

ORIGINAL

IN THE SUPREME COURT OF OHIO

13-1894

STATE OF OHIO,)
)
 Plaintiff-Appellee,)
)
 vs.)
)
 GARETH C. WEBLEY,)
)
 Defendant-Appellant.)

On Appeal from the Cuyahoga County
Court of Appeals, Eighth Appellate District

Case No. CA-13-99489

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT GARETH C. WEBLEY

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**EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND/OR IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST OR WHY LEAVE TO APPEAL SHOULD BE GRANTED**

The Ohio Revised Code authorizes the issuance of at least four (4) different types of protection orders: (1) Domestic Violence Temporary Protection Order (DVTPO)(R.C. 2919.26); (2) Civil Protection Order (CPO)(R.C. 3113.31); (3) Criminal Protection Order (CRPO)(2903.213); and (4) Stalking and/or Sexually Oriented Offense Protection Order (SSOOPO)(R.C. 2903.214). The decision by the Eighth District Court of Appeals in the herein matter obliterates the substantive and procedural differences between these protections orders, specifically between a DVTPO and a CRPO.

Here, the trial court incorrectly issued an order of protection pursuant to R.C. 2903.213 (CRPO) against Mr. Webley for alleged conduct arising between himself and a family and/or household member. R.C. 2903.213(CRPO) authorizes a protection order where the alleged victim is *not* a family or household member at the time of the offense. Instead, the complainant or victim was required to apply for a protection order pursuant to R.C. 2919.26 (DVTPO), which specifically authorizes protection orders where the alleged victim is a family or household member of the respondent/defendant at the time of the offense.

However, the Eighth District Court of Appeals disagreed with the plain reading of the statutes. Instead, the Eighth District Court of Appeals interpreted R.C. 2903.213(A)(1) as “permitting the complainant/alleged victim or household member to request the protection order under either statute if the criminal complaint involves a family or household member—as indicated by the ‘may’ in the last sentence of R.C. 2903.213(A)(1).” This interpretation of the statutes is improper and merely permits a family or household member to file a temporary protection order pursuant to section R.C. 2919.26 and not vice-versa.

Without a judicial mandate from this Court distinguishing the types of relief available to petitioners seeking protection orders and mandating that relief must be pursued through the proper applicable statute, the due process rights of those subject to such orders will continue to be abused and at jeopardy.

This case exemplifies the inconsistent application of the protection order statutes and the effect that such inconsistent application can have on the parties subject to such orders. Permitting the Eighth District Court of Appeals decision to stand will permit other persons seeking protection order relief to seek such relief by choosing which statute they wish to invoke, thereby choosing the procedure that will apply at the hearing, as occurred here, and will have a resultant detrimental effect on the public.

Further, R.C. 2903.213 does not include an explicit burden of proof. As such, the statute itself violates the due process rights of persons subject to R.C. 2903.213 protection orders. The protection order issued in this matter pursuant to R.C. 2903.213 violated Mr. Webley's constitutional right to due process because the statute, which limits Mr. Webley's constitutionally guaranteed freedoms, does not include an explicit burden of proof. Without a judicial mandate holding this statute unconstitutional, the due process rights of persons defending against petitioners seeking protection order relief through this statute will continue to be violated.

This case thus presents several critical issues necessary to ensure the proper application of the protection order statutes as well and to address the fact that R.C. 2903.213 fails to include an explicit burden of proof: 1) whether R.C. 2903.213 permits a court to issue an order of protection where the alleged victim was a family or household member of the respondent at the

time of the alleged offense; 2) whether the failure of R.C. 2903.213 to include a statutory burden of proof in hearings on motions for temporary protection orders renders said statute unconstitutional and deprives respondents of due process of law; 3) whether a respondent's due process rights are violated when a R.C. 2903.213 protection order hearing is held prior to the filing and service of an amended petition; and 4) whether the evidence in this case supported the issuance of a R.C. 2903.213 protection order.

