

FILED

APR 26 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

350941

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

VERONICA RIVERA, RESPONDENT

V.

ALBERTO SANCHEZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S BRIEF

Alex Newhouse
Attorney for Appellant

NEWHOUSE LAW PLLC
PO Box 346
Sunnyside, WA 98944
(509) 837-2433

INDEX

A. ASSIGNMENTS OF ERROR.....1

B. ISSUES.....1

C. STATEMENT OF FACTS.....2

D. ARGUMENT.....4

1. THE COURT LACKED AUTHORITY TO GRANT THE PROTECTION ORDER.....4

2. MR. SANCHEZ WAS DENIED DUE PROCESS.....10

 a. NATURE AND WEIGHT OF THE PRIVATE INTEREST AFFECTED AND IMPACT OF WRONGFUL DEPRIVATION OF THAT INTEREST.....13

 b. RISK OF ERRONEOUS DEPRIVATION.....14

 c. GOVERNMENT’S INTERESTS.....14

E. CONCLUSION.....15

TABLE OF AUTHORITIES

WASHINGTON CASES

AMUNRUD V. BD. OF APPEALS, , 158 Wn.2nd 208 143 P.3d 571 (2006).....	11
CRUMP V. BLANCHETTE, 149 Wn. App. 111 201 P.3 rd 1089 (2009).....	5, 6, 8-0
CITY OF REDMOND V. MOORE, 151 Wn.2 nd 664 91 P.3 rd 875 (2004).....	12
EMPLOYEES' BD. V. COOK, 88 Wn.2d 200 559 P.2d 991 (1977).....	7
IN RE DET. OF BOYTON, 152 Wn. App. 442 216 P.3d 1089 (2009).....	8
IN RE INTEREST OF M.B., 101 Wn. App 425 3 P.3d 780 (2000).....	12
SPENCE V. KAMINSKI, 103 Wn. App. 325 12 P.3d 1030 (2000).....	13
STATE V. JACKSON, 42 Wn. App. 393 711 P.2d 1086 (1985).....	7-8
STATE V. RILES , Wn.2nd 326, 346 957 P.2d 655 (1998).....	13
MATTHEWS V. PENN-AM. INS. CO, 106 Wn. App. 745 25 P.3d 451 (2001).....	6-7
NAACP V. ALABAMA, 357 U.S. 449 (1958).....	13

STATUTES

RCW 9A.64.020.....7
RCW 10.99.030(3).....6
RCW 26.50.010(6).....5, 8, 14-15

COURT RULES

RAP 2.5(a).....10

OTHER AUTHORITIES

US CONSTITUTION, 1st AMENDMENT.....10
US CONSTITUTION, 5th AMENDMENT.....10-11
US CONSTITUTION, 14th AMENDMENT.....11

A. ASSIGNMENTS OF ERROR

1. The Court lacked the authority to grant the Petition because a family or household relationship as defined by statute was not established.
2. Mr. Sanchez was denied due process since he did not have an opportunity to cross-examine his accuser, no testimony was given under oath, and the hearing was expedited due to a congested docket.

B. ISSUES

1. Can a trial court grant a domestic violence protection order when there is absolutely no testimony or evidence about a single common ancestor and the only evidence of relation is a biased hearsay statement not given under oath and made by the party asking for the protection order?
2. Was Mr. Sanchez's due process rights violated when: a) he was not afforded an opportunity to cross examine Ms. Rivera; b) no witnesses were placed under oath; and c) the hearing was expedited due to court congestion?

C. STATEMENT OF FACTS

For several years, Alberto Sanchez loaned various sums of money to Veronica Rivera several times. (RP 1, 10) (CP 4-6). The debt grew to approximately \$62,000. (RP 10). As a creditor, Mr. Sanchez attempted to collect on this debt when, according to Mr. Sanchez, Ms. Rivera stopped paying. (RP 13) On 1/19/17, Ms. Rivera filed a Petition for Order of Protection (hereinafter referred to as Petition) pursuant to RCW 26.50.030. (CP 1-8) At the first hearing on the Petition, which occurred on the date of filing, the court granted temporary orders of protection and set a date for a second hearing for permanent orders and to give Mr. Sanchez and opportunity to respond. (CP 9-12) Mr. Sanchez did not have counsel at the first hearing because notice is not required at this stage.

