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SUPREME COURT OF THE STATE OF WASHINGTON

NO: 73337-1

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

MEGAN ROAKE,
Respondent/Appellee

v.

MAXWELL DELMAN,
Petitioner/Appellant

**Respondent's Answer to
Petition for Review**

Riddhi Mukhopadhyay, WSBA 42759
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Sexual Violence Legal Services
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 ORIGINAL

TABLE OF CONTENT

A. INTRODUCTION	4
B. RESTATEMENT OF RELEVANT FACTS	4
C. ARGUMENT	7
1. <u>PETITIONER HAS NOT MET THE CRITERIA OF RAP 13.4(B) TO GRANT REVIEW</u>	7
B. <i>REVIEW IS NOT AUTHORIZED UNDER RAP 13.4(B)(2)</i>	10
C. <i>REVIEW IS NOT AUTHORIZED UNDER RAP 13.4(B)(3)</i>	12
D. <i>REVIEW IS NOT AUTHORIZED UNDER RAP 13.4(B)(4)</i>	14
2. <u>PETITIONER HAD ACTUAL NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD</u>	17
D. CONCLUSION	21

TABLE OF AUTHORITIES

Cases

<i>Blackmon v. Blackmon</i> , 155 Wn.App. 715, 721, 230 P.3d 233 (2010) _____	11
<i>Buffelen Woodworking v. Cook</i> , 28 Wn.App 501, 505, 625 P.2d 703 (1981) _____	12
<i>Gourley v. Gourley</i> , 158 Wn.2d 460, 467, 145 P.3d 1185 (2006)_	8, 9, 17, 18
<i>In re Marriage of Stewart</i> , 133 Wn.App 545, 552, 137 P.3d 25, 29 (2006) _____	10, 14
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) _____	8, 13
<i>Spence v. Kaminski</i> , 103 Wn. App. 325, 336, 12 P.3d 1030 (2000) _____	11, 13, 18
<i>State v. Karas</i> , 108 Wn.App. 692, 700, 32 P.3d 1016, 1021 (2001) _____	11, 17
<i>Washington Independent Telephone Assn v. WUTC</i> , 110 Wn. App 498, 508, 41 P.3d 1212 (2002) _____	13

Statutes

RCW 26.50 _____	9
RCW 26.50.020 _____	9, 14
RCW 7.90.005 _____	14, 16
RCW 7.90.020 _____	10, 16, 19
RCW 7.90.040 _____	9, 13
RCW 7.90.050 _____	9, 10, 13
RCW 7.90.090 _____	9, 10

RCW 7.90.110 _____ 9, 13

RCW 7.90.120 _____ 10

RCW 7.90.121 _____ 18

RCW 7.90.130 _____ 20

Rules

CR 81 _____ 11

RAP 13.4 _____ passim

A. INTRODUCTION

Respondent, Megan Roake, as represented by Riddhi Mukhopadhyay of the Sexual Violence Legal Services, requests that this Court deny Petitioner's Petition for Review of the Court of Appeal case 73337-1 reversing and remanding the trial court's decision to dismiss Ms. Roake's petition for a Sexual Assault Protection Order.

B. RESTATEMENT OF RELEVANT FACTS

On the evening of May 9, 2014, Roake, an 18-year old freshman at the University of Washington, had gone out with friends to celebrate her birthday. VRP 15, CP 4. During the celebration, she met Delman who later that night sexually assaulted her. VRP 20-21; CP 4. Roake was observed crying by a witness moments after the incident and also stating things had gone further than she wanted. VRP 23; CP 18, 20, 28-29. She also disclosed specifics of the assault to a close friend the next day. CP 18-19. A week after the sexual assault, Roake returned home for the summer quarter. CP 18-19.

Once back on campus in September 2014, she reported the sexual assault both to law enforcement and the University's student

conduct process. CP 18. The King County Prosecutor's Office declined to file charges within a month. CP 11. The University initiated an investigation and issued an on-campus no-contact order. CP 3-4 But in the following months, Roake continued to encounter Delman at student social events that left her shaking, crying and in fear. CP 3-4, 16, 19, 27, 30.