STATEMENT OF THE CASE & FACTS

On January 2, 2013, the State of Ohio filed a Motion for a Criminal Protection Order (CRPO) pursuant to RC 2903.213 seeking an order prohibiting Webley from having any contact with Ms. Weisman and/or her minor children. At times during the hearing on this matter the Prosecution and trial court referred to the Motion for a CRPO as a "Motion for Temporary Protection Order" which is an improper description of a motion filed pursuant to R.C. 2903.213. The Ohio Supreme Court Form 10.03-A states that a motion filed pursuant to R.C. 2903.213 is a Motion for Criminal Protection Order (CRPO).

Webley appeared for his initial appearance on January 2, 2013. Webley would not agree to a CRPO during his initial appearance on January 2, 2013 and, accordingly, the trial court scheduled a hearing on the CRPO for January 3, 2013 and issued a no contact order as a condition of Webley's bond. The trial court's docket also reflects that only a "no contact order" was issued on January 2, 2013, not a CRPO.

At the start of the January 3, 2013 hearing on the State's Motion for a CRPO, the State advised the Court that it realized that a "typo" had been made on the January 2, 2013 Motion for a CRPO and that it had prepared a new Motion. The January 3, 2013 Motion for a CRPO, however, was not actually filed with the clerk of court until *after* the hearing occurred. Webley

argued that he was not timely served with a copy of either of the State's Motions for a CRPO. Webley's counsel advised the trial court that if the State sought to make changes to the Motion for a CRPO that it filed on January 2, 2013, it would need to file its new Motion with the clerk of court and serve it upon Webley. Further, since the State failed to serve Webley with a copy of the January 2, 2013 Motion for a CRPO neither Webley nor his counsel would be able to determine what the alleged "typo" was that the State made on the January 2, 2013 Motion for a CRPO. Nor would Webley and/or his counsel be able to determine what changes, if any, were made in the January 3, 2013 Motion besides the request that Ms. Weisman be added as a protected person. As the request that Ms. Weisman be added as a protected person was handwritten into the typed motion, it is not clear whether that was the "typo" the State was referring to, or whether there was some other procedural and/or substantive "typo" in the January 2, 2013 Motion.

Despite the issues surrounding whether Webley received proper notice of the CRPO motion, the hearing commenced on January 3, 2013.

During the hearing, Ms. Weisman testified that medical staff at Hillcrest Hospital did not find any physical evidence that Webley abused her daughter. Ms. Weisman also admitted that her daughter told her that Webley did not touch her in any physical or sexual way. In addition, Ms. Weisman confirmed that during the entire time that she and her children had been living with Webley, there had been no indication that Webley did anything untoward or sexual with her daughter. Ms. Weisman further admitted that she told Webley on the phone after he had been arrested that she and her family did not believe that he had any kind of contact with her daughter.

During the hearing it was established that Ms. Weisman and Webley had been in a relationship for approximately fourteen (14) months and had been living together for over a year.

Ms. Weisman and Webley even shared a joint checking account that contained over \$239,000.00 of Webley's money.

At the hearing it was Webley's position that the allegations against him were false and that Ms. Weisman made up the allegations as part of an exit strategy from their relationship and to steal over a hundred thousand dollars from Webley while he sat in jail.

At the conclusion of the hearing, the trial court found that the "evidence at his point would be sufficient to grant a protection orders." Accordingly, the trial court granted the protection order and stated that it would remain in effect until the conclusion of Webley's underlying criminal case.

Webley timely appealed to the Eighth District Court Court of Appeals asserting several assigned errors. The Eighth District affirmed the trial court's judgment. This timely appeal follows. S.Ct.Prac.R.§7.01(A)(1)(a).

Proposition of Law No. 1: R.C. 2903.213 does not permit a court to issue an order of protection where the alleged victim was a family or household member of the defendant's at the time of the alleged offense.

It is clear that RC 2903.213, entitled "Protection order as a pretrial condition of release", also known as a Criminal Protection Order (CRPO), does not permit the issuance of a protection order where the alleged victim was a family or household member of the defendant at the time of the alleged offense.

R.C. 2903.213 specifically excludes its relief from household or family members of a respondent/defendant. R.C. 2903.213 titled "Motion for protection order as pretrial condition of release" states in relevant part in subsection (A) the following:

Except when a complaint involves a person who is a family or household member as defined in 2919.25 of the Revised Code, upon the filing of a complaint that alleges * * * the commission of a sexually oriented offense * * * the complainant, the alleged victim, or a family or

household member of an alleged victim may file a motion that requests the issuance of a protection order as a pretrial condition of release of the alleged offender, in addition to any bail set under Criminal Rule 46. (Emphasis added).

