

NO. 2013-1894

ORIGINAL

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
EIGHTH APPELLATE DISTRICT  
NO. 98489

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STATE OF OHIO

Plaintiff-Appellee

-vs-

GARETH C. WEBLEY

Defendant-Appellant

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**MEMORANDUM IN RESPONSE OF APPELLEE STATE OF OHIO**

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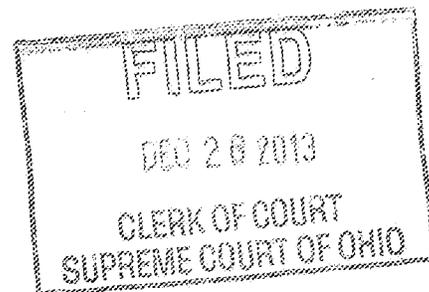
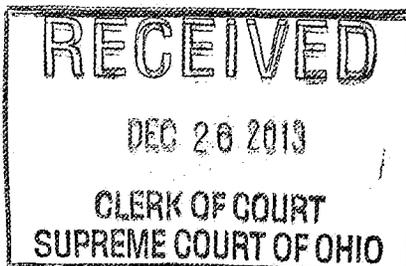
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**TABLE OF CONTENTS**

WHY THIS FELONY CASE IS NOT A CASE OF GREAT PUBLIC OR GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION..... 1

STATEMENT OF THE CASE AND FACTS ..... 1

LAW AND ARGUMENT .....5

PROPOSITION OF LAW:  
The Discretionary Jurisdiction of the Supreme Court of Ohio is not warranted where Appellant’s claims were properly considered and rejected upon the well-reasoned application of case law and statutes.

CONCLUSION ..... 8

CERTIFICATE OF SERVICE ..... 9

**WHY THIS FELONY CASE IS NOT A CASE OF GREAT PUBLIC OR  
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION**

In this case, Gareth Webley challenges the Eighth District Court of Appeal's opinion affirming the trial court's order granting a protection order after a criminal case was filed alleging Webley committed a sex offense against his live-in girlfriend's daughter. A full hearing on the protection order was held, at which Webley and counsel were present.

This Honorable Court's discretionary jurisdiction is not warranted, as no substantial constitutional question is involved nor is this case one of public or great general interest. Rather, Webley's re-hashing of claims fully considered and rejected by the Eighth District amounts to a claim of error correction. Moreover, while Webley claims his due process rights were violated, defense counsel expressly rejected the trial court's efforts made in response to the same claims Webley raises in his Memorandum in Support of Jurisdiction.

**STATEMENT OF THE CASE AND FACTS**

The Eighth District Court of Appeals set forth a thorough statement of the case and facts in *State v. Webley*, 8<sup>th</sup> Dist. No. 99489, 2013-Ohio-4598, which the State adopts, as follows:

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.

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.

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.

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.

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.

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."

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.

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.

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.

After the hearing, the trial court granted the protection order. FN1 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:

FN1. Subsequently, 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.

*Id.*, ¶¶ 1-10.

Webley's appeal from the protection order set forth the following assignments of error:

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

*Id.*, ¶ 10.

The Eighth District rejected Webley's claims, finding in part:

- 1) Webley is correct that Weisman and her minor children qualify as "family or household members." FN3 Reading R.C. 2903.213(A)(1) in its entirety, however, we interpret R.C. 2903.213(A)(1) as permitting the complainant/alleged 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). *Id.*, ¶ 18. (footnote omitted).

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. *Id.*, ¶ 19.

- 2) 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. *Id.*, ¶ 37.
- 3) 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.

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 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(1) and (G)(1). Webley does not claim that he was not served with a copy of the protection order. *Id.*, ¶¶ 23-24.

- 4) 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, 574 N.E.2d 510 N.E.3d 284 (1991).

[T]he 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. *Id.*, ¶¶ 30, 32.

## LAW AND ARGUMENT

### PROPOSITION OF LAW:

**The Discretionary Jurisdiction of the Supreme Court of Ohio is not warranted where Appellant's claims were properly considered and rejected upon the well-reasoned application of case law and statutes.**

Webley fails to provide any claims that warrant this Honorable Court's discretionary jurisdiction. Rather, Webley argues the Eighth District erred in affirming the protection order for a variety of reasons.

Initially, Webley argues the order was sought under R.C. 2903.213, but should have been sought under R.C. 2919.26 because the victim was a family or household member. Under the facts of this case, this is a distinction without a difference. The Eighth District found:

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.

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).

*Id.*, ¶¶ 14-15.

As the Eighth District found, the sole procedural difference between the statutes is that 2919.26 requires the presence of the alleged offender at the hearing. Here, Webley and counsel were present; the Court found Webley was not prejudiced nor was he deprived of his due process rights:

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.

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.

*Id.*, ¶¶ 19-20.

Webley also claims that the Eighth District erred, as insufficient evidence was presented to support issuance of a protection order. The Eighth District held there was sufficient competent, credible evidence,

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.

*Id.*, ¶ 36.

Webley also argues his due process rights were violated because the State failed to file an amended petition before the beginning of the hearing and failed to properly serve him. Webley's argument is disingenuous, at best. Webley raised these claims at the hearing – despite being present, with counsel, fully prepared with exhibits. Counsel rejected the trial court's offers to continue the hearing date at no prejudice to his client, if counsel desired. Counsel stated they wanted to go forward and informed the court no one was contesting the protection order. (T. 6, 10, 16). As to the amended petition, it was filed the morning of the hearing solely to reflect the name of the newly elected



prosecutor. Further, as noted by the Eighth District, Webley did not claim that he was not served with a copy of the order.

Finally, Webley claims R.C. 2903.13 is unconstitutional as it does not include a burden of proof. The Eighth District held:

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, 574 N.E.2d 510 N.E.3d 284 (1991).

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.

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).

*Id.*, ¶¶ 30-32.

As found by the Eighth District, Webley failed to raise this claim at the trial court level and therefore has waived it. Moreover, a reading of the related statutes and applicable case law provide instruction as to the standard of proof.

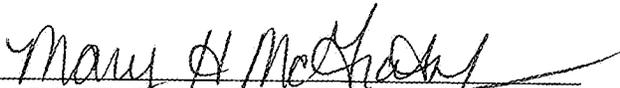
### **CONCLUSION**

This Honorable Court's discretionary jurisdiction is not warranted, as no substantial constitutional question is involved nor is this case one of public or great

general interest. The State respectfully requests that Gareth Webley's appeal not be accepted.

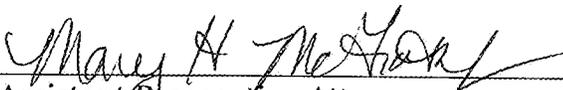
Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum in Response has been mailed this 23<sup>rd</sup> day of December, 2013, to S. Michael Lear, 3912 Prospect Avenue, East, Cleveland, Ohio 44113.

  
Assistant Prosecuting Attorney