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No. 36784-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MIRANDA ROSE BENA,

Respondent,

v.

CHRISTOPHER NICHOLAS POPOV,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The trial court erred when it allowed Ms. Bena to introduce seven letters into the record at the hearing on her petition for a protection order and considered those letters in making its decision to grant the order for protection when Ms. Bena never previously disclosed the letters to Mr. Popov and Mr. Popov was never provided an opportunity to review the letters prior to the hearing. This constituted a denial of Mr. Popov's due process rights under the United States and Washington State Constitutions.

II. STATEMENT OF THE CASE

On March 13, 2019, Petitioner Miranda Bena filed a petition for an order of protection in which she alleged she felt unsafe because Respondent Christopher Popov attempted to remove their eight-year-old son C.J.P. (DOB 03/10/2011) from his school without first consulting her. In the petition, Ms. Bena outlined several alleged acts of domestic violence by Mr. Popov during the course of their eight-year relationship. She alleged that he hurt their animals, punched holes in walls, and that she stopped him from beating and screaming at their son when he was four or five years old. She also alleged that he shot a pedestrian with a pellet gun one or two years ago, though she made no allegation that he used a weapon to threaten or harm her.

On the date Ms. Bena filed the petition, Judge Gibson of the Yakima County Superior Court issued a Temporary Order of Protection which restrained Mr. Popov from contacting Ms. Bena or their two children, C.J.P. and their one-year-old daughter M.R.P. The court scheduled the hearing on the petition for March 28, 2019 and Mr. Popov was served the petition and temporary order on March 15, 2019.

On March 28, 2019, Judge Naught of the Yakima County Superior Court presided over the hearing on Ms. Bena's petition. Both parties appeared pro se. At the beginning of the hearing, Ms. Bena provided seven typed statements consisting of letters signed by her, her mother Lisa Bena, her stepfather Rollie McKown, her maternal grandmother Gloria Hogue, her adult brother Joshua Bena, her minor brother, and her minor sister. Ms. Bena brought multiple copies of these letters to the hearing to give to Mr. Popov, but did not have them served on Mr. Popov or file them with the court prior to the hearing. RP 4-5. These letters contained horrific allegations that had not been included in Ms. Bena's petition.

At the hearing, Ms. Bena spoke first. She stated that she had been in an eight-year relationship with Mr. Popov and claimed he was "controlling and abusive to everyone, ... including [their] animals" and that she feared for her well-being and that of their children. RP 5. This was the only oral statement she made at the hearing about the alleged abuse—

beyond that, she indicated that the letters she submitted contained everything she wanted to tell the court. RP 6.

Judge Naught reviewed the letters Ms. Bena submitted and subsequently asked to hear from Mr. Popov. RP 6. Mr. Popov provided the court with a letter written by Ms. Bena's grandmother, Gloria Hogue, demanding money and threatening to contact law enforcement if the money wasn't paid. RP 7-8. Mr. Popov told the court that Ms. Bena had brought the petition for a protection order because she didn't get tax money owed to her and offered Ms. Hogue's letter as evidence of this claim. RP 7. Mr. Popov told the court that police had never been called to the house for any incident involving Ms. Bena and him and described the letters from Ms. Bena's relatives as "stuff from her family trying to make [him] look bad." RP 7. However inarticulately, with these statements he sought to deny that any domestic violence involving Ms. Bena and him had ever occurred. Following Mr. Popov's statement, Ms. Bena denied that her petition was related to money. RP 9.

The court ruled in favor of Ms. Bena and granted the petition based primarily or perhaps even exclusively on the statements Ms. Bena provided for the first time at the hearing. RP 10. From the record, it is unclear whether the "statements" Judge Naught referred to included only the letters from Ms. Bena and her family members, or also included the

allegations Ms. Bena made in the petition itself. RP 10. Regardless, Judge Naught found that the statements described “excessive” forms of discipline of children and abuse of animals, which, according to Judge Naught, “can also be used to inflict fear on other people.” RP 10. Judge Naught called the allegations in the statements before him “disturbing” and found that they constituted “overwhelming” evidence that domestic violence had occurred. RP 10. Based on this finding, he granted the protection order prohibiting Mr. Popov from contacting Ms. Bena or their children, which he ordered would last for one year. RP 13-14.

Mr. Popov denies ever hitting Ms. Bena or touching her in an unwanted or offensive manner. He also denies ever causing harm to their children. He spanked C.J.P. approximately four times, but never assaulted C.J.P. or used excessive discipline on him. He further denies intentionally harming any of their animals. He put one dog down after it bit two people and another down after it got into a fight with another dog and sustained serious injuries. However, he did not hit those dogs or cause them to suffer in any way.

III. ARGUMENT

A. The protection order issued by Yakima County Superior Court is a final judgment that may be appealed as a matter of right.

