No. 46884-1-II
(47110-8-II)
Thurston County Superior Court No. 12-2-30114-7

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

BETH RENEE RIETEMA, Respondent,

v.

DEAN ERVIN PHILLIPS, Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR THURSTON COUNTY
FAMILY AND JUVENILE COURT

The Honorable Christopher Wickham, Judge

RESPONSE BRIEF

KATE M. FORREST
Attorney for Respondent
Pioneer Building Suite 106
600 First Avenue
Seattle, WA 98104
(206) 973-7953

TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

ARGUMENT

I. DIRECT APPEAL

A. STANDARD OF REVIEW FOR DOMESTIC VIOLENCE PROTECTION ORDER IS ABUSE OF DISCRETION.....3

B. THE COURT DID NOT ABUSE ITS DISCRETION IN AFFIRMING THE RENEWAL OF THE LONG-TERM DOMESTIC VIOLENCE PROTECTION ORDER.....5

C. COMPLETION OF DOMESTIC VIOLENCE TREATMENT IS NOT DISPOSITIVE AS TO THE PERPETRATOR'S LIKELIHOOD OF RESUMING ACTS OF VIOLENCE.....7

D. REMAINING ASSIGNMENTS OF ERROR (#1, 2, 3, AND 4) ARE NOT PROPERLY BEFORE THIS COURT.....11

II. PERSONAL RESTRAINT PETITION

A. A PERSONAL RESTRAINT PETITION IS NOT AN APPROPRIATE COLLATERAL ATTACK ON A CIVIL PROTECTION ORDER.....12

B. IF CONSIDERED, THE STANDARD OF REVIEW FOR THE PERSONAL RESTRAINT PETITION IS VIOLATION OF LAW OR CONSTITUTION.....13

C. NEITHER THE DOMESTIC VIOLENCE PROTECTION ACT NOR THE RESULTING PROTECTION ORDER IN THIS CASE IS UNCONSTITUTIONALLY VAGUE.....15

D. THE RESTRAINTS AGAINST PHILLIPS DO NOT INFRINGE ON PROTECTED SPEECH.....19

E. RESTRAINTS WERE REASONABLY IMPOSED WITH DUE PROCESS TO ADVANCE A VALID STATE INTEREST IN PROTECTING OF VICTIMS OF DOMESTIC VIOLENCE.....24

III. ATTORNEY FEES

A. THE COURT DID NOT ERR IN AWARDING FEES AND COSTS UPON DENIAL OF THE MOTION FOR REVISION.....26

B. FEES SHOULD BE AWARDED TO RESPONDENT ON APPEAL.....26

CONCLUSION.....27

TABLE OF AUTHORITIES

CASES

Barber v. Barber 136 Wn. App. 512, 516, 150 P.3d 124 (2007).....6

Cantwell v. Connecticut, 310 U.S 296, 309-310 (1940).....20

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942).....20

City of Seattle v Eze, 111 Wn.2d 22, 26, 759 P2d 366 (1988).....16, 17

Connally v. General Construction Co., 269 U.S. 385, 391 (1926).....16

Dickson v Dickson, 12 Wn.App. 183, 529 P.2d 476 (1974), review denied, 85 Wn.2d 1003, cert denied, 423 U.S. 832 (1975).....22, 23

In re Marriage of Foley, 84 Wn.App. 839, 847, 930 P.2d 929 (1997).....27

In re Marriage of Freeman, 169 Wn.2d 664, 671, 239 P.3d 557 (2010).....4

In re Marriage of Spreen, 107 Wn.App. 341, 346, 28 P.3d 769 (2001).....4

In re Marriage of Thomas, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991).....4

In re Marriage of Wherley, 34 Wn. App. 344,349, 61 P.2d 155, review denied, 100 Wn.2d 1013 (1983).....27

In re Marriage of Wicklund, 84 Wn.App. 763, 770 footnote 1, 932 P.2d 652 1996).....4, 6

In re Pers. Restraint of Arseneau, 98 Wn. App. 368, 989 P.2d 1197 (1999).....21

In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).....14

In re Pers. Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086, cert denied, 506 U.S. 958 (1992).....15

In re Pers. Restraint of Williams, 111 Wn.2d 353, 364-5, 759 P.2d 436 (1988).....15

Muma v. Muma, 115 Wn. App. 1, 6-7, 60 P.3d 592 (2002).....6

Snyder v. Haynes, 152 Wn.App. 774, 779, 217 P.3d 787 (2009).....10

Spence v. Kaminski, 103 Wn. App. 325, 334, 12 P.3d 1030 (2000).....6

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).....4

State v. Dejarlais, 136 Wn.2d 939, 944, 969 P.2d 90 (1998).....25

State ex rel. J.V.G. v. Van Guilder, 137 Wn.App. 417, 423, 154 P.3d 243 (2007).....6

