STATE OF MICHIGAN

COURT OF APPEALS

KATHY KIRKLEY

Plaintiff-Appellee,

v

PAUL DUDRA,

Defendant-Appellant.

UNPUBLISHED
August 30, 1996

No. 182837
LC No. 94-311-CZ

Before: Hood, P.J. and Markman and A. T. Davis,* JJ.

PER CURIAM.

Defendant appeals by right an order of the circuit court restraining him from stalking the plaintiff. We affirm.

Plaintiff and defendant are neighbors. Defendant has estranged relationships with several neighbors, including plaintiff, because they blocked his construction of a large garage and assisted in the enactment of an ordinance that requires pet owners to pick up their pets' feces. Plaintiff alleged that defendant stalked her by following her and looking into the windows of her house.

Plaintiff contended that defendant bothered several people on the street but singled her out for particularly egregious conduct. Defendant followed plaintiff when she walked to work, waved and laughed at her, then left abruptly her alone. He followed her to work numerous times, often whistling or clearing his throat to make sure she knew he was there. She cited specific instances of such behavior: December 21, 1995 - he followed her as she walked to work; approximately 1 1/2 years ago - he followed her while she was in her car on the way to Grand View Hospital; and August 1993 - he drove past plaintiff and her husband several times when they were walking around Mt. Zion. He had his dogs defecate in her yard and in the street in front of her house. She obtained a restraining order to prohibit defendant and his dogs from entering her property but defendant and his family then came over with their dogs, stood on the property line and laughed and yelled.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff alleged also that defendant sometimes loitered in front of her house and looked in the windows. She had her lawyers tell him to stop this behavior and filed police reports but the conduct continued. She was informed that she needed to videotape defendant's behavior, which she did; then defendant started videotaping her. She testified that she did not provoke defendant. She testified that she felt violated, threatened, harassed, frustrated and confined in her own home. She admitted that she has sworn at him, told him to stay away from her house and told him not to let his dogs defecate in her yard. She also admitted that he made no verbal threats or physical gestures that put her in fear.

Defendant contended that the alleged conduct is part of an ongoing neighborhood war. The neighbors do not like him walking his dogs in the neighborhood. He testified that he never attempted to follow plaintiff or purposely harass her. He denied ever following plaintiff to Grand View Hospital. He indicated that he crossed plaintiff's path several times once when she and her husband were walking around Mt. Zion but that he was out doing business at the time and not following them. He denied hanging around her house.

He stated that when he walks his dogs near plaintiff's house, plaintiff and her husband knock on the window, videotape him and shout obscenities. Plaintiff once turned her hose on defendant's dog when he was walking him near her house. Plaintiff's husband once threatened defendant by saying he would like to meet defendant "in a dark alley." Another neighbor pulled a gun on him when defendant's dog defecated in the street near the neighbor's house. On the advice of his attorney, defendant would try to be friendly and wave when plaintiff and her husband made obscene gestures to him and videotaped him. His attorney conceded that, in following this advice to "turn the other cheek," defendant may have laughed at the neighbors in an effort to get back at them.

Plaintiff filed the present action on December 22, 1994. The court held an ex parte hearing and issued an ex parte restraining order that prohibited defendant from "following or appearing within sight of plaintiff" and from "appearing at workplace/residence of plaintiff."[1] The court later held a hearing on January 18, 1995. Defendant appeared and was represented by counsel at this hearing. The court found that defendant purposely followed plaintiff on several occasions to intimidate her, which conduct constituted stalking. At the conclusion of the hearing, the court issued a restraining order to restrain stalking that prohibited defendant from "following plaintiff." This is the order which this Court now reviews.

Defendant first claims that the anti-stalking statute is unconstitutional because it prohibits conduct that is protected by the First Amendment. Specifically, he claims that the practical result of the restraining order is that he is not free to walk around in his own neighborhood. He also claims that the statute is unconstitutionally vague. The constitutionality of a statute is a legal question that this Court reviews de novo. *People v White*, 212 Mich App 298, 309; 536 NW2d 876 (1995).

MCL 750.411h; MSA 28.643(8), the anti-stalking law, states in pertinent part:

(1) As used in this section:

(a) "Course of conduct" means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts, evidencing a continuity of purpose.

(b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily require, medical or other professional treatment or counseling.

(c) "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact, that would cause a reasonable individual to suffer emotional distress, and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

(d) "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(e) "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent, or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

(i) Following or appearing within the sight of that individual.

(ii) Approaching or confronting that individual in a public place or on private property.

(iii) Appearing at the workplace or residence of that individual.

(iv) Entering onto or remaining on property owned, leased, or occupied by that individual.

(v) Contacting that individual by telephone.

(vi) Sending mail or electronic communications to that individual.

(vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual.

This Court considered the constitutionality of the anti-stalking law in the context of First Amendment challenges (including a void for vagueness challenge) in *People v White*, 212 Mich App 298, 309; 536 NW2d 876 (1995). The *White* Court began by reiterating that statutes are presumed valid and are to be construed as such unless there is a clear showing of unconstitutionality. *Id*. at 309. The court stated:

> It is a basic tenet of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Our Supreme Court has adopted the following standards for evaluating vagueness challenges:
>
> A statute may be challenged for vagueness on the grounds that it
>
> -- is overbroad, impinging on First Amendment freedoms, or
>
> -- does not provide fair notice of the conduct proscribed, or
>
> -- is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed. [*Id*.]

