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Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 20650-5-III
Title of Case: In RE Ann M. Byers and
v.
Michael Greg Sweeney
File Date: 10/10/2002

SOURCE OF APPEAL

Appeal from Superior Court of Spokane County
Docket No: 012056772
Judgment or order under review
Date filed: 11/01/2001
Judge signing: Hon. Linda G. Tompkins

JUDGES

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANN M. BYERS, Respondent, v. MICHAEL GREG SWEENEY, Appellant.	) No. 20650-5-III)) Division Three) Panel Three))) UNPUBLISHED OPINION)

SCHULTHEIS, J. -- Michael Greg Sweeney appeals from a Spokane County Superior Court order denying his motion to revise a commissioner's ruling granting respondent Ann M. Byers's petition for an order protecting her two minor sons from unlawful civil harassment. Mr. Sweeney contends the evidence in support of Ms. Byers's petition was legally insufficient to constitute unlawful harassment under RCW 10.14.020(1). We disagree and affirm the trial court.

FACTS

Ms. Byers filed the petition on September 25, 2001, alleging her minor sons Joseph (born February 8, 1985) and Ryan (born April 21, 1986) were victims of harassment by Mr. Sweeney and that his contact was detrimental to them. Ms. Byers requested a protective order restraining Mr. Sweeney from contacting them or being within two miles of their residence and the children's school and sporting events. Ms. Byers's petition contained the following sworn statement:

Respondent {Mr. Sweeney} had joint custody of {the} children until he gave up his parental rights {and} allowed my husband of 10 years to adopt the children. This was prior to respondent being sent to prison in Sheridan, OR. Respondent relinquished all parenting rights after years of drug abuse, non-payment of child support {and} long periods of abandonment.

Since being released from prison, respondent has been attending {the} children's football practices and games.
9-21-01 Football game {at} CDA High School
9-14-01 Football game - Joe Albi Stadium
9-4-01 Watching {and} taking pictures of son during practice
Sons distressed over presence; have participated in years of proceedings to abolish from their lives.

Clerk's Papers (CP) at 3.

The court entered a temporary protection order and notice of hearing for October 8, 2001. Mr. Sweeney was properly served with the petition, but did not answer or otherwise file any documents with the court. He did appear at the hearing with counsel. Ms. Byers appeared pro se. Both parties presented argument, but did not submit additional evidence or sworn testimony.

A superior court commissioner granted Ms. Byers's petition and entered the requested order but for reducing the spatial restriction from two miles to two blocks. The court reasoned:

Mr. Sweeney chose to relinquish his rights to these children, . . . which basically terminates his rights to be a parent to those children. They have been adopted, and basically have a new father, and have basically moved on with their lives. The petition indicates that on three occasions, September 21st there was a football game at Coeur d'Alene High School, September 14th there was a football game at Joe Albi Stadium, and September 4th there was some watching and taking pictures of son during practice.
. . .

Mom says that the sons are distressed over Mr. Sweeney's presence. There has been a pattern of this distress, at least on two occasions, probably on three occasions.

CP at 29. The one-year protective order expires on October 8, 2002. Mr. Sweeney moved for revision of the commissioner's ruling, contending the

protective order should not have been granted because the petition did not sufficiently allege the existence of harassment as required by RCW 10.14.040(1); and, the commissioner erred in finding by a preponderance of the evidence the existence of unlawful harassment. A superior court judge reviewed the matter de novo without taking additional evidence or testimony and entered an order denying Mr. Sweeney's motion. The court found (1) Ms. Byers alleged sufficient facts in her petition to satisfy the elements of harassment, and (2) Ms. Byers has shown by a preponderance that Mr. Sweeney's course of action was detrimental to the children. Mr. Sweeney appeals, challenging only that part of the protective order restricting him from attending the children's sporting events.

REVIEW STANDARDS

The parties are first in dispute as to the appropriate standard of review. Ms. Byers contends this court is bound under the substantial evidence rule by the court's findings of fact based upon testimony requiring it to assess witness credibility and weigh conflicting evidence. But the court below took no live sworn testimony; the sole evidence in the record is Ms. Byers's sworn statement in her petition.1 Our review is therefore de novo, encompassing the court's legal conclusions as flowing from the ultimate facts of the case. See Smith v. Skagit County, 75 Wn.2d 715, 718-19, 453 P.2d 832 (1969); Rasmussen v. Bendotti, 107 Wn. App. 947, 954-55, 29 P.3d 56 (2001). We may independently review evidence consisting solely of written documents. See Lobdell v. Sugar 'N Spice, Inc., 33 Wn. App. 881, 887, 658 P.2d 1267 (1983).