Under RAP 2.2(a)(1), final judgments may be appealed, that is, reviewed as a matter of right. See also RAP 2.1(a)(1). A final judgment is one that “settles all the issues in a case.” In re Detention of Turay, 139 Wn.2d 379, 392, 986 P.2d 790, 797 (1999). While Ms. Bena and Mr. Popov have a pending family law case in Yakima County Superior Court, 18-5-00413-39, that case is independent of the protection order case which Mr. Popov presently appeals. Here, the only issue in the superior court hearing on Ms. Bena’s petition for protection order was whether Mr. Popov engaged in domestic violence warranting issuance of a protection order under RCW 26.50. The trial court found that she met her burden and issued the order pursuant to that finding, thus settling that issue. The protection order thus issued therefore constitutes a final judgment within the meaning of Turay and is appealable as a matter of right under RAP 2.2(a)(1).

B. The Superior Court denied Mr. Popov's due process rights when it allowed Ms. Bena to introduce seven letters into the record at the hearing on her petition for a protection order and considered those letters in making its decision to grant the order for protection even though Ms. Bena had never previously disclosed the letters to Mr. Popov and even though Mr. Popov was never provided an opportunity to review the letters prior to the hearing.

Both the United States and Washington State Constitutions guarantee due process of law prior to restricting a person's liberty. U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. The Washington State due process clause and Fourteenth Amendment due process clause provide the same level of protection. In re Hambleton, 181 Wn.2d 802, 823, 335 P.3d 398 (2014). While due process is a flexible concept with different applications to different situations, at its core it consists of the "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333-34, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1995)).

The procedural due process protections provided by RCW 26.50 include,

(1) a petition to the court, accompanied by an affidavit setting forth facts under oath; (2) notice to the respondent within five days of the hearing; (3) a hearing before a judicial officer where the petitioner and respondent may testify; (4) a written order; (5) the opportunity to move for revision in superior court; (6) the opportunity to appeal; and (7) a one-year limitation on the

protection order if it restrains the respondent from contacting [his or her] minor children.

Aiken v. Aiken, 187 Wn.2d 491, 501, 387 P.3d 680 (2017) (quoting Gourley v. Gourley, 158 Wn.2d 460, 468-69, 145 P.3d 1185 (2006)).

RCW 26.50 references a “full hearing” to take place following issuance of an emergency temporary protection order in cases where such an order is issued. RCW 26.50.070(1). While the phrase “full hearing” is not defined in RCW 26.50, the statute refers to the court ordering restraints on the respondent “upon notice and after hearing.” RCW 26.50.060(1). The United States Supreme Court has defined a “full hearing” as one where the parties may present evidence and are afforded a “reasonable opportunity to know the claims of the opposing party and to meet them.” Morgan v. United States, 304 U.S. 1, 18, 19, 58 S.Ct. 773, 82 L.Ed. 1129 (1938). Black’s Law Dictionary similarly defines a “full hearing” as one where the parties are allowed notice of each other’s claims and are given ample opportunity to present their positions with evidence and argument. Black’s Law Dictionary 735 (8th Ed. 1990).

Pursuant to the foregoing authorities, it is the appellant’s position that in order to assess the appropriate level of due process constitutionally required in protection order cases, a reviewing court should consider the nature of the protection order hearing, the petitioner’s interest in obtaining

protection, the respondent's interest in his children, and the government's interest in preventing domestic violence. The government's interest in preventing violence is not in dispute. Nor is it in dispute that those seeking protection orders have a right to not be victims of violence. However, a parent's interest in the care, custody, and control of their children is "perhaps the oldest of the fundamental liberty interests recognized by the [United States Supreme] Court." Troxel v. Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000).

Here, Ms. Bena provided the court and Mr. Popov seven typed statements or letters at the beginning of the protection order hearing. These statements contained new and highly egregious allegations. Mr. Popov was unable to read these statements before the court asked him to respond during the hearing and had no opportunity to defend against the egregious allegations included therein. This specific due process issue has not been addressed in any Washington State cases discussing due process protections in domestic violence protection order proceedings that counsel could find. However, this issue has been addressed by the courts of other states. From these cases, it is clear that allowing a hearing on acts of domestic violence that were not alleged in the protection order petition is a fundamental violation of due process.

According to one New Jersey case, “[i]t constitutes a fundamental violation of due process to convert a hearing on a complaint alleging one act of domestic violence into a hearing on other acts of domestic violence which are not even alleged in the complaint.” Pazienza v. Camarata, 381 N.J. Super. 173, 184-85, 885 A.2d 455 (App. Div. 2005).

According to another New Jersey case, a father’s statement that he needed time to prepare to address additional allegations which were not mentioned in the mother’s complaint under New Jersey’s Prevention of Domestic Violence Act should have been treated as a request for adjournment and should have been granted to protect the father’s due process rights even though his assertion that he needed time to prepare was “not cloaked in the lawyer-like language of an adjournment request and was made as part of a longer response to a question,” as the statement “was sufficient to raise the due process question for the trial court.” J.D. v. M.D.F., 207 N.J. 458, 480, 25 A.3d 1045 (2011).