Moreover, the R.C. 2903.213(A) also addresses situations where a respondent is a family or household member of the petitioner and/or a protected person and states:

If the complaint involves a person who is a family or household member, the complainant, the alleged victim, or the family or household member may file a motion for a temporary protection order pursuant to section 2919.26 of the Revised Code.

Therefore, it follows that an individual who is a family or household member of the alleged offender must seek relief by filing a motion for temporary protection order pursuant to RC 2919.26. Therefore, the judgment of the Eighth District Court of Appeals must be reversed and the CRPO vacated.

Proposition of Law No. 2.: The failure of R.C. 2903.213 to include a statutory burden of proof in hearings on motions for temporary protective orders constitutes a deprivation of a defendant's federal Constitutional Guarantee to Due Process of Law.

The CRPO issued against Gareth Webley must be vacated and deemed unconstitutional as R.C. 2903.213 fails to include an explicit burden of proof and such absence of an explicit burden encourages arbitrary and discriminatory enforcement.

Neither the trial court nor the Eighth District Court of Appeals even articulated a burden of proof for the issuance of R.C. 2903.213, Criminal Protection Order. In fact, on appeal, the State of Ohio admitted that the statute does not set forth an explicit burden of proof.

The thrust of the State's argument on appeal was that Webley's failure to raise the issue of constitutionality with the trial court constituted a waiver. However, Crim.R.52 (B) allows courts to recognize "plain errors or defects affecting substantial rights," although they have not been preserved at trial, in exceptional circumstances to prevent a miscarriage of justice. The test

for plain error is whether the result of the trial would have clearly been otherwise had the error not occurred. *State v. Reynolds*, 148 Ohio App. 3d 578 (2nd Dist. App. 2002). If R.C. 2903.213 were deemed unconstitutional, then the outcome of the case would clearly be different because there would be no finding that the safety and protection of Ms. Weisman and/or her minor children would be impaired by the continued presence of Webley.

R.C. 2903.213 violates Webley's Federal and State Constitutional Due Process Rights, as it does not include a statutory burden of proof and therefore is void for vagueness. It is clear that RC 2903.213 is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Whitney v. California*, 274 U.S. 357, 368 (1927). *See, e.g., In re Columbus Skyline Securities, Inc.*, 74 Ohio St.3d 495, 660 N.E.2d 427 (Ohio 1996) (in order to prove that a statute is unconstitutionally vague, the party challenging the statute must show that upon examining it, an individual of ordinary intelligence would not understand what he is required to do under the law). Since 2903.213 lacks a specific burden of proof it encourages arbitrary and discriminatory enforcement, which violates an individual's right to be free from vague criminal statutes.

Therefore, the judgment of the Eighth District Court of Appeals must be reversed and the CRPO vacated.

Proposition of Law No. 3: A trial court violates a defendant's state and federal due process rights where the trial court proceeds with a hearing pursuant to R.C. 2903.213 even though the petitioner failed to file an amended motion/petition for a protection order with the clerk of court prior to the start of the full hearing and failed to properly serve the defendant/respondent with a copy of the motion for a protection order prior to the start of the hearing.

The CRPO issued against Gareth Webley must be vacated because the petitioner State of Ohio did not properly file the motion for the protection order with the Clerk of Court prior to the start of the hearing as required by law. In fact, *during the hearing*, the State of Ohio stated the

“motion would be filed at the conclusion of the hearing.” R.C. 2903.213(A) requires that the motion for protection order “be filed with the clerk of court that has jurisdiction of the case at the time after the filing of the complaint.” Further, “after the filing of a motion that requests the issuance of a protection order under this section . . . the court shall conduct a hearing to determine whether to issue the order.” RC 2903.213(C). Therefore, only after the petitioner files a motion requesting a protection order can the court conduct a hearing to determine whether to issue the order.

Therefore, the judgment of the Eighth District Court of Appeals must be reversed and the CRPO vacated.