State v. Karas, 108 Wn.App. 692, 32 P.3d 1016 (2001).....24, 25

State v. Hoffman, 115 Wn. App. 91, 101, 60 P.3d 1261 (2003).....12

State v. Ramer, 151 Wn.2d 106, 113, 86 P.3d 132 (2004).....12

State v. Rundquist, 79 Wn.App. 786, 793, 905 P.2d 922 (1995).....4

Weiss v. Glemp, 127 Wn.2d 726, 730, 903 P.2d 455 (1995).....7

STATUTES

RCW Chapter 26.50.....17, 24
RCW 26.50.060.....5, 6, 16, 26
RCW 26.50.150.....8

COURT RULES

Rule of Appellate Procedure 2.4.....11
Rule of Appellate Procedure 16.4.....12, 13, 14
Rule of Appellate Procedure 16.7.....14
Rule of Appellate Procedure 18.1.....26
Rule of Appellate Procedure 18.9.....26

COURT PUBLICATIONS

DV Manual for Judges, Washington State Administrative Office of the Courts (2006).....9, 15-16, 22

OTHER AUTHORITIES

Washington Appellate Practice Deskbook (3d ed.), Washington State Bar Association (2005).....12

STATEMENT OF THE CASE

Respondent Rietema was first granted a Domestic Violence Protection Order ("DVPO") against Appellant Phillips on March 2, 2012. Clerk's Papers ("CP") at pp18-22. In her petition for this original order, Rietema described in her sworn declaration the violence Phillips perpetrated against her during their marriage, including an incident in which he "pushed [her] out of bed and onto the floor…restrained [her] by sitting on top of [her] and restraining/pinning [her] wrists to the bed," and "later attempted to drag [her] out of [her] daughter's room by [her] ankles and he urinated on [her] at approx. 2 am that next morning." CP at p8.

After the parties' marriage was dissolved, Phillips violated the DVPO, posting vulgar and defamatory posters throughout Tumwater, including Rietema's place of employment and her daughter's bus stop. Report of Proceedings ("RP") for 9/12/14 at p7. Police investigated, and Phillips pled guilty to violating the DVPO. See Exhibits A and D of Appellant's consolidated Personal Restraint Petition ("PRP"). Later in 2012, a second round of fliers appeared. RP for 9/12/14 at p9, CP at pp361-362, and Exhibit C of PRP.

The DVPO was renewed in 2013, CP at p30, and prior to its expiration, Rietema filed a Petition for Renewal in which she indicated that Phillips had violated the order and that she had a present, ongoing fear of Phillips. CP at p31-33. She gave supporting testimony for these statements before Commissioner Lack on September 12, 2014, RP for 9/12/14 at pp6-12, and Phillips testified in opposition to the renewal with the assistance of counsel, RP for 9/12/14 pp14-19. The renewal was granted, with the court finding:

> [T]he significance of the violations of the protective order after they were issued is so severe that I do believe that Ms. Rietema has an ongoing fear that Mr. Phillips has not proven that there is a likelihood of non-recurrence. I am very concerned that there is a potential for recurrence based on the testimony that I have heard today, and I am going to reissue the order. RP for 9/12/14 at p25.

Phillips filed a Motion for Revision of the commissioner's order, CP at p88, and the ruling was affirmed on October 17, 2014, CP at pp112-113. The Judge told Phillips:

> The burden was on you to prove that you successfully completed treatment. You didn't carry that burden.
>
> There is also the issue of the flyers which would create concern in many people that you still had a motive to carry out further acts of domestic violence. I don't know if that's true or not, but, again, the burden was on you to show that it's more likely than not that you weren't going to do that. You didn't carry that burden, so I think the Commissioner got the right result. RP for 10/17/14 at pp13-14.

Phillips filed a timely appeal, but failed to present any valid argument for reversal. Rietema filed a Motion on the Merits on March 2, 2015 requesting that the Superior Court ruling be upheld, which was held pending Phillips curing defects in his appellant's brief. Letter from Court Clerk David C. Ponzoha dated March 31, 2015. The PRP concurrently filed by Phillips was then consolidated with this appeal by Commissioner Bearse on April 22, 2015.

Phillips' PRP was filed against the government; however, the consolidation of these cases and the fact that there has been no appearance on behalf of the government compels Rietema to respond to all claims now included with the direct appeal to ensure the full defense of her DVPO. Any argument regarding Phillips' criminal record is beyond the scope of Rietema's standing in this case as the protected party under the DVPO, and is therefore not addressed in this brief.

