

74665-1

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No. 74665-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KENCAYD ET ANO, Respondent
v.
BRYEN VON PRIECE, Appellant

BRIEF OF RESPONDENT

Bradley G. Barshis
WSBA No. 44302
Attorney for Respondent

Newton & Hall, Attorneys at Law
610 Central Avenue South
Kent, Washington, 98032
(253) 852-6600

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COURT OF APPEALS
STATE OF WASHINGTON~~

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1. INTRODUCTION

Korby Kencayd and Randle Kencayd sought out a protection order to stop the constant stalking and harassing behavior that Mr. Bryen Von Priece was engaged in against the two of them. Both sides presented their case in chief and the court found within its discretion that a protection order was warranted. The judge did not abuse his discretion by denying to admit the video evidence offered by Mr. Von Priece because the court allowed Mr. Von Priece to give an offer of proof as to what the videos would show. The court found based on that offer of proof that the videos would not have changed the court's decision to grant the Kencayd's request for a protection order.

2. STATEMENT OF THE CASE

This is a dispute between neighbors, who live blocks apart, which began in the summer of 2013 in which the Kencayd's small dog got out of the yard and ran into the middle of the street towards Mr. Von Priece's dog. The Kencayds ordered the dog to stop, which it did, and retrieved the dog from the street. The Kencayds apologized to Mr. Von Priece who instantly became agitated and confrontational.

Since the summer of 2013 Mr. Von Priece has continuously walked in front of the Kencayd's home/bed and breakfast, and kept the Kencayd's

and their home under constant observation evidenced by his video surveillance. Since 2013 there have also been several verbal altercations between the parties, as well as a harassing phone message left by Mr. Von Priece, slanderous yelp reviews made by Mr. Von Priece, and threats by Mr. Von Priece to use his concealed weapon.

In October of 2015 there was a verbal altercation had by Randle Kencayd and Mr. Von Priece, in which Mr. Von Priece was again walking in front of the Kencayd's home and monitoring it with his video camera as he crept down the sidewalk with his dog. During that altercation Mr. Randle Kencayd made some distasteful statements that he admitted in both courts when asked about the interaction. Mr. Randle Kencayd also explained to the court that he made those statements to try and deter Mr. Von Priece from his continued harassment and stalking behaviors.

In December of 2015 Mr. Von Priece petitioned the court for an anti-harassment order. During that hearing Mr. Von Priece and Mr. Randle Kencayd presented their cases including Mr. Von Priece's video evidence and the court found that there wasn't a sufficient basis to issue an order for Mr. Von Priece. Also in December of 2015 the Kencayds filed a petition for an anti-stalking order based on their fear of Mr. Von Priece and his continued course of conduct. The court in that matter after hearing all of

the relevant evidence found that a protective order was warranted as stalking had been proving by a preponderance of the evidence. The court did not admit the videos taken by Mr. Von Priece as they were not in the proper format to submit to the court, and more importantly after an offer of proof was made about the videos and there relevance the court found that they would not have changed the court's ruling in light of all of the other evidence including Mr. Von Priece's 18 other protection orders.

3. ARGUMENT

Protection orders are special proceedings in which the rules of evidence need not apply; however this language leaves the court with a lot of discretion on what evidence to allow and what evidence not to allow. These special proceedings have been set up to be expeditious hearings in which parties can get the protections that are needed. Often times protection order hearings are he said she said cases and the judge must be the ultimate determiner of facts and credibility. In this case the court listened to both parties and made a determination on all of the relevant admissible evidence, and issued a protection order for the Kencayds.

A. THE TRIAL COURT DID NOT ERR WHEN IT ISSUED AN ORDER OF PROTECTION BENEFITTING KORBY KENCAYD.

In this case the court must look at whether the issuing judge abused his discretion in issuing the stalking protection order benefitting Korby Kencayd. A judge must find by only a preponderance that stalking conduct occurred or is occurring to issue a stalking no contact order, and when looking at the definition of “stalking conduct” pursuant to RCW 7.92.020 it states:

“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.

Stalking as defined in part pursuant to RCW 9a.46.110 states:

(1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling

of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or **harassed** even if the stalker did not intend to place the person in fear or intimidate or harass the person.

