

FILED
December 23, 2015
Court of Appeals
Division I
State of Washington No. 73337-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MR
Appellant,

vs.

MD
Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE DOUGLASS NORTH

RESPONDENT'S ANSWER TO AMICI CURIAE BRIEFS

SMITH GOODFRIEND, P.S.

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I. INTRODUCTION

Sexual Assault Protection Orders are a powerful and important tool for protecting victims of sexual assault. But they are not to be wielded lightly. The Legislature understood as much, imposing two distinct prerequisites before a SAPO may issue: 1) that a sexual assault occurred and 2) that something else the respondent said or did, at the time of the alleged assault or afterwards, has made the petitioner reasonably fearful of future dangerous acts by the respondent. This brief responds to the amicus curiae briefs submitted by Legal Voice and Northwest Justice Project (collectively “Legal Voice”), and King County Sexual Assault Resource Center and Washington Coalition of Sexual Assault Programs (collectively “KCSARC”). This Court should reject amici’s contrary reading of RCW ch. 7.90, based on a version of the SAPO statute they wish the Legislature had passed, and not the one it actually passed.

II. ARGUMENT IN RESPONSE TO AMICI

A. **The Legislature deliberately added RCW 7.90.020(1)’s requirement of “specific statements or actions . . . which give rise to a reasonable fear of future dangerous acts.”**

The legislative history of RCW 7.90.020(1) confirms the trial court’s interpretation of the statute – a petitioner must allege and prove both a sexual assault and specific statements or actions of the

respondent that give rise to a reasonable fear of future dangerous acts. Because MR did not allege, let alone prove, the second element of a SAPO, the trial court correctly dismissed her petition.

The Legislature rejected the initial version of the statute, proposed by amici here, that would have allowed SAPOs to issue based only on an allegation of sexual assault and a perfunctory request for relief. The initial draft of RCW 7.90.020(1) required that a SAPO petition allege only a sexual assault and “the specific facts and circumstances from which relief is sought.” House Bill 2576 § 5 (2006) (App. A). The Legislature amended the bill to require more – a SAPO petitioner must allege and prove an assault and “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.” Laws of 2006, ch. 138 § 5; *see also* Senate Bill Report SHB 2576 (2006) (“The amended bill requires that the petitioner for a sexual assault protection order must set forth, in the affidavit, the statements or actions made that gave rise to a reasonable fear of future dangerous acts, for which the order is sought.”).

The Legislature’s deliberate decision to add this language confirms that it is a necessary element of a SAPO petition, contrary

to amici's arguments. *Lewis v. State, Dep't of Licensing*, 157 Wn.2d 446, 470, ¶ 45, 139 P.3d 1078 (2006) ("This court may consider sequential drafts of a bill in order to help determine the legislature's intent."). The Legislature's addition of this language also reflects its rejection of amici's position that SAPOs should issue based on a petitioner's generalized fears and distress, and that it instead intended that SAPOs issue on reasonable fears of future dangerous acts *by the respondent*. (KCSARC 4-6) It is not for amici, or this Court, to overrule the Legislature's judgment on when or how SAPOs would issue. *Det. of Hatfield*, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 7424863, at *13 n.9 (2015) ("Because we will not disturb legislative policy determinations, [the] assertion is properly one for the legislature to consider, not one for us to consider.").

Other resources are available for addressing the broader psychological impacts of a sexual assault, as the very existence of amici demonstrates. These resources, not the narrow legal remedy afforded by a SAPO, are the proper tools for addressing "the psychological injuries sustained by victims of sexual assault." (KCSARC 4)

The Legislature had good reason to require a petitioner to establish the need for a SAPO by proving specific statements or

actions that give rise to a reasonable fear of future dangerous acts by the respondent. The consequences of issuing a SAPO are severe not only for the respondent, but for the government agencies charged with enforcing SAPOs. RCW 7.90.160; RCW 26.50.110(1)(a) (discussed at Resp. Br. 11). The trial court correctly interpreted and applied the statute the Legislature actually enacted by dismissing MR's petition because she did not allege or prove a reasonable fear of future dangerous acts by MD. This Court should reject amici's attempt to judicially enact a statute the Legislature rejected.

B. Amici ignore the language of RCW 7.90.020(1) that requires a petitioner to allege and prove a “reasonable fear of future dangerous acts.”

