

74665-1

74665-1

No. 74665-1

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

KORBY KENCAYD ET ANO.,

Respondent

v.

BRYEN VON PRIECE,

Appellant

**ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. John H. Chun)**

BRIEF OF APPELLANT

D. Jack Guthrie, WSBA #46404
Attorney for Bryen Von Priece
McKay Chadwell, PLLC
600 University Street, Suite 1601
Seattle, WA 98101-4124
(206) 233-2800

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2016 MAY 13 PM 2:07

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR	1
III. STATEMENT OF THE CASE	3
IV. ARGUMENT	12
A. THE TRIAL COURT ERRED WHEN IT ISSUED AN ORDER OF PROTECTION BENEFITTING KORBY KENCAYD.....	13
1. The Kencayds fail to establish a repeated course of conduct against Korby Kencayd.....	15
2. The Kencayds also fail to establish at least one element of each of the definitions of “stalking conduct.”	16
B. VON PRIECE WAS DEPRIVED OF DUE PROCESS WHEN THE COURT ERRONEOUSLY REFUSED TO PERMIT HIM TO MARK HIS VIDEO EVIDENCE AS AN EXHIBIT.	19
1. Standard of Review.....	19
2. Von Priece was erroneously prohibited from marking his video exhibit as objective evidence controverting his accuser’s uncorroborated word-of-mouth allegations.	20
C. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ERRONEOUSLY REFUSED TO VIEW THE VIDEO EVIDENCE MADE AVAILABLE AS AN OFFER OF PROOF. ...	24
D. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT RULED VON PRIECE’S VIDEO EVIDENCE WOULD NOT HAVE MADE A DIFFERENCE IN THE COURT’S RULING.	26
E. THE TRIAL COURT DENIED VON PRIECE DUE PROCESS WHEN IT ABRUPTLY TRUNCATED HIS CASE-IN-CHIEF AND ENTERED THE FINAL ORDER OF PROTECTION.	29

F. THE TRIAL COURT DENIED VON PRIECE DUE PROCESS
WHEN IT DENIED VON PRIECE AN OPPORTUNITY TO
CONDUCT EFFECTIVE CROSS-EXAMINATION.31

V. CONCLUSION.....33

TABLE OF AUTHORITIES

Cases

Federal:

<i>Armstrong v. Manzo</i> , 380 U.S. 545, 85 S. Ct 1187, 14 L. Ed.2d 62 (1965)	19
<i>Gray v. Lucas</i> , 677 F.2d 1086 (5th Cir. 1982).....	21
<i>Matthews v. Eldridge</i> . 424 U.S. 319, 96 S.Ct. 893, 47 L. Ed.2d 18 (1976)	passim

Washington State:

<i>Chavez v. Dep't of Labor & Indus.</i> , 129 Wn. App. 236, 118 P.3d 392 (2005)	7
<i>Freeman v. Freeman</i> , 169 Wn.2d 664, 239 P.3d 557, (2010).....	14
<i>Go2Net, Inc. v. C I Host, Inc.</i> , 115 Wn. App. 73, 60 P.3d 1245 (2003)....	31
<i>Gourley v. Gourley</i> , 158 Wn.2d 460, 145 P.3d 1185 (2006)...	19, 20, 31, 32
<i>In re Det. Of Stout</i> , 159 Wn.2d 357,150 P.3d 86 (2007).....	20
<i>In re Estate of Hambleton</i> , 181 Wn.2d 802, 335 P.3d 398 (2014).....	19
<i>Jacqueline's Washington, Inc. v. Mercantile Stores Co.</i> 80 Wn.2d 784, 498 P.2d 870 (1972)	27
<i>Loveridge v. Fred Meyer, Inc.</i> , 125 Wn.2d 759, 887 P.2d 898 (1995)	7
<i>Pulcino v. Fed. Exp. Corp.</i> , 94 Wn. App. 413, 972 P.2d 522 (1999).24, 25, 26	
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	27
<i>State v. Johnson</i> , 150 Wn. App. 663, 208 P.3d 1265 (2009).....	27
<i>State v. Kintz</i> , 169 Wn.2d 537, 238 P.3d 470, (2010)	14, 15
<i>State v. Ray</i> , 116 Wn.2d 531, 806 P.2d 1220 (1991).....	21
<i>Sturgeon v. Celotex Corp.</i> , 52 Wn. App. 609, 762 P.2d 1156 (1988).....	21
<i>Tamburello v. Department of Labor and Industries</i> , 14 Wn. App. 827, 545 P.2d 570 (1976)	25
<i>Thor v. McDearmid</i> , 63 Wn. App. 193, 817 P.2d 1380 (1991).....	21
<i>Von Priece v. Potter</i> , King Co. Dist. Ct. No.: 151-00526	6

Constitutional Provisions

Federal:

Const. Amend. XIV19

Washington:

Wash. Const. Art. 1 § 319

Statutes

RAP 9.1123

RCW 7.92.01012

RCW 7.92.020passim

RCW 7.92.10013, 17, 18

RCW 9.61.26013, 16, 17

RCW 9A.46.10016, 17

RCW 9A.46.11013, 14, 15

Rules

Civil Rule 59.....31

King County Local Court Rule 79(2)(d)6, 22

Other Authorities

5D Karl B. Tegland, Washington Practice: Courtroom Handbook on
Washington Evidence ch. 5, § 103:5 (2015-16)21, 22

I. INTRODUCTION

Bryen Von Preece was denied his day in court when his proffered video evidence disproving his neighbors' fabricated narrative for a protection order was erroneously excluded. Korby Kencayd and Randle Kencayd are not entitled to the protection order they obtained against Von Preece after he petitioned for a protection order against them. While "good fences make good neighbors," retaliatory protection orders do not. The Court of Appeals should remand this matter for the trial court to admit and weigh Von Preece's video evidence, which proves the Kencayds' petition is baseless and requires vacation of the protection order against Von Preece.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1: The trial court abused its discretion when it granted the order of protection against Von Preece for the benefit of Korby Kencayd.

No. 2: The trial court erred when it refused to permit Von Preece to mark video evidence he presented as a protection order hearing exhibit.

No. 3: The trial court erred when it refused to admit and weigh Von Preece's video evidence, pursuant to his offer of proof.

No. 4: The trial court abused its discretion when it determined, without viewing Von Preece's video evidence, that the objective evidence

regarding otherwise uncorroborated word-of-mouth incidents reported by the Kencayds was not relevant.

No. 5: The trial court erred when it deprived Von Preece the ability to present his case-in-chief through objective video evidence to defend himself against uncorroborated word-of-mouth allegations by the Kencayds.

No. 6: The trial court erred when it refused to allow Von Preece to cross-examine the Kencayds regarding their uncorroborated word-of-mouth allegations prior to granting the Kencayds' petition.

Issues Pertaining to Assignments of Error

No. 1: Did the trial court abuse its discretion when it found that Von Preece committed stalking conduct against non-party Korby Kencayd without considering Von Preece's video evidence of the same conduct? (Assignment of Error 1).

