

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. 06-1689

Plaintiff-Appellee,

On Appeal from the
Montgomery County
Court of Appeals,
Second Appellate District

vs.

JEFFREY L. PRICE

**Court of Appeals
Case No. CA21370**

Defendant-Appellant.

APPELLEE'S MERIT BRIEF

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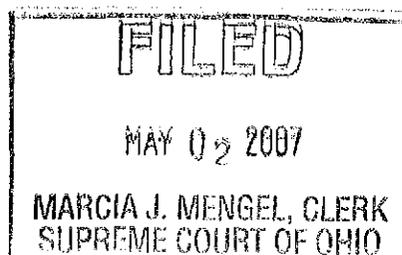


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STATEMENT OF THE CASE

This is a discretionary appeal accepted from the Second District Court of Appeals' split decision finding that a divorce decree ordering visitation at "Mother's discretion" does not expressly or impliedly permit a respondent to initiate contact with a protected party in violation of a civil protection order (CPO).

On May 9, 2005, Appellant Jeffrey L. Price was charged by indictment with one count of violating a civil protection order pursuant to R.C. 2919.26 or 3113.31. On September 9, 2005, a jury trial was held. On September 13, 2005, the jury found Price guilty of the charged offense and also found that Price had a prior conviction for violating a civil protection order. On October 19, 2005, the trial court sentenced Price to five years of community control sanctions. A direct appeal followed. On July 28, 2006, the appellate court affirmed Price's conviction and sentence. *State v. Price*, 2nd Dist. No. 21370, 2006-Ohio-3856. This appeal followed.

STATEMENT OF THE FACTS

Catherine Price and Jeffrey Price were married in April of 1998 and one child, Justin, was borne of their marriage. (Tr. 23) On September 21, 2000, the Montgomery County Court of Common Pleas, Domestic Relations Division, issued a CPO pursuant to R.C. 3113.31. Pursuant to the terms of that order, Price was not permitted to contact either Ms. Price or their son, by telephone, fax, e-mail, voicemail or otherwise. The CPO temporarily allocated parental rights and responsibilities and granted Ms. Price custody of their son and suspended Price's visitations, until he engaged in regular counseling for his bipolar disorder and took his medication. The CPO warned that any visitation orders of the domestic relations court did not permit Price to violate the terms of the protection order and that "Only the Court [could] change this order. The petitioner [Ms. Price] cannot give you legal permission to change this order. If you go near the

petitioner, even with the petitioner's consent, you may be arrested. ****" Finally, the CPO remained in full force and effect for five years unless modified, vacated or extended by the same Court, except with regard to parental responsibilities, such as support and visitation orders – the terms of the CPO survives a Divorce.

On April 20, 2001, the Final Judgment and Decree of Divorce (Divorce Decree) was issued. The Divorce Decree allocated parental rights and responsibilities and granted Ms. Price full custody and control of the parties' son and ordered that "Visitation shall be at the Mother's discretion" until Price completed the Court's parenting seminar.

In her discretion, Ms. Price allowed Price to visit with their son throughout the years following their divorce. (Tr. 24) However, in December of 2003, Justin began exhibiting violent tendencies and had to be hospitalized twice after his visits with Price. (Tr. 36-38) Ms. Price placed Justin in counseling and he was prescribed medications. (Id.) As a result, Ms. Price terminated visitations between Price and their son in June of 2004. (Tr. 37) Nevertheless, Ms. Price, in her discretion and with her supervision, allowed Justin to visit with Price over Christmas of 2004. (Tr. 26, 38)

In January of 2005, Price violated the CPO and entered a guilty plea to the offense. (Tr. 55) Price had not visited with Justin after that time, and had not petitioned the Court for visitation.

On April 11-13, 2005, Price contacted Ms. Price's residence, by pay phone, and left several messages on her digital answering machine. (Tr. 17, 47) The messages were: (1) "Check your front door." (2) "I love you, Justin, talk to you later." (3) "I love you, Justin." And (4) "Justin, I love you. I'll see you on your birthday." (Tr. 47) Ms. Price recorded the messages and after the last message, Ms. Price contacted the police. (Tr. 18; State's Ex. 4) Ms. Price

explained that she was afraid to check the front door, but when she did, she found an Easter Basket for Justin. (Tr. 17-18) Ms. Price also explained that she was afraid because there were no plans for Price to see their son on his birthday. (Tr. 20) For these reasons, Ms. Price explained to the police and to the jury that she considered these messages to be harassment and a violation of the CPO. (Tr. 31, 39)

During the investigation, Price initially denied making these calls to Ms. Price's home. (Tr. 48) Once confronted with the recordings of the calls, Price admitted making the calls but told the police that he wanted Ms. Price to check the front door because he was worried about his son who he saw standing outside waiting for the bus alone while he was across the street at a gas station buying oil. (Tr. 48-49) At trial, Price defended his actions by arguing that he left the messages out of love for his son.