Regardless of legislative history, the plain language of RCW 7.90.020(1) requires a petitioner to allege and prove both “the existence of nonconsensual sexual conduct or nonconsensual sexual penetration, *and* . . . 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.” (emphasis added) Amici ignore this language in arguing that a SAPO may issue solely on “a finding that a sexual assault occurred.” (Legal Voice 7) Far from “imposing additional requirements not found in the statute” (Legal Voice 6, 11-14), the trial

court's reading of the statute implements all its language. *Whatcom Cty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.").

Amici's contention that under RCW 7.90.090 a finding of sexual assault is the *only* requirement for entry of a SAPO would make superfluous the second element of a SAPO petition in RCW 7.90.020(1). If a reasonable fear of future dangerous acts could be established by reliance on the allegations of assault alone, as amici argue (KCSARC 4-6), then the second element of a petition would be redundant of the first, which already requires a petitioner to allege a sexual assault. (*See* Resp. Br. 13-14) Moreover, the statute requires that a respondent be served with a copy of the petition, confirming that its elements are not mere formalities. RCW 7.90.120(1)(a). Because MR failed to allege, let alone prove (*see* § II.C, *infra*), a necessary element of a SAPO petition, her petition was no different than a defective complaint, subject to dismissal for failure to state a claim. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 843-44, ¶ 9, 347 P.3d 487 ("If a plaintiff's claim remains legally insufficient even under his or her proffered hypothetical facts,

dismissal pursuant to CR 12(b)(6) is appropriate.”) (quotation omitted), *rev. denied*, 184 Wn.2d 1011 (2015).

Requiring proof of both elements of a SAPO petition does not mean victims of a single sexual assault or those who “do not know their assailants would never qualify for a SAPO, because they would not be able to sufficiently predict their attackers’ future actions.” (Legal Voice 8-9, 12) The statute does not require petitioners to “predict” a respondent’s actions, or “to establish the fear of another future sexual assault.” (Legal Voice 11) (emphasis in original) It allows anyone, including victims of a single sexual assault, to obtain a SAPO by proving an assault and some basis for believing that the remedy provided by the statute – a no-contact order – is needed. RCW 7.90.005 (statute creates a civil remedy requiring offenders to “stay away from the victim”). For example, a petitioner could obtain a SAPO by alleging an assault and (unlike here) that the respondent threatened the petitioner if she reports the assault, or intentionally contacted her after the assault.

The reasonable fear requirement also is not meant only as a due process protection for temporary *ex parte* orders that then falls away for final orders, as amici suggest. (Legal Voice 13) RCW 7.90.020 establishes the necessary elements of a SAPO petition.

RCW 7.90.110 deals specifically with *ex parte* orders and protects the respondent's due process rights by requiring the court to find "the harm which th[e] remedy is intended to prevent would be likely to occur if the respondent were given any prior notice." The reasonable fear requirement of RCW 7.90.020 would be redundant of RCW 7.90.110 if it served only as a due process protection for *ex parte* orders. It would also be absurd if the statute required proof of reasonable fear for a temporary order lasting 14 days, but not for a final order that restricts the respondent's freedom for two years. See RCW 7.90.050 (authorizing 14 day temporary orders pending full hearing); RCW 7.90.120(2) (authorizing two year final orders).

This case amply demonstrates the serious due process risks of accepting amici's assertion that a petitioner need only "prove" the need for a SAPO at an *ex parte* hearing held without the respondent. Here, MR obtained a temporary order without informing the commissioner that a UW no-contact order had already been in place for four months and that MD had not violated it, as required by RCW 7.90.020(1), and by falsely telling the commissioner that MD was aware of her class schedule and thus knew the areas of campus he

should avoid.¹ (RP 7) MR then argued to the trial court it should treat the commissioner’s “finding” that her petition was sufficient as conclusive. (RP 61-63: “It was addressed at the ex-parte hearing.”) Amici likewise argue that MR should not have to prove at a contested hearing – where MD could correct her omissions and misstatements – “the 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.” RCW 7.90.020(1).