No. 2: Did the trial court err when it refused to permit Von Preece from marking his proffered video evidence and make it part of the record prior to, and after, granting the protection order petition? (Assignment of Error 2).

No. 3: Did the trial court err when it refused to review the video evidence, which was part of Von Preece's offer of proof, to determine whether that video evidence was relevant to disproving the Kencayds'

word-of-mouth allegations for a protection order? (Assignment of Error 3).

No. 4: Did the trial court abuse its discretion when it held that the proffered video evidence was not relevant without viewing it? (Assignment of Error 4).

No. 5: Did the trial court deprive Von Preece of Due Process when it prevented him from completing his case-in-chief and presenting objective video evidence to defend himself against otherwise uncorroborated word-of-mouth allegations about the same incidents by the Kencayds? (Assignment of Error 5).

No. 6: Did the trial court deprive Von Preece of Due Process when it prevented him from cross-examining the Kencayds regarding their word-of-mouth allegations against him during his case-in-chief? (Assignment of Error 6).

III. STATEMENT OF THE CASE

The parties are neighbors who live in the Central District, a densely populated neighborhood east of downtown Seattle. CP 9. The Kencayds' residence and place of work is only blocks away from Von Preece's home. *Id.* Von Preece and the Kencayds are dog owners. RP 14.

Von Preece trains show dogs and works from his home. RP 13. As part of the dogs' training process, Von Preece videotapes the dogs as they

are walked to document and assist his training work. RP 13-14. Von Priece has a small high definition video camera (with simultaneous audio recording) that he wears attached to the bill of his ball cap when he walks his dogs. RP 6. He records his show dogs during all of his dog walks. He does not wear his video camera to surreptitiously film others and there was no evidence admitted at the hearing to show this; an allegation made by the Kencayds to the contrary was only self-serving speculation.

Von Priece's first interaction with the Kencayds involved confrontations between their respective dogs. RP 14. In the summer of 2013, one of the Kencayds' dogs, while unlawfully off leash within Seattle city limits¹, confronted Von Priece's leashed dog. RP 5. While the encounter was brief, it triggered a verbal argument between Von Priece and the Kencayds. RP 14. Several other verbal spats occurred between the parties in 2013, RP 14, culminating in 2015 when Von Priece called an animal control agency to report that the Kencayds' dogs were in violation of the city's leash laws. *See* CP 12.

On October 12, 2015, while Von Priece was walking his dog in his neighborhood on a public street, Randle Kencayd verbally confronted him using harassing and offensive language. RP 15.

¹ *See* SMC 9.25.084-A.

Mr. Von Priece: And when I ignore him and the fellow that he's talking to, he immediately goes into this rant about how I need - - and I apologize ahead of time to everyone in the courtroom who has ears that are not into - - that need more delicate language. But what he says things to me - - in how own video, you need to get fucked. You need to get laid. You need a dick up your butt. Come back and I'll tell you what kind of - - tell me what kind of man you want and I'll get him for you. Don't go away. Don't leave. Don't leave. Come back. That's what he is on video saying to me. And I ignored him, and I walked away.

Id. Video objectively documenting the entire incident and recording Randle's offensive words as the aggressor was offered by Von Priece numerous times, RP 12-15, 20-23, 26-28, 30, but the trial court repeatedly refused to even allow it to be marked as an exhibit to the hearing, RP 22, 26.

The interaction was described quite differently in the fabricated narrative presented by Randle Kencayd's petition. CP 3. Randle Kencayd entirely omitted his verbally abusive conduct, falsely alleging that Von Priece stated "you know I have a gun and will defend myself," which Randle Kencayd "took . . . as a direct threat that he had a weapon and would use it." *Id.* While Randle Kencayd claims he contacted law enforcement immediately after the alleged threat, no documentation of police contact was offered or proven. The trial court could have resolved the material dispute over whether Von Priece had actually threatened

Randle Kencayd by simply viewing Von Priece's offered video and listening to the clear audio.

Less than two months later, on December 3, 2015, Von Priece and Randle Kencayd encountered each other as Von Priece was walking his dog and Randle Kencayd was jogging. RP 14. As Randle Kencayd jogged away, he shouted a derogatory remark at Von Priece. RP 10, 12.

As a result of the continued unwanted and offensive verbal assaults, Von Priece sought an anti-harassment order against Randle Kencayd. *See Von Priece v. Potter*, King Co. Dist. Ct. No.: 151-00526.² The final hearing on that order occurred on December 28, 2015. *See* Exhibit 1.³ At that hearing, Von Priece presented video recordings that he had preserved from his small video camera he wears attached to a ball cap that captured the entirety of the October 12, 2015, and December 3, 2015, interactions. Ex. 1 at 1:46:00 – 1:50:00. The Court questioned both Kencayds and Von Priece at that hearing. *Id.* Significantly, no one alleged, nor did the trial court comment upon, any threat of any kind made by Von

² Randle Kencayd previously used the name Randle Lee Potter. RP 19.

³ Exhibit 1 is an audio CD containing the recording of the final hearing on Von Priece's anti-harassment petition. It appears as though it was filed as a submission to the court file and later converted to an exhibit pursuant to King County Local Court Rule 79(2)(d). CP 22-23. It also appears as though no exhibit list was generated. Because this is the only exhibit in this case, this brief will refer to it as Exhibit 1.

Priece directed toward Randle Kencayd. *Id.* Had such a threat been made, it would have logically been presented to undercut Von Priece's claims that he was the victim of harassment. After nearly two hours on the record on the matter, the trial court denied Von Priece's motion because it did not find that Von Priece was sufficiently fearful of Randle Kencayd, despite Von Priece's reasonable offense over the derisive language. RP 16.

Two weeks before that hearing, Randle Kencayd filed the instant anti-stalking petition against Von Priece. CP 1-8. Randle Kencayd's petition was based on the same conduct discussed in Von Priece's 2015 anti-harassment petition, and could have been rejected as *res judicata*.⁴

On January 5, 2016, the trial court heard argument on the Kencayds' anti-stalking petition. RP 1. Both Randle Kencayd, and his partner Korby Kencayd, were present, although only Randle Kencayd addressed the Court RP 2. The Court permitted Randle Kencayd to cross-examine Von Priece, and to present documents not contained within the

⁴ The circumstances of this case beg the question of why the Kencayds did not consolidate their petition with Von Priece's petition. Ordinarily, the doctrine of *res judicata* would have prevented duplicative litigation of this nature. *Chavez v. Dep't of Labor & Indus.*, 129 Wn. App. 236, 239, 118 P.3d 392, 394 (2005) (quoting *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995)) ("Claim preclusion, or *res judicata*, prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action.") (emphasis added).

petition. RP 3-10. During cross-examination the following exchange regarding the alleged threats to kill occurred:

Mr. R. Kencayd: Have you ever threatened to shoot or kill me?

Mr. Von Priece: I have that scene on video. And the day that you said that it happened, and the video will prove

- -

Mr. R. Kencayd: I didn't ask you that. I asked you -

-

Mr. Von Priece: No, I did not.