The judge in this case did not abuse his discretion when looking at the totality of the facts. The fact that Korby Kencayd lives at the protected residence, works at the protected residence, and has been privy to the repeated surveillance and harassment, as well as being in fear for his loved one Randall Kencayd provides a legitimate legal basis pursuant to the statute to issue a stalking order benefiting Korby Kencayd. Mr. Von Priece should have reasonably known that Korby Kencayd felt harassed based on his interactions with the Kencayds, and Mr. Von Priece intentionally and repeatedly walked by the Kencayds videotaping them, posting slanderous comments on yelp, and threatening Randall Kencayd with a weapon. Korby Kencayd may not have had an abundance of direct contact with Mr. Von Priece but there was certainly indirect contact that was harassing and caused Korby Kencayd fear for himself and Randall Kencayd.

B. MR. VON PRIECE WAS NOT DENIED DUE PROCESS WHEN THE COURT REFUSED TO ALLOW THE HIM TO PRESENT OR ADMIT VIDEO EVIDENCE.

Due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Matthews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). For the court to determine if due process was denied it must look at the balancing test laid out in *Matthews v. Eldridge*; which lays out 3 factors to look at: “(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.” *Id.* Although Mr. Von Priece does have an interest in walking his dog down the sidewalk, that interest is minimalized when it is specifically directed at a sidewalk directly in front of the Kencayds home. That interest also fails in comparison to the governmental interest in preventing stalking which the legislature has indicated affects over 3.4 million people over the age of 18. *RCW 7.92.010*. Lastly, the protection order only deprives Mr. Von Priece of his interest for a period of one year. As for factor 2 of the *Matthews v. Eldridge* balancing test the court can look at the fact that the legislature has already adopted procedural safeguards in setting out Chapter 7.92 of the Revised Code of Washington, while taking into consideration the interest

of all parties. Here Mr. Von Priece has a very limited private interest coupled with a very high governmental interest in protecting stalking victims, and the court in this matter gave Mr. Von Priece the procedural process outlined in Chapter 7.92 of the Revised Code of Washington. Mr. Von Priece was given an opportunity to give oral argument, and when it came to submitting video evidence the court denied its admissibility as it was not in the proper format for the court, nor was it deemed relevant based on all of the information that the court had before it after Mr. Von Priece provided an offer of proof as to what would be seen on the videos. A trial court can exercise its discretion to permit additional discovery. *Gourley v. Gourley*, 158 Wn. 2d 460, 145 P. 3d 1185 (2006). The court within its discretion allowed Mr. Von Priece to give an oral offer of proof to the court as to what would be seen on the videos, and the trial court found that what was on the videos would not be relevant, and would not have altered the court's decision based upon the all of the other evidence presented. The court properly exercised its discretion and denied the admission of the video evidence.

C. THE TRIAL COURT DID NOT DENY MR. VON
PRIECE DUE PROCESS WHEN IT TRUNCATED HIS
CASE BUT STILL ALLOWED CROSS EXAMINATION.

Mr. Von Priece was not denied an opportunity to present his case in chief, in fact Mr. Von Priece was allowed to rebut what was said by the Kencayds but continued to rely on inadmissible video evidence that was not relevant, and to move the court along the court made a decision based upon the relevant facts presented. The court then gave Mr. Von Priece an opportunity to cross exam the Kencayds, but terminated the questioning when it was no longer relevant. If a court had no discretion as to when questioning and presentation of a case was no longer relevant a court would run the risk of having endless proceedings because a long winded party could continue to beat a dead horse until they were blue in the face. Here the court did not deny due process to Mr. Von Priece when looking at the *Matthews v. Eldrige* balancing test.

4. CONCLUSION

The trial court in this matter did not abuse its discretion, and acted within its discretion when it denied the admissibility of certain video evidence, and did not deny Mr. Von Priece his due

process right. The trial court's ruling should be affirmed as there has already been a full hearing on the merits.

DATED this 28th day of July, 2016.

A handwritten signature in black ink, appearing to read 'Bradley G. Barshis', written over a horizontal line.

Bradley G. Barshis
Attorney for Respondent Kencayd
Newton and Hall Attorneys at Law
610 Central Ave S
Kent, WA 98032
Phone: (253) 852-6600
Fax: (253) 852-6800
Email: brad@newtonandhall.com