On January 14, 2015, Roake filed her petition for a Sexual Assault Protection Order. CP 1-5. Along with providing details of the non consensual sexual penetration and conduct she was subjected to, Roake also stated in her petition that she was fearful of future contact with Delman based on her single experience with him being so violent and the fact that she had encountered him several times on campus. Not knowing him well, she did not know what else he was capable of. CP 3. Based on the facts alleged in the petition, the court granted an *ex parte* temporary protection order and set the full hearing for January 28, 2015. Delman was served with the petition and filed a response prior to the first hearing. CP 9-13. At the initial SAPO hearing, Delman appeared before the court and both parties agreed to a continuance to February 10, 2015. CP 14. At the second hearing, assigned to Judge Douglass North, Roake started testimony but midway

through her testimony Delman asked for additional time. VRP 23-29. The Court permitted the interruption of a party's testimony, and granted the continuance. The hearing was continued to February 20, 2015. CP 32. Delman filed nearly 40 pages of motions and declarations. CP 33-70.

At the February 20 hearing, instead of continuing with Roake's testimony and allowing the hearing to proceed as before, the Court granted Delman's CR12 motion to dismiss. VRP 52-79; CP97-99. The Court voiced concern that seven to eight months was too much time since the sexual assault for Roake to pursue a protection order and that it was "peculiar" for her to be filing for protection now. VRP 77-78; CP 97-99. The Court granted the Respondent's motion to dismiss without allowing Roake to resume the full hearing, stating in its Dismissal Order that she "failed to establish that she had any reasonable fear of future dangerous acts from the Respondent and therefore the temporary order was invalid." CP 98. Roake filed an uncontested Motion for Reconsideration which the trial court dismissed on March 13, 2015. CP 102-118.

Roake appealed the dismissal. CP 119. In its decision, the Court of Appeals noted that the plain language of RCW 7.90.020

requires the SAPO petition allege nonconsensual sexual conduct and include “specific statements or actions made at the time of the sexual assault or consequently thereafter, which give rise to a reasonable fear of future dangerous acts.” Petitioner’s App A at 3, ¶ 15. Though the SAPO Act required the two elements in the petition for filing and issuance of the temporary ex parte order, for a final protection order, a petitioner has only the burden to prove by a preponderance of the evidence that a sexual assault occurred. Petitioner’s App A at 5, ¶ 27. The Court of Appeals reversed and remanded the sexual assault protection order for further proceedings. Petitioner’s App A at 5, ¶ 35-36.

C. ARGUMENT

1. PETITIONER HAS NOT MET THE CRITERIA OF RAP 13.4(b) TO GRANT REVIEW

As a party seeking review under RAP 13.4(b), Delman must meet the criteria set forth in the rule, which provides that a petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the

Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

a. Review is not authorized under RAP 13.4(b)(1)

The Supreme Court has found that civil protection order proceedings uphold due process. Due process is “a flexible concept in which varying situations can demand differing levels of procedural protection.” *Gourley v. Gourley*, 158 Wn.2d 460, 467, 145 P.3d 1185 (2006). (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”). In *Gourley*, the respondent challenged the entry of a domestic violence protection order under RCW 26.50 under a similar claim that his due process had been denied.¹ The Supreme Court specifically found that “the due process requirements of being heard at a meaningful time and in a meaningful manner are protected by the procedures outlined in chapter 26.50 RCW. *Gourley* 158 Wn.2d 460 at 468. The Court identified that the procedural protections of due process included:

¹ Delman's counsel also represented the Respondent Gourley in the appeal to the Supreme Court.

(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 minor children.

Id. at 469, Chapter 26.50 RCW.

Petitioner claims he had no notice of which allegations needed to be proven. Petition at 10. Petitioner's argument that the SAPO proceeding allows courts to authorize relief without proof of every allegation is a misstatement of the statutory requirement for a final order. RCW 7.90.090. The SAPO is a summary proceeding like the Domestic Violence Protection Order Act at RCW 26.50 after which it is modeled. As with a DVPO, there is an initial determination of an ex parte temporary order followed by a hearing on whether to grant a more permanent order. RCW 7.90.110, RCW 7.90.050. Pursuant to RCW 7.90.040(5), jurisdiction of the courts over the SAPO proceeding shall be the same as for a DVPO under RCW 26.50.020(5). Mimicking the DVPO requirements, the SAPO statute requires the same procedural protections. A petition to the court, accompanied by an affidavit setting forth facts under