RP 10. Von Priece was referring to the video evidence he planned to introduce during his defense case-in-chief, which documented the entire exchange between himself and Korby Kencayd. Von Priece had offered the same video evidence in the anti-harassment hearing two weeks earlier. Ex. 1 at 1:46:00 – 1:50:00. At no time during the hearing did the petitioners allege that any of Von Priece's conduct was directed towards Korby Kencayd, or that Korby Kencayd feared Von Priece.

In Von Priece's defense case-in-chief, he repeatedly referred to and offered the objective videos that contradicted Randle Kencayd's word-of-mouth mischaracterizations of the October 12, 2015, and December 3, 2015, confrontations. RP 9 ("I have that scene on video."); RP 13 ("I never said a word to him, you'll see that in the video."); RP 20 ("Your Honor, but - - but what he says - - the evidence shows that I did not do what he's saying that I did do. . . what he's claiming is not what you'll

see.”); RP 26 (“It - - the video will show you that it’s not true.”). In an attempt to adhere to court rules, he even brought copies of the videos for the Kencayds and the Court. RP 12. Before Von Priece completed his defense case-in-chief, and before he was able to cross-examine either of the Kencayds, play his video evidence, or introduce the recorded testimony of the Kencayds from the December 28, 2015, anti-harassment petition hearing, the trial court interrupted Von Priece’s case-in-chief and summarily granted the Kencayds’ petition. RP 20.

In response, Von Priece pleaded that the trial court at least view the objective video footage of the October 12, 2015, and December 3, 2015, interactions:

Mr. Von Priece: Your Honor, but - - but what he says, - - the evidence shows that I did not do what he’s saying that I did no. That’s the evidence that you need to see. . . You have to see this, Your Honor, because on the dates that he’s claiming that I did these things, on the dates that he’s claiming that I did these things, what he’s claiming is not what you’ll see. You’ll see complete - - it’s not - -

RP 20. While initially curious as to the video footage and audio recording, the trial court ultimately refused to view the videos, or to let Von Priece file a copy of the videos with the Court.

Mr. Von Priece: No, Your Honor. I brought copies for you. I brought copies to be filed with the Court.

The Court: Of your videos.

Mr. Von Priece: Yes.

The Court: All right.

Mr. Von Priece: And I also would like my opportunity - -

The Court: Are they on DVD?

Mr. Von Priece: They are not, but I can play them on this one (a laptop), and they can still be entered as - -

The Court: No. No, no, no. Because then what I see won't go into the public record.

RP 21-22. Von Priece later offered to make a DVD copy of the videos, but the trial court stated that even if he did, it will not accept it as an exhibit.

The Court: And are you able to (inaudible) the video on DVD, and can you file it?

Mr. Von Priece: I can put it on - - if you need me to put it on DVD, I can take - -

The Court: Look. Look, look. If you want to file a motion for reconsideration with new evidence, you can, you know. But I'm not going to consider something that you can't make part of the court record right now. All right?

RP 26.

At various times during the hearing Von Priece requested the opportunity to cross-examine the Kencayds, which was largely denied. RP 22, 24-25, 29 (allowing Von Priece to ask a single question of Randle Kencayd after the petition had been granted). The trial court did not allow Von Priece to cross-examine the Kencayds prior to granting the Kencayds' petition and only perfunctorily addressed the issue after the final order of protection had been signed. RP 27, 29.

Before the hearing ended Von Priece was able to file the audio recording of the December 28, 2015, anti-harassment petition hearing concerning the same facts addressed in the Kencayds' petition. RP 30-31; Ex. 1. While it allowed him to file the recording, the trial court made it clear that it refused to consider this objective evidence, despite the fact that it contained relevant inconsistent prior testimony from the Kencayds regarding their word-of-mouth allegations.

Mr. Von Priece: It says - - it's where they admit that there were only the amount of interactions between us that he's written down right there. And the interactions are all on video, as you already know, but you don't want to see those. The interactions are actually on video, and they match what he's saying here. And there was no harassment based on those - - or stalking based on videos that match the interactions that he said happened right here.

The Court: All right. That doesn't make a difference in my ruling, but go ahead.

RP 30-31.

At the close of the hearing, the trial court clarified its reasoning regarding the offered video evidence:

And, again, the reasons I didn't consider it today was, number one, they were not in a format adequate to be filed with the court today. And, number two, the offer of proof regarding the contents of the video, I did not feel would make a difference in my ruling.

RP 36. While the trial court erroneously reasoned why it did not consider, or view, objective video evidence accurately depicting the contested

events in question, it provided no justification for refusing Von Priece's request to mark the videos as an exhibit to the hearing.

In an effort to allow the trial court to properly review all of the evidence offered to the trial court, Von Priece sought to supplement the appellate record with the video recordings that objectively depict the actual October 12, 2015, and December 3, 2015, interactions by a motion and supporting declaration under RAP 9.11. Appendix A (Von Priece's Motion to Present Additional Evidence). The commissioner denied the motion. Appendix B (order denying Motion). The commissioner's opinion did not address how the appellate court could review the trial court's finding that the videos were not relevant without viewing the videos itself.

IV. ARGUMENT

Protection order matters are distinguishable from other civil matters because the legislature intended them to be available to all, with or without counsel, to litigate. *See* RCW 7.92.010. Washington Courts expressed the same intent when they implemented ER 1101, which states that the Rules of Evidence "need not be applied" to "protection order proceedings under RCW . . . 7.92," allowing pro se litigants to easily and inexpensively litigate grievances. That said, protection order proceedings are not intended to be rubber-stamp mechanisms for unproven petition

allegations, and the trial court must ensure that a protection order hearing comports with due process for both the petitioner and respondent.

Particularly when both parties are unrepresented, the trial court instead must act evenhandedly. Despite his best efforts as a pro se litigant, Von Preece was unable to defend himself against the Kencayds' fabricated and uncorroborated word-of-mouth allegations because of the trial court's error in this case excluding objective evidence showing that the retaliatory protection order sought by the Kencayds was baseless.

A. THE TRIAL COURT ERRED WHEN IT ISSUED AN ORDER OF PROTECTION BENEFITTING KORBY KENCAYD.

“[T]he court shall issue a stalking protection order” “[i]f the court finds by a preponderance of the evidence that the petitioner has been a victim of stalking conduct by the respondent.” RCW 7.92.100. The term “stalking conduct” is defined by statute:

"Stalking conduct" means any of the following:

- (a) Any act of stalking as defined under RCW 9A.46.110;
- (b) Any act of cyberstalking as defined under RCW 9.61.260;
- (c) Any course of conduct involving repeated or continuing contacts, attempts to contact, monitoring, tracking, keeping under observation, or following of another that:
 - (i) Would cause a reasonable person to feel intimidated, frightened, or threatened and that actually causes such a feeling;
 - (ii) Serves no lawful purpose; and
 - (iii) The stalker knows or reasonably should know threatens, frightens, or intimidates the person, even

if the stalker did not intend to intimidate, frighten, or threaten the person.