ARGUMENT

The State's Response to Price's First and Second Propositions of Law:

A civil protection "no contact" order survives a subsequent divorce decree permitting visitation at a "Mother's discretion."

Because Price's first two propositions of law are interrelated, the State will address them together. In support, Price cites to R.C. 3113.31 and both *Signer v. Signer*, 8th Dist. No. 85666, 2006-Ohio-3580 and *Yazdani-Isfehiani v. Yazdani-Isfehiani*, 4th Dist. No. 06CA6, 2006-Ohio-7105, for the proposition that a CPO can only temporarily allocate parental rights and responsibilities and that a Divorce Decree ultimately governs the parental rights and responsibilities of the parties. See *In re Poling* (1992), 64 Ohio St.3d 211, 215; R.C. 3113.31(E)(1)(d) (codifying this principle and stating that the CPO is to "temporarily allocate parental rights and responsibilities for the care of, or establish temporary parenting time rights with regard to, minor children, if no other court has determined, or is determining, the allocation

of parental rights and responsibilities for the minor children or parenting time rights.”) The State does not dispute this proposition. However, Price misapplies this concept to the facts of his case.

In *Signer*, supra, the original CPO temporarily granted custody of the child to the Mother and allowed Father supervised visitations at a designated public place. Later, the same court modified the visitation order, gradually eliminating supervision and specific location. Mother refused to obey these later orders and was charged with contempt of court. The court found her in contempt, and she appealed. The Eighth District Court of Appeals reversed the trial court’s decision finding that the court did not have the authority to modify its CPO orders pertaining to parental rights and responsibilities. Importantly, the Court noted that the trial court could have and should have issued a new order and pursuant to Mother’s Divorce Complaint under the Civil Rules, as the court did in this case. R.C. 3113.31(E)(3)(b).

Likewise, in *Yazdani-Isfehani*, supra, the Fourth District Court of appeals found that the trial court did not have jurisdiction to modify an allocation of parental rights and responsibilities in the context of a CPO proceeding, but warned that the trial court could have and should have addressed Father’s motion for visitation in the context of the Divorce proceeding.

Applying the above principles of law to the facts of this case, the parental rights and responsibilities allocated in the CPO were modified by the Divorce Decree. The CPO temporarily granted custody of Justin to Ms. Price and Price’s visitation rights were suspended until he engaged in regular counseling for his bi-polar disorder and took his medication. Later, parental rights and responsibilities were properly addressed by the Court in the Divorce proceeding. The Divorce Decree, modifying the parental rights and responsibilities temporarily set forth in the CPO, granted full custody of Justin to Ms. Price and ordered, “Visitations at

Mother's Discretion. Upon proof of completion of this Court's Parenting Seminar, Father may petition the Court for visitation."

However, except those temporary orders of custody and visitation that were later resolved through the Divorce proceeding, the CPO remained in full force and effect. One such order that remained in effect - Price was not permitted to contact either Ms. Price or their son, Justin, by telephone, fax, e-mail, voicemail or otherwise. The language utilized in the Divorce Decree, "Visitation shall be at the Mother's discretion" did not imply that Price could then initiate contact with either Ms. Price or their son in violation of the CPO. Instead, because visitation was at Ms. Price's discretion, Ms. Price was responsible for initiating contact with Price to make an arrangement for visitation, as had been the parties' practice for many years. The reason is simple: It is not necessary for a CPO respondent to initiate contact with a protected party in order to exercise visitation, even at a protected party's discretion.

For example, ordinarily a CPO or divorce decree specifically allocates parental rights and responsibilities by setting forth specific days, times, and locations for visitation. Thus, no contact between the parties need be made in order to exercise that visitation. In the case of a CPO allocation of parental rights and responsibilities, the plain language of the CPO itself provides a limited exception to the order prohibiting a respondent from coming within 500 yards of a protected party, and that is limited to when the parties engage in the court-ordered visitation. The same is not true of the "no contact" order, however. This is simply because in such situations, where the respondent knows what days, times, and locations visitations are to occur, it is not necessary for him or her to initiate contact with a protected party in order to exercise visitation. Therefore, a "no contact" order will always survive a subsequent visitation order.

