

FILED
Court of Appeals
Division III
State of Washington
11/8/2017 11:28 AM

YAKIMA COUNTY NO. 17-2-02928-39

APPEAL NO. 355250

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

ELVIRA FLORENCIA FLORES (Respondent)

v.

JUNIOR ENRIQUE SOTO (Appellant)

BRIEF OF APPELLANT JUNIOR ENRIQUE SOTO

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ORIGINAL

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I. INTRODUCTION

Mr. Soto appeals an ex parte and final antiharassment protection order against him by Yakima County Superior Court on August 7, 2017 and August 17, 2017, respectfully.¹

II. ASSIGNMENT OF ERRORS

1. On August 7, 2017, the trial court erred when it granted an ex parte temporary antiharassment protection order restraining Mr. Soto from entering or being within 1000 feet of Mr. Soto's primary residence, jointly owned by Mr. Soto and Ms. Flores. Clerk's Papers (CP) at 4.
2. On August 7, 2017, the trial court erred as a matter of law by issuing an ex parte antiharassment protection order that ordered Mr. Soto to "return" his son (I.S.) to Ms. Flores, when no case under Chapter 26.09 was filed or pending. CP at 5.
3. On August 17, 2017, the trial court erred as a matter of law by ordering Mr. Soto to stay 500 feet away from his primary

¹ To avoid confusion, Mr. Soto is referred to "Respondent"; and Ms. Flores is referred to "Petitioner".

residence, jointly owned with Ms. Flores, when no case under Chapter 26.09 was filed or pending. CP at 15.

4. On August 17, 2017, the trial court erred by (a) limiting Mr. Soto's contact with his minor children "at Petitioner's Residence" and (b) ordering Mr. Soto to make arrangements with Petitioner's Mother to visit his children, when no case under Chapter 26.09 was filed or pending. CP at 15.
5. The trial court abused its discretion when it refused Mr. Soto's request to set the matter over "for at least an hour" for Mr. Soto to testify on his own behalf and to "bring some witnesses to corroborate" his defense. Report of Proceedings (RP) at 5-6.
6. The trial court abused its discretion when it refused Mr. Soto's request for a one-week continuance of the hearing. RP at 6.
7. The trial court abused its discretion by denying Mr. Soto's request for a continuance to allow Mr. Soto the benefit of having legal representation as provided under RCW 10.14.090. RP at 8-9.
8. The trial court denied Mr. Soto his constitutional right to due process, including but not limited to, the right to be represented by counsel, when it summarily entered the final

antiharassment protection order on August 17, 2017. RP at 5, 8.

9. The trial court violated Mr. Soto's constitutional right to due process when it ruled: "He had his opportunity to bring witnesses today and he didn't." RP at 6.
10. The trial court erred when it ruled Mr. Soto's right to representation of counsel under RCW 10.14.090 is limited to the "right to bring his attorney". RP at 9.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Did the trial court exceed its statutory authority under Chapter 10.14? (Assignment of Error 1-4)**
- B. Did the court abused its discretion by denying Mr. Soto's motion to continue the hearing? (Assignment of Error 5-7).**
- C. Did the procedure followed in this case violate Mr. Soto's right to due process? (Assignment of Error 8)**

IV. STATEMENT OF THE CASE

Mr. Soto and Ms. Flores were in a committed intimate relationship for 15 years, had two minor children, and jointly owned their home at 81 Terry Lane, Selah, WA.

At some point, Ms. Flores asked Mr. Soto to move out of the family residence on Terry Lane. It is unclear whether Mr. Soto moved out voluntarily after Ms. Soto told him to leave. It is undisputed that Ms. Flores told Mr. Soto not to come over. It is undisputed that Ms. Flores "took his house key" to prevent Mr. Soto from entering family home.

According to Mr. Soto, Ms. Flores allowed Mr. Soto to come to the house from time to time to help out with their daughter in the mornings and to take her daycare. RP at. 3.

The evening before Ms. Flores obtained an ex parte restraining order against Mr. Soto, she (Ms. Flores) and Mr. Soto were involved in an incident with their 14 year old son, where the police were called. RP at 2. The next morning on August 7, 2017, Ms. Flores obtained an ex parte restraining order that (1) ordered Mr. Soto to return their 14 year old I.S. to Ms. Flores and (2)

restrained Mr. Soto from going near or entering the family home at 81 Terry Lane, Selah, WA. CP 4-5.