oath initiates the proceeding. RCW 7.90.020 (1). Notice to the respondent within five days of the hearing is required. RCW 7.90.050. A full hearing is required where both parties may testify and present evidence. RCW 7.90.050, 070. A written order is provided that parties may appeal. RCW 7.90.090. And unlike the DVPO statute that can allow for a permanent protection order to be entered without an end date, the SAPO statute limits final protection orders to two years, thus further protecting a respondent's liberty interests. RCW 7.90.120(2). Where the Supreme Court has found protection order proceedings complying with due process, the decision of the Court of Appeals does not conflict with the Supreme Court and there is no basis for a grant under RAP 13.4(b)(1).

b. Review is not authorized under RAP 13.4(b)(2)

The Court of Appeals has consistently found that protection order proceedings uphold due process standards as well as any criminal proceeding. “[T]he protection order proceeding is intended to be a rapid and efficient process.” *In re Marriage of Stewart*, 133 Wn.App 545, 552, 137 P.3d 25, 29 (2006). In Division III, the Court of Appeals found that a protection order does not constitute a substantial impairment of the restrained person's rights and the

private interest at risk is minimal. A protection order is a reasonable exercise of police power requiring one person's freedom of movement to give way to another person's freedom to not be disturbed. *Spence v. Kaminski*, 103 Wn. App. 325, 336, 12 P.3d 1030 (2000). Civil protection orders do not interfere with the restrained person's legitimate freedom of movement or right to travel. *Id.* Division III also recognized the special proceeding nature of protection orders that supersede the Civil Rules complied with due process. CR 81(a). Given the emergency nature of protection order cases, fourteen day notice is constitutionally adequate; nothing in protection order proceedings prevents a party from presenting witnesses or precludes a party from seeking discovery. *State v. Karas*, 108 Wn.App. 692, 700, 32 P.3d 1016, 1021 (2001).

Similarly, Division II determined that protective orders are in the nature of an injunction and that an order prohibiting contact, is not a "massive curtailment of liberty." *Blackmon v. Blackmon*, 155 Wn.App. 715, 721, 230 P.3d 233 (2010). The statutory safeguards and the revision process are commensurate with the interests protected. Although nonconsensual sexual conduct is the basis for the SAPO, the remedy of a protection order is not "a massive

curtailment of liberty amounting to incarceration and is not criminal in nature.” *Id.* at 721. As such, the respondent in a protection order hearing does not have a clear legal right to equal protection similar to criminal defendants or defendants in quasi-criminal hearings where the risk of erroneous deprivation and the protected property interest are greater. Where the Court of Appeals has found protection order proceedings to comply with due process, the decision of the Court of Appeals does not conflict with its published decision and there is no basis for a grant under RAP 13.4(b)(2).

c. Review is not authorized under RAP 13.4(b)(3)

The concept of due process is flexible and should be afforded as the situation demands. *Buffelen Woodworking v. Cook*, 28 Wn.App 501, 505, 625 P.2d 703 (1981). Delman contends that he was denied his right to due process and equal protection. Ignoring existing Washington case law on civil protection orders completely, he specifically cites to criminal cases where the State seeks to impose a deprivation of a serious liberty interest. He also attempts to claim that his reputational interest is a protected interest under due process. Petition at 9. These claims are without merit. To determine whether a procedure violates due process the court first considers whether a liberty or property interest exists entitling

an individual to due process protections. "Second, if there exists such a constitutionally protected interest, we employ a balancing test to determine what process is due." *Washington Independent Telephone Assn v. WUTC*, 110 Wn. App 498, 508, 41 P.3d 1212 (2002). Balancing the minimally constitutionally protected interest, the court considers: the private interests affected by official action; the risk of an erroneous deprivation of such interest through procedures used; and the Government's interest. *Matthews*, 424 U.S. at 321.