ARGUMENT

I. DIRECT APPEAL

A. STANDARD OF REVIEW FOR DOMESTIC VIOLENCE PROTECTION ORDER IS ABUSE OF DISCRETION

Whether to grant, modify, or terminate a protection order is a matter of judicial discretion. In re Marriage of Freeman, 169 Wn.2d 664, 671, 239 P.3d 557 (2010).

> Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Id. at 671, quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A court's decision is based on untenable grounds or reasons "if its factual findings are unsupported by the record." In re Marriage of Wicklund, 84 Wn.App. 763, 770 fn 1, 932 P.2d 652 (1996), citing State v. Rundquist, 79 Wn.App. 786, 905 P.2d 922 (1995). A trial court's factual findings are accepted on appeal if "supported by substantial evidence in the record." In re Marriage of Thomas, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991). Evidence is substantial if it would "persuade a fair-minded, rational person of the truth of that determination." In re Marriage of Spreen, 107 Wn.App. 341, 346, 28 P.3d 769 (2001). A court is not unreasonable in its discretion so long as its decision is not "outside the range of acceptable choices given the facts and the legal standard." Wicklund, supra, at fn1.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN AFFIRMING THE RENEWAL OF THE LONG-TERM DOMESTIC VIOLENCE PROTECTION ORDER

RCW 26.50.060(3) directs that a court "shall grant the petition for renewal unless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of domestic violence" if the order is allowed to expire. Commissioner Lack carefully considered the testimony of both parties and made a balanced and well-reasoned analysis:

> So I do appreciate that Mr. Phillips has essentially completed a domestic violence batterer's intervention program. It appears that he has taken that requirement seriously and he has completed it and he has learned some things from it. The dilemma that I have in this matter is that Mr. Phillips' current position is still a little bit self-centered. The explanation for these quite horrific flyers is not I've learned from my batterer's intervention program and these are horrible things to do and I can't believe I did them and they would never happen again. His explanation is that I posted them and I didn't really know that that's where she worked, which shows a lack of insight. RP for 9/12/14 at p23-24.

The court was aware of the burden shifting to the respondent upon petition for renewal, and was not persuaded:

> I do know that in the last we will call it 18 months or almost two years I guess really at this point that Mr. Phillips essentially has been in compliance with the order, but the significance of the violations of the protective order after they were issued is so severe that I do believe that Ms. Rietema has an ongoing fear that Mr. Phillips has not proven that there is a likelihood of non-recurrence. I am very concerned that there is a potential for recurrence based on the

> testimony that I have heard today, and I am going to reissue the order. RP for 9/12/14 at p25.

The Court of Appeals has consistently held that a present fear of harm based on past violence or threats is the correct standard for issuance or renewal of DVPO. Spence v. Kaminski, 103 Wn. App. 325, 334, 12 P.3d 1030 (2000); Muma v. Muma, 115 Wn. App. 1, 6-7, 60 P.3d 592 (2002); Barber v. Barber 136 Wn. App. 512, 516, 150 P.3d 124 (2007). When Judge Wickham ruled that "the Commissioner got the right result," RP for 10/17/14 at p14, the court adopted these findings as its own. State ex rel. J.V.G. v. Van Guilder, 137 Wn.App. 417, 423, 154 P.3d 243 (2007).

Upon finding that renewal is appropriate, "The court may renew the protection order for another fixed time period or may enter a permanent order." RCW 26.50.060(3). Because the commissioner found the flyer posted at the child's bus stop "exponentially concerning," RP for 9/12/14 at p25, extending the order until Rietema's youngest child finishes high school was within "the range of acceptable choices given the facts and the legal standard." In re Marriage of Wicklund, supra, 84 Wn.App. at 770 footnote 1.

C. COMPLETION OF DOMESTIC VIOLENCE TREATMENT IS NOT DISPOSITIVE AS TO THE PERPETRATOR'S LIKELIHOOD OF RESUMING ACTS OF VIOLENCE

Phillips alleges that on revision, the court erred in renewing the DVPO because he focused on the absence of proof of his completion of treatment, which Phillips provides in Exhibit L of his PRP. However, nowhere in the statute is it stated or even implied that completing treatment creates a presumption that a perpetrator will not resume acts of domestic violence. Judge Wickham's statement that there was a burden on Phillips to prove that he successfully completed treatment, RP for 10/17/14 at p13, even if incorrect, does not undermine the ultimate determination. "An appellate court can sustain a trial court judgment on any theory established by the pleadings and proof, even if the trial court did not consider it." Weiss v. Glemp, 127 Wn.2d 726, 730, 903 P.2d 455 (1995). Judge Wickham went on to cite the flyers as weighing against Phillips' claims that he does not pose an ongoing risk (Id. at p14), which, along with Rietema's testimony, provided sufficient independent grounds for finding Phillips did not meet the burden that is set forth in the statute.