RCW 7.92.020(3). All three definitions of “stalking conduct” require a repeated course of conduct intimidating, threatening or frightening conduct. *See* RCW 9A.46.110(6)(e); *State v. Kintz*, 169 Wn.2d 537, 550, 238 P.3d 470, 477 (2010); RCW 7.92.020(3)(c). The appellate court shall review the issuance of a protection order under the abuse of discretion standard. *Freeman v. Freeman*, 169 Wn.2d 664, 671, 239 P.3d 557, 560 (2010). (“Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.”).

Given the statutory definition above, the trial court abused its discretion when it found facts sufficient to support a finding that Von Preece committed “stalking conduct” against both Kencayds, but especially Korby Kencayd due to the dearth of evidence. The petitioners presented evidence to the trial court in two forms: the written petition that was submitted by Randle Kencayd, and the oral testimony of and written submissions offered by Randle Kencayd. Even when viewed together, the evidence submitted by Randle Kencayd was not sufficient for the trial court to find that Von Preece committed “stalking conduct” against Korby

Kencayd. Accordingly, the trial court abused its discretion in issuing an order of protection benefitting Korby Kencayd.

1. The Kencayds fail to establish a repeated course of conduct against Korby Kencayd.

Under the anti-stalking statute, “stalking conduct” must consist of a course of conduct involving multiple contact or attempts, by the respondent, to contact the petitioner. *See* RCW 9A.46.110(6)(e); *Kintz*, 169 Wn.2d at 550; RCW 7.92.020(3)(c). The petitioners’ allegations focus on Randle Kencayd’s interactions with Von Preece and fail to show a course of conduct of any kind by Von Preece directed toward Korby Kencayd.

Randle Kencayd’s allegations focus on the October 12, 2015, and December 3, 2015, interactions with Von Preece. At no time does Randle Kencayd allege that any of Von Preece’s October 12, 2015, conduct or the December 3, 2015, conduct was directed at Korby Kencayd, or even that Korby Kencayd was present. Because the petitioners failed to show a course of conduct by Von Preece towards Korby Kencayd, the trial court abused its discretion by finding that Von Preece had committed “stalking conduct” against Korby Kencayd.

Likewise, the Kencayds failed to show such a course of conduct because by Korby Kencayd’s own admission, none existed. In the hearing

on Von Priece's anti-harassment petition on December 28, 2015, Korby Kencayd testified that he only had two interactions with Von Priece: one involving a civil dispute over Korby Kencayd's dog being off leash, and the other where Korby Kencayd catcalled at Von Priece.

The Court: Ah, have you had any interaction with Mr. Von Priece other than that (a single incident in June of 2013 regarding dogs being off leash)? Direct contact with him?

Mr. K. Kencayd: Just one time, and that was when I was leaving the bread store to walk back to my house, and I started to catcall him, and he told me to stop, and I immediately stopped and continued walking on.

The Court: Okay. . . .

Ex. 1 at 1:38:43 – 1:39:07. By his own admission, Korby Kencayd was never the target of “stalking conduct” by Von Priece. The trial court erred in finding that Von Priece had committed “stalking conduct” against Korby Kencayd and in issuing an order of protection listing Korby Kencayd as a protected party.

2. The Kencayds also fail to establish at least one element of each of the definitions of “stalking conduct.”

In addition to failing to show a course of conduct was perpetrated by Von Priece against Korby Kencayd, the Kencayds failed to prove all of the elements of “stalking conduct” in each of the three alternative statutory definitions. Again, “stalking conduct” is defined as stalking under the criminal code, RCW 9A.46.100(1), cyberstalking, RCW 9.61.260(1), or

“stalking conduct” defined by RCW 7.92.020(3). The trial court abused its discretion in granting the order of protection benefitting Korby Kencayd under the facts presented.

The Kencayds failed to show any of the three elements of stalking under the criminal stalking statute RCW 9A.46.100(1), as applied to Korby Kencayd. First, no facts were presented that Von Priece intentionally and repeatedly harassed or followed Korby Kencayd. On December 28, 2015, Korby Kencayd testified under oath that he had no interactions with Von Priece since 2013 except when Korby Kencayd attempted to harass Von Priece. Ex. 1 at 1:38:43 – 1:39:07. Next, there was no evidence presented that Korby Kencayd feared physical harm from Von Priece. Finally, no facts were presented that showed that Von Priece intended to frighten, intimidate, or harass Korby Kencayd other than Randle Kencayd’s own self-serving speculation. The petitioners failed their burden to prove stalking conduct under the criminal stalking statute and the trial court erred in finding sufficient evidence of this.

The Kencayds failed to show that Von Priece committed “stalking conduct” against Korby Kencayd under the criminal cyberstalking statute, RCW 7.92.100(3)(b). Criminal cyberstalking must be perpetrated through the means of “an electronic communication.” RCW 9.61.260(1). The gravamen of the petition is that Von Priece committed “stalking behavior”

by walking his dog down the sidewalk in front of the Kencayds' business and residence. As walking down a public sidewalk does not involve "electronic communications," the Kencayds cannot show that Von Priece committed "stalking conduct" under the criminal cyberstalking statute, RCW 7.92.100(3)(b).

Finally, under RCW 7.92.020(3)(c), the Kencayds failed to show that Von Priece committed "stalking conduct" against Korby Kencayd. The Kencayds alleged no conduct by Von Priece towards Korby Kencayd that could cause Korby Kencayd to "feel intimidated, frightened, or threatened" let alone that "actually cause[d] such a feeling." RCW 7.92.020(3)(c)(i). Korby Kencayd provided no testimony to the Court regarding whether he felt intimidated, frightened, or threatened by Von Priece, and the petitioners offered no evidence that any of Von Priece's limited contacts with Korby Kencayd could cause a reasonable person to feel "intimidated, frightened, or threatened." *Id.*

As the Kencayds failed to allege facts sufficient to meet at least one element in all three prongs of the definition of "stalking conduct" under RCW 7.92.020(3), the trial court abused its discretion when it found sufficient evidence that Von Priece committed "stalking conduct" against Korby Kencayd.

B. VON PRIECE WAS DEPRIVED OF DUE PROCESS WHEN THE COURT ERRONEOUSLY REFUSED TO PERMIT HIM TO MARK HIS VIDEO EVIDENCE AS AN EXHIBIT.

1. Standard of Review

Both the Washington State and the federal constitutions guarantee a degree of due process of law prior to restricting a person's liberty. Const. Amend. XIV; Wash. Const. Art. 1 § 3. The Washington State due process clause and the Federal due process clause are co-extensive. *In re Estate of Hambleton*, 181 Wn.2d 802, 823, 335 P.3d 398 (2014). Protection orders implicate a respondent's liberty interests and respondents must receive due process before their liberty interests are abridged by the trial court. *See Gourley v. Gourley*, 158 Wn.2d 460, 467-8, 145 P.3d 1185 (2006).