Proposition of Law No. 4: A trial court is only permitted to issue a protection order pursuant to R.C. 2903.213 where the evidence presented during the hearing supports a finding that the defendant’s presence would impair the safety of the protected persons.

The CRPO issued against Gareth Webley must be vacated because the trial court issued an order of protection pursuant to R.C. 2903.213 where the evidence presented during the hearing did not support the finding that the defendant’s presence would impair the safety of protected persons.

Ms. Weisman’s testimony alone was not enough to support the trial court’s finding that the “safety and protection of the complainant or the alleged victim may be impaired by the continued presence of the alleged offender.” R.C. 2903.213(C)(1). In fact, Ms. Weisman’s own testimony should have led the trial court to conclude that there was not enough evidence to find that Webley’s continued presence would impair the safety of Ms. Weisman and her minor children. At the hearing, Ms. Weisman confirmed that the medical staff at Hillcrest Hospital did not find any physical evidence that Webley abused her daughter. Ms. Weisman also confirmed that her daughter told her that Webley did not touch her in any physical or sexual way. In

addition, Ms. Weisman admitted that during the entire time that she and her children had been living with Webley, there had been no indication that Webley did anything untoward or sexual with her daughter. Ms. Weisman even testified that she told Webley on the phone after he had been arrested that she did not believe and that her family did not believe that he had any kind of contact with her daughter.

Therefore, the judgment of the Eighth District Court of Appeals must be reversed and CRPO vacated.

I. CONCLUSION

Based on the foregoing, Webley respectfully asks this Court to accept the appeal herein and order that the case be briefed in accordance with the applicable provisions of S.Ct.Pract. 16.01 through 16.08.

Respectfully Submitted,

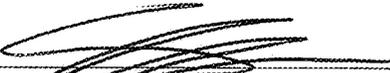


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CERTIFICATE OF SERVICE

I certify that a true copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel, on December 2, 2013:

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99489

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GARETH C. WEBLEY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-570278

BEFORE: McCormack, J., Rocco, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: October 17, 2013

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FILED AND JOURNALIZED
PER APP.R. 22(C)

OCT 17 2013
CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By Deputy

TIM McCORMACK, J.:

{¶1} Gareth C. Webley appeals from a protection order issued by the Cuyahoga County Court of Common Pleas. The court granted the protection order after a criminal complaint was filed against Webley alleging that he committed a sex offense against his live-in girlfriend's daughter. For the following reasons, we affirm the court's decision granting the protection order.

{¶2} Webley lived with his girlfriend, Brea Weisman, and her two minor children for 14 months prior to an incident on New Years Eve, 2012. According to Weisman, sometime past midnight, she found Webley passed out and asleep in her nine-year-old daughter's bed, with his pants pulled down. She called the police. Based on the incident, on January 2, 2013, the Cuyahoga County prosecutor's office filed a criminal complaint against Webley.

{¶3} On the same day, Webley went before the trial court for his initial appearance in the criminal matter. He waived a right to a preliminary hearing, and the court set the bond at \$10,000, the conditions of which included a no contact order with the alleged victim and a surrender of his passport.

{¶4} On the same day, Weisman, on behalf of her daughter and her 12-year-old son, filled out a request form for a criminal protection order pursuant to R.C. 2903.213. (Weisman later added herself to the protection order as well.) On the same day, the state filed a motion for temporary protection order on her behalf.

{¶5} The next day, on January 3, 2013, the trial court scheduled a hearing on the motion for the protection order. Webley and his counsel appeared at the hearing but objected to it, claiming Webley was not served with a proper notice of the hearing. The court explained that it could issue the protection order ex parte and schedule a hearing later. Webley's counsel opted to go forward with the hearing.

{¶6} At the hearing, Weisman testified that she has been in a relationship with Webley for 14 months prior to the incident on December 31, 2012. She woke up past midnight on New Year's Eve, and went downstairs to look for Webley. Unable to find him anywhere in the house, she took a flashlight into the children's bedroom to look for him. According to Weisman, she found him "with his sweat pants and his boxers pulled down to his mid-thigh with his penis hanging on [her] daughter's bed and [her] daughter asleep under the covers, * * * 18 to 24 inches away from [Webley's] body."