In the portion of his PRP titled "2nd Ground for Relief" Phillips argues that the court erred in its belief that there was a requirement of a certificate, citing WAC 388-60-0275 for the assertion that no certificate was required. However, it was not the absence of a certificate that concerned the court, but rather the apparent lack of insight gained as to the wrongful nature of his behavior. (See RP for 9/12/14 at p23-24, quoted above.)

RCW 26.50.150(4) requires that in addition to ending violence, treatment must focus on "holding the perpetrator accountable…and changing his or her behavior," and "must be based on nonvictim-blaming strategies." Additionally, his Domestic Violence Compliance Report contains this statement: "If client uses the techniques learned in group he/she should remain safe." Exhibit L to PRP. Phillips demonstrated repeatedly in court testimony and in his written submissions that he has not retained any lessons that would have been imparted by successful treatment.

At times he refuses to accept any responsibility for his behavior. For example, in his declaration in response to Rietema's petition for renewal, Phillips claimed that his actions "that evening were out of character and likely influenced by blood sugar issues

complicated by extreme stress from emotional abuse." CP at p90. More often he blames the victim, stating in oral argument, "I was treated very poorly by her and that was what caused these flyers to be put out there." RP for 10/17/14 at p5. Most disturbing and antithetical to accountability is his denial of the original violence. Phillips claims, "the only evidence Ms. Rietema has is her testimony of that 'brutal' evening, as she calls it but has no evidence to support this supposed brutality" and that he "had committed no acts of violence to begin with." Brief of Appellant at pp7-8.

Whether or not Phillips completed the treatment required by the criminal court is ultimately irrelevant to the question the Superior Court was charged with answering, which was whether Phillips had demonstrated by a preponderance of the evidence that he would not resume acts of domestic violence if the order expired.

> Research indicates that batterers change due to a series of experiences that communicate that they are both responsible for their abusive conduct and for changing that behavior. It is not treatment alone that is changing batterers, but treatment embedded in a system of accountability that includes law enforcement, criminal prosecution, adjudicated sanctions, and close court monitoring by a system such as probation for criminal court issues or by a court review process for civil court issues. DV Manual for Judges, Washington State Administrative Office of the Courts (2006), at Appendix A-2.

Neither the commissioner nor the judge, charged with maintaining the integrity of this system of accountability, found Phillips' arguments compelling. The appellate court must "defer to the trial court's determinations on the persuasiveness of the evidence, witness credibility, and conflicting testimony." Snyder v. Haynes, 152 Wn.App. 774, 779, 217 P.3d 787 (2009).

If there were any room for doubt as to the reasonableness of the conclusions coming from the commissioner and judge of the superior court, Phillips' opening brief in the direct appeal and his PRP remove that doubt. Phillips repeatedly asserts that his actions were justified and again attempts to shift blame to Rietema. He states that he believes the DVPO "is a vendetta, another form of punishment she can continue to inflict upon me, her way of maintaining a modicum of control, as those who emotionally abuse are known to do." Brief of Appellant at p16. He disclaims the impact of his behavior on his victim, stating that it is "unreasonable to make me responsible for her irrational emotional state," Id. at p22. He goes on to make himself out to be the aggrieved party, stating, "I should be released from the constraints of the OP because I have done everything the court has ordered me to do even though, I believe, I have done nothing wrong. I have done

nothing to hurt anyone." PRP at p3. The perpetrator's belief that he has a right to engage in the behavior at issue certainly provides a tenable reason for the court to believe he may resume this behavior if the order is lifted, which is all that is required for renewal.

D. REMAINING ASSIGNMENTS OF ERROR (#1, 2, 3, AND 4) ARE NOT PROPERLY BEFORE THIS COURT

Washington State Rule of Appellate Procedure ("RAP") 2.4 limits the scope of review on appeal to the trial court decision designated in the notice of appeal except in narrow circumstances. Phillips sought appeal of the order issued in Thurston County Superior Court Case #12-2-30114-7, which denied his motion for revision and affirmed the long-term renewal of Rietema's DVPO. In his opening brief, Phillips attempts to seek relief regarding the criminal case against him for violating the underlying order. The alleged errors include entering his guilty plea, conducting an unlawful search, and mistreating him in jail. Each of these issues exceeds the scope of review of the case currently before this court. To the extent they also appear in the consolidated PRP, they do not impact the DVPO and therefore Rietema declines to brief these issues.

