

STATE OF MICHIGAN
COURT OF APPEALS

JAMES C. WILLIAMS,

Petitioner-Appellant,

v

ELIZABETH WOJTOWYCZ,

Respondent-Appellee.

UNPUBLISHED

May 21, 2002

No. 229742

Wayne Circuit Court

LC No. 00-011828

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

Petitioner appeals as of right from an order terminating a non-domestic personal protection order (PPO). We affirm.

Petitioner first argues that the trial court erred in denying his motion for rehearing and reconsideration. We disagree. We review a trial court's decision regarding a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). An abuse of discretion occurs when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Id.*

With regard to petitioner's first argument, the trial court did not err in denying petitioner's motion for rehearing and reconsideration based on its failure to consider petitioner's affidavit, and the argument contained therein, that respondent failed to serve the motion to terminate the PPO in compliance with the court rules. The standard for granting or denying a motion for rehearing or reconsideration is contained in MCR 2.119(F)(3), which provides:

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Further, MCR 3.707(A)(1) provides that either party may file a motion to modify or terminate a PPO and request a hearing. MCR 3.707(A)(1)(c) provides, in relevant part:

The moving party shall serve the motion to modify or terminate the order and the notice of hearing at least 7 days before the hearing date as provided in MCR 2.105(A)(2) to the mailing address or addresses provided to the court. On an appropriate showing, the court may allow service in another manner as provided in MCR 2.105(I). . . .

Thus, the above rule specifically refers to MCR 2.105(A)(2) for the requirements governing service of motions to modify or terminate PPOs. MCR 2.105(A)(2) provides, in relevant part:

(A) Process may be served on a resident or nonresident individual by,

* * *

(2) sending a summons and copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the defendant acknowledges receipt of the mail. A copy of the return receipt signed by the defendant must be attached to the proof showing service under subrule (A)(2).

Additionally, MCR 2.105(I) provides that the trial court may permit service of process to be made in another manner reasonably calculated to give actual notice of the proceedings and an opportunity to be heard.

Returning to the court rule governing the filing of a motion to modify or terminate a PPO, MCR 3.707 does not provide sanctions for failure to meet the service requirements set forth in MCR 2.105(A)(2). Presumably, the trial court can delay the hearing if it finds that a party has been prejudiced by late service of motion, but it is not clear that the trial court is required to do so. As MCR 2.613(A) provides:

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 . . . disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

In this case, neither the failure to strictly comply with the service requirements contained in the court rules, nor the termination of the PPO, resulted in substantial injustice to petitioner. The lower court docket sheet indicates that respondent filed her motion to terminate the PPO on April 21, 2000. Respondent then filed the proof of service on April 24, 2000. It was signed by the court clerk, who indicated that the motion was mailed to petitioner's address.¹ Petitioner acknowledged at the motion for rehearing on July 13, 2000, that this was his correct address. However, service was never made pursuant to MCR 2.105(A)(2) because a return receipt signed by petitioner was neither attached to the proof of service nor included in the lower court file.

¹ MCR 2.104(A)(2)(c) provides that requirements for proof of service may be made by a court officer by "a certificate stating the facts of service, including the manner, time, date, and place of service, if service is made within the State of Michigan."

Nonetheless, petitioner acknowledges that he received the motion on May 1, 2000, five days before the hearing on respondent's motion to terminate the PPO. Therefore, petitioner was deprived of only two days' notice of the hearing under MCR 3.707(A)(2). Petitioner has failed to show how he was prejudiced by losing two days' notice. Petitioner appeared at the hearing and brought two witnesses with him. He also had time to prepare a written affidavit to support his argument.

Petitioner argues that MCR 2.105(J) provides that an action shall be dismissed where service fails to inform a party of the action within the time provided for in the rules. However, MCR 2.105(J)(3) actually states: "An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service." This language does not provide an imperative sanction for failure to comply with the notice requirements. Rather, it provides that defects in service of process will generally not warrant dismissal unless the service failed to inform the opposing party of the action within the appropriate time frame. *In re Gosnell*, 234 Mich App 326, 344; 594 NW2d 90 (1999). Additionally, the rule regarding motions to modify or terminate a PPO, MCR 3.707(A)(1)(c), specifically refers to MCR 2.105(A)(2) and 2.105(I). The rule does not refer to MCR 2.105(J). Thus, based on the plain meaning of MCR 3.707(A)(1)(c), we conclude that MCR 2.105(J) should not be applied. *Colista v Thomas*, 241 Mich App 529, 535; 616 NW2d 249 (2000); *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). The trial court did not err in denying petitioner's motion for rehearing and reconsideration on this basis.