{¶7} Weisman flashed the flashlight in his face. Webley was non-responsive. She shook his body several times but could not wake him up. After scooping her daughter up and taking her somewhere else, she went back to the room. By that time, Webley had pulled up his pants and sat on the bed, disheveled and disoriented. She called the police, who arrested Webley. She took her daughter to the hospital. There was no physical evidence of abuse.

{¶8} Weisman testified she requested a protection order based on what she saw that night, as well as Webley's "uncontrollable rage the night of the events and a pattern of rage behavior in the past." She stated her concerns were based on the following:

* * * Gareth's licensed to hold a gun, as well as just obviously the concern that he is very upset about this situation from phone calls I have received from him, his statements of his non-desire to continue living a life without us makes me concerned that that could extend to me not deserving a life without him.

The day before the hearing, she contacted the police regarding the weapons owned by him that were kept in the residence and the police removed them from the house.

{¶9} After the incident, Weisman checked her family into a hotel in Beachwood out of concerns for their safety. The night before the hearing, she received a text message at 1:02 a.m. from Webley, who was in the hotel's parking lot. The message stated that he saw both of their vehicles in the parking lot.

{¶10} After the hearing, the trial court granted the protection order.¹ On appeal, Webley raises four assignments of error for our review, which we address out of order for ease of discussion. The four assignments of order state:

I. The trial court erred to the prejudice of the appellant when it issued a protection order pursuant to R.C. 2903.213, as

¹Subsequently, the state dismissed the criminal complaint. Instead, Webley was indicted by a grand jury on February 27, 2013, for kidnapping a child under the age of 13 with a sexual motivation specification, two counts of gross sexual imposition, and one count of domestic violence involving Weisman.

R.C. 2903.213 does not permit the issuance of such an order where the alleged victim was a family or household member of the appellant's at the time of the alleged offense.

II. The trial court abused its discretion in granting Ms. Weisman's motion for a protection order as the evidence presented during the hearing did not support a finding that the appellant's presence would impair the safety of Ms. Weisman and her minor children.

III. The trial court erred in not affording the appellant due process of law as it allowed the petitioner to proceed with the hearing on the motion for the protection order despite the fact that the petitioner had not filed the amended motion/petition for a protection order with the Clerk of Court prior to the start of the full hearing and despite the fact that the appellant had not been properly served with a copy of the motion for a protection order prior to the start of the hearing.

IV. The failure of R.C. 2903.213 to include statutory burden of proof in hearings on motions for temporary protective orders constitutes a deprivation of the federal Constitutional guarantee due process.

Protection Order Statutes: R.C. 2903.213 and 2919.26

{¶11} Several statutes authorize the issuance of a protection order. Under the first assignment of error, Webley claims the trial court erred in issuing a protection order pursuant to R.C. 2903.213, alleging a different statute, R.C. 2919.26, should have been utilized instead because the alleged victim was a family or household member at the time of the incident. We begin with a review of these two statutes.

{¶12} The protection order in this case was sought under R.C. 2903.213 ("Motion for protection order as pretrial condition of release"), found in Chapter 2903 of the Revised Code ("Homicide and Assault; Stalking"). This statute

authorizes a complainant or alleged victim of assault, menacing, trespassing, or a sexually oriented offense to seek a temporary protection order when a criminal complaint alleging one of these offenses is filed. R.C. 2903.213(A) states, in pertinent part:

Except when the complaint involves a person who is a family or household member as defined in section 2919.25 of the Revised Code, upon the filing of a complaint that alleges a violation of section 2903.11, 2903.12, 2903.13, 2903.21, 2903.211, 2903.22, or 2911.211 of the Revised Code, * * * or the commission of a sexually oriented offense, the complainant, the alleged victim, or a family or household member of an alleged victim may file a motion that requests the issuance of a protection order as a pretrial condition of release of the alleged offender * * *. The motion shall be filed with the clerk of the court that has jurisdiction of the case at any time after the filing of the complaint. *If the complaint involves a person who is a family or household member, the complainant, the alleged victim, or the family or household member may file a motion for a temporary protection order pursuant to section 2919.26 of the Revised Code.*