ANALYSIS

Mr. Sweeney contends the superior court erred in upholding the antiharassment order preventing him from attending the Byers children's football games in public venues. He takes the position in his opening and reply briefs that Ms. Byers has failed to sufficiently allege harassing conduct for the case to even go forward, much less gain a finding by the court that his mere attendance at these events and taking photos from afar in public stadiums is a course of conduct sufficient to constitute unlawful harassment. He claims lack of any scienter to harass, in contrast to conduct in other cases involving humiliation or legitimate safety concerns.

State v. Noah, 103 Wn. App. 29, 9 P.3d 858 (2000), review denied sub nom. Calof v. Casebeer, 143 Wn.2d 1014 (2001); Burchell v. Thibault, 74 Wn. App. 517, 874 P.2d 196 (1994). We find no error.

At the threshold, RCW 10.14.040 provides the mechanism to petition for an order for protection from unlawful harassment. The petition must allege the existence of harassment and be accompanied by a sworn statement of the specific facts and circumstances from which relief is sought. RCW 10.14.040(1). A parent is authorized to file the petition on behalf of children under age 18. RCW 10.14.040(6).

Ms. Byers's petition alleged harassment of the children by Mr. Sweeney in this judicial district on certain dates and that his contact was detrimental to them as described in her accompanying sworn statement. The petition also recites the statutory definition of harassment. It adequately complies with RCW 10.14.040. Mr. Sweeney's challenge to the superior court's finding in this regard is without merit.

When, as here, the petition sufficiently alleges harassment, a protective order will properly issue if the court finds by a preponderance of the evidence that unlawful harassment exists. RCW 10.14.080(3). The elements of the cause

of action are '{1} a knowing and willful {2} course of conduct {3} directed at a specific person {4} which seriously alarms, annoys, harasses, or is detrimental to such person, and {5} which serves no legitimate or lawful purpose.' RCW 10.14.020(1) (emphasis added).

Course of conduct means a pattern and series of acts 'evidencing a continuity of purpose,' and includes either contact or conduct, but not constitutionally protected activity. RCW 10.14.020(2). The course of conduct must be such that it would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner or cause a reasonable parent to fear for the well-being of his or her child. RCW 10.14.020(1); see Burchell, 74 Wn. App. at 521.

The harassment statute authorizes the court to protect a specific victim against contact by the harasser. Noah, 103 Wn. App. at 43; see also Burchell, 74 Wn. App. at 522 (since RCW 10.14.020(1) requires that the harassing conduct be 'directed at a specific person,' the scienter aspect goes to both the commission of the conduct and the identity of the targeted victim). This coincides with the legislative intent, which is not to punish past behavior, but to prevent ''all further unwanted contact between the victim and the perpetrator.'' Burchell, 74 Wn. App. at 522-23 (quoting RCW 10.14.010) (some emphasis added).

The scope of the court's order protecting the victim is reviewed for abuse of discretion. Noah, 103 Wn. App. at 43. The court abuses its discretion only when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, the scienter aspect arises from Mr. Sweeney's course of conduct in going on his own volition to particular places to watch these children play football despite his earlier termination of parental rights and removal from the children's lives. As the superior court observed on revision, it is reasonable to infer from the facts that Ms. Byers has a sufficient understanding and connection in relationship to the children to recognize their distress due to Mr. Sweeney's presence.

Mr. Sweeney nevertheless contends there was no admissible evidence that his conduct was detrimental to the children or that they desired not to have contact with him. He points to a colloquy during the October 8 hearing when his counsel objected on hearsay grounds to Ms. Byers's statements that Mr. Sweeney unexpectedly showed up at a football practice and it 'was very, very upsetting to my middle son. And, then he showed up at a football game, and both of my sons saw him and were very distressed by this.' CP at 26. Apparently treating Ms. Byers's statements as testimony,2 the court sustained the objection in part, acknowledging what was already contained in the written petition, but telling Ms. Byers she was not allowed to relate what other people have said to her. Critically, Mr. Sweeney made no written or oral evidentiary challenge to the content of Ms. Byers's sworn written statement submitted with her petition.

Thus, at least as to that sworn statement that her sons were distressed by Mr. Sweeney's presence, Ms. Byers presented admissible evidence excepted from the hearsay rule under ER 803(a)(3) (statement of declarant's then existing state of mind or emotion). Since ER 801(a) includes in the definition of 'statement' both oral assertions or nonverbal conduct of a person, Ms. Byers's written statement pertaining to her sons' distress due to Mr. Sweeney's

presence is admissible evidence that stands uncontroverted.3 The superior court thus did not err in its determination on review that Mr. Sweeney's course of conduct was detrimental to the children, as alleged in Ms. Byers's petition.4

Mr. Sweeney's contrast of this case with those involving humiliation or physical confrontations evoking legitimate safety concerns misses the mark because the allegation here is that his continued presence is detrimental to the children. See Noah, 103 Wn. App. 29 (court found willful course of conduct designed to alarm, annoy, and harass); Burchell, 74 Wn. App. 517 (offender initiated physical scuffle with petitioner).