As soon as MD was actually made aware of MR’s allegations, however, he denied them (*see, e.g.*, CP 9-11, 33-34), contrary to amici’s assertion that “[r]espondent failed to present any evidence rebutting M.R.’s claim of sexual assault.” (Legal Voice 14) Moreover, MD was prepared to deny MR’s allegations at the full hearing, but the need for his testimony was mooted when the trial court dismissed MR’s facially deficient petition. MD no more “conceded” the truth of MR’s allegations than any other defendant that obtains dismissal for failure to state a claim. (*See* RP 70-71: trial court recognized it was “hotly disputed whether, in fact, a sexual assault occurred”)

¹ When MD requested this information so he could comply with the temporary SAPO, MR refused to provide it. (CP 10)

It is disingenuous, at best, for amici to both complain that testimony was “shut down” (Legal Voice 19-20) and then to rely on the fact that MD never testified to claim the evidence is “uncontested.” (Legal Voice 1) The trial court correctly refused to render superfluous RCW 7.90.020’s language requiring a petitioner to establish the specific statements or actions of the respondent *other* than the alleged assault that “give rise to a reasonable fear of future dangerous acts” before a SAPO can issue.

C. The trial court denied MR’s petition based on the lack of any allegation or evidence of a reasonable fear of future dangerous acts, not because of MR’s delay in seeking a SAPO.

Amici, like MR, distort the trial court’s reasoning in asserting that it declined to enter a SAPO based on MR’s “delay in filing for a [SAPO].” (KCSARC 6; *see* Resp. Br. 22) The trial court made clear the basis for its decision was not delay in seeking a SAPO, but the lack of evidence “in that ensuing period of time to think that there’s . . . a reasonable fear of future dangerous acts for which relief is sought.” (RP 78-79) Taken in context, the trial court’s statement that the facts of this case were “peculiar” (RP 78) reflects only its belief that MR had failed to prove a reasonable fear of future dangerous acts, not any denigration of her delay in seeking a SAPO. (KCSARC 8)

Just as a petitioner may establish the need for a SAPO based on subsequent conduct, a respondent may demonstrate that none is needed based on the same temporal evidence. The Legislature expressly authorized trial courts to consider conduct (or the absence of conduct) after the alleged assault when it added language to the statute allowing petitioners to establish the need for a SAPO by relying on events occurring “subsequently thereafter” the assault. RCW 7.90.020(1). The trial court stressed: “I recognize that one of the things in the statute says that you’re not to deny a [SAPO] simply because there’s been a delay in reporting. And I recognize that.” (RP 78)

MD never argued that a final SAPO should be denied because he had no “track record” of dangerous acts, but consistently argued it should be denied because he never “attempt[ed] to have any type of interaction with” MR. (*Compare* Legal Voice 11 *with* CP 42, 47) The trial court correctly recognized “we’ve got quite a history of information provided by both sides about what has happened since the alleged assault” and that, based on that history, there was no “basis for believing there’s a reasonable fear of future dangerous acts.” (RP 77-78) In the nine months between the alleged assault and the SAPO hearing, MD made no attempts to contact MR, and

was in full compliance with the mutual no-contact order issued by the UW on September 26, 2014.² (CP 47) By MR's own account, she sought a SAPO not because of any threats or intentional contact by MD, but because she was dissatisfied with the speed of the UW student conduct process. (RP 5, 63) MR thus failed to allege, let alone prove, specific acts or conduct *by MD* giving rise to a reasonable fear of future dangerous acts.

Unable to dispute the above facts, and ignoring that MD has transferred to an out-of-state university (CP 51-52), amici assert MR needs protection from "future interactions" with MD because of chance encounters on UW's campus. (Legal Voice 11, quoting RCW 7.90.005) But an "interaction" is a "mutual or reciprocal action or influence." Interaction, Merriam-Webster.com (last visited December 22, 2015). There was nothing "mutual" or "reciprocal" about the accidental encounters between MR and MD. MD never spoke with MR, never sought her out, and in no way tried to "interact" with her. Indeed, the most significant "interaction" MR claimed was that she "thought they made eye contact" once. (CP 23)

² Amicus ignores the UW's no-contact order in asserting MR was "unprotected" after the prosecutor declined to file charges against MD in October 2014. (KCSARC 8) MR never attempted to enforce this order, despite her claims that she was traumatized by her chance glimpses of MD on the UW campus.

