

State of New Hampshire Supreme Court

MARGARET BRYNE
petitioner/appellee

v.

GARY HART
defendant/appellant

N.H.Sup.Ct. No. 2010-0720

MEMORANDUM OF LAW IN SUPPORT OF AFFIRMANCE

NOW COMES Margaret Byrne, by and through her attorney, Joshua L. Gordon, and respectfully requests this honorable court to affirm the decision of the Brentwood Family Division to extend by five years the domestic violence order it issued in 2008 and 2009.

As grounds it is stated:

I. Background: Mr. Hart Threatened Ms. Byrne and Placed her in Fear for her Safety

Margaret Byrne filed a domestic violence petition in August 2008. A hearing was held a few days later.

During the hearing, the parties told their respective stories. Ms. Byrne testified she feared Mr. Hart and explained why. Ms. Bryne quoted some of the hundreds of emails Mr. Hart sent to her. They contained statements such as:

- “My venom has a cause.” *Trn.* at 11;
- “I want to hurt you. I do not deny it.” *Trn.* at 12;
- “I’ve been sending all those threats to you.” *Trn.* at 12;

- “I will stop all my harassing bullshit” if Ms. Byrne would talk to him, *Trn.* at 11;
- “You are primarily responsible for my behavior. The only threat you need to fear, if you must, is the threat that you are powerless to stop me from carrying out.” *Trn.* at 14;
- “keep your eyes and ears open for all the effects that you have done to me.” *Trn.* at 15;
- I went ballistic on you. *Trn.* at 14;
- “You do not know what I am capable of doing.... I have no intentions of causing anything that could be used against me. My nastiness is your fault.” *Trn.* at 16;
- “Whether I carry out my threats is anyone’s guess. *Trn.* at 15;
- “I have started to enjoy the annoyance that I’m causing you.” *Trn.* at 13;
- “I just want to hurt you. I have malice in my heart.” *Trn.* at 14.
- “I would consider using your kids to get back at you.” *Trn.* at 16.

Even though Ms. Byrne had made it very clear to Mr. Hart that she considered their relationship over, Mr. Hart repeatedly contacted her in a variety of ways, sent her packages at her home and at work, *Trn.* at 23-24, left notes on her car, *Trn.* at 25, and repeatedly appeared at her place of work. She testified “that was eerie.” *Trn.* at 23.

Even though Ms. Byrne is an emergency room nurse, and thus does not scare easily, she testified “he came up to where I worked, and I was very frightened.” *Trn.* at 24. Because at the time they were both employed at Massachusetts General Hospital, and because Mr. Hart wears a MGH uniform, he easily gained access to her at work, even after he was instructed not to by Hospital security. *Trn.* at 25-6.

Consequently, Ms. Byrne became concerned for both her own safety, and that of her

children. *Trn.* at 27.

Mr. Hart offered a two-part defense – that Ms. Byrne’s reactions to his conduct did not exemplify fear on her part, *Trn.* at 30-31, 34, 38, 42, and that his threats were misunderstood. *Trn.* at 29, 33. He admitted sending her the threatening emails, admitted to threatening her on several occasions, *Trn.* at 38, admitted that his actions were designed “to torment her,” *Trn.* at 35, and admitted to having violated a prior no-contact order. *Trn.* at 33.

Consequently the court issued a one-year domestic violence order, and from the bench explained in detail what “no contact” means. *Trn.* at 44. The court found that Mr. Hart:

sent voluminous e-mails to the Plaintiff threatening her life and safety, [and] refused to stay away from her at her place of employment despite being advised to do so by the Security Force at Mass. General Hospital.

FINDINGS OF FACT FOR DOMESTIC VIOLENCE FINAL ORDER (Aug. 22, 2008), *appx.* at 12.

The court found that Mr. Hart posed a “credible threat” because “he continued to escalate his behavior toward the plaintiff and threatened in an email ‘you are powerless to stop me’ from carrying out threats against her life unless ‘you get me committed somehow.’” *Id.* A final order of protection was granted. FINAL ORDER OF PROTECTION (Aug. 22, 2008), *appx.* at 9. Mr. Hart filed a motion for modification, and then later a motion to reconsider, which were denied.