With regard to petitioner's second argument, the trial court did not err in denying his motion for rehearing and reconsideration based on its failure to allow petitioner and his witnesses the right to be heard. A review of the hearing transcript reveals that petitioner and his witnesses were provided an opportunity to be heard. Petitioner refused to provide direct answers to the trial court's questions. Instead, petitioner insisted on providing evasive and/or non-responsive answers. One witness, Joyce Houston, indicated that she did not see respondent do anything. The other witness, Ms. Litsey, indicated that she saw respondent "have an outburst at one point and time," wherein respondent stated: "Nobody threatens my job."² Ms. Litsey also saw petitioner and respondent interacting while standing close to one another and talking very quietly in the presence of the other members. The record simply does not reflect that petitioner and his witnesses were not given the opportunity to speak. Therefore, the trial court did not err in denying petitioner's motion for reconsideration on this basis.

With regard to petitioner's third argument, the trial court did not err in ordering the parties to participate in mediation. Petitioner correctly points out that mediation, now referred to as case evaluation pursuant to MCR 2.403, may be ordered by the trial court in any civil action in which the relief sought is primarily money damages or division of property. However, petitioner cites no authority stating that cases involving personal protection orders may not be ordered to proceed to mediation. A party may not merely announce his position and leave it to this Court to discern and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d

² This testimony therefore implied that petitioner had threatened respondent, not that respondent had threatened petitioner.

100 (1998). The trial court did not abuse its discretion in denying petitioner's motion for rehearing or reconsideration on this basis.

With regard to petitioner's fourth argument, the trial court did not err in denying his motion for rehearing and reconsideration because the termination of the PPO was not against the great weight of the evidence. A PPO shall not be issued on an ex-parte basis unless it clearly appears from the petition that the petitioner would suffer "immediate and irreparable injury, loss, or damage" in the absence of an order. MCL 600.2950a(9). A PPO is an injunctive order that precludes a person from engaging in specific types of conduct. MCL 600.2950a(1). This Court reviews a decision to grant or deny a request for injunctive relief for an abuse of discretion. *Fancy v Egrin*, 177 Mich App 714, 719; 442 NW2d 765 (1989).

At the hearing on respondent's motion to terminate the PPO, petitioner presented no persuasive evidence that respondent engaged in the activities complained of in the petition. Also, petitioner failed to specify what, if any, immediate and irreparable harm he would suffer in the absence of the PPO, as required by MCL 600.2950a(9). Petitioner failed to establish either that he was in danger of an immediate threat, or that petitioner had made any threat to him at all. Neither his testimony nor that of his witnesses support a finding that respondent was any type of threat to petitioner. Petitioner refers to his affidavit dated May 4, 2000, and accepted by the trial court at the hearing held on May 5, 2000, which enumerates the ways in which respondent allegedly threatened petitioner. However, none of these alleged acts show that petitioner was in danger of immediate or irreparable harm. Additionally, this Court recognizes that the trial court, while not infallible, is in a better position to weigh evidence and evaluate a witness' credibility. *Fletcher v Fletcher*, 229 Mich App 19, 29; 581 NW2d 11 (1998). Based on the testimony at the hearing, the great weight of the evidence supported the termination of the PPO. The trial court did not err in denying the motion for rehearing on this basis.

Petitioner next argues that the trial court erred by denying petitioner's request for a continuance. We disagree. A court's ruling on a motion for a continuance is discretionary and we review it for an abuse of discretion. *In re Jackson*, 199 Mich App 22, 28; 501 NW2d 182 (1993).