At the second hearing, counsel for Alberto Sanchez was present. (CP 16) Counsel quickly raised the issue concerning blood relation. Counsel stated: “ I’ve done some research on this, Your Honor, and I believe at most they’re second cousins once removed.”

(CP 2) During the hearing, counsel informed the court about the perceived ancestors he was aware of, but not once does a common ancestor come up. (CP 2-3) The court, in searching for a practical solution, reset the case so that counsel for Mr. Sanchez could reach out to Ms. Rivera. (CP 17) (RP 3, 5) The temporary order of protection was extended until the third hearing. (CP 17)

At the third hearing, it was quickly learned that the parties were not able to resolve their differences. (RP 9) The Court immediately began asking questions of Ms. Rivera and then moved on to Mr. Sanchez. (RP 9-10) Very soon after Mr. Sanchez started answering the Court's questions, his counsel respectfully interrupted the Court to inquire about the blood relation issue. (RP 10) The Court stated that there are no "limitations on the degree of relatedness" and that "the question isn't what she believes, the question is are they related in any way that can be traceable." (RP 11) Ms. Rivera at that time told the court that her "father says that he is the son of a first cousin of my father's mother." (RP 11) When the court asked Mr. Sanchez if he knew of any way that he was related to Ms. Rivera he responded: "Well, they say, I'm not sure. Possibly, yes." (RP 11) Once again, no common ancestor was brought up. After a brief colloquy with counsel,

the court denied Mr. Sanchez's motion to dismiss on the blood issue.
(RP 12-13)

After denying the motion to dismiss, the Court continued its questioning of Mr. Sanchez. (RP 13) When the Court asked him how many times in the last year he asked Ms. Rivera for the money she owes, Mr. Sanchez tried to explain. At this point, the Court addressed the entire courtroom about how to answer its questions due to the number of cases on the docket that morning. (RP 13) After more questioning, the court granted the petition in favor of Ms. Rivera. (RP 14) (CP 18-22) The only individuals who testified were Mr. Sanchez and Ms. Rivera. No one was ever placed under oath. Mr. Sanchez appeals.

D. ARGUMENT

1. THE COURT LACKED AUTHORITY TO GRANT THE PROTECTION ORDER.

Despite the trial Court stating that "the question isn't what she believes, the question is are they related in any way that can be traceable," *the identity, name and/or gender of a common relative was never revealed* and so the petition should not have been granted. (RP

11) The question that must be answered is this: Can a trial Court grant a domestic violence protection order when there is absolutely no testimony given under oath or evidence about a single common ancestor, and the only evidence of blood relation is a biased hearsay statement made by the party seeking the protection order?

RCW 26.50.010 (6) states:

“Family or household members” means spouses, domestic partners, former spouses, former domestic partners, persons who have a child in common regardless of whether they have been married or have lived together at any time, **adult persons related by blood or marriage**, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

Rev. Code Wash. (ARCW) § 26.50.010(6) (emphasis in bold added)

In Crump v. Blanchette, the Washington Supreme Court held:

Statutory interpretation is a question of law, which we review de novo. In interpreting statutory provisions, the primary objective is to ascertain and give effect to the intent and purpose of the Legislature in creating the statute. To determine legislative intent, we look first to the language of the statute. If a statute is clear on its face, its meaning is to be derived from the plain language of the

statute alone. In addition, legislative definitions included in the statute are controlling. An unambiguous statute is not subject to judicial construction. A statute is ambiguous if it can be reasonably interpreted in more than one way, but it is not ambiguous simply because different interpretations are conceivable.

Crump v. Blanchette, 149 Wn. App. 111, 115-116 (2009).

It should be noted that the definition of “family or household member” in RCW 26.50 is essentially the same as it is in RCW 10.99.030, the criminal law equivalent of RCW 26.50.010(6). It states:

"Family or household members" means spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

RCW 10.99.30(3).

In other actions under Washington law, blood relation can be equally important. With respect to insurance policies and the meaning of language within them, specifically “family,” the Court has held:

. . . the Supreme Court has said that although the word ‘family’ can be used synonymously with the broader term ‘household,’ the most common use of ‘family’ conveys the notion of some relationship--blood or otherwise,’ noting that ‘[i]n its most common use, the word implies father, mother and children--immediate blood relatives.’ Although this does not foreclose further analysis of the meaning of ‘family,’ the most common use is, by definition, the meaning an average insurance purchaser is most likely to consider.

