

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDDIE BILLS,

Defendant-Appellant.

UNPUBLISHED

September 29, 2000

No. 214089

Wayne Circuit Court

LC No. 97-003912

Before: Gribbs, P.J., and Neff and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant of two counts of aggravated stalking, MCL 750.411i(2); MSA 28.643(9)(2). Defendant received an enhanced sentence as a fourth felony offender, MCL 769.12; MSA 28.1084, of thirty to sixty years' imprisonment. He appeals as of right. We affirm.

This case arises out of defendant's breach of two personal protection orders ("PPOs") that his mother-in-law, Jessie Mae Jacobs, filed against him. The record below established that defendant married Jacobs' daughter in approximately 1985. In 1986, defendant and Jacobs' daughter had a son. In 1987, Jacobs' daughter left defendant, took her son, and moved in with Jacobs. Later that year, defendant entered Jacobs' home with a shotgun and assaulted Jacobs and her daughter. Defendant received a conviction of felonious assault in 1988 as a result of this incident, and served a prison sentence. In 1992, while defendant was in prison, Jacobs' daughter died in an automobile accident. Jacobs obtained formal guardianship of her grandson in 1993. Defendant was released from prison in December 1995. Thereafter, defendant began making threatening phone calls to Jacobs, and he filed an unsuccessful challenge to Jacobs' guardianship of his son.

On May 16, 1996, Jacobs filed a request in Wayne Circuit Court for a PPO against defendant. The PPO issued that same day, and it prohibited defendant from coming within 500 feet of Jacobs or contacting Jacobs on the telephone. On January 7, 1997, the court issued a revised PPO. According to Jacobs' testimony, defendant continued to follow her and threaten her over the phone. The prosecutor subsequently charged defendant with two counts of aggravated stalking.

Defendant first argues that the prosecutor presented insufficient evidence to support his bindover and conviction for aggravated stalking. According to defendant, the two PPOs on which the aggravated stalking charges were predicated were invalid due to a clerical error. We disagree. This Court will not disturb a district court's probable cause determination unless it was wholly unjustified based on the record. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the prosecutor proved the essential elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

Count I of the information charged defendant with aggravated stalking pursuant to MCL 750.411i(2)(a); MSA 28.643(9)(2)(a), which provides:

An individual who engages in stalking is guilty of aggravated stalking if the violation involves any of the following circumstances:

(a) At least 1 of the actions constituting the offense is in violation of a restraining order and the individual has received actual notice of that restraining order.

In section D of both PPOs, the name "Jessie Jacobs," who was actually the victim in this case, appeared in the box on the form where the name of the restrained party should have been. Defendant argues that this clerical error made each of the PPOs invalid, and that consequently the evidence was insufficient to support his conviction. Defendant's argument is without merit.

MCR 2.613(A) provides:

An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

Refusal to vacate the PPOs because of a clerical error would not be inconsistent with substantial justice in this case. While Jessie Jacobs' name mistakenly appeared as the restrained party in section D of both PPOs, section I of those documents makes clear that defendant was the subject of the PPOs. Defendant admitted that he received actual notice of the PPOs, and his testimony and comments at the preliminary examination and at trial show that he was aware that he was the restrained party. Defendant's testimony also demonstrated that he was aware of the activities and behavior that the PPOs prohibited. Therefore, because the clerical errors did not invalidate the PPOs, we reject defendant's argument.

Defendant also argues that the PPOs were invalid because they were not issued in compliance with MCR 3.310(B)(2)(b), which provides that a temporary restraining order granted without notice

must “describe the injury and state why it is irreparable and why the order was granted without notice.” This argument is also without merit. In her May 16, 1996, motion for the initial PPO, Jacobs stated the following reasons for needing a restraining order against defendant:

He once did time for shooting my house. He did seven years, release [sic] on 12/30/95. Ever since than [sic] he has been a thorn in my side in fact my worse [sic] nightmare. He’s threatened me by phone, letter . . . [Y]esterday he tried to run me down.