Due process is a flexible concept that applies in different ways in different circumstances. *Matthews v. Eldridge*. 424 U.S. 319, 334, 96 S.Ct. 893, 47 L. Ed.2d 18 (1976). At its core, however, due process is the "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct 1187, 14 L. Ed.2d 62 (1965)).

An appellate court analyzes whether procedures utilized by trial court satisfy due process under the *Matthews v. Eldridge* balancing test. 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The test balances "(1) the private interest affected; (2) the risk of erroneous deprivation of that

interest through existing procedures and the probable value, if any, of additional procedural safeguards; and (3) the governmental interest, including costs and administrative burdens of additional procedures.”

In re Det. Of Stout, 159 Wn.2d 357, 370, 150 P.3d 86 (2007). When the private interests are significant, the risk of erroneous deprivation of that interest great, and the cost of implementing corrective procedures low, due process has been violated. *See Gourley*, 159 Wn.2d at 467-8. Such is the case with Von Preece, against whom an erroneous protection order was entered with distance restrictions that interfere with basic travel routes in his own neighborhood to his own home. *See* CP 19 (ordering a 300 foot Stay Away provision).

2. Von Preece was erroneously prohibited from marking his video exhibit as objective evidence controverting his accuser’s uncorroborated word-of-mouth allegations.

The trial court deprived Von Preece of due process by refusing his request to make the proffered video evidence part of the record. “An offer of proof performs three functions: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review.” *Thor v.*

McDearmid, 63 Wn. App. 193, 204, 817 P.2d 1380, 1388 (1991) (citing *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991)).

An offer of proof assists the trial court in making its ruling and assists the appellate court by assuring that it has an adequate record to review the merits of the evidentiary issue . . . An offer of proof is available as a matter of right.

* * *

If the rejected evidence is a document or some other exhibit, counsel should ask that the exhibit be made part of the record for purposes of appeal, and should be sure that any colloquy with the judge or clerk is recorded by the court reporter. Unless these steps are taken, appellate review may be precluded.

5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence* ch. 5, § 103:5 (2015-16) (citing *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982), *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 762 P.2d 1156 (1988)).

Von Priece tried to present his video evidence at the time of his initial proffer. RP 12. The trial court refused Von Priece's basic and necessary procedural request in his defense. RP 20. It made various comments in refusing to make the video evidence part of the case file: the video supposedly was not viewable on the courtroom technology, RP 21-22, the video was not on a CD or DVD, RP 22, and that the video was not relevant, RP 36. Von Priece, appearing pro se, tried as best as he could to address the Court's concerns: he had technology with him that could play

the videos for the Court, RP 21-22, and he could convert the videos to a CD or DVD format given a short recess, RP 26.⁵ The trial court was unrelenting in its position that it would not allow Von Priece to file the videos based on the erroneous assumption they were not relevant.⁶

Even after the trial court has granted the petition, Von Priece attempted to submit the videos as an exhibit in order to perfect his record for appeal. RP 20-22, 26. But, the trial court again refused to allow Von Priece to file his videos as an exhibit to that hearing. *Id.*

The trial court's refusal to allow Von Priece to submit his videos was a clear deprivation of due process when viewed under the *Matthews v. Eldridge* test and flies in the face of Washington State practice. 424 U.S. 319, 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence ch. 5, § 103:5 (2015-16), *supra*. Von Priece's liberty interests are significant: he and the petitioners live blocks away and the stay-away provision severely curtails Von Priece's ability to walk and travel in his own neighborhood. CP 19 (enforcing at 300 foot Stay Away

⁵ Additionally, the court has procedures to accommodate docket entries or exhibits that cannot be electronically scanned. *See* King County Local Court Rule 79(2)(d). In fact, those procedures were implemented in this case when the clerk converted a CD that had been filed as a docket entry into an exhibit. CP 22-23.

⁶ Von Priece disputes this ruling. Argument on the abuse of discretion in finding the videos irrelevant can be found at Section IV.D., *infra*.

zone provision). The chance of erroneous deprivation of Von Priece's liberty interests is also high; preventing Von Priece from making a record of his proffered video evidence deprives this appellate court of the ability to review the trial court's determination that the videos themselves were irrelevant. Finally, the cost of additional process to address the potential for deprivation of Von Priece's rights is negligible; the trial court could have simply allowed Von Priece to mark his videos. The trial court violated Von Priece's due process rights under the *Matthews v. Eldridge* test.

Von Priece, acting as his own attorney, did everything in his power to make his evidence part of his case's record. He offered it as part of his offer of proof, RP 12-13, 15, he attempted to have it marked by the trial court as an exhibit after the final order of protection had been granted, RP 20-22, 26, and he sought the extraordinary remedy to have it included in the appellate record under RAP 9.11, *See* Appendix A. Because of the trial court's erroneous refusal to allow Von Price to make his evidence part of the case's record, he is prevented from obtaining meaningful appellate review of significant issues that ultimately show the protection order was not supported by a preponderance of the evidence.

In drafting this brief, undersigned counsel has found no instances in Washington State case law where a trial court refused to allow a litigant

to at least file or mark an exhibit. Such unprecedented conduct appears to be contrary to judicial practice in Washington State.

C. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ERRONEOUSLY REFUSED TO VIEW THE VIDEO EVIDENCE MADE AVAILABLE AS AN OFFER OF PROOF.

Trial courts have discretion over offers of proof. ER 103. But the discretion is not limitless, and a trial court commits error when it does not meaningfully consider a party's offer of proof to present relevant evidence. "[A] trial court abuses its discretion when it finds potential evidence irrelevant without an offer of proof or its equivalent." *Pulcino v. Fed. Exp. Corp.*, 94 Wn. App. 413, 426, 972 P.2d 522, 529 (1999), as amended (Apr. 1, 1999), *aff'd sub nom. Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 9 P.3d 787 (2000).

Von Priece's offer of proof for his video evidence came in two parts: his verbal description of why the video was relevant, and the video itself. After listening to the parties' descriptions of the October 12, 2015, and December 3, 2015, incidents, which were described in significantly differing ways by Randle Kencayd and Von Priece, the trial court refused to review the video that would have provided it with an objective view of what had actually transpired. Von Priece's verbal offer of proof provided the trial court sufficient notice that the videos called Randle Kencayd's credibility and recollection into question and clearly contradicted specific

word-of-mouth allegations made in the petition. A witness's credibility and ability to recall facts are always relevant. *See Tamburello v. Department of Labor and Industries*, 14 Wn. App. 827, 545 P.2d 570 (1976) (holding that the admission of video evidence to contradict allegations of the opposing party was proper). Had the trial court reviewed the videos, it would have seen and heard that the October 12, 2015, and December 3, 2015, incidents were misrepresented by the Kencayds and that Von Priece's "stalking conduct" had not occurred.⁷

While the circumstances of this case differ slightly from those in *Pulcino*, the result should be the same. 94 Wn. App. 413. In *Pulcino*, the trial court erroneously found that the plaintiff's employment claims were limited to wrongful discharge and excluded all evidence relating to her employment at the post from where she was wrongfully discharged. *Id.* at 426. The trial court resolved that issue by holding that "[o]n remand, it should permit Pulcino to present an offer of proof on any evidence the