{¶13} The statute Webley argues should have been utilized instead, R.C. 2919.26 (“Motion for temporary protection order, form”), is found in Chapter 2919 of the Revised Code (“Offenses Against the Family; Domestic Violence”). It contains very similar provisions and states:

Upon the filing of a complaint that alleges a violation of section 2909.06, 2909.07, 2911.12, or 2911.211 of the Revised Code if the alleged victim of the violation was a family or household member at the time of the violation, * * * or any sexually oriented offense if the alleged victim of the offense was a family or household member at the time of the commission of the offense, the complainant, the alleged victim, or a family or household member of an alleged victim may file * * * a motion that requests the issuance of a temporary protection order as a pretrial condition of

release of the alleged offender, in addition to any bail set under Criminal Rule 46. * * * R.C. 2919.26(A(1)).

{¶14} Our comparison of these two statutes reflects parallel procedural provisions. Under both statutes, there are two ways for a protection order to be issued after a criminal complaint alleging certain offenses is filed. Either the alleged victim can request a protection order or the trial court can on its own motion issue an ex parte order, as a pretrial condition of release. Either way, the trial court must hold a hearing within 24 hours to determine whether a protection order should be issued, or remain in effect, respectively. R.C. 2903.213(C) and (D); R.C. 2919.26(C) and (D). Under both statutes, the protection order is effective only until the disposition of the criminal proceeding upon which the protection order is based.

{¶15} Furthermore, under both statutes, at the hearing, the person requesting the protection order shall appear before the court to provide the court with information concerning the basis of the motion. If the court finds that "the safety and protection of the complainant or the alleged victim may be impaired by the continued presence of the alleged offender," it shall order the protection order. R.C. 2903.213(C)(1) and 2919.26(C)(1).

{¶16} The two statutes differ in one respect procedurally. R.C. 2919.26 expressly requires the presence of the alleged offender at the hearing.

R.C. 2919.26(D)(2). On the other hand, R.C. 2903.213, the statute utilized by the state in this case, is silent on this requirement.² R.C. 2903.213(D)(2).

{¶17} Webley argues the trial court erred in granting the protection order under R.C. 2903.213, claiming that because Weisman and her minor children were “family or household members,” this statute is not applicable and the trial court did not have authority to grant a protection order under this statute. He draws our attention to the first sentence of R.C. 2903.213, which states, “[e]xcept when the complaint involves a person who is a family or household member as defined in section 2919.25 of the Revised Code * * *.”

{¶18} Webley is correct that Weisman and her minor children qualify as “family or household members.”³ Reading R.C. 2903.213(A)(1) in its entirety, however, we interpret R.C. 2903.213(A)(1) as *permitting* the complainant/alleged

²The two statutes differ in another aspect. While both statutes authorize the trial court to issue an order containing “terms designed to ensure the safety and protection” of the complainant or alleged victim, R.C. 2903.213(C)(1) and 2919.26(C)(1), the latter alone requires the protection order to notify the alleged offender that it “may be unlawful for the [alleged offender] to possess or purchase a firearm.” R.C. 2919.26(G)(1).

³Under R.C. 2919.25, a “family or household member” includes one “who is residing or has resided with the offender” and who is “a person living as a spouse.” It also includes one “who “is residing or has resided with the offender” and who is a child of “a person living as a spouse.”

Furthermore, “person living as a spouse” means “a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.”

victim/family or household member to request the protection order under either statute if the criminal complaint involves a family or household member — as indicated by the word “may” in the last sentence of R.C. 2903.213(A)(1).

{¶19} *Even if* R.C. 2903.213 were to be read as requiring a complainant or an alleged victim who is a household member to proceed under R.C. 2919.26 only, we observe that Webley had not been deprived of any due process rights or otherwise prejudiced by the utilization of R.C. 2903.213 instead, because the two statutes contain parallel provisions. Although R.C. 2919.26 had the additional requirement that the hearing be held “in the presence of the alleged offender,” Webley did not suffer prejudice, because he *was* present at the hearing, assisted by very able counsel, who presented several exhibits and vigorously cross-examined his accuser. The trial court, furthermore, offered Webley an opportunity to present his own evidence.