Appellant additionally assigns error to Commissioner Lack's initial order under the present cause number, of which he sought revision before Judge Wickham, whose resulting ruling is being appealed. "Once the superior court makes a decision on revision, the appeal is from the superior court's decision, not the commissioner's." State v. Ramer, 151 Wn.2d 106, 113, 86 P.3d 132 (2004), citing State v. Hoffman, 115 Wn. App. 91, 101, 60 P.3d 1261 (2003). Therefore, this assignment of error must also be disregarded.

II. PERSONAL RESTRAINT PETITION

A. A PERSONAL RESTRAINT PETITION IS NOT AN APPROPRIATE COLLATERAL ATTACK ON A CIVIL PROTECTION ORDER

Relief by means of a personal restraint petition will only be granted "if other remedies which may be available to petitioner are inadequate under the circumstances." RAP 16.4(d).

> This simply reflects the personal restraint petition's status as an extraordinary remedy, and means that if a remedy at law --such as a timely appeal of a judgment--is available, a personal restraint petition cannot be employed. Washington Appellate Practice Deskbook (3d ed.), Washington State Bar Association (2005).

Phillips' provides no argument as to why his direct appeal, seeking the same relief from the DVPO as he seeks in the PRP, is an

inadequate remedy under the circumstances. Absent any factual or legal grounds to invoke the extraordinary remedy of the PRP, the petition should be dismissed to the extent it concerns the provisions of Rietema's DVPO.

B. IF CONSIDERED, THE STANDARD OF REVIEW FOR THE PERSONAL RESTRAINT PETITION IS VIOLATION OF LAW OR CONSTITUTION

If this court is inclined to reach the merits of Phillips' PRP as it pertains to the DVPO, his claim still fails to warrant relief. Phillips asserts he is under a "restraint" because he has "limited freedom because of a court decision," RAP 16.4(b). Although he does not specifically define the restraint, it can be gleaned from his testimony and argument in the lower courts and his asserted grounds for relief on appeal that the restraints are twofold: physical restraints, in that he is prohibited from being in proximity of Rietema, her residence and workplace, and the children's schools, and restraints on speech, in that he is prohibited from contacting Rietema or otherwise engaging with her in any manner proscribed by the DVPO, including indirect contact such as the flyers at issue.

To seek relief from either of these restraints, RAP 16.7(2)(ii) requires that the PRP state "why the petitioner's restraint is

unlawful for one or more of the reasons specified in rule 16.4(c)." Two of the three subsections Phillips cites are inapplicable to the discussion of the DVPO: RAP16.4(c)(1) addresses an order having been entered without proper jurisdiction, which Phillips does not and cannot reasonably allege, and RAP 16.4(c)(2) is limited to proceedings "instituted by the state or local government," which does not apply to the petition for renewal of the DVPO initiated by Rietema herself.

The remaining provision citied by Phillips, RAP 16.4(c)(6), that "conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington," has a high threshold showing:

> [T]he appellate court will reach the merits of a constitutional issue when the petitioner demonstrates that the alleged error gives rise to actual prejudice, and will reach the merits of a nonconstitutional issue when the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

The petition must cite "the facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations," RAP 16.7(2)(i), and must not rely on "bald assertions and conclusory allegations." In re Pers. Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086, cert denied, 506 U.S.

958 (1992). "[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." In re Pers. Restraint of Williams, 111 Wn.2d 353, 364-5, 759 P.2d 436 (1988) (internal citations omitted). Phillips makes sweeping declarations of assaults on his liberty but provides no legal support on which the relief he seeks could reasonably be based.

C. NEITHER THE DOMESTIC VIOLENCE PROTECTION ACT NOR THE RESULTING PROTECTION ORDER IN THIS CASE IS UNCONSTITUTIONALLY VAGUE

Phillips asserts that the DVPO is a "vague document that has been used against me in an arbitrary and capricious manner." PRP at p8. The occasions Phillips references are his violation of the DVPO for posting flyers at Rietema's workplace in June 2012 and the search of his home in December 2012. As Rietema lacks both standing and interest in defending the government's actions in a search that is unconnected with the reissuance of her DVPO, only the first claim will be addressed here.

The DVPO in this case was issued on the state's mandatory form, which is intentional:

> USE OF MANDATORY FORMS ENSURES THAT THE ORDERS WILL BE ENFORCEABLE. All courts should use the approved Washington state forms as those forms have been drafted to meet all state and federal requirements

> regarding domestic violence cases. The Order for Protection, WPF DV 3.015, is a mandatory form. Law enforcement officers, judicial and criminal information gathering agencies, and other courts are familiar with and rely upon those forms. DV Manual for Judges at 8-3.