As the trial court found, “While [MR] has said that she has seen [MD] and been placed in fear by doing so, that doesn’t constitute a reasonable fear of future dangerous acts.” (RP 77)

The cases cited by amici do not exempt petitioners from complying with RCW 7.90.020(1)’s requirement to prove specific acts or conduct by respondent giving rise to a reasonable fear of future dangerous acts. (KCSARC 7) Rather, those cases affirmed trial court decisions to issue domestic violence protection orders “based on a demonstrated need to protect [petitioner] from domestic violence,” and a “current fear” caused by respondent contacting petitioner “in direct violation of the parenting plan’s requirements.” *Spence v. Kaminski*, 103 Wn. App. 325, 332, 12 P.3d 1030 (2000); *Muma v. Muma*, 115 Wn. App. 1, 6-7, 60 P.3d 592 (2002), *rev. denied*, 149 Wn.2d 1029 (2003); *see* Resp. Br. 17-18. Unlike petitioners seeking a SAPO, petitioners for a domestic violence protection order are not required to establish a reasonable fear of future dangerous acts because domestic violence necessarily arises in the context of an existing relationship, and thus establishing domestic violence also establishes the likelihood of future contact. (Resp. Br. 18-19) No similar facts exist here, where it is undisputed MD has not contacted MR since the alleged assault.

The fact that RCW ch. 7.90 does not contain a statute of limitations does not mean that SAPOs may be issued without regard to whether they are needed. (KCSARC 7) The absence of a statute of limitations allows a petitioner to obtain a SAPO where an assault occurred but the need to prevent contact because of respondent's "statements or actions" arises later. It does not mean, as amici suggest, that a petitioner may obtain a SAPO without proving "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." RCW 7.90.020(1).

D. The trial court did not consider the impact a SAPO would have on MD's reputation.

Amici's focus on the trial court's purported consideration of MD's reputation is a red herring. The trial court nowhere relied on harm to MD's reputation as a basis for denying the SAPO. Rather, it indisputably denied MR's petition because she did not allege and could not prove a reasonable fear of future dangerous acts and thus there was not a "statutory basis for a petition here." (RP 77-78) Amici cite no statement by the trial court reflecting it considered MD's reputation, instead focusing on MD's efforts to correct the trial court's erroneous view that a SAPO is "just" a no-contact order without any other consequences. MD's accurate statements to the

trial court that SAPOs have profound and lasting consequences (including branding the respondent a rapist and requiring registration in a criminal database) are not a basis for reversal, but entirely consistent with the Legislature’s judgment that SAPOs should issue only when they are needed.³

E. The trial court correctly dismissed MR’s petition without her unspecified additional testimony.

Trial courts have wide discretion to control the presentation of evidence. ER 611; *Sanders v. State*, 169 Wn.2d 827, 851, ¶ 54, 240 P.3d 120 (2010). That discretion is even greater in informal SAPO proceedings, where neither the Civil Rules nor Rules of Evidence apply. *See* CR 81; *Scheib v. Crosby*, 160 Wn. App. 345, 352, ¶¶ 15-16, 249 P.3d 184 (2011) (protection order proceedings are special proceedings under CR 81); ER 1101(c)(4). RCW ch. 7.90 does not provide any specific instructions on the form a SAPO hearing should take or require that any particular evidence be admitted.⁴ *Cf.*

³ The declaration of MD’s father outlining the severe impact a SAPO would have on MD was part of this effort to correct the trial court’s mistaken view of the consequences of a SAPO. (*See* RP 41-42; CP 51) Accurately reciting the legal consequences of a SAPO is not an attempt to “curry favor.” (Legal Voice 15)

⁴ In contrast, the statute instructs what evidence should be excluded. *See, e.g.*, RCW 7.90.090(4): “[d]enial of a remedy may not be based . . . on evidence” that either party was intoxicated, or that the petitioner engaged in limited consensual sexual touching; RCW 7.90.080: limiting admissibility of evidence of prior sexual activity.

Gourley v. Gourley, 158 Wn.2d 460, 469-70, ¶¶ 25-27, 145 P.3d 1185 (2006) (Domestic Violence Protection Order Act did not “explicitly set[] forth the form the hearing must take or define[] what is meant by ‘full hearing’”) (Resp. Br. 27-28).

The trial court afforded MR the hearing required by the statute. It listened to her arguments that she could establish a reasonable fear of future dangerous acts based on the assault, her chance “encounters” with MD, and the fact that she did not “know” MD. (RP 61-68, 75-76) It then rejected those arguments, correctly finding that MR’s allegation that MD might engage in unspecified conduct at an unspecified time could not satisfy RCW 7.90.020(1)’s requirement that she prove “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.” (RP 77-79)

The trial court was well within its discretion to deny a SAPO without additional testimony from MR when no testimony could have changed the deficient nature of her petition. That is particularly true where MR nowhere, either below or on appeal, explained what additional evidence she would have provided had she been allowed to provide further testimony, and to the contrary repeatedly encouraged the trial court to issue a SAPO without formal testimony.