{¶20} Thus, even if R.C. 2903.213 were to be interpreted as Webley proposes and were not applicable when the complainant or the alleged victim is a household member, he fails to demonstrate any prejudice he suffered as a result of the trial court’s issuance of the protection order under that statute. The first assignment of error lacks merit.

Service and Notice issues

{¶21} Under the third assignment of error, Webley complains his due process rights were also violated because the motion for protection order, as

amended by the state, was not served on him or filed with the clerk of court prior to the hearing.

{¶22} The docket of this case reflects the motion for the protection order was filed on January 2, 2013, at 12:35 p.m. It further reflects that an amended motion was filed the next day, on January 3, 2013, at 4:18 p.m. — hours after the hearing over the motion was held. At the hearing, the state explained the motion had to be amended because of a “typo.” Our review of the original and the amended motions indicates the original motion bears the name of former County Prosecutor William D. Mason, instead of current Prosecutor Timothy McGinty, whose name is correctly reflected in the amended motion.⁴

{¶23} As the amended motion is substantially similar to the original motion, we do not perceive any prejudice to Webley by the filing of the amended motion correcting an innocuous error on the same day of the hearing.

{¶24} As to Webley’s allegation that he was not properly served with the amended motion before the hearing, R.C. 2903.213 (as well as R.C. 2919.26) permits the court to issue a protection order as a pretrial condition of release after a criminal complaint is filed upon finding the safety and protection of the complainant or alleged victim warrants it; neither statute expressly require the

⁴Also, the two motions had a slightly different certificate of service. In the original motion, the motion was served by email upon the public defender; in the amended motion, the motion was served personally on Webley’s newly retained counsel.

service of the motion on the alleged offender. As we noted above, R.C. 2903.213 does not even explicitly require the presence of the alleged offender at the hearing. The statute only requires the trial court to hold a hearing, within 24 hours after a motion is filed, to hear the testimony from the person requesting the order and determine whether the protection order should be issued. The statute only requires a copy of the protection order to be delivered to the alleged offender the same day the order is issued. R.C. 2903.213(C)(1) and (G)(1). Webley does not claim that he was not served with a copy of the protection order.

{¶25} In any event, the essential elements of due process are notice and an opportunity to respond. *Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532, 546, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). The notice should be reasonably calculated to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865 (1950). As discussed under our analysis of the first assignment of error, Webley clearly had advance notice of the hearing, because he appeared with counsel at the hearing, and counsel brought several documents and exhibits that were used to impeach Webley's accuser's credibility. While Webley indeed had very short notice of the hearing, we note that both R.C. 2903.213 and 2919.26 contemplate a speedy resolution of the protection order matter — requiring the hearing to be held the next court day.

{¶26} Webley cites *Lindsay v. Jackson*, 1st Dist. Hamilton No. C-990786, 2000 Ohio App. LEXIS 4043 (Sept. 8, 2000) to support his claim. Webley's reliance on *Lindsay* is misplaced. *Lindsay* involved yet a different protection order statute, R.C. 2903.214 ("Petition for protection order to protect victim of menacing by stalking or sexually oriented offense."). That statute permits the issuance of protection orders for victims of menacing by stalking, based on a petitioner's allegations (rather than on the filing of a criminal complaint, as in the instant case). Furthermore, that statute requires the trial court to hold an ex parte hearing within the next court day of the request of a protection order; however, unlike R.C. 2903.213 and 2919.26, that statute goes on to provide for a "full hearing" within seven court days if the court issues a protection order after an ex parte hearing, and further explicitly provides that the court "shall give the respondent notice of, and an opportunity to be heard at, the full hearing." R.C. 2903.214(D)(2)(a).

{¶27} In *Lindsay*, after a magistrate issued an ex parte protection order, appellant was served with a copy of the protection order, which included notice that a full hearing would be held four days later. Because the four-day period included the weekend, appellant received notice of the hearing only one business day prior to the hearing. The First District held that, under such circumstances, appellant was denied due process of law because he did not receive adequate notice of the hearing or a meaningful opportunity to present his side of the story.

