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IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 20, 2022 Session

MARK STANTON JACKSON v. BENNETT JACKSON BURKE

Appeal from the Circuit Court for McMinn County
No. 2021-CV-351 Michael E. Jenne, Judge

No. E2021-01484-COA-R3-CV

This is an appeal from the entry of an order of protection for stalking. The respondent asserts that he did not receive the statutorily required notice of hearing and that the evidence did not support a finding of stalking. The trial court ruled in favor of the petitioner. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which THOMAS R. FRIERSON, II, and KRISTI M. DAVIS, JJ., joined.

D. Mitchell Bryant, Athens, Tennessee, for the appellant, Bennett Jackson Burke.

Donald Winder, III, Athens, Tennessee, for the appellee, Mark Stanton Jackson.

OPINION

I. BACKGROUND

Mark Stanton Jackson ("Jackson") and Bennett Jackson Burke ("Burke") were neighbors in the Town and Country Homes apartment complex in Athens, Tennessee. The two men were casual friends and would occasionally do favors for each other. His relationship deteriorated after Jackson became disturbed by the allegedly strange behavior of Burke and tried to end their interaction. According to Jackson, Burke refused to leave him alone.

In September 2021, Jackson, acting pro se, filed for an order of protection against Burke, wherein he alleged that Burke was stalking him. The relevant definition of stalking

is "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." Tenn. Code Ann. §39-17-315(a)(4). The court did not enter a temporary order of protection, finding no present danger to Jackson from the evidence presented. The matter, however, was set for a hearing.

On October 26, 2021, Burke was served with the petition and notice ordering him to appear in court two days later. Upon appearing for the hearing, Burke contended that he did not have enough time to retain counsel for the hearing, but he did not request a continuance to obtain legal counsel or seek additional time to prepare. Instead, he informed the court that he was ready to proceed with a contested hearing. He submitted a pro se written answer, gave an opening statement, testified on this own behalf, entered exhibits, and gave a closing argument. Jackson, also appearing pro se, told the court about Burke recording him, driving slowly by Jackson's separate property multiple times, finding him at the laundromat, yelling at him, staring at him, calling him "wicked," and following him in and out of the apartment building. Jackson related that Burke had a "bad temper." Jackson also called two witnesses who lived in the building, whom Burke cross-examined. The hearing lasted over two hours.

The trial court found Jackson to be more credible than Burke, who was inconsistent in his testimony and had been evicted from the apartment complex due to his conduct. The court determined that Jackson, of smaller stature than Burke, met his burden of proof for stalking by a preponderance of the evidence. In an order dated October 28, 2021, the court found that Burke "stalked [Jackson] so as to make [him] feel frightened, intimidated, threatened and/or harassed. . . ." The court ordered that Burke have no contact with Jackson and to surrender his firearms to someone allowed to have them.

Upon hiring counsel, Burke moved pursuant to Rule 59 of the Tennessee Rules of Civil Procedure to alter or amend the judgment or for a new trial, arguing that he did not receive his statutorily mandated five days' notice of hearing and that the evidence presented did not support a finding of stalking. The trial court ruled in an order entered December 1, 2021, that Burke waived his right to object to notice because he appeared in court pro se and agreed to proceed with the hearing. Additionally, the trial court emphasized that the ruling was not prejudicial because the facts and witnesses for a second trial "would be the same" that were used to enter the order of protection. Burke filed a timely appeal.

II. ISSUES PRESENTED

We restate the issues presented as follows:

A. Whether the trial court erred in holding that Burke waived his right to receive the statutorily mandated five days' notice prior to the order of

protection hearing.

B. Whether the trial court erred in granting Jackson's petition for an order of protection.

III. STANDARD OF REVIEW

Review following a non-jury trial is "de novo upon the record, accompanied by a presumption of correctness of the trial court's finding of fact, unless the preponderance of the evidence is otherwise." *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 204 (Tenn. 2012) (citing Tenn. R. App. P. 13(d); *Gautreaux v. Internal Med. Educ. Found.*, 336 S.W.3d 526, 532 (Tenn. 2011)). We may only reverse the factual findings of the trial court if the evidence presented necessitates a new finding of fact that is more persuasive than the evidence used to make the decision at the trial court. *Wood v. Starko*, 197 S.W.3d 225, 257 (Tenn. Ct. App. 2006) (citing *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001)). However, a trial court's conclusions of law are reviewed de novo with no presumption of correctness. *S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

IV. DISCUSSION

A.