The *White* Court found that the stalking statutes, § 411h and § 411i, were not unconstitutionally vague under these standards. *Id*. First, it found that neither statute was overbroad nor impinged free speech rights. *Id*. It stated that:

> [the function of overbreadth adjudication] attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. [*Id*. at 310, quoting *Broadrick v Oklahoma*, 413 US 601, 615; 93 S Ct 2908; 37 L Ed 2d 830 (1973).]

In the case before it, this Court found that the statute addressed conduct (following or confronting the victim) and conduct combined with speech (telephoning the victim). *Id*. It noted that the statutes excepted "constitutionally protected activity or conduct that serves a legitimate purpose," which have been defined as labor pickets or other organized protests. *Id*.[2] It held that the stalking statutes address a willful pattern of conduct and could not reasonably be applied to entirely innocent conduct. *Id*. at 311.

Second, it found that the statutes provided fair notice of the proscribed conduct. *Id*. A person of reasonable intelligence would not have to guess at the meaning of the statutes because the statutory definitions of crucial words and phrases are clear and can be fairly ascertained by reference to common law, dictionaries and their common and generally accepted meaning. *Id*. at 5-6.

Third, it found that the statutes did not confer unlimited discretion to the trier of fact. *Id*. at 6. "Vagueness cannot be established under this prong unless the wording of the statute is itself vague, which defendant does not allege and which we do not find." *Id*.

Under *White*, defendant's constitutional claims fail. Further, with respect to defendant's specific concern that merely walking in his neighborhood might be construed as a violation of the

restraining order, the trial court specifically stated that innocent conduct, like crossing paths in a small town would not be construed as the equivalent of following plaintiff.

Defendant next claims that his conduct did not meet § 411h's definitions of "harassment" and "stalking." Whether the conduct at issue met the statutory definition of stalking is a mixed question of fact and law. This Court reviews factual findings under the clearly erroneous standard. *SSC Associates Limited Partnership v General Retirement System of Detroit*, 210 Mich App 449, 452; 534 NW2d 160 (1995). This Court reviews questions of law de novo. *Westchester Fire Ins Co v Safeco Ins Co*, 203 Mich App 663, 667; 513 NW2d 212 (1994).

At the close of the January 18, 1995 hearing, the trial court found that the issue involved credibility and concluded:

> I believe, therefore, that there have been repeated acts of unconsented contact in the form of that following. That the plaintiff, at least insofar as this precise issue is concerned-- the following her is concerned-- was reasonable; not unreasonable in feeling intimidated by it or harassed by it.
>
> Our stalking law in Michigan is not limited to threats of physical violence. If it were, I quite agree that this case would have no business before this Court.

Section 411h provides the following relevant definitions:

> (b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily require, medical or other professional treatment or counseling.
>
> (c) "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact, that would cause a reasonable individual to suffer emotional distress, and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.
>
> (d) "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

Defendant's alleged conduct, following plaintiff and calling attention to himself by laughing, was repeated, unconsented contact. Plaintiff testified that this behavior caused her to feel violated, threatened, harassed, frustrated and confined in her own house. Such reactions were sufficient to constitute emotional distress under the statute. The trial judge did not err in finding that her reactions were reasonable. Thus, the conduct and her reaction fit within the statute's definition of "harassment."

Because the trial judge found that defendant acted purposely and intentionally and that plaintiff reasonably felt harassed by his conduct, the conduct also fits within the definition of "stalking." Accordingly, the trial court did not clearly err when it found that the conduct at issue violated § 411h.

Defendant correctly points out that plaintiff admitted that he had never made verbal threats or physical gestures that placed her in fear. But § 411h's definition of stalking does not require that the victim fear physical violence. Its use of the disjunctive "or" indicates that it is sufficient if the victim reasonably experiences any of the six described emotions. See *Bechtol v Mayes*, 198 Mich App 691, 694; 499 NW2d 439 (1993) (disjunctive "or" generally indicates alternatives). Here, plaintiff's testimony indicates that she felt harassed by defendant's conduct. On the basis of the language of the statute, the trial court correctly held that § 411h did not require threats of physical violence and that the conduct at issue met the definition of stalking and could appropriately be the subject of a restraining order.

Finally, defendant contends that the trial judge was biased and should have disqualified himself. He cites MCR 2.003, which states in pertinent part:

> (B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including a proceeding in which the judge
>
> (1) is personally biased or prejudiced for or against a party or attorney;

Defendant did not preserve this claim by raising it below, but we will briefly address it.

Defendant's main complaint is that the court improperly engaged in ex parte communications with the prosecutor. During the ex parte hearing, the court alluded to a conversation with the prosecutor that resulted in his impression that this matter involved a neighborhood dispute. Whatever the merits of such a conversation, there is no indication that this communication prejudiced defendant. It was defendant's contention that the conduct at issue was part of an ongoing neighborhood dispute. The trial judge's conversation with the prosecutor apparently supported this theory. Defendant also claims that an impression "of breached impartiality is also bolstered by [plaintiff's] name dropping of local attorneys . . . and [her] expression of surprise that [she] might even need an attorney to represent her." Such statements by plaintiff have nothing to do with any bias on the part of the trial judge. Accordingly, defendant fails to demonstrate that the judge was biased for or against either party.

For these reasons, we affirm the restraining order. Affirmed.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Alton T. Davis

[1] This ex parte restraining order is not the subject of the present appeal.

[2] This provision -- the final sentence of § 411h(1)(c), -- is not raised by defendant in the present appeal.