The short notice did not give him sufficient time to contact his attorney, much less to know the claims of the opposing party and to prepare a defense.

{¶28} *Lindsay* is inapposite. The statute governing *Lindsay* provides for a “full hearing” and provides for a longer period (seven days) for this hearing to be held. In contrast, both R.C. 2903.213 and 2919.26 — which permits the court to issue a protection order after a criminal complaint is filed — require the trial court to act swiftly to resolve the request of a protection order without a “full hearing.” Webley’s citation to *Lindsay* does not support his claim. The third assignment of error is without merit.

Burden of Proof

{¶29} Under the fourth assignment of error, Webley claims R.C. 2903.213 violates his constitutional right to due process because the statute does not include a burden of proof.

{¶30} Failure to raise at the trial court level the issue of the constitutionality of a statute constitutes a waiver of such issue and need not be heard for the first time on appeal. *State v. Smith*, 61 Ohio St.3d 284, 293, 574 N.E.3d 284 (1991).

{¶31} Moreover, even if we were to address the merit of this claim, we are unaware of any authority holding the lack of a statutory burden of proof renders a statute unconstitutional.

{¶32} Instead, the Supreme Court of Ohio, interpreting yet a different protection order statute relating to an allegation of domestic violence (R.C. 3113.31), has stated that when granting a protection order, the trial court must find that the petitioner has shown by a preponderance of the evidence that the petitioner is in danger of domestic violence. The court explained that since the statute is silent on the standard of proof, a preponderance of evidence is the proper standard. *Felton v. Felton*, 79 Ohio St.3d 34, 679 N.E.2d 672 (1997). See also *Abuhamda-Sliman v. Sliman*, 8th Dist. Cuyahoga No. 85174, 2009-Ohio-3597, ¶ 8 (8th Dist.) (a preponderance of evidence standard of proof applied to R.C. 3113.31); *Strausser v. White*, 8th Dist. Cuyahoga No. 85174, 2009-Ohio-3597, ¶ 30 (preponderance of evidence standard of proof applied to R.C. 2903.214).

{¶33} The fourth assignment of error lacks merit.

Second Assignment of Error

{¶34} Under the second assignment of error, Webley argues the trial court abused its discretion in granting a motion for a protection order because the evidence presented at the hearing did not support a finding that Webley's presence would impair the safety of Weisman and her minor children.

{¶35} This court has held that, on appeal from the issuance of a protection order pursuant to R.C. 2903.214, our standard of review is whether there was some competent, credible evidence to support the order. *Sliman*, 8th Dist.

Cuyahoga No. 85174, 2009-Ohio-3597, at ¶ 10; *White*, 8th Dist. Cuyahoga No. 85174, 2009-Ohio-3597, at ¶ 33.

{¶36} At the hearing over the instant motion, Weisman testified she found Webley in her daughter's bed with his pants pulled down. She stated she sought a protection order based on what she witnessed that night, as well as "a pattern of rage behavior in the past." She also referenced Webley's license to hold a gun, his statement to her about "his non-desire to continue living a life without [her and her family], and her concern that he might feel that she did not "[deserve] a life without him." The testimony may or may not prove the offense Webley was charged with, but it certainly demonstrates the legitimacy of her fear at the time she filed for the protection order.

{¶37} Our review of the testimony, the credibility of which is strictly a matter for the trial court, reflects sufficient competent, credible evidence upon which the trial court could reasonably find that "the safety and protection of the complainant or the alleged victim may be impaired by the continued presence of the alleged offender" and grant the protection order sought. The second assignment of error is without merit.

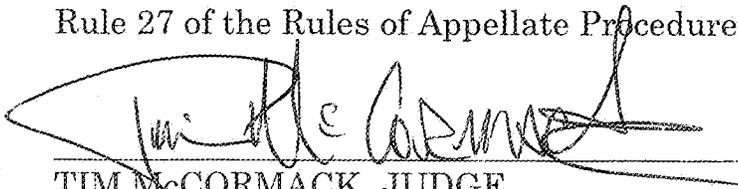
{¶38} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



TIM McCORMACK, JUDGE

KENNETH A. ROCCO, P.J., and
MARY EILEEN KILBANE, J., CONCUR