Matthews v. Penn-Am. Ins. Co., 106 Wn. App. 745, 749 (2001). In a similar vein, the Washington Supreme Court in Wash. State Public Employees’ Bd. v. Cook, interpreted “insurable interest” under RCW 41.40.270 as requiring the recipient to be a *close blood relation or be married to the decedent*. A close blood relationship mattered. Wash. State Public Employees’ Bd. v. Cook, 88 Wn. 2d 200, 203-204 (1977).

Washington State’s criminal statute concerning incest is also helpful. RCW 9A.64.020. It state’s in pertinent part:

A person is guilty of incest in the first degree if he or she engages in sexual intercourse with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.

RCW 9A.64.020 (1)(a). The Supreme Court, in State v. Jackson, ruled that RCW 9A.64.020 no longer applies to cousins.

Clearly the statute no longer applies to cousins. Appellant could not have been charged under the incest statute and

was properly charged under RCW 9A.44.100, the indecent liberties statute.

State v. Jackson, 42 Wn. App. 393, 396, (1985), *see also* In Re Det. Of Boyton, 152 Wn.App.442, 454-455 (2009).

Naturally, a ruling on what is sufficient to find that adult persons are related by blood in RCW 25.50.010(6) will likely be cited by analogy in a wide range of criminal cases involving domestic violence.

At the second hearing, counsel for Mr. Sanchez clearly indicated that the appellant and the respondent were – at most – 2nd cousins once removed. (RP 2) Ms. Rivera, stated in response to the court’s questioning that the appellant was not a brother of one of her parents and that he was her dad’s cousin. (RP 2) At the third hearing, Ms. Rivera indicated that she believed there was a relation because of what her father told her. (RP 11) Again, the identity of a common ancestor never came up. Mr. Sanchez indicated that he could possibly be related but was not sure. (RP 11) The court denied Mr. Sanchez’s motion to dismiss and ultimately granted the petition for an order of protection. (RP 13) (CP 18-22)

Though case law in Washington State does not help much on this issue, we do know from what little exists that a blood relation is absolutely required. RCW 26.50.010 (6); *see also* Crump v.

Blanchette, 149 Wn. App. at 115-116. In Crump v. Blanchette, the court held that a Domestic Violence Protection Order should not have been granted between two dating individuals because one was not yet 16 and the other was 17. Strictly holding to the clear language of the statute mattered in this case, and Mr. Sanchez argues now that it should matter for his case as well. The court held “[p]lainly, the statutory definition of ‘family or household members’ does not apply here . . .” Id., at 116.

It is Mr. Sanchez’s position that unsupported and biased hearsay from Ms. Rivera’s testimony without any evidence of a common ancestor or certainty of blood relationship, is not sufficient to meet the clear and unambiguous definition of family or household member, especially when it is not given under oath. It is abundantly clear that there is no evidence supporting the notion that the parties to this action are former or current spouses or domestic partners or have ever lived together. (RP 1-16) (CP 1-36) There is no evidence of a child in common. (RP 1-16) (CP 1-36)

2. MR. SANCHEZ WAS DENIED DUE PROCESS

Mr. Sanchez's due process rights were violated when: a) he was not afforded an opportunity to cross examine Ms. Rivera; b) no witnesses were placed under oath; and c) the hearing was expedited due to docket congestion.

Mr. Sanchez has a right to due process. Though the appellate court may refuse to hear a claim of error not raised at the lower level, the error may nonetheless be raised if it is a manifest error affecting a constitutional right. RAP 2.5(a). Mr. Sanchez was deprived of the process due to him under the 5th and 14th Amendments to the US Constitution.

The 1st Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, First Amendment.

The 5th Amendment states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, 5th Amendment.

The 14th Amendment states in pertinent part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, 14th Amendment.

In Washington, it has been held that: “Constitutional challenges are questions of law subject to de novo review.” Amunrud v. Bd. of Appeals, 158 Wn.2nd 208, 215 (2006). With respect to Procedural Due Process, the Washington Supreme Court has held:

The United States Constitution guarantees that federal and state governments will not deprive an individual of ‘life, liberty, or property, without due process of law.’ The due process clause of the Fourteenth Amendment confers both procedural and substantive protections. When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation. The opportunity to be heard must be at a meaningful time and in a meaningful manner, appropriate to the case.