In a Florida case, that state’s Third District Court of Appeal found that a nephew’s due process rights were violated when the trial court allowed his aunt to raise material allegations for the first time during the final hearing on her motion for a permanent injunction for protection from domestic violence against her nephew. Sanchez v. Marin, 138 So.3d 1165, 1167-68 (Fla. 3d DCA 2014).

In another Florida case, the Fourth District Court of Appeal found that a trial court's denial of the husband's motion for continuance of the hearing for an injunction against domestic violence was an abuse of discretion and violated the husband's due process rights where his wife's new allegations of abuse were raised in a supplemental affidavit, a copy of which was never provided to the husband (according to the record), and which was filed only a few days before the final hearing. Vaught v. Vaught, 189 So.3d 332, 333, 335 (Fla. 4th DCA 2016).

In a recent unpublished decision, Division One of the Washington State Court of Appeals found that the due process rights of a respondent in a domestic violence protection order case had not been violated by issuance of a protection order based on an injury to a child where the respondent claimed no injury had been alleged in the petition. Wiley v. Wiley, 196 Wn.App. 1059, 2016 WL 6680511 (Div. 1 2016) (unpublished opinion with no precedential value). However, the court in Wiley observed that the petitioner alleged an injury to the child in her petition and therefore found that the record did not support the respondent's claim. Id. Significantly, Division One did *not* find that it was irrelevant whether the petitioner alleged the injury to the child in the petition; rather, it ruled that the respondent's due process rights were not violated precisely *because* that alleged injury was included in the petition. Had that allegation not

been included in the petition, the implication is that Division One would have found that the respondent's due process rights had been violated had the court granted the protection order on grounds not alleged in the petition. Here, the protection order against Mr. Popov was issued on grounds not alleged in Ms. Bena's petition, at least in part. Thus, unlike in Wiley, here Mr. Popov's due process rights were violated.

A Petition for Order of Protection carries with it the ability to curtail substantial rights of the restrained party. See RCW 26.50.060. While relief under RCW 26.50 is often necessary and reasonable, actions brought under that statute also carry with them the ready ability to abuse the court system—to use the statute as a sword rather than a shield, according to a well-known metaphor. Because protection orders almost by definition curtail the rights of the restrained party, the court must provide a full and fair hearing to all parties prior to issuing a protection order.

Here, Mr. Popov was denied due process when Ms. Bena was permitted to proceed with her petition on the same day she provided seven statements containing new allegations to the court and Mr. Popov. It would be unreasonable to believe that Mr. Popov would have been able to read through the seven statements and effectively respond. This is especially true when the court gave him only a couple of minutes to read the letters and respond.

To ensure that Mr. Popov's due process rights and parental rights were protected, Judge Naught should have continued the hearing to allow Mr. Popov an opportunity to review the new allegations and respond. RCW 26.50.050 requires that a petition for protection order be served upon the respondent no later than five court days prior to the hearing. There is no reason to believe the State Legislature did not also intend that a party receive adequate notice of allegations not contained in the petition.

Also, under RCW 26.50.030 the "*petition* for [an order of protection] shall alleged the existence of domestic violence, and shall be accompanied by an affidavit made under oath stating the *specific* facts and circumstances from which relief is sought" (emphasis added). Here, the affidavit accompanying Ms. Bena's petition did not state the specific facts and circumstances that the seven letters did, as required by the statute. As a result, Mr. Popov did not have the opportunity to know what Ms. Bena's claims in those letters were or to meet them, though he would have had that opportunity had Ms. Bena followed the procedures outlined in RCW 26.50, including those specified in RCW 26.50.030.

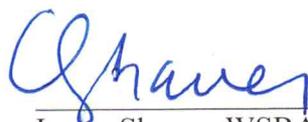
The Yakima County Superior Court should have afforded Mr. Popov a genuine opportunity to challenge the claims in the letters Ms. Bena brought to court by continuing the hearing until a time when he had

an opportunity to review them. The lower court's failure to do so deprived Mr. Popov of his due process rights.

IV. CONCLUSION

Yakima County Superior Court denied Mr. Popov his due process rights when it permitted Ms. Bena to introduce seven statements into the record at the hearing for an order of protection that she had not included with her petition for that order, served on Mr. Popov before the hearing, or filed with the court before the hearing. Therefore, this Court should reverse the protection order issued by the trial court and remand this case to the trial court to make a decision on the issuance of a protection order based solely on the information included with Ms. Bena's original petition. Alternatively, this Court should remand this case to the trial court with instructions to continue the hearing on entry of a permanent protection order until such time as Mr. Popov has had the opportunity to review and effectively respond to the allegations made by Ms. Bena in the seven additional statements she introduced at the hearing.

Respectfully Submitted on this 6th Day of September, 2019.



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