⁷ While the court prevented the video from being included in the case's record, Von Priece was able to submit a CD containing an audio recording of a District Court judge presiding over Von Priece's December 28, 2015, anti-harassment petition on the same conduct. During that hearing, the judge viewed all of the relevant videos and questioned the Kencayds and Von Priece regarding the video's content. Ex. 1 at 1:12:00 – 2:09:00. Neither party nor the court made mention of any threats made by Von Priece, whether involving firearms or not, or of the Kencayds' alleged fear of Von Priece.

court intends to exclude and admit evidence relevant to FedEx's corporate state of mind.” *Id.*

Here, the trial court erroneously ruled that the proffered video was not relevant, despite the fact that this objective evidence affected the petitioners’ credibility and contradicted the subjective, word-of-mouth allegations made in the petition. The trial court’s failure to at least view, if not to consider the objective video evidence was an abuse of discretion. This case should be remanded with instructions to the trial court to admit the proffered video to test the Kencayds’ uncorroborated word-of-mouth allegations against this reliable objective video evidence, which will show the protection order is not warranted and the order of protection should be vacated.

D. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT RULED VON PRIECE’S VIDEO EVIDENCE WOULD NOT HAVE MADE A DIFFERENCE IN THE COURT’S RULING.

The videos offered by Von Priece depict the entirety of the October 12, 2015, and December 3, 2015, interactions between Von Priece and Randle Kencayd, the only two incidents in 2015 that could support a finding of “stalking conduct.” *See* Ex. 1 at 1:46:00 – 1:50:00; RCW 7.92.020(3). As Von Priece repeatedly stated on the record, the videos significantly contradicted the allegations made in the petition regarding the two incidents. RP 9 (“I have that scene on video.”); RP 13 (“I never

said a word to him, you'll see that in the video."); RP 20 ("Your Honor, but - - but what he says - - the evidence shows that I did not do what he's saying that I did do. . . what he's claiming is not what you'll see."); RP 26 ("It - - the video will show you that it's not true."). The trial court indicated that the videos were not relevant because Randle Kencayd admitted that he verbally harassed Von Preece during the October 12, 2015 incident. RP 22. But Von Preece's consistent point, not addressed by the trial court, was that the videos objectively depicted interactions that were misrepresented by Randle Kencayd in the fabricated narrative of his petition.

"The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 621-2, 41 P.3d 1189 (2002). Contradictory evidence of this nature is unquestionably relevant, *see Jacqueline's Washington, Inc. v. Mercantile Stores Co.* 80 Wn.2d 784,788-9, 498 P.2d 870 (1972), as the trial court relied solely on Randle Kencayd's assertions in granting the petition. Such error by the trial court is reviewed for abuse of discretion. *State v. Johnson*, 150 Wn. App. 663, 673, 208 P.3d 1265 (2009).

Von Preece's videos contradict Randle Kencayd's most disturbingly false allegation: that Von Preece threatened him with a gun. The video, as Von Preece represented to the trial court, shows the entire

October 12, 2015, *gunless* interaction between Randle Kencayd and Von Priece. At no point does Von Priece say “you know I have a gun and will defend myself” which Randle Kencayd allegedly “took . . . as a direct threat that he had a weapon and would use it.” CP 3. Along with Randle Kencayd’s aggressive demeanor and Von Priece’s polite but firm requests for Kencayd to cease contacting him, the October 12, 2015, video shows that the interaction was not “stalking conduct.” *See* Ex. 1 at 1:46:00 – 1:50:00. Randle lied about a supposed gun threat.

The second video shows the entire December 3, 2015, interaction and depicts Randle Kencayd running by Von Priece and verbally taunting Von Priece. Not only does it show that Randle Kencayd initiated the December 3, 2015, interaction, but it shows that he was again engaging in unwanted contact with Von Priece, and starkly contrasts with Randle Kencayd’s representations to the trial court:

I was 20 feet from my house starting out on a jog (as I do every day at the same time) I was surprised to notice Mr. Vonpriece standing across the street from my house again with his dog. This incident is most upsetting to me because of Mr Vonpriece latest threats. . . .

CP 4. Not only does the October 3, 2015, video show that no “latest threats” were made, but it shows that Randle Kencayd misrepresented his demeanor in his petition. It is readily evident from the video that the December 3, 2015, incident was also not an incident of “stalking conduct.”

The videos establish that neither of the 2015 incidents were “stalking conduct” and the petition alleges no recent incidents of “stalking conduct” with which any court could grant a petition for an order of protection – stalking. Had the videos been reviewed, the trial court would not have issued the final order.

E. THE TRIAL COURT DENIED VON PRIECE DUE PROCESS WHEN IT ABRUPTLY TRUNCATED HIS CASE-IN-CHIEF AND ENTERED THE FINAL ORDER OF PROTECTION.

Due process violations are analyzed under the *Matthews v. Eldridge* test. 424 U.S. 319, *supra*. Von Priece’s liberty interests as a respondent in a protection order matter are high, the likelihood of error when he is deprived the opportunity to fully present his case is high, and the burden of allowing Von Priece to present his entire case to the trial court is low. Von Priece was denied his right to due process when the trial court prevented him from completing his case-in-chief.

The record shows that the trial court’s erroneous evidentiary rulings foreclosed many issues before the trial court granted the unwarranted protection order. *See* RP 21-22, 26, 28 (arguing whether his videos should be reviewed); RP 24, 27, 29 (seeking reciprocal opportunity for cross-examination); RP 28 (challenging the allegation that he threatened Randle Kencayd with a gun); RP 30 (impeaching the Kencayds with their prior testimony). After the granting the Kencayds relief, the trial

court and Von Priece continued to discuss the relevance of the videos, RP 21-22, 26, 28, Von Priece's ability to cross-examine the petitioners, RP 24, 27, 29, and an audio recording of a court hearing on the same facts and circumstances. RP 30. The risk of erroneously depriving Von Priece of his liberty interests by erroneously granting the petition is exceptionally high and the burden on the court to at least address each of Von Priece's remaining issues prior to ruling against him is very small.

The trial court expressed palpable impatience with this case and an interest in dispensing with it quickly because "there are folks waiting in the courtroom" on its very full docket. RP 24. The trial court could have easily scheduled a full hearing at a later date that was amenable to the court's schedule, rather than depriving Von Priece the opportunity to fully present his defense. Continuing the hearing would have also allowed the trial court to receive a copy of the video evidence in a format of its choosing.