Id. at 216.

In the case In re Interest of M.B., the Court held: “The oath requirement is important to the truth-finding process. Failure to require testimony under oath, therefore, “taints the integrity of the entire proceeding.” In re Interest of M.B., 101 Wn.App. 425, 472 (2000).

When testimony is not taken under oath, “the risk of error is . . . high, because the primary function of requiring testimony under oath or affirmation is to provide “additional security for credibility” by impressing upon witnesses their duty to tell the truth, and to furnish a basis for a perjury charge.

Id., at 471

To determine if adequate due process is given, courts in this state must apply the Mathews balancing test, which requires: 1) identification of the nature and weight of the private interest affected by the official action challenged and determining the impact of a wrongful deprivation of the interest; 2) the risk of erroneous deprivation of the private interest; and 3) the government’s interest and any burdens that would be imposed on the government with additional burdens or substitute procedural requirements. City of Redmond v. Moore, 151 Wn.2nd 664, 671-672 (2004).

- a. Nature and weight of private interest affected and impact of wrongful deprivation of that interest.

Being free to associate and move about is protected by the 1st Amendment. State. V. Riles, Wn.2nd 326, 346 (1998); see NAACP v. Alabama, 357 U.S. 449 (1958). However, freedom of movement can be regulated when it is “harmful or illegal and interferes with the victim’s right to be free of invasive, oppressive, and harmful behavior.” State v. Kaminski, 103 Wn. App. 325 336 (2000). It is not disputed that there is a feud between the parties over money owed and that Mr. Sanchez is the lender. A protection order prohibiting any contact by Mr. Sanchez with Ms. Rivera essentially curtails his freedom of movement, speech and association to such a degree that he likely cannot collect on the debt without an expensive lawsuit (3rd party contact is prohibited) and will be financially harmed. He has a property interest in the money owed him. (RP 1) (CP 4-6) Like the trial court properly recognized, this dispute is really one about money. (RP 5-6, 14) And like counsel stated at the second hearing, given the allegations in the petition, this is a case that should have been filed in district court through an anti-harassment petition. (RP 4) This prong of the balancing test leans in Mr. Sanchez’s favor.

b. Risk of erroneous deprivation.

In this case, the trial Court performed all of cross and direct examination, no witnesses were placed under oath, and the third hearing was rushed. (RP 1-16) This created a substantial risk of an erroneous deprivation of Mr. Sanchez's private liberty and property interests, and his ability to associate and move about. Attorneys in the courtroom are the most familiar with a case and are best suited at establishing the circumstances and facts on the record so the trier of fact can make a proper decision. In a case of this nature, the judge is the trier of fact. This prong of the balancing test persuasively supports Mr. Sanchez's allegation that his due process rights were violated.

c. The Government's interests

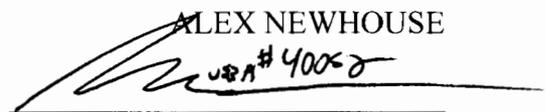
In instances of domestic violence protection order actions under RCW 26.50, all Mr. Sanchez is requesting is sufficient time for a hearing to establish the facts through cross and direct examination of witnesses under oath. Though this may prove difficult for the trial court to accomplish at times because of case load, it is hard not to see how it is indeed possible and absolutely necessary for a fair hearing.

The government does have a substantial interest in protecting individuals suffering from domestic violence, but justice also requires

that it put forth reasonable safeguards to discourage and prevent the use of RCW 26.50 for nefarious reasons, i.e., using the statute to secure protection orders for improper purposes. People placed under the burden of a protection order have a number of real life complications to contend with such as, but not limited to, employment issues and the ability to purchase firearms. This is why more of a hearing is required than what was given. This last prong of the balancing test supports Mr. Sanchez's allegation that due process was not given.

E. CONCLUSION

For the foregoing reasons, Mr. Sanchez is requesting that the order granting the Domestic Violence Protection Order be vacated and the matter dismissed.

ALEX NEWHOUSE
 A handwritten signature in black ink, appearing to read 'Alex Newhouse' with the number '#40052' written below it.

Alex Newhouse, #40052
Attorney for Appellant