In granting such an order, the court may "[e]xclude the respondent…from the residence, workplace, or school of the petitioner," RCW 26.50.060(1)(b), and "[p]rohibit the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location," RCW 26.50.060(1)(c). The DVPO in this case did exclude Phillips from Rietema's residence and workplace and prohibited him from knowingly coming within or remaining within 500 feet of either. CP at p19. Because the DVPO mirrors the statute and uses the same language, we can employ the same legal analysis to the order as we do to the law that provides for it.

It has long been established that a law is vague if persons of "common intelligence must necessarily guess as at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). "The vagueness doctrine serves two important purposes: to provide fair notice to citizens as to what conduct is proscribed and to protect against arbitrary enforcement of the laws." City of Seattle v Eze, 111 Wn.2d 22, 26, 759 P2d 366

(1988). Phillips argues vagueness because Rietema had multiple work locations and he "was not notified of all the places of work to be avoided," Brief of Appellant at p5, but cites no authority for "workplace" being necessarily singular and not including all locations where a protected person works. To the contrary,

> …a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct… "if men of ordinary intelligence can understand a penal statute, notwithstanding some possible areas of disagreement, it is not wanting in certainty." City of Seattle v. Eze, supra, 111 Wn.2d at 27 (internal citations omitted).

Within the context of an RCW 26.50 proceeding addressing the protection of a victim of domestic violence, a person of ordinary intelligence could not reasonably believe that the court intended to limit a victim's protection to only the narrowest list of discrete locations. WPF DV 3.015 permits a petitioner to keep her residential addresses confidential even while prohibiting the respondent from being near it, so absolute specificity in identifying the places the respondent must avoid is clearly not required.

Moreover, this is not a situation in which Phillips was arrested for being near any Department of Corrections ("DOC") campus with no contact with Rietema or actions taken against her,

or a case in which he might rightfully challenge an overly broad interpretation, for example if the protected party worked at one Starbucks location and the order excluded the restrained party from the entire franchise. Rather, Rietema works out of a DOC office in Lacey and the DOC headquarters building in Tumwater, where Phillips distributed flyers he knew would reach her directly or indirectly. PRP Exhibit A at p4. The facts suggest Phillips chose the alternate DOC location precisely because he believed he could target her co-workers without being in technical violation of the order:

> At the time I recall thinking that if I could stop one person from falling into her trap and suffering the abuse that I had suffered, by Ms. Rietema, it would be worth the effort. Never once did I attempt to violate the OP, nor do I believe I was violating it. I stayed far away from the areas I was supposed to avoid. I was hurt and in emotional turmoil due to stress and abuse and wanted others to know what Ms. Rietema had done to me. It seemed to me, at the time, my only recourse was to use my words, express myself, something I believe I have a right to do even still! Brief of Appellant at p11.

Phillips' stated purpose would not have been accomplished had the flyers not been placed strategically where they would be seen by people who knew Rietema, specifically her co-workers.

Commissioner Lack highlighted in his ruling the problem of domestic violence perpetrators taking a narrow view of their restraints:

> Oftentimes when a court issues protective orders people look at the protective orders and they say I'm not to commit acts of domestic violence, and their response is okay, I'm not gonna hit somebody, I'm not gonna call somebody, and then they figure out what they can do within the context of the order to essentially abuse the victim. RP 9/12/14 at p29.

The legislative intent of the Domestic Violence Prevention Act would be inhibited by an interpretation that allows perpetrators to twist the language of resulting orders to find new methods of abuse. To adopt Phillips' position would be to encourage perpetrators to find loopholes in a protection order. He was given fair notice of what conduct was prohibited by the categorical exclusion from Rietema's workplace, and the order was justly applied within the reasonable interpretation of law enforcement and the court.

D. THE RESTRAINTS AGAINST PHILLIPS DO NOT INFRINGE ON PROTECTED SPEECH

Phillips alleges that Rietema, law enforcement, and the justice system "are trying to stop me from expressing myself, a form of gag order," which he claims violates "the 1st Amendment to the Constitution which guarantees the right of personal expression," PRP at p9. He asserts that because "the flyers contain no threats

and therefore contain nothing illegal, then the words must be protected speech and cannot be used against me." Brief of Appellant at pp25-26. However, it has long been held by the United States Supreme Court that freedom of speech is by no means absolute, and expression can be prohibited even if it falls short of an overt threat:

> Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument. Cantwell v. Connecticut, 310 U.S 296, 309-310 (1940).

Phillips' flyers fall within this category. At Clerks' Papers pp361-362, they need no elaboration to establish their derogatory, personally abusive nature.