A protection order does not constitute a substantial impairment of the restrained person's rights and the private interest at risk is minimal. A protection order is a reasonable exercise of police power requiring one person's freedom of movement to give way to another person's freedom to not be disturbed. *Spence*, 103 Wn. App. at 336. The SAPO is a summary proceeding like the Domestic Violence Protection Order Act at RCW 26.50 after which it is modeled. As with a DVPO, there is an initial determination of an ex parte temporary order followed by a hearing on whether to grant a more permanent order. RCW 7.90.110, 7.90.050. Pursuant to RCW 7.90.040(5), jurisdiction of the courts over the SAPO proceeding shall be the same as for a DVPO under RCW

26.50.020(5). Additionally, the allegations in a civil sexual assault petition are not raised by the State but by private parties who have experienced a sexual assault, like Roake. Sexual assault petitions solely seeks protective relief, not punitive. Therefore, it is improper to try to impose a criminal justice standard of due process, where there is a higher burden of proof, on a civil proceeding where the purpose is to provide “rapid and efficient” protection. *Stewart*, 133 Wn.App at 552.

Recognizing that flexibility of due process afforded as the situation demands, the notice and hearing requirements under RCW 7.90, a civil special proceeding, do not violate the U.S. and Washington Constitutions. Petitioner has not raised a significant question of law under the Constitution of the State of Washington or of the United States that has not already been resolved by the Court and therefore, has no basis for a grant under RAP 13.4(b)(3).

d. Review is not authorized under RAP 13.4(b)(4)

The procedural protections of the Sexual Assault Protection Order Act at RCW 7.90 adequately protect a respondent’s due process rights, particularly when considering the strong governmental interest articulated in RCW 7.90. RCW 7.90.005 makes the legislative intent of the SAPO statute very clear:

Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims. According to the FBI, a woman is raped every six minutes in the United States. *Rape is recognized as the most underreported crime*; estimates suggest that only one in seven rapes is reported to authorities. Victims who do not report the crime still desire safety and protection from future interactions with the offender. *Some cases in which the rape is reported are not prosecuted. In these situations, the victim should be able to seek a civil remedy requiring that the offender stay away from the victim.* (emphasis added)

The legislative intent of the SAPO statute codified under RCW 7.90 exists to protect victims like Roake, who have experienced the trauma of a sexual assault, who have a reported case that was not prosecuted and who now seek safety and protection from future interaction from respondents such as Delman.

The future harm a SAPO is designed to prevent is not merely a risk of additional assaults, but also the psychological danger of simply encountering a respondent. This is because “sexual assault inflicts humiliation, degradation, and terror on victims,” so when a sexual assault occurs, that assault itself is sufficient to make the Petitioner’s fear of “interactions” with the Respondent reasonable.

It is true that the statute requires that the Petition must include “specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts, for which relief is sought.” RCW 7.90.020(1). However, the term “dangerous acts” is not defined by the statute and the Court of Appeals declined to define it as well. Therefore, it is appropriate to look to the legislative intent, and understand that the danger “for which relief is sought” is not solely the possibility of being raped again, but includes the danger to the victim’s psychological well-being that would result from having any “interaction” with a person responsible for already inflicting “humiliation, degradation, and terror” on the Petitioner. RCW 7.90.005.

In his footnote 4, going beyond the Record of Proceeding, Petitioner accuses Roake of misleading the Commissioner by not mentioning the decline by King County Prosecutor's office and being unwilling to share the specifics of her schedule as a student. Petition at 14. However, the statutory intent is clear that a SAPO petitioner may seek protection where a criminal case is not pursued. It is also counter to the purpose of the SAPO process that a party seeking protection would actually provide specifics of her

schedule and whereabouts for the respondent. Petitioner's position that parties seeking protection should be required to disclose the very schedule and movements that they seek to protect the respondent from having access to is completely counter to the Act.

Though Roake is represented by counsel in this matter, SAPO petitioners generally appear *pro se*, in need of immediate help, and unable to endure a lengthy criminal-like trial as Delman seeks. In light of these issues and many others, the government has a compelling interest in protection order proceedings that are flexible and accessible, ensuring that petitioners are not discouraged from seeking such orders. *Gourley*, 158 Wn.2d at 470. Delman's claim that his due process rights were denied are counter to legislative intent that the Court of Appeal affirmed, thus the petition does not involve a novel issue of substantial public interest and there is no basis for a grant under RAP 13.4(b)(4).