The language of the Divorce Decree, here, “Visitation shall be at the Mother’s discretion,” does not change this principle. In fact, the CPO specifically warned Price that “Visitation orders do not permit respondent to violate the terms of this order.” The CPO also warned that the orders could only be modified by the court. The court even suggested to Price that he petition the Court for visitation rights after he attended the court’s parenting seminar. Importantly, under this order, Ms. Price was not obligated to allow for *any* visitation, and Price was not permitted to contact her to force her to exercise that discretion. Price’s remedy, instead, was to petition the court for visitation, which he had failed to do. Because the “no contact” order survived the visitation order, Price was not permitted to initiate contact with either Ms. Price or their son. Therefore, his four phone messages to the protected parties’ residence, violated the CPO.

The State’s Response to Price’s Third Proposition of Law:

Violation of a civil protection “no contact” order occurs when a respondent initiates contact with a protected party, regardless of the content of the message.

Price argues that not all forms of communication are restricted pursuant to the “no abuse” clause that prevents a respondent from abusing a protected party by means of “harming, attempting to harm, threatening, molesting, following, stalking, bothering, harassing, annoying, contacting, or forcing sexual relation upon them.” Price asserts that because the content of his messages was not of a threatening nature, he did not violate the CPO. He is mistaken.

A separate “no contact” order prevents a respondent from initiating contact with a protected party by telephone, fax, e-mail, voicemail or otherwise – regardless of the content of the message. Therefore, the act of a respondent initiating *any* contact with a protected party violates a CPO. The reason is simple: For the safety and protection of the protected parties, a

CPO prevents *any* communication initiated by a respondent to a protected party. Otherwise, as Price suggests, a respondent could call the protected party's home everyday or 14 times a day to say, "I love you." To you and me, this would be a pleasant experience. However, to a domestic violence victim, this message has a much different meaning.

For example, you and I hear, "Check the front door." But, a domestic violence victim hears "You will fear me." Instead of applauding a CPO respondent for leaving his son an Easter Basket, a domestic violence victim hears, "I can get close to you." Instead of hearing, "I love you Justin, I will talk to you later," a domestic violence victim hears "I will not stop, until I get what I want." Instead of hearing, "I love you Justin, see you on your birthday," a domestic violence victim hears, "I will get what I want and I can get to him." While it is true that the content and frequency of contact made is relevant to determine whether a CPO respondent violated a "no abuse" order, the same inquiry is not relevant to determine whether a CPO respondent violated a "no contact" order. Price understandably makes the same mistake as Judge Donovan did in her dissent, when she also referred to the "no abuse" order and opined that Price's actions appeared to be "sentiments of love."

The First District Court of Appeals dealt with a similar issue, when a respondent to a CPO wrote a letter to the family cat. *State v. Frazier*, 158 Ohio App.3d 407, 2004-Ohio-4506. In *Frazier*, the respondent, Frazier, was not permitted to initiate any contact with the residence occupied by Rita Frazier and the children. The State introduced evidence that Frazier had sent a letter to the residence. Frazier argued that he did not contact a protected party to the CPO, but had addressed the letter to the family cat. However, the court of appeals found that, "While the letter was addressed to the family cat, the trial court was justified in rejecting that transparent ruse and finding that defendant was attempting to contact the persons listed in the protection

order.” Id., at **P11. The court also found that even though there were no overt threats made in the letter, the letter itself was an attempt to defy the order and cause emotional distress or psychological harm to the protected parties and, therefore, it violated the spirit, as well as the letter, of the CPO. Id., at **12. Likewise, here, just because Price decided to direct “sentiments of love” towards his son, does not excuse him from his apparent violation of the spirit, as well as the letter, of the CPO’s “no contact” order. Accordingly, regardless of the content of the messages, Price violated the CPO.

The State’s Response to Price’s Fourth Proposition of Law:

The manifest weight of the evidence supports Price’s conviction.

In determining whether a verdict is against the manifest weight of the evidence, the appellate court sits as the “thirteenth juror” and “*** weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. An appellate court, however, must bear in mind the trier of fact’s superior, first-hand perspective in judging the demeanor and credibility of witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The power to reverse on “manifest weight” grounds should only be used in exceptional circumstances, when “the evidence weighs heavily against the conviction.” *Thompkins*, supra, at 387.