On August 17, 2017, a final antiharassment protection order was entered, restricting Mr. Soto's visitation with his children at the family home. Mr. Soto had to make all arrangement to see his children by contacting his mother-in-law. Except for visitation, Mr. Soto was not allowed in or near the family home.

By all accounts, Mr. Soto is a loving, nurturing father to his two minor children. Ms. Flores told the court on August 17, 2017, that their children missed their father. After the court abruptly granted Ms. Soto's final order, Ms. Soto interrupted the court mid-sentence and stated: "I just wanted to see if I could get like a temporary full custody order for my children because he said that he was going to take my children from me, so---" RP at 11.

V. ARGUMENT

A. Did the trial court exceed its statutory authority under Chapter 10.14? Yes.

The trial court it exceeded statutory authority under the RCW 10.14.080(8) when it issued the ex parte and final

antiharassment protection order against Mr. Soto which (1) prohibited Mr. Soto from the “*use or enjoyment of real property to which the respondent has a cognizable claim*” (RCW 10.14.080(8) and (2) limited Mr. Soto’s “*right to care, control, or custody of*” Mr. Soto’s minor children. RCW 10.14.080 (9). *Burchheit v. Geiger*, 192 Wn.App. 691, 693, 368 P.3d 509, 510 (2016) and *Price v. Price*, 174 Wn.App. 894, 905, 301 P.3d 486, 491 (2013).

Whether a court exceeds its authority is a question of statutory interpretation and is subject to *do novo* review on appeal. *Shinaberger ex rel. Campbell v. LaPine*, 109 Wn.App. 304, 307, 34 P.3d 1253 (2001).

A superior court has broad discretion to issue an antiharassment protection order under Chapter 10.14. That discretion, however, is limited under the statute. RCW 10.14.080(8) and (9). Mr. Soto relies upon *Burchheit v. Geiger*, 192 Wn.App. 691 (2016) and *Price v. Price*, 174 Wn.App. 894 (2013) as authority to vacate the ex parte and final antiharassment protection order against Mr. Soto.

In *Price v. Price*, supra, the trial court issued an antiharassment protection order against the respondent, Ms. Price, prohibiting her from going near or entering property, jointly owned with the petitioner. *Price*, at 896.-7. The subject property was the respondent's primary residence. *Id.* at 897.

At trial, Ms. Price argued under RCW 10.14.080 the court could not issue a protection order preventing her (Ms. Price) from "using or enjoying her real property" or "any property to which she had a cognizable interest" unless a separate case was filed (or pending) under Chapter 26.09 or a separate civil case that concerned the parties' ownership interests in the subject property. *Id.* at 900. After testimony from Ms. Price, the trial held evidence supported a finding of unlawful harassment. The court rejected Ms. Price's argument and issued a final antiharassment protection order, restraining Ms. Price from entering or coming on the property. (900-901).

On appeal, the protection order was vacated. The court ruled "even where the petitioner makes the requisite showing of unlawful harassment, the superior court not grant an ex parte antiharassment protection order or a final civil antiharassment

protection order that prohibits the respondent from *'the use of enjoyment of real property to which the respondent has a cognizable claim'* unless that order is issued under chapter 26.09 RCW or under a separate action commenced with a summons and complaint to determine title or possession of real property. Price v. Price, 174 Wn.App.894, 903-904 (2013)

In February 2016, the court of appeals decided *Buchheit v. Geiger*, 192 Wn.App. 691, 368 P.3d 509 (2016). In *Buchheit*, appellant (restrained party) claiming an interest in an easement, argued the court exceeded its authority under RCW 10.14.080(8) because the protection order prohibited Mr. Geiger from using an easement to access his dock, boat ramp, and bulkhead. *Id.* at 693. The court held Mr. Geiger had a "cognizable claim" to use and enjoy the easement, and that the trial court lacked the authority to issue an antiharassment order prohibiting him using the easement. *Id.* at 699.

In this case, it is undisputed that Mr. Soto and Ms. Flores jointly owned the subject property. Mr. Soto explained in court that his name was on the property which Ms. Flores referred to as her "residence". RP at 3. The court specifically asked Ms. Flores

whether she owned the property with Mr. Soto. She answered “Yes”. RP at 4. It is undisputed that no other case had been filed or was pending in court, regarding the parties’ ownership interests of their home at Terry Lane. CP at 2.

