitioner ultimately did state that he had no further questions, the contact ended. Simply put, respondent's response to petitioner's question at the June 19, 2017 public meeting could not constitute "unconsented contact" under MCL 750.411h(1)(e).

Yet harassment is not limited to unconsented contact. See MCL 750.411h(c) (defining "harassment" as "conduct directed toward a victim that includes, but is not limited to . . . unconsented contact"). The trial court reasoned that respondent's remarks at the June 19 meeting constituted harassment because they were "something that a reasonable person could feel threatened by." The trial court was particularly concerned with respondent's statement that petitioner "was the reason . . . that he went to prison," as well as respondent's comment, "I'm going to be a thorn in your side[.]"

But the court's discussion of these statements does not consider the surrounding context in which they were made. Respondent was sentenced in 1986 to a maximum of 10 years' imprisonment. Since his release, respondent never contacted petitioner or otherwise acted inappropriately towards him. In fact, the first contact between respondent and petitioner was at the June 19 meeting and, again, that contact was initiated by petitioner. Thus, it is difficult to understand how respondent blaming petitioner for going to prison was threatening; petitioner first became aware that respondent blamed him for going to prison *over 30 years after* respondent was sentenced, and in that time, respondent never contacted or otherwise confronted petitioner, and the first time that they spoke was when *petitioner* confronted respondent at a public meeting. In this context, namely that respondent never contacted petitioner in the 30 years since he was sentenced to prison and that the first and only contact between them was initiated by petitioner, we cannot agree that a reasonable person could feel threatened by respondent's conduct, or that the conduct otherwise amounted to harassment under MCL 750.411h(1)(c).

Similarly, in context, respondent's comment that he was going to be a thorn in petitioner's side would not make a reasonable person feel threatened, and would not otherwise constitute harassment. While, in the months before this exchange, respondent had been critical of petitioner's conduct, respondent's comments always focused on petitioner's actions in his official capacity as mayor. As for the remark at the meeting, it was immediately preceded by respondent's criticism of petitioner's conduct as a public servant and politician, and followed by respondent expressing his opinion of the effect of petitioner's public conduct on the local community. Thus, taken in context, respondent's remark was not threatening, but instead conveyed respondent's intent to remain vigilant in his scrutiny of petitioner's public conduct.

In sum, because the trial court did not consider in context respondent's comments about blaming petitioner for going to prison and being a thorn in petitioner's side, we are definitely and firmly convinced that the trial court made a mistake by finding that the comments would make a reasonable person feel threatened or otherwise suffer emotional distress. We therefore conclude that the exchange at the June 19 meeting is not the type of conduct that constitutes harassment, and thus could not support a finding of stalking. See MCL 750.411h(1)(c) and (d).

As for the emails, the trial court referenced two: one sent on July 5, and the other on July 8. But the trial court's factual findings about these emails were minimal. Significantly, the trial court never explained why the July 8 email constituted harassment. Rather, the trial court merely concluded that the email was "concerning." Assuming that "concerning" conduct is equivalent to harassment, it is unclear what about the email was concerning. The email was sent to the Adrian city attorney and the Adrian chief of police the day after the ex parte PPO was issued. In the email, respondent explained that he assumed that the PPO was issued to petitioner in his official capacity as mayor, and that the city attorney was therefore petitioner's legal counsel. The email was clear that it was being sent because respondent was also running a political campaign, and respondent wanted to make petitioner, in his official capacity, aware of respondent's campaign itinerary so that they would not appear at the same events. There was nothing about the email that "would cause a reasonable individual to suffer emotional distress" thereby constituting harassment. MCL 750.411h(1)(c). The email was sent so that respondent could *avoid* contact with petitioner, and it did not otherwise contain anything that would make a reasonable person feel threatened or suffer emotional distress. Thus, we are definitely and firmly convinced that the trial court made a mistake by finding that the July 8 email was conduct constituting harassment, and therefore it was not conduct that could support a finding of stalking. See MCL 750.411h(1)(c) or (d).

Turning to the July 5 email, the trial court concluded that petitioner "could have felt threatened" by the email because it was direct in blaming petitioner for deviations from parliamentary procedures at city commission meetings and the email "perpetuate[d] [petitioner's] concern about personal matters being transcended from the political stage." But nothing in the July 5 email concerned "personal matters." The email was sent to the Adrian city attorney and the entire city commission. The email explained that it was sent in response to petitioner's representation about which set of parliamentary rules that the city commission followed, and that the procedures used during the meetings were sanctioned by the city attorney. The email then focused on instances where the commission violated the rules of parliamentary procedures that it supposedly followed. While the email was direct in its criticisms of petitioner, the email focused exclusively on petitioner's role as the presiding officer at city commission meetings. The email

outlined the parliamentary rules that meetings were supposed to follow, and then gave examples of when petitioner deviated from those rules and the effects that those deviations had. But the email also pointed to an instance where the entire city commission deviated from the rules, and the effect that this deviation had. While the email was lengthy, there was nothing inappropriate about it. A member of the public can undoubtedly express concerns about the manner in which public meetings are held, and that was all that this email did. While respondent's criticisms of petitioner were pointed, they focused on technical breaches of the rules of parliamentary procedure and petitioner's role in those breaches in his official capacity as chair of city commission meetings. In light of the content of the July 5 email, even if it was motivated by "personal matters being transcended form the political stage," we are definitely and firmly convinced that the trial court made a mistake by finding that respondent's criticisms of petitioner's deviations from the rules of parliamentary procedures would cause a reasonable person to suffer emotional distress. Thus, the July 5 email was not conduct that amounted to harassment, and could not support a finding of stalking. See MCL 750.411h(1)(c) and (d).

In sum, the trial court found three instances of respondent's conduct that it concluded amounted to stalking, but for the reasons explained, none of that conduct was the type of conduct that constitutes harassment under MCL 750.411h(c). Thus, there was no evidence of harassment under MCL 750.411h(1)(c), nor evidence that respondent engaged in a "course of conduct," see MCL 750.411h(1)(a), "involving repeated or continuing harassment," MCL 750.411h(1)(d), so respondent could not have stalked petitioner under MCL 750.411h. And because there was insufficient evidence to conclude that respondent stalked petitioner, the trial court erred as a matter of law by not rescinding the PPO. See MCL 600.2950a; *Lamkin*, 295 Mich App at 706 (explaining that the petitioner is required to demonstrate that the respondent's conduct amounted to stalking under MCL 750.411h). Thus, the trial court necessarily abused its discretion by not rescinding the PPO. *Pirgu*, 499 Mich at 274.

Given our disposition of respondent's initial issue on appeal, it is unnecessary to address respondent's additional claims that entry of the modified PPO violated his constitutional rights. The "widely accepted and venerable rule of constitutional avoidance counsels that [this Court] first consider whether statutory or general law concepts are instead dispositive." *Dep't of Health & Human Servs v Genesee Circuit Judge*, 318 Mich App 395, 407; 899 NW2d 57 (2016).

The trial court's modified PPO is vacated.

/s/ Colleen A. O'Brien
/s/ Kathleen Jansen
/s/ Amy Ronayne Krause