That was all in 2008. Mr. Hart did not appeal.

As the domestic violence order was set to expire in August 2009, Ms. Byrne requested an extension. REQUEST FOR EXTENSION OF DOMESTIC VIOLENCE OR STALKING FINAL PROTECTIVE ORDER (Aug. 12, 2009), *appx.* at 14. The court granted the request for one year, “based upon the Plaintiff’s representations [] that good cause exists to extend the order.” ORDER ON INITIAL

EXTENSION OF DOMESTIC VIOLENCE OR STALKING FINAL PROTECTIVE ORDER (Aug. 12, 2009), *appx.* at 15.

As it was again set to expire, in August 2010 Ms. Byrne again requested an extension.

REQUEST FOR EXTENSION OF DOMESTIC VIOLENCE OR STALKING FINAL PROTECTIVE ORDER (Aug. 13, 2010), *appx.* at 16. She alleged that she had received “bizarre” calls “in the middle of the night when I am at work,” which caused her to fear for herself and her children. *Id.*

Mr. Hart objected claiming Ms. Byrne could not “substantiate her claims” and that “her actions ... indicat[e] a lack of support for her allegations.” OBJECTION TO EXTENSION OF PROTECTIVE ORDER (Aug. 31, 2010), *appx.* at 17

The court held a hearing on September 14, 2010. The hearing, however, has not been transcribed, and Mr. Hart made no effort to have a transcript of the hearing prepared for this Court. *See* NOTICE OF APPEAL, TRANSCRIPT ORDER FORM (Oct. 25, 2010).

The court extended the no-contact order another five years, until August 2015. ORDER (Sept. 17, 2010), *appx.* at 18. In its order the court noted the calls Ms. Byrne had received, recognized that they caused her to “reinvigorate the fears that she had when she came to the Court in August 2008,” and reported that Ms. Bryne’s co-worker had seen Mr. Hart at Ms. Bryne’s place of work. The court noted that Mr. Hart did not refute the allegations that he had been at Ms. Bryne’s place of work, and did not deny involvement in the phone calls. The court wrote that instead, Mr. Hart “spent a considerable amount of time rehashing the issues that were addressed at the original hearing in 2008,” and offered exhibits “which were considered at the time of the original Order.” ORDER (Sept. 17, 2010), *appx.* at 18. He also introduced a Security

Investigation Report prepared the Massachusetts General Hospital which “was not helpful to ... his case, but, rather supported the Plaintiff’s concerns regarding her fears and continued safety based on his previous extensive course of conduct.” *Id.*

The court wrote that “having considered the evidence” and “evaluated the demeanor of the witnesses,” the court “specifically finds that the Plaintiff has established she remains in fear of her safety and that the Defendant remains and presents a credible threat to her safety.” It thus found “there is sufficient cause” to extend the no-contact order for five years. *Id.*

Mr. Hart then filed this appeal.

II. This Court Must Affirm Because the Court Properly Exercised its Discretion

In his brief Mr. Hart mentions little about the 2010 hearing and the extension of the domestic violence order. Rather it is a rehash of the 2008 hearing, which he did not appeal. As such, the issues are untimely raised. SUP.CT.R. 7(1)(A) (“[A]n appeal shall be filed by the moving party within 30 days from the date on the clerk’s written notice of the decision on the merits.”).

All the issues Mr. Hart has raised on appeal turn of the discretion of the trial court. *Tosta v. Bullis*, 156 N.H. 763, 767 (2008) (in domestic violence cases, this Court will “uphold the findings and rulings of the trial court unless they are lacking in evidential support or tainted by error of law.” When performing this review, we accord considerable weight to the trial court’s judgments on the credibility of witnesses and the weight to be given testimony.”) (quotations and citations omitted).

As to the 2008 proceedings, even if it were timely raised, there is sufficient evidence on

the record to support the initial issuance of a domestic violence order pursuant to RSA 173-B. As to the 2009 proceedings which extended the order one year, even if it were timely raised, there no suggestion in Mr. Hart's brief that the extension was unlawful, and no record presented to this Court to review.