With the uncontroverted facts in Ms. Byers's petition establishing the existence of the first four elements of RCW 10.14.020(1), the remaining question is whether the final element is met--Did Mr. Sweeney's conduct serve no lawful or legitimate purpose? RCW 10.14.030 provides factors the court should consider in making this determination. Included are whether

(1) Any current contact between the parties was initiated by the respondent only or . . . by both parties;
(2) The respondent has been given clear notice that all further contact with the petitioner is unwanted;
(3) The respondent's course of conduct appears designed to alarm, annoy, or harass the petitioner;
(4) The respondent is acting pursuant to any statutory authority...;
(5) The respondent's course of conduct has the purpose or effect of unreasonably interfering with the petitioner's privacy or the purpose or effect of creating an intimidating, hostile, or offensive living environment for the petitioner;
(6) Contact by the respondent with the petitioner or the petitioner's family has been limited in any manner by any previous court order.

RCW 10.14.030.

Mr. Sweeney contends he is a father merely watching his sons play football from afar in public stadiums with no threat to their safety and no design to harass or interfere with their privacy. He claims he had no notice that his presence was unwanted. And, moreover, Ms. Byers produced no documentary evidence or court order showing that his ability to contact the children has been limited in some manner. He likens the court's ruling here to an actor obtaining an order restraining a newspaper critic from attending his play because the reviewer's attendance is upsetting and the reviews humiliating. He concludes the court erred legally by essentially ruling that his relinquishment of parental rights amounts to a no-contact provision preventing him from attending football games. We disagree.

The uncontroverted evidence and reasonable inferences establish that Mr. Sweeney unilaterally attended the sporting events upon his prison release following years of abandonment, relinquishment of parental rights and adoption of the children by a new parent. His contact is obviously limited in some manner by a parental rights termination order. The children's participation in proceedings to 'abolish' him from their lives likewise gives rise to a reasonable inference that future contact with him is unwanted.5 The court commissioner and superior court judge were each mindful of these relevant facts when issuing their rulings. On the other hand, Mr. Sweeney's reference to the interference with privacy and design to annoy or harass factors in RCW 10.14.030 is misplaced. Those were not relevant considerations for the court

when it is the children's knowledge of Mr. Sweeney's presence, whether in public or private places, that is distressing them to their detriment.

Although the court below made no specific finding with respect to lawful or legitimate purpose, there are no facts on this limited record from which it could have found that Mr. Sweeney's course of conduct was serving a lawful or legitimate purpose within the ambit of RCW 10.14.030. Given that he was present with counsel at the hearing, yet made no attempt to create an evidentiary dispute on this issue, or for that matter any other element of Ms. Byers's claim, we will not engage in the unnecessary act of remanding for formal findings. See State v. Mecca Twin Theater & Film Exch., Inc., 82 Wn.2d 87, 93, 507 P.2d 1165 (1973).

Thus, we agree with the superior court that the facts stated in Ms. Byers's uncontroverted sworn petition sufficiently satisfied the elements of RCW 10.14.020(1) by a preponderance so as to justify issuance of this antiharassment order designed to prevent further unwanted contact. The restriction that Mr. Sweeney not be within two blocks of the children's residence, school, or sporting events is within the court's discretion and will not be disturbed. Noah, 103 Wn. App. at 43. Accordingly, we affirm the superior court's denial of Mr. Sweeney's motion to revise the commissioner's ruling.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Schultheis, J.

WE CONCUR:

Brown, C.J.

Sweeney, J.

1 The court will therefore not further address arguments in the Brief of Respondent to the extent those arguments consider as evidence the statements made by Ms. Byers and counsel for Mr. Sweeney at the October 8 hearing.
2 As discussed earlier, Ms. Byers was not under oath and her unsworn statements at the hearing are not evidence.
3 Mr. Sweeney does not contend that his attendance at the events is constitutionally protected activity. In any case, the finding of a course of conduct constituting unlawful harassment precedes any restrictions on the respondent's activities. Noah, 103 Wn. App. at 43. No one but Mr. Sweeney is covered by the order.
4 Moreover, although not specifically articulated by the court commissioner, we consider it implicit in these circumstances that the children's feelings of distress are objectively reasonable. See LaHue v. Keystone Inv. Co., 6 Wn. App. 765, 776, 496 P.2d 343 (1972) (for purposes of affirming judgment appellate court may imply finding from undisputed evidence).
5 A fact brought further to light by Ms. Byers filing this petition on the children's behalf.