> It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly out-weighed by the social interest in order and morality. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942)

Phillips finds fault with the court's concern over Rietema's emotional state at the expense of his liberties (Brief of Appellant at p16), but provides no justification for why his speech should be protected at the expense of the social interest in order and morality.

The Washington State Court of Appeals conducted a thorough analysis of First Amendment claims raised in a PRP in the case of In re Pers. Restraint of Arseneau, 98 Wn. App. 368, 989 P.2d 1197 (1999). The petitioner in that case had been convicted of sexual abuse of a minor and was prohibited from writing letters to his 11-year-old niece. The restriction was upheld because the "prohibition at issue is no more restrictive than necessary to protect the important governmental interests of furthering Arseneau's rehabilitation and preventing him from 'grooming' his niece as a potential abuse victim." Id. at 370. Although Phillips is not a prisoner, the cases are analogous because Phillips is likewise challenging limits on his expression stemming from a restraint imposed in direct response to his own prior behavior.

Rietema disputes Phillips' contentions that the flyers were not inherently harmful, but even if that were true, communication that could be considered benign on its face can be nonetheless improper when viewed in context. The letters at issue in Arseneau were facially affectionate and doting to his niece and not at all threatening on their face, but they were properly flagged as inappropriate because his confinement was a result of his

conviction for sexual abuse of a minor. Phillips' flyers must be viewed in the context of his history of domestic violence.

> A verbal insult done by a person who has not also been physically assaultive is not the same as a verbal attack done by a person who has been violent in the past. It is the perpetrators' use of physical force that gives power to their psychological abuse through instilling the dynamic of fear in their victims. The psychological battering becomes an effective weapon in controlling abused parties because abused parties know through experience that perpetrators will at times back up the threats or taunts with physical assaults. DV Manual for Judges at 2-6.

There is sufficient evidence in the record to support a finding that the flyers constituted psychological battering in continuation of the pattern of abuse existing during the marriage, which instilled in Rietema a reasonable and ongoing fear of Phillips.

The Court of Appeals addressed First Amendment restraints specifically between former spouses in Dickson v Dickson, 12 Wn.App. 183, 529 P.2d 476 (1974), review denied, 85 Wn.2d 1003, cert denied, 423 U.S. 832 (1975). In that case an injunction was entered against the ex-husband to prohibit harassing behavior against the ex-wife that included accusing her of being insane, comparable to Phillips' accusations in the flyers that Rietema is a "cruel manipulative liar" and "deviant, pathological liar." CP at pp361-362. Finding that such statements "are injurious to her

reputation and subject her to scorn and ridicule," the Dickson court ruled that they were "clearly defamatory" and thus not protected by the First Amendment. Dickson, supra, 12 Wn.App. at 187.

The Court highlighted the damage this expression would cause to the children in addition to the ex-wife, indirectly because of the impact of their mother's upset and directly "through damage to the reputation of their family and to their feelings about their mother." Id. at 187. In this case, the same results could be expected, and were likely intended by Phillips when he chose the school bus stop location. The Dickson court went on to conduct a balancing test, ruling that "interference with Mrs. Dickson's privacy and the children's well being outweighs Mr. Dickson's absolute exercise of his First Amendment rights." Id. at 188.

The Court also explained its reasoning for upholding injunctive relief, citing, inter alia, "the recurrent nature of plaintiff's invasions of defendant's rights" and "the imminent threat of continued emotional and physical trauma." Id. In this case, Rietema's protection arises from clear statutory authority and thus resort to a common law injunction is not necessary, but the fact that

it would be constitutionally defensible to do so lends additional support for the legality of First Amendment restrictions in a DVPO.

E. RESTRAINTS WERE REASONABLY IMPOSED WITH DUE PROCESS TO ADVANCE A VALID STATE INTEREST IN PROTECTING VICTIMS OF DOMESTIC VIOLENCE

Division Two of the Washington State Court of Appeals upheld the Domestic Violence Prevention Act ("the Act"), RCW 26.50, against wholesale constitutional challenge in State v. Karas, 108 Wn.App. 692, 32 P.3d 1016 (2001). The appellant in that case, like Phillips, sought relief from convictions including violation of a DVPO on the basis that the Act was unconstitutional and thus the DVPO underlying the offenses was invalid The court found "no merit in these contentions," Id. at 695, and should rule likewise in this case.

After a detailed discussion of "the Act's provisions [that] satisfy the two fundamental requirements of due process--notice and a meaningful opportunity to be heard by a neutral decisionmaker," Id. at 699, the Court discussed the societal implications of the Act's authority:

> A protection order issued under chapter 26.50 RCW "does not protect merely the 'private right' of the person named as petitioner in the order. Rather, the Act reflects the legislative determination that the public has an interest in preventing

> domestic violence. Id. at 700, quoting State v. Dejarlais, 136 Wn.2d 939, 944, 969 P.2d 90 (1998).