2. PETITIONER HAD NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD

The procedures established by the protection order statutes have been repeatedly upheld as complying with procedural due process requirements. The courts have held that the statutory procedures for protection orders satisfy "the inherently flexible

demands of procedural due process.” *State v. Karas*, 108 Wn.App. 692, 700, 32 P.3d 1016, 1021 (2001). See *Gourley v. Gourley*, 158 Wn.2d 460, 468-69, 145 P.3d 1185, 1188-89 (2006); *Spence v. Kaminski*, 103 Wn.App. 325, 335, 12 P.3d 1030, 1035 (2000).

First, Delman essentially concedes that he received proper notice of the hearing but then argues that it was not sufficient. He also erroneously asserts that no challenge can be made to the *ex parte* order. Petitioner at 14. Under RCW 7.90.121 an *ex parte* temporary order may be renewed one or more times. If the motion for renewal is contested, upon receipt of the motion, the court shall order that a hearing be held no later than fourteen days from the date of the order. RCW 7.90.121(4)(a). Prior to the February 20 denial, Delman was afforded two opportunities of access and opportunity to be heard on the issue of the temporary order. His first opportunity was at the initial SAPO hearing on January 28 where he agreed to the reissuance with minor modifications. His second opportunity was where Roake’s testimony was cut short on February 10. At both hearings, he decided to waive his objections to the temporary order being renewed. On February 20, parties were present to continue with the hearing on the full SAPO petition.

The temporary order was no longer an issue that needed to be adjudicated.

Second, the inherent flexible demands of procedural due process can be seen in how the Act requires notice to the respondent only after the petitioner has filed and received a temporary order, when there is reasonable fear of future dangerous acts, recognizing that notice prior to filing can put a petitioner in danger. Specifically, RCW 7.90 requires that the petition include “specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts, for which relief is sought.” RCW 7.90.020(1). The fact that a lack of good cause to believe the “harm which that remedy is intended to prevent would be likely to occur if the respondent were given any prior notice” can be a basis for denying an *ex parte* temporary order explains the purpose in having the reasonable fear requirement at the *ex parte* hearing. It is because the respondent is having a temporary order issued against him or her without notice at *ex parte*, due process requires a petitioner to meet a higher standard by providing not only facts related to nonconsensual conduct, but also acts and statements giving rise to reasonable fear.

Third, any sexual assault protection order shall describe each remedy granted by the court, in reasonable detail and not by reference to any other document, so that the respondent may clearly understand what he or she must do or refrain from doing. RCW 7.90.130(1). For *ex parte* temporary sexual assault protection orders, the respondent may petition the court to reopen the order if he or she did not receive actual prior notice of the hearing and if the respondent alleges that he or she had a meritorious defense to the order or that the order or its remedy is not authorized by this chapter. RCW 7.90.130(2)(e).

Under the statutory challenges allowed in 7.90.130, Delman did not contest that he did not receive actual prior notice of the hearing. He also provided no meritorious defense that the order was invalid under the statute such as the facts alleged did not rise to the definition of nonconsensual sexual conduct or that Roake was not eligible for a SAPO because she should have petitioned under the DVPO statute RCW 26.50—his challenge was not that Roake did not meet her burden for the *ex parte* order but that she had no basis for reasonable fear of future dangerous acts for a final order. Therefore, there is no basis for Delman to now raise a notice requirement issue that he failed to raise at the trial or appellate

levels. In this case, Delman had full opportunity to provide rebuttal evidence, which he did. He also had the benefit of counsel and was provided all of Roake's filings and notice of each hearing that was scheduled. His due process rights were fully protected because he was provided the opportunity to be heard at a meaningful time and in a meaningful manner. Allowing for the SAPO hearing to move forward with the remand from the Court of Appeals does not violate Delman's right to due process.

D. CONCLUSION

The Court of Appeals appropriately exercised its authority in reversing and remanding the case at hand. Ms. Roake asks the Court to deny the Petition for Review of the Division 1 decision because Petitioner has failed to establish sufficient grounds for review under RAP 13.4.

Dated on September 9, 2016.

Respectfully submitted by:



Riddhi Mukhopadhyay, WSBA 42759
Attorney for Respondent Megan Roake

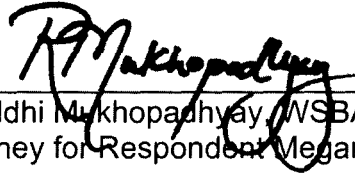
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Dated on September 9, 2016.

Respectfully submitted by:



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