We conclude that, in her motion for the PPO, Jacobs sufficiently described an irreparable injury. That defendant posed an immediate threat to Jacobs’ personal safety is clear to us from Jacobs’ statement. The injury she was in danger of suffering could reasonably be characterized as irreparable because defendant had taken actions in the past, such as attempting to force her car off the road and discharging a shotgun in her home, that put Jacobs’ life at risk. Although the PPO did not incorporate Jacobs’ testimony, based on MCR 2.613(A), we cannot conclude that the failure was contrary to substantial justice.

Defendant next argues that his conviction under count II of the amended information must be reversed because it violated his constitutional protections against double jeopardy and ex post facto prosecutions. We disagree. This Court reviews constitutional issues de novo. *People v Brown*, 239 Mich App 735, 750; 610 NW2d 234 (2000).

Under count II, the prosecution charged defendant with aggravated stalking pursuant to MCL 750.411i(2)(c); MSA 28.643(9)(2)(c), which provides:

An individual who engages in stalking is guilty of aggravated stalking if the violation involves any of the following circumstances:

(c) The course of conduct includes the making of 1 or more credible threats against the victim, a member of the victim’s family, or another individual living in the same household as the victim.

Defendant claims that his conviction pursuant to this subsection of the stalking statute constituted a violation of his constitutional protections against ex post facto prosecutions because it was based on his 1988 conviction for felonious assault. Defendant’s argument is without basis in fact.

“Where a statute affects the prosecution or disposition of criminal cases involving crimes committed before its effective date, it violates the Ex Post Facto Clause if it (1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence.” *People v Pennington*, 240 Mich App 188, 192; 610 NW2d 608 (2000). Defendant claims that the prosecutor improperly used his 1988 conviction for felonious assault as evidence of a “credible threat” to support his conviction for aggravated stalking because that statute was enacted in 1993. Thus, defendant appears to be arguing that his prosecution for aggravated stalking was a violation of the Ex Post Facto Clause because it made punishable “that

which was not.” *Pennington, supra* at 192. We disagree. Defendant’s 1988 conviction for felonious assault was used only to establish that the threats defendant made against Jacobs after his release from prison in 1995 were credible. The prosecutor was not seeking to punish defendant a second time for his actions in 1988. Rather, the prosecutor was attempting to punish defendant for actions he took after his release from prison. Therefore, defendant’s conviction under MCL 750.411i(2)(c); MSA 28.643(9)(2)(c) did not constitute a violation of the constitutional prohibition against ex post facto prosecutions.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” *People v Garcia (After Remand)*, 203 Mich App 420, 423; 513 NW2d 425 (1994). This guarantee applies to the states through the Due Process Clause of the Fourteenth Amendment. *Id.* Defendant appears to claim that the prosecution violated the Double Jeopardy Clause in this case because he twice received punishments for the same offense. Defendant’s double jeopardy claim fails. Our review of the lower court record makes clear that the prosecutor did not attempt to punish defendant a second time for the crime he committed in 1988. Instead, the prosecutor attempted to punish defendant for the threats he made against Jacobs following defendant’s release from prison in 1995. Consequently, defendant’s double jeopardy argument is without merit.

Defendant next argues that he received ineffective assistance of counsel because his trial attorney allowed the court to take judicial notice of the fact that the PPOs issued against defendant were properly executed court documents. We do not agree. Defendant claims that his counsel should have objected to the court’s decision to take judicial notice of the fact that the two PPO’s were “entered in an appropriate Court and that they are official court documents.” As we explained above, defendant offers no authority to support his contention that a clerical error in the PPOs rendered them invalid for purposes of his aggravated stalking conviction. Each of the PPOs was filed in the Wayne Circuit Court and bore the verification of the county clerk. Under the circumstances, an objection to the court’s taking judicial notice of the PPOs would have been futile. Defendant’s attorney was not required to argue a frivolous or meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Therefore, defense counsel’s failure to object to the court’s decision to take judicial notice of the PPOs as properly executed court documents did not constitute ineffective assistance of counsel.

Affirmed.

/s/ Roman S. Gribbs

/s/ Janet T. Neff

/s/ Peter D. O’Connell