Suggesting that Von Priece file a motion for reconsideration on the basis of newly discovered evidence, did not remedy the erroneous ruling that deprived Von Priece the ability to present his case prior to the trial court issuing the protective order. RP 26 (The Court: Look. Look, look. If you want to file a motion for reconsideration with new evidence, you can, you know.). Indeed, it is unlikely that Von Priece could successfully assert

under the limited grounds for reconsideration that his video evidence and foreclosed arguments constitute “newly discovered evidence” under CR 59(a) as suggested by the trial court. *See Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003) (holding that newly discovered evidence, for the purposes of a Rule 59 motion, must not have been discoverable before trial by the exercise of due diligence). The trial court’s suggestion was no remedy at all. Von Priece was denied his day in court and this matter should be remanded for a full hearing on the merits that includes admission of his video evidence.

F. THE TRIAL COURT DENIED VON PRIECE DUE PROCESS WHEN IT DENIED VON PRIECE AN OPPORTUNITY TO CONDUCT EFFECTIVE CROSS-EXAMINATION.

The trial court’s decision to deprive Von Priece of cross examination is subject to the *Matthews v. Eldridge* test. 424 U.S. 319, *supra*. The Washington Supreme Court examined a similar issue in *Gourley v. Gourley*, 158 Wn.2d 460, 145 P.3d 1185 (2006). In *Gourley* the trial court denied the respondent the chance to cross-examine his child-victim during the hearing on the final order of protection. *Id.* at 463-464. The trial court applied the *Matthews v. Eldridge* test to the facts of that case and found that sufficient alternative procedures were used such that the deprivation of cross examination was not a violation of due process. *Id.* at 469-470. In that case, the respondent availed himself of the due

process guaranteed by statute and was also granted additional discovery by the court; he was allowed to subpoena and depose the adult petitioner, his wife. *Id.* at 469.

In this case, Von Priece was allowed far less due process than the litigants in *Gourley*, and the trial court never expressly applied the *Matthews v. Eldridge* due process considerations. He was denied the ability to present relevant video evidence, he was denied the ability to properly preserve the issue of the video's relevance by filing a copy of the video, he was denied the opportunity to fully present his case to the trial court before it ruled adversely, and he was effectively denied the opportunity to cross-examine the petitioners.

The trial court's refusal to allow Von Priece to cross-examine the Kencayds was particularly prejudicial in light of the fact that it allowed the Kencayds to cross-examine him. Had Von Priece been allowed cross-examination he could have, at the very least, established facts that would have supported his videos' admissibility and controverted the petitioners' false allegations. Denying Von Priece cross-examination, particularly when it allowed the petitioners to cross-examine him, violated due process and requires reversal.

V. CONCLUSION

Von Priece's hearing on a final order of protection was replete with procedural errors that caused the trial court to reach an incorrect result. The case should be remanded to allow the trial court to benefit from a complete hearing on the facts at issue in this case so that it can reach the correct result.

DATED this 13th day of May, 2016.

Respectfully submitted,



D. Jack Guthrie, WSBA #46404
Attorney for Bryen Von Priece
McKay Chadwell, PLLC
600 University Street, Suite 1601
Seattle, WA 98101-4124
(206) 233-2800

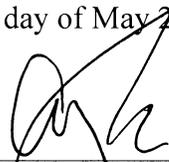
CERTIFICATE OF SERVICE

I, Annika Jakes, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of Brief of Appellant to be filed with the court and served by U.S. Mail on:

Randle Kencayd
816 19th Ave S.,
Seattle WA 98144

Korby Kencayd
816 19th Ave S.,
Seattle WA 98144

Signed at Seattle, Washington, this 13th day of May 2016.



Annika Jakes
Legal Assistant
McKay Chadwell, PLLC
600 University Street, Suite 1601
Seattle, WA 98101
Phone: (206) 233-2800
Facsimile: (206) 233-2809
Email: aaj@mckaychadwell.com

Appendix A

APR 16 2016

No. 74665-1

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

KENCAYD ET ANO.,

Respondent

v.

BRYEN VON PRIECE,

Petitioner

**ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. John H. Chun)**

**APPELLANT VON PRIECE'S MOTION TO PRESENT
ADDITIONAL EVIDENCE ON THE MERITS UNDER RAP 9.11**

D. Jack Guthrie, WSBA #46404
Attorney for Appellant Von Priece
McKay Chadwell, PLLC
600 University Street, Suite 1601
Seattle, WA 98101
(206) 233-2800

A. Identity Of Moving Party

Appellant Bryen Von Priece is the respondent in a Petition for Order of Protection brought pursuant to RCW 7.92.

B. Statement Of Relief Sought

Von Priece seeks to supplement the record from the trial court with a video exhibit that the trial court forebode Von Priece from entering into the court record. The video exhibit is attached as Exhibit A to the Supporting Declaration of Appellant Von Priece (Von Priece declaration). In the alternative, Von Priece requests the Court to direct the trial court to take this additional evidence for a factual finding pursuant to RAP 9.11(b).

C. Relevant Facts And Procedural History

Von Priece appeals the issuance of the Order of Protection against him by the trial court. At the hearing on the petition, Von Priece, who was pro se at the time of the hearing, sought to admit video evidence that directly contradicted the petitioners' allegations. As part of his offer of proof, Von Priece attempted to present the videos he sought to admit as evidence. VRP at 12:19-22. Without viewing the videos, the trial court abruptly interrupted Von Priece's case in chief, granted the petition, and issued the Order of Protection against Von Priece. VRP at 20:7.

After the Order of Protection had been granted, Von Priece renewed his efforts to submit the videos as an exhibit in order to preserve his record on appeal. Without viewing the videos themselves, the trial court refused to allow Von Priece to mark them as an exhibit.

The Court: Look - -

Mr. Von Priece: I just want to - -

The Court: Any - -

Mr. Von Priece: - - answer - -

The Court: - - evidence that's submitted to me has to be filed, okay? Your materials (the videos), I'm not going to consider for two reasons. Number one, if you're just planning on showing them in court and not - -

Mr. Von Priece: No, Your Honor. I brought copies for you. I brought copies to be filed with the Court.

The Court: Of your videos.

Mr. Von Priece: Yes.

The Court: All right.

Mr. Von Priece: And I also would like my opportunity - -

The Court: Are they on DVD?

Mr. Von Priece: They are not, but I can play them on this one, and they can still be entered as - -

The Court: No, no, no, no. Because then what I see won't go into the public record.

VRP at 22:9-23:3. Shortly thereafter, Von Priece renewed his efforts to mark the videos and the Court refused a second time.

The Court: But I'm not going to consider something that you can't make part of the court record right now.

Mr. Von Priece: I can make it part of the court record, Your Honor. I can - -

The Court: You can't.

VRP at 26:17-21.

In its closing remarks, after the Order of Protection issued, the Court specifically found that Von Priece's offer of proof as to the admissibility of his video evidence was insufficient without viewing the video evidence, which was part of Von Priece's offer of proof:

The Court: And, again, the reasons I didn't consider it (the video) today was, number one, they were not in a format adequate to be filed with the court today. And, number two, the offer of proof regarding the contents of the video, I did not feel would make a difference in my ruling.

VRP at 36:6-11. By prohibiting Von Priece from making the videos part of the record, the Court significantly damaged his ability to obtain fair review of his case in this Court.