Under these facts, the trial court erred as a matter of law. It exceeded its statutory authority under RCW 10.14.080(8) by issuing a protection order that restrained Mr. Soto from going near or into his primary residence. By its very terms, the protection order prevented Mr. Soto from “using or enjoying” his real property, jointly owned with Ms. Flores.² For these reasons, both the ex parte and final protection order must be vacated. RCW 10.104.080(8).

The same reasons, because the final antiharassment protection order mandated when, where, and how Mr. Soto could visit his children, thereby interfering with Mr. Soto’s right to custody and care of his children, the court exceeded statutory

² The same analysis applies to the ex parte antiharassment protection order – it also exceeded the court’s authority under RCW 10.14.080. Like the final order, the ex parte order should also be vacated.

authority under RCW 10.14.090, and by doing so, committed reversible legal error.

B. Did the court abused its discretion by denying Mr.

Soto's motion to continue the hearing? Yes.

Whether a motion for continuance should be granted or denied is a matter of discretion with the trial court, reviewable on appeal for manifest abuse of discretion. *Trummel v. Mitchell*, 156 Wn.2d 653, 131 P.3d 305, (2006). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In exercising its discretion, a court may consider the necessity of prompt resolution for the parties, the needs of the parties', the possible prejudice to the adverse party; the prior history of the case, whether the court granted prior continuances, and any other relevant circumstances. *Trummel v. Mitchell*, 156 Wn.2d 653, 671, 131 P.3d 305 (2006), *citing*, *Balandzich v. Demeroto*, 10 Wn.App. 718, 720, 519 P.2d 994 (1974).

In denying Mr. Soto's requests for a continuance, the trial court abused its discretion. RP at 8. The following facts are

undisputed: (1) Counsel's Notice of Appearance was filed (CP at 13); (2) Mr. Soto did not file a written narrative declaration nor any declarations from witnesses in support of his defense (CP and RP); (3) August 17, 2017 was the first hearing after issuance of the ex parte antiharassment protection order; (4) There were no prior requests for a continuance; (5) Mr. Soto asked for a brief continuance of one week; and (6) Mr. Soto asked for the hearing to be set over for "at least an hour".

If the court had granted a one-week continuance, Ms. Flores would not have been prejudiced. The current restraining order could have been re-issued with the same restraints to protect Ms. Flores. Chapter 10.14, RCW. Ms. Flores never objected to Mr. Soto's request for a continuance—her only interest, which was expressly stated to the court, was getting a temporary parenting plan signed by the court, placing the children in her primary custody. RP at 5.

In addition to the reasoning set forth above, it is worth noting, when Mr. Soto's attorney asked to continue the hearing, at one point, the court explained it could not grant a continuance,

because it (court) had been previously reversed by the Court of Appeals. For the reasons set forth in footnote 4, this also was legal error. RP at 6.³

³ Assuming, *arguendo*, that the trial court was referencing *Juarez v. Juarez*, 195 Wn.App 880, 382 P.3d 13 (2016), that case did not limit the court's authority to grant Mr. Soto's continuance under these circumstances. If anything, the *Juarez* case gave the court authority to grant Mr. Soto's continuance. *Juarez, supra*, stands for the proposition that hearings under RCW 26.50 (like RCW 10.14), should be decided carefully and that trial judges must "take the time to conduct a hearing sufficient to arrive at the truth." In other words, the courts should not delay ruling on a petition under RCW 26.50. *Juarez*, 195 Wn.App. 880, 891-892.

Chapter 26.50 and Chapter 10.14 are relatively similar in their statutory scheme. Therefore, it is understandable the trial court in the instant case applied *Juarez* to limit the court's authority to grant Mr. Soto's continuance.

But, the *Juarez* case does not apply to the instant case. *Juarez* involved RCW 26.50, while Mr. Soto's case involved RCW 10.14. The court erred as a matter of law when it applied *Juarez, supra*. In *Juarez*, the court had the authority to issue the protection order. In the instant case, it did not. RCW 10.14.080(8)9().

Moreover, the trial court ignored more recent case law: *Maldonado v. Maldonado*, 197 Wn.App. 779, 391 P.3d 546 (2017), further clarifying the majority opinion in *Juarez, supra*.

For these reasons, the court abused its discretion when it denied Mr. Soto a continuance.

C. Did the procedure followed in this case violate Mr. Soto's right to due process? Yes.

The court denied Mr. Soto due process under the law when it granted Ms. Flores' petition for a final temporary antiharassment protection order. U.S. Const. Amend. 14; Const. art. I, §3;

Mr. Soto's due process rights is a question of law, reviewed de novo. *Gourley v. Gourley*, 158 Wn2d. 460, 467, 145 P.3d 1185 1187 (2006). Due process is a flexible concept, depending upon the circumstances of each case. *Id.* at 467.