Price was convicted of R.C. 2919.27(A)(1), which prohibits a person from recklessly violating the terms of a protection order issued pursuant to R.C. 3113.31. A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a

known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. R.C. 2901.22(C).

Price again relies on the April 20, 2001 Divorce Decree to support the proposition that the evidence failed to demonstrate beyond a reasonable doubt that he recklessly violated the CPO. Price argues that he was acting in a reasonable manner under the visitation order in exercising what he believed to be visitation with his son. This argument must be rejected because it ignores the plain language and purpose of the CPO.

The jury heard the evidence and examined the language of both the CPO and the Divorce Decree. The evidence demonstrated that Price initiated contact with Ms. Price in violation of the civil protection “no contact” order. Price does not dispute the fact that he initiated contact, made several phone calls within a couple days and left an Easter Basket at their front door. In fact, these facts prove that Price’s conduct violated the CPO in many ways. For example, Price’s act of leaving an Easter Basket at the front door could have been found to violate the order that he shall not be present within 500 yards of where Ms. Price or their son may be found. And Price’s act of leaving several messages in a short period of time could have been found to be harassment and in violation of the “no abuse” order. Indeed, Ms. Price, a domestic violence victim, testified that she found these four messages in two days to be harassing. (Tr. 39) Ms. Price testified that she was afraid because she was not sure what she was going to find at the door. (Tr. 17-18) Ms. Price explained that there were no plans for Price to see their son on his birthday, “I was scared because I was afraid he would come by or do something on his birthday.” (Tr. 20) But absolutely, when Price initiated contact with Ms. Price and their son, regardless of the content of his messages, he violated the “no contact” order.

Price, in his defense, offered many excuses for his behavior. First, the jury heard the evidence that Price told the police that he initiated contact with Ms. Price to protect his son from harm. Price used this excuse to explain why he called and left a message for Ms. Price to “check the front door.” Price told the police that he was across the street buying oil at a gas station and saw that his son was standing outside alone waiting for the bus. However, at trial, it was discovered that Price had left the message “check the front door” because he had left an Easter Basket at the front door for his son.

Second, Price argued that because Ms. Price frequently permitted visitations, as early as December of 2004, that he was permitted to contact her to arrange for more visitations. However, it must be inferred from the record that these prior visitations complied with both the CPO and the Divorce Decree as there was no evidence submitted to the contrary. In fact, during those permissible visitations, Ms. Price did not involve law enforcement. What’s more, Price was warned that, “Only the Court can change this order. The petitioner [Ms. Price] cannot give you legal permission to change this order. If you go near the petitioner, even with the petitioner’s consent, you may be arrested. *** .” Price knew if he wanted visitations, he had to petition the Court, not Ms. Price. He knew of the parameters of the CPO as Price entered a guilty plea to violating the same CPO only months prior to this incident in January of 2005.

Finally, Price argued that he was required to contact Ms. Price and their son in order to communicate with them for the purpose of arranging for visitations pursuant to the Divorce Decree. As stated above, the language employed that “Visitations shall be at Mother’s discretion” does not imply that Price had to initiate contact with either party. Even so, Price did not contact either party for the purpose of arranging a visitation; a mistake even Judge Donovan made in her dissenting opinion. While Judge Donovan correctly noted that arranging visitation

always involves some form of communication, the converse is not always true – that communication will always pertain to a visitation arrangement. Here, Price’s communication simply did not pertain to arranging a visitation.

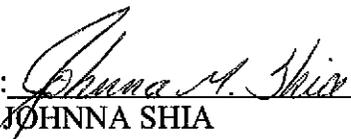
Therefore, when these facts and the language of both the CPO and Divorce Decree are considered, the jury did not lose its way when it found that Price violated the terms of the CPO when he initiated contact with Ms. Price.

CONCLUSION

For all of the reasons discussed herein, the Second District Court of Appeals properly concluded that the Divorce Decree visitation order was not in conflict with the prior-issued civil protection “no contact” order. Therefore, the State respectfully asks this Court to AFFIRM the decision of the appellate court.

Respectfully submitted,

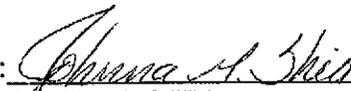
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellee's Merit Brief was sent by first class on this 1st day of May, 2007, to Opposing Counsel: Michael B. Miller, 2233 Miamisburg Centerville Road, Dayton, Ohio 45459.

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