As to the 2010 proceedings, which extended the order for five years (the only issue timely raised here), Mr. Hart has not presented to this Court a record for review.

This Court cannot review the discretion of a lower court without a transcript of the proceeding. "It is the burden of the appealing party ... to provide this court with a record sufficient to decide [his] issues on appeal." *Bean v. Red Oak Prop. Mgmt., Inc.*, 151 N.H. 248, 250 (2004); SUP.CT.R. 13. "[A]bsent a transcript of the hearing, we must assume that the evidence was sufficient to support the result reached by the trial court." *Id.* This Court routinely dismisses discretion-based claims where there is no record: "Because the sparse record before us does not include a transcript of the hearing for our review, we cannot conclude that the trial court erred in these findings." *In re Lynn*, 158 N.H. 615, 618 (2009). Mr. Hart has provided to this Court a transcript of the 2008 hearing, but not the 2010 hearing. *See* NOTICE OF APPEAL, TRANSCRIPT ORDER FORM. Because only the 2010 proceeding is timely raised, what occurred in 2008 is not material here. Consequently, the lower court's ruling must be affirmed.

Moreover, the order issued after the 2010 hearing contains factual findings that support an extension of the domestic violence no-contact order. The statute provides in full:

Any order under this section shall be for a fixed period of time not to exceed one year, but may be extended by order of the court upon a motion by the plaintiff, showing good cause, with notice to the defendant, for one year after the expiration

of the first order and thereafter each extension may be for up to 5 years, upon the request of the plaintiff and at the discretion of the court. The court shall review the order, and each renewal thereof and shall grant such relief as may be necessary to provide for the safety and well-being of the plaintiff. A defendant shall have the right to a hearing on the extension of any order under this paragraph to be held within 30 days of the extension. The court shall state in writing, at the respondent's request, its reason or reasons for granting the extension. The court shall retain jurisdiction to enforce and collect the financial support obligation which accrued prior to the expiration of the protective order.

RSA 173-B:5, VI.

In its order the court pointed out that Ms. Byrne had received phone calls which caused her to "reinvigorate the fears that she had when she came to the Court in August 2008," and that Ms. Byrne's co-worker had seen Mr. Hart at Ms. Byrne's place of work. The court noted that Mr. Hart did not refute the allegations that he had been at Ms. Byrne's place of work, and did not deny involvement in the phone calls. The court wrote, rather, that Mr. Hart "spent a considerable amount of time rehashing the issues that were addressed at the original hearing in 2008," and offered exhibits "which were considered at the time of the original Order." ORDER (Sept. 17, 2010).

The court also noted that Mr. Hart introduced a Massachusetts General Hospital Security Investigation Report which "supported the [Ms. Byrne's] concerns regarding her fears and continued safety based on his previous extensive course of conduct." *Id.*

Thus court wrote that "having considered the evidence" and "evaluated the demeanor of the witnesses," the court "specifically finds that the Plaintiff has established she remains in fear of her safety and that the Defendant remains and presents a credible threat to her safety. It thus found "there is sufficient cause" to extend the no-contact order for five years. *Id.*

Because there is no record to review the court's discretion, and the court's discretion was properly exercised, this Court must affirm. *In re Lynn*, 158 N.H. 615, 618 (2009) (where no record, "we must assume that the evidence does not support the [appellant's] argument"); *In re Lynn*, 158 N.H. at 619 (Dalianis, J., concurring specially) ("Without a transcript of the trial court hearing, we assume that the evidence supported its decision.").

WHEREFORE, Margaret Byrne respectfully requests this honorable Court affirm the order of the Brentwood Family Division extending its domestic violence order until August 2015.

Respectfully submitted
for Margaret Byrne
by her attorney,

Dated: April 11, 2011

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I hereby certify on this 11th day of April 2011, a copy of the foregoing is being forwarded to Gary Hart, *pro se*, at 202 Vine St., Everett, MA 02149-4923.

Dated: April 11, 2011

Joshua L. Gordon, Esq.