Having made that determination, the court applied the broader principle to the specific restraints at issue and found "the minor curtailment of [respondent's] liberty imposed by the protection order" was outweighed by "the significant public and governmental interest in reducing the potential for irreparable injury." Id. at 700.

In this case, Commissioner Lack thoughtfully considered Phillips' position that the DVPO impacts his health and work, and accepted that these assertions were true; however, also found the same to be true for the victim. He found the harassment to be "substantially impacting Ms. Rietema's health. She has a sincere concern for her safety. It has impacted her ability to work." RP for 9/12/14 at p24. In the manner of the Karas court, he went on to consider the social context of the behavior at issue: "The whole concept of sex shaming, particularly victims of domestic violence, is growing in our country…This type of behavior is completely inexcusable. It is abusive." RP for 9/12/14 at p25. Contrasted with the state's interest in protecting victims of domestic violence from further abuse, Phillips being "forced to find alternate routes around Lacey and Tumwater due to the locations of Ms. Rietema's multiple

places of work" (Brief of Appellant at p15) is of negligible concern. The restraints are not unlawful or unconstitutional, and should not be disturbed on appeal.

III. ATTORNEY FEES

A. THE COURT DID NOT ERR IN AWARDING FEES AND COSTS UPON DENIAL OF THE MOTION FOR REVISION

By statute, it is plainly within the court's authority in an action to renew a protection order to "award court costs, service fees, and reasonable attorneys' fees," RCW 26.50.060(3), and there is no question of the applicability of that law to this case. Respondent's attorney gave proof on the record of the fees and costs incurred (RP for 10/17/14 at p14), and there was no dispute as to the reasonableness of the amounts. There is no legal basis to overturn the superior court's fee award.

B. FEES SHOULD BE AWARDED TO RESPONDENT ON APPEAL

Respondent requests an award of fees for having to respond to this appeal as a prevailing party pursuant to RAP 18.1, and as an aggrieved party under RAP 18.9, which permits sanctions against a party who files a frivolous appeal.

> An appeal is frivolous if the appellate court is convinced that the appeal presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal. In re Marriage of Foley, 84 Wn.App. 839, 847, 930 P.2d 929 (1997)

Appellant asks the court for leniency because he is not a lawyer (Brief of Appellant at p2), but "the law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel--both are subject to the same procedural and substantive laws." In re Marriage of Wherley, 34 Wn. App. 344,349, 61 P.2d 155, review denied, 100 Wn.2d 1013 (1983).

CONCLUSION

Phillips was found to have harassed Rietema after she obtained a protection order against him, and failed to persuade the court below that he would not resume this or his original violent behavior if the order were lifted. There was no abuse of discretion in these findings, and no other valid basis for appellate review or the extraordinary remedy of relief through a PRP. The DVPO comports with a statute that this court has found constitutional, and the restraints are only as extensive as Phillips' own behavior dictated was necessary.

Phillips continues to harass Rietema, now through the legal process. By filing this frivolous appeal, Phillips has not only caused her to need further representation, but has also greatly prolonged the distress associated with the uncertainty of the status of her protection. Ms. Rietema respectfully requests that this court affirm the superior court ruling securing her extended protection order, affirm the fee award, and award reasonable fees on appeal.

Respectfully submitted this 2nd day of June, 2015.

Kate Forrest, WSBA #44153
Attorney for Respondent

The Law Office of Kate M. Forrest
600 First Avenue, Suite 106
Seattle, Washington 98104
(206) 973-7953 | Phone
(206) 337-1032 | Fax
kate@kateforrestlaw.com

CERTIFICATE OF FILING AND SERVICE

I certify that on today's date, I mailed the foregoing brief, postage prepaid, to:

Dean Phillips
1026 J Street
Centralia WA, 98531

And filed the same with:

Court of Appeals for the State of Washington – Division Two
950 Broadway, Suite 300
Tacoma, WA 98402

I declare under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

Signed at Seattle, WA on June 2, 2015.

_____
Kate Forrest

KATE FORREST LAW OFFICE PLLC

June 02, 2015 - 12:29 PM

Transmittal Letter

Document Uploaded: 1-468841-Respondent's Brief.pdf

Case Name: Beth Renee Rietema v. Dean Ervin Phillips

Court of Appeals Case Number: 46884-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Kate Forrest - Email: kate@kateforrestlaw.com

A copy of this document has been emailed to the following addresses:

deanervin@yahool.com