To determine what process is due in a given case, court considers three factors: (1) the private interest affected by the government action; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value of additional procedural safeguards, and (3) the government's interest, including the burden that additional procedural safeguards would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.3d.18 (1976).

While the legislative intent is to provide a quick and speedy relief for victims of harassment, the legislature also intended the parties get a fair hearing where each party has a meaningful opportunity to be heard. Const. art. I, §3; RCW 10.14.070, 80, .85, 90, and 190. The legislature made that clear by enacting enacted statutory safeguards. See RCW 10.14.090(8) and (9). Both statutes were enacted because the legislature recognized the private interests at stake: Mr. Soto's constitutional right to the care and custody of his children and his right to property.

It is clear the trial court denied Mr. Soto those procedural safeguards (due process) to Mr. Soto when it issued the final antiharassment protection order in this case. RCW 10.14.090(8) and (9).

One of many procedural safeguards in Chapter 10.14 is the right to be represented by counsel. RCW 10.14.090. However, Mr. Soto was denied the right to counsel. At the hearing, the court quickly began questioning Ms. Flores and Ms. Soto. Counsel requested to speak on behalf of Mr. Soto, but was abruptly cut off, and denied the request to speak on behalf of Mr. Soto. RP at. 3.

Counsel was consistently denied opportunity to explain the factual background between the parties and why Mr. Soto believed the matter would be dismissed the morning of the hearing on August 17, 2017. Counsel attempted, but was not provided an opportunity to argue why the facts alleged by Ms. Flores did not constitute lawful harassment. Most important, could not tell the court that counsel, having just filed a Notice of Appearance the day before and having just received papers from Mr. Soto, needed additional time to prepare for a full hearing. RP 1-12. Counsel could not advocate for Mr. Soto, without risk of possibly offending the court, or worse, being held in contempt of court. RP1-12.

Not only did the court deny counsel the opportunity to address, it denied Ms. Flores an opportunity to address the court. RP at 11.

The procedure made it difficult to make a complete record on the hearing. After counsel moved for continuance, the court instantly denied it and turned immediately to Mr. Soto to verify date of birth for the final protection order. RP 8

The court erred when it assumed Mr. Soto “had his opportunity to bring witnesses today and he didn’t.” RP 6. It is unknown how much, notice, if any, Mr. Soto had of the August 17, 2017 hearing. There is no affidavit of personal service.⁴ This fact alone legally warranted Mr. Soto a continuance of the hearing. Under these facts, there was nothing in the record to infer Mr. Soto had sufficient time to gather his witnesses to appear on August 17, 2017.

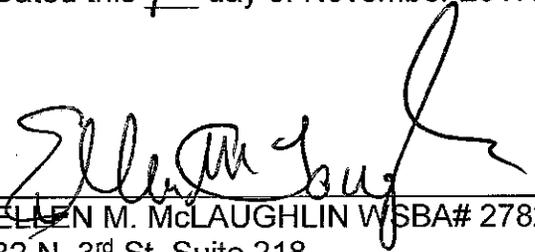
For all reasons set forth above, both antiharassment protections orders should be vacated.

VI. CONCLUSION

The August 7, 2017 ex parte temporary antifharassment and the final antiharassment protection order dated August 17, 2017 are invalid. The court of appeals should remand the case with instructions to the Yakima County Superior Court to vacate both orders.

⁴ This fact alone warranted the court to reset the hearing. RCW 10.14.085. The record is incomplete – it is unknown whether Mr. Soto’s counsel was aware no affidavit of service had been filed with the court.

Dated this 7th day of November 2017.

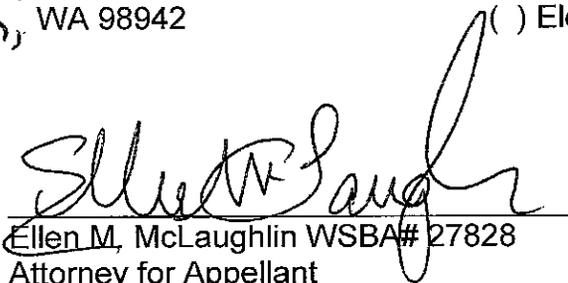

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I certify that on the 7th day of November 2017, I caused a true and correct copy of the Appellant's Brief to be served on the following in the manner indicated below:

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