On June 12, 2000, a hearing was held on petitioner's motion to disqualify and his motion to show cause. At the beginning of the hearing, petitioner moved for a continuance, stating that he was under a doctor's care and felt "extremely lethargic and not alert as I should be in order to argue this motion." The trial court asked petitioner what, other than that contained in his brief supporting the motion to disqualify, he would add to his argument if the continuance were granted, noting that the paperwork filed by petitioner was very thorough. Petitioner did not provide a responsive answer. Based on the hearing transcript, it is apparent that, as the trial court questioned him, petitioner abandoned his request for a continuance and proceeded to present his arguments before the trial court. Additionally, petitioner could not provide the trial court with an answer regarding what he would add to his argument if the continuance were granted. The trial court also noted that petitioner's arguments were set forth thoroughly in writing. Therefore, the trial court's denial of his request for a continuance was not an abuse of discretion.

Petitioner also argues that the trial court erred by refusing to send his motion to disqualify to the chief judge. However, as the hearing transcript reveals, the trial court did not prevent petitioner from having his motion heard before the chief judge. Rather, the trial court told

petitioner to take the motion to the chief judge himself. At a hearing on July 13, 2000, the trial court denied petitioner's motion for rehearing and reconsideration and informed petitioner that the second motion to disqualify him needed to be heard by the chief judge. At that time, the trial court indicated that it would send the motion to the chief judge. Moreover, the chief judge ultimately heard and denied petitioner's motion. Therefore, the trial court did not err in telling petitioner to take the motion to the chief judge, nor did the trial court deny petitioner a hearing before the chief judge.

Petitioner finally argues that the trial court erred by improperly entering the order terminating the PPO on May 5, 2000, improperly dismissing the order for respondent to show cause for violating the PPO, and improperly entering the order terminating the PPO on July 19, 2000. We disagree. This Court reviews interpretation of court rules de novo as a question of law. *Gosnell, supra* at 333.

The trial court clearly ordered that the PPO be terminated at the hearing that occurred on May 5, 2000. The written order was signed by Judge Halloran on May 5, 2000. However, that order was not filed on that date. Petitioner argues that the order was not "ever signed, dated, issued, or filed on May 5, 2000, and as required under MCR 2.602(C)." However, MCR 2.602(C) does not require that the order be filed on the day it is entered. It simply requires that the order be filed. An order is deemed entered on the day that it is signed. MCR 2.602(A)(2).

The fact that the order had not been filed was brought to the trial court's attention at the hearing that occurred on June 12, 2000, when the trial court attempted to instruct petitioner on his right to appeal and petitioner announced that the trial court had not terminated the PPO because it had not properly filed an order. The trial court nonetheless dismissed the show cause order, believing that the PPO had been terminated. On July 19, 2000, a hearing was held on the motion to terminate the PPO, before a special master. Petitioner did not appear for that hearing, and the special master terminated the PPO. The order shows that the date of May 5, 2000, was crossed out and the date of July 19, 2000, inserted. However, the order remained signed by Judge Halloran. The order was received by the lower court clerk for filing on July 19, 2000.

Even if the trial court failed to comply with the court rules because it failed to file the order on May 5, 2000, and then re-entered the order on July 19, 2000, we will not reverse the trial court's rulings because we find no substantial injustice. MCR 2.613(A). As discussed above, the great weight of the evidence supported termination of the PPO on May 5, 2000. Therefore, petitioner suffered no substantial injustice when the trial court, on June 12, 2000, refused to require respondent to show cause for violating the PPO on May 8, 2000. Because the trial court properly ordered the termination of the PPO on May 5, 2000, the re-entry of the order on July 19, 2000, had no practical effect other than to: (1) clarify for petitioner that the PPO in fact had been terminated, (2) result in the filing of the order, and (3) result in the removal of the PPO from the LEIN system.

Finally, there is no merit to petitioner's claim that the trial court erred in entering an order when it lacked jurisdiction. The July 19, 2000, hearing was conducted by a special master, not by the trial court. The order filed on July 19, 2000, shows that, while Judge Halloran signed and dated the order on May 5, 2000, the date of July 19, 2000, was written in based on the special master's ruling. Therefore, the trial judge did not improperly rule on a matter or enter an order while a motion to disqualify him was pending before the chief judge. Moreover, if there was

such an error, it was harmless because the trial court properly ordered termination of the PPO on May 5, 2000, and the chief judge denied the motion to disqualify.

Affirmed.

/s/ Michael R. Smolenski

/s/ Janet T. Neff

/s/ Helene N. White