When a matter such as the one in this appeal is set for a hearing, state law requires notice of the hearing to be served on the respondent at least five days prior to the hearing. Tenn. Code Ann. § 36-3-605(c). Burke argues that because he was pro se when he was served with the petition and unaware of his right to five days' notice of the order of protection hearing, the court improperly found that he waived notice, as he did not make an "intentional relinquishment of a known right." *Gitter v. Tenn. Farmers Mut. Ins. Co.*, 450 S.W.2d 780, 784 (Tenn. Ct. App. 1969) (citing *Baird v. Fidelity-Phenix Fire Ins. Co.*, 162 S.W.2d 384, 388 (Tenn. 1942); *State ex rel. Lea v. Brown*, 64 S.W.2d 841, 848 (Tenn. 1933)); *see also id.* ("[T]here must be clear, and decisive acts of the party or an act which shows determination not to have the benefit intended in order to constitute a waiver." (citing *Webb v. Bd. of Trs. of Webb Sch.*, 271 S.W.2d 6 (Tenn. Ct. App. 1954)).

Pro se litigants have a right to fair and equal treatment by the courts. *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000). However, the courts may not prejudice the rights of other parties in order to be "fair" to parties who decide to represent themselves. *Hodges v. Attorney General*, 43 S.W.3d 918, 920 (Tenn. Ct. App. 2000). Despite Burke arguing that an order of protection hearing is a quasi-criminal proceeding, civil litigants do not possess a constitutional or statutory right to counsel. *Lavado v. Keohane*, 992 F.2d 601, 605 (6th Cir. 1993); *Hessmer v. Miranda*, 138 S.W.3d 241, 245 (Tenn. Ct. App. 2003). Although trial courts may very well have the inherent prerogative

in exceptional circumstances to request appointed counsel to assist indigent civil litigants, this authority is discretionary. Tenn. Sup. Ct. R. 13; *Bell v. Todd*, 206 S.W.3d 86, 92 (Tenn. Ct. App. 2005).[1]

A method of waiver "is by making a voluntary, 'general appearance' before the court." *Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn. 1994). "[A] party's consent to the entry of judgment against it constitutes a general appearance." *Dixie Sav. Stores, Inc. v. Turner*, 767 S.W.2d 408, 410 (Tenn. Ct. App. 1988). Further, as a "general rule, defects in process . . . may be waived." *Faulks v. Crowder*, 99 S.W.3d 116, 125 (Tenn. Ct. App. 2002) (quoting *Goodner v. Sass*, No. E2000-00837-COA-R3-CV, 2001 WL 35969, at *2 (Tenn. Ct. App. Jan. 16, 2001)). "A defendant may …, by his conduct, be estopped to object that service was improper." *Watson v. Garza*, 316 S.W.3d 589, 598 (Tenn. Ct. App. 2008) (citing *Faulks*, 99 S.W.3d at 125). Tennessee case law has long maintained that an appearance in court, and participation in a proceeding serves as waiver to later contest proper notice. *See, e.g.*, *Chaffin v. Crutcher*, 34 Tenn. 360 (1854).

The trial court acknowledged that the petition was not served at least five days before the hearing. However, it found that Burke had waived his right to notice because he appeared in court pro se on the scheduled hearing date and stated that he would proceed with the hearing. As noted by the court, when the case was initially called, Burke "stood up in open Court and stated that he disputed the allegations in the Petition and that he was ready to proceed with a contested hearing." Later, Burke "again advised the Court that he disputed that an Order of Protection should be entered, and further advised the Court that he was ready to proceed with an Order of Protection hearing." The trial court observed that Burke "did not request a continuance seeking additional time to prepare his case and/or obtain legal counsel." Burke further filed his pro se answer with the court.

We may not allow any litigant to announce a desire to proceed with a hearing, conduct that hearing, only to later disregard the court's determination when the litigant is dissatisfied with the court's ruling. We find that the trial court did not err in proceeding with the hearing and in finding the objection to be waived.

B.

Stalking is defined as "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." Tenn. Code Ann. § 39-17-315(a)(4). For Burke's actions to be considered harassment, his conduct would have to "cause a reasonable person to suffer emotional distress and … actually cause[] the victim to suffer emotional distress." *Id.* at 39-17-315(a)(3). Conduct

[1] The parties in this matter did not seek indigency status or request counsel.

that amounts to "mere insults, indignities, threats, annoyances, petty oppression or other trivialities" does not rise to the level of causing emotional distress. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997).

The trial court, after conducting a hearing, determined that Jackson met his burden by a preponderance of the evidence. When a trial court has seen and heard the witnesses, considerable deference must be accorded to the court's factual findings. *Seals v. England/Corsair Upholster Mfg. Co.*, 984 S.W.2d 912, 915 (Tenn. 1999). Reviewing the record de novo, with a presumption of correctness given to the trial court's determination of the facts, we must honor the court's findings unless there is evidence which preponderates to the contrary. Tenn. R. App. P. 13(d).

Burke offers no evidence to support a contrary ruling. As noted by Jackson, a desire for a different outcome is not a sufficient justification to overcome the judgment. In view of the unique facts and circumstances of this matter, the proof introduced at trial was sufficient to support the case for stalking by a preponderance of the evidence.

V. CONCLUSION

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the appellant, Bennett Jackson Burke.

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JOHN W. MCCLARTY, JUDGE