The videos that are contained within the DVD attached as Exhibit A to Von Priece's Supporting Declaration clearly contradict the allegations made by petitioner Randle Kencayd. In his petition, Randle Kencayd alleged that, among other things, Von Priece stated, "[y]ou know I have a gun and will defend myself" during an October 12, 2015, verbal altercation between the two. CP at 3. File "RandallPotterHarassment312Oct1511AM" contained within Exhibit A of the Von Priece declaration is a video of the interaction, which was offered at the trial court. That video shows Von Priece consistently instructing Kencayd not to speak to him and informing Kencayd that future contact was unwelcome while being verbally harassed with homophobic slurs by

Kencayd. *See* file “RandallPotterHarassment312Oct1511AM” at 7:10 contained within Exhibit A of the Von Priece declaration.

The second video, file “RandalPotterKencaydGIRLFRIEND” contained within Exhibit A of the Von Priece declaration, which was offered at the trial court, shows the entirety of the December 3, 2015, interaction between Randle Kencayd and Von Priece. That video also contradicts specific allegations made in the Kencayd petition. The petition alleged that Von Priece was surveilling the Kencayd home on December 3, 2015. The video Von Priece offered depicts no such surveillance and instead shows Randle Kencayd calling, “Girlfriend . . . you look good” to Von Priece as he runs by, undercutting the allegation that Randle Kencayd was upset or scared of Von Priece. *See* file “RandalPotterKencaydGIRLFRIEND” at 15:04 contained within Exhibit A of the Von Priece declaration.

D. Grounds For Relief And Supporting Argument

RAP 9.11 authorizes this Court to consider additional evidence on the merits of a case pending on appeal:

(a) Remedy Limited. The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4)

the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

(b) Where Taken. The appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence.

Where review of the additional evidence is “important” to the appellate court’s decision on the merits, appellate courts have authorized consideration of such evidence under RAP 9.11. *See Spokane Airports v. RMA Inc.*, 149 Wn. App. 930, 937-38, 206 P.3d 364, *rev. den’d*, 167 Wn.2d 1017, 224 P.3d 773 (2009); *Mansour v. Mansour*, 126 Wn. App. 1, 7-8, 106 P.3d 768 (2004); *Lawson v. State*, 107 Wn.2d 444, 447-48, 730 P.2d 1308 (1986).

Here, all elements of RAP 9.11 have been met: (1) including the videos in the record is necessary for the Court to fairly evaluate the trial court’s determination that Von Preece failed to make a sufficient showing that the videos contained relevant and admissible evidence, particularly in light of the fact that the trial court prohibited the videos, which were part of Von Preece’s offer of proof, from being admitted during the hearing on the petition; (2) consideration of the videos, as part of Von Preece’s offer of proof, could very well affect the Court’s conclusion as to whether Von

Priece made a sufficient offer of proof; (3) it is equitable to excuse Von Priece's failure to include the videos in the trial court record because the trial court explicitly forbade Von Priece from submitting the videos; (4) a postjudgment remedy would be inadequate as the trial court has already explicitly ruled that Von Priece cannot submit the videos and the Court is unlikely to revise that determination; (5) similarly, the grant of a "new trial" could be sufficient under these circumstances, but review from the appellate court could be necessary to avoid the same result at a new hearing; and (6) it would be inequitable for the Court to decide this issue without Von Priece's complete offer of proof at the time he attempted to present the video evidence to the trial court. It is crucial for this Court to be able to review excluded evidence, which was properly offered to the trial court, when determining whether that evidence was properly excluded.

E. Conclusion

For the above reasons, Von Priece respectfully moves this Court under RAP 9.11 to consider the additional evidence presented in Exhibit A to the supporting declaration of Bryen Von Priece on the merits of the pending appeal, which is important to the Court's consideration of the merits and accuracy of Von Priece's appeal of the Final Order of Protection. In the alternative, Von Priece requests the Court to direct the

trial court to take this additional evidence for a factual finding pursuant to
RAP 9.11(b).

DATED this 6th day of April, 2016.

McKAY CHADWELL, PLLC



D. Jack Guthrie, WSBA No. 46404
Attorney for Bryen Von Preece
600 University Street, Suite 1601
Seattle, WA 98101-4124
Phone: (206) 233-2800
Fax: (206) 233-2809
Email: djg@mckay-chadwell.com

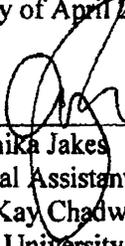
CERTIFICATE OF SERVICE

I, Annika Jakes, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of Appellant Von Preece's Motion to Present Additional Evidence on the Merits Under RAP 9.11 to be filed with the court and served by U.S. Mail on:

Randle Kencayd
816 19th Ave S.,
Seattle WA 98144

Korby Kencayd
816 19th Ave S.,
Seattle WA 98144

Signed at Seattle, Washington, this 6th day of April 2016.



Annika Jakes
Legal Assistant
McKay Chadwell, PLLC
600 University Street, Suite 1601
Seattle, WA 98101
Phone: (206) 233-2800
Facsimile: (206) 233-2809
Email: aaj@mckaychadwell.com

Appendix B

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

April 29, 2016

Donald Gamble Guthrie
McKay Chadwell, PLLC
600 University St Ste 1601
Seattle, WA 98101-4124
djg@mckay-chadwell.com

Randle Kencayd
816 - 19th Ave S.
Seattle, WA 98144

Korby Kencayd
816 - 19th Ave S.
Seattle, WA 98144

CASE #: 74665-1-I
Korby Kencayd, et ano., Respondents v. Bryen Von Priece, Appellant

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on April 29, 2016, regarding Appellant's Von Priece's Motion to Present Additional Evidence on the Merits Under RAP 9.11:

Bryen Von Priece appeals from a January 5, 2016 order of protection – stalking. On April 6, 2016, Priece filed a motion to present additional evidence under RAP 9.11. He seeks to include a videotape, which the trial court declined to consider. He argues that the videotape would contradict the allegations made by respondent Randle Kencayd. Kencayd, pro se, opposes the motion and points out the trial court's statement that the videotapes Priece sought to include in the record would not make a difference in its ruling.

This Court does not make findings of fact on review. Priece fails to show that the videotape evidence is needed to fairly resolve the issues on review or that the evidence would probably change the decision being reviewed. Based on the evidence considered by the trial court and the transcript of the trial court proceedings, this Court may decide whether the trial court erred in refusing to consider the videotape evidence. Priece essentially seeks a remand for the trial court to consider the videotape before this Court decides whether the trial court made an error that warrants such a remand.

The motion to present additional evidence is denied.

No. 74665-1-I
Page 2 of 2

Please be advised a ruling by a Commissioner "is not subject to review by the Supreme Court." RAP 13.3(e)

Should counsel choose to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a "motion to modify the ruling must be served... and filed in the appellate court not later than 30 days after the ruling is filed."

Sincerely,

A handwritten signature in black ink, appearing to read "R. Johnson", with a long horizontal flourish extending to the right.

Richard D. Johnson
Court Administrator/Clerk

LAM