(See Resp. Br. 26-29) Petitioners can have their “day in court,” as MR did; the trial court’s refusal to allow MR to offer additional unspecified testimony did not here and will not “perpetuate[] the underreporting of sexual assault.” (Legal Voice 19) When they meet the statutory requirements for a SAPO, one will be issued. But where, as here, a petition fails to meet those statutory requirements, it should be dismissed.

III. CONCLUSION

This Court should reject the arguments of amici and affirm the trial court’s denial of MR’s SAPO petition.

Dated this 23rd day of December, 2015.

SMITH GOODFRIEND, P.S.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 23, 2015, I arranged for service of the foregoing Respondent's Answer to Amici Curiae Briefs, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 23rd day of December,
2015.



Tara D. Friesen

HOUSE BILL 2576

State of Washington 59th Legislature 2006 Regular Session

By Representatives Williams, Green, O'Brien, Kirby, Hunt, Ericks,
Simpson, Lovick, McCoy, Lantz, Ormsby, Springer and Conway

Read first time 01/10/2006. Referred to Committee on Judiciary.

1 AN ACT Relating to protection of sexual assault victims; amending
2 RCW 9A.46.060, 10.14.130, 10.31.100, 19.220.010, 26.50.035, 26.50.110,
3 59.18.575, and 10.31.100; reenacting and amending RCW 9.41.300 and
4 26.50.160; adding a new chapter to Title 7 RCW; creating new sections;
5 and prescribing penalties.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 NEW SECTION. **Sec. 1.** Sexual assault is the most heinous crime
8 against another person short of murder. Sexual assault inflicts
9 humiliation, degradation, and terror on victims. According to the FBI,
10 a woman is raped every six minutes in the United States. Rape is
11 recognized as the most underreported crime; estimates suggest that only
12 one in seven rapes is reported to authorities. Victims who do not
13 report the crime still desire safety and protection from future
14 interactions with the offender. Some cases in which the rape is
15 reported are not prosecuted. In these situations, the victim should be
16 able to seek a civil remedy requiring that the offender stay away from
17 the victim.

- 1 (a) A minor child;
2 (b) A vulnerable adult as defined in RCW 74.34.020; or
3 (c) Any other adult who, because of age, disability, health, or
4 inaccessibility, cannot file the petition.

5 NEW SECTION. **Sec. 4.** (1) Any person may seek relief under this
6 chapter by filing a petition with a court alleging that the person has
7 been the victim of nonconsensual sexual conduct or nonconsensual sexual
8 penetration committed by the respondent.

9 (2) A person under eighteen years of age who is sixteen years of
10 age or older may seek relief under this chapter and is not required to
11 seek relief by a guardian or next friend.

12 (3) No guardian or guardian ad litem need be appointed on behalf of
13 a respondent to an action under this chapter who is under eighteen
14 years of age if such respondent is sixteen years of age or older.

15 (4) The court may, if it deems necessary, appoint a guardian ad
16 litem for a petitioner or respondent who is a party to an action under
17 this chapter.

18 (5) An action under this chapter shall be filed in the county or
19 the municipality where the petitioner resides.

20 NEW SECTION. **Sec. 5.** There shall exist an action known as a
21 petition for a sexual assault protection order.

22 (1) A petition for relief shall allege the existence of
23 nonconsensual sexual conduct or nonconsensual sexual penetration, and
24 shall be accompanied by an affidavit made under oath stating the
25 specific facts and circumstances from which relief is sought.
26 Petitioner and respondent shall disclose the existence of any other
27 litigation or of any other restraining, protection, or no-contact
28 orders between the parties.

29 (2) A petition for relief may be made regardless of whether or not
30 there is a pending lawsuit, complaint, petition, or other action
31 between the parties.

32 (3) Within ninety days of receipt of the master copy from the
33 administrative office of the courts, all court clerk's offices shall
34 make available the standardized forms, instructions, and informational
35 brochures required by RCW 26.50.035 and shall fill in and keep current
36 specific program names and telephone numbers for community resources.