

State of New Hampshire
Supreme Court

NO. 2011-0648

2012 TERM

FEBRUARY SESSION

Tamara Ann Tello

v.

John Thomas Tello

RULE 7 APPEAL OF FINAL DECISION OF
MILFORD DISTRICT COURT

BRIEF OF PETITIONER/APPELLEE TAMARA TELLO

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STATEMENT OF FACTS

John Tello and Tamara Tello¹ were married in Texas in 1982 and divorced in Texas in 2005. They have two children together: Nicholas who is now an adult and lives in New Hampshire, and Sarah who is a minor and lives with Tamara in New Hampshire. Because of prior events and current threats, Tamara sought and received in the Milford District Court (*Martha Crocker, J.*) a domestic violence protective order against John, who appealed.

I. John's Criminal History: Sexual Assaults on Children, Including His Son

In 2003 John was indicted by a Texas grand jury for two counts of "Indecency with a Child." Texas alleged that "with the intent to arouse or gratify the sexual desire of John Thomas Tello, [he] intentionally or knowingly engage[d] in sexual contact ... by touching the genitals of ... a child younger than 17 years." One of the counts involved Nicholas Tello, John's son, who was then 11 years old. INDICTMENT 2-03-279 (May 20, 2003), *Appx.* at 6; INDICTMENT 2-03-280 (May 20, 2003), *Appx.* at 7. The Texas grand jury also indicted John for one count of "Possession of Child Pornography." INDICTMENT 2-03-451 (Aug. 13, 2003), *Appx.* at 8.

John plead guilty and was convicted of all three charges. He was sentenced to 7 years on each count, with the sentences running concurrently. JUDGMENT ADJUDICATING GUILT 2-03-279 (Mar. 1, 2005), *Appx.* at 9; JUDGMENT ADJUDICATING GUILT 2-03-280 (Mar. 1, 2005), *Appx.* at 12; JUDGMENT ADJUDICATING GUILT 2-03-451 (Mar. 1, 2005), *Appx.* at 15. John appealed his case at least twice. In the first, involving appeal bonds, the Texas court wrote:

¹Because all parties share a last-name, to ease confusion first names are used throughout. No disrespect is intended.

Appellant was charged with two indecency with a child offenses and one possession of child pornography offense. Pursuant to plea bargain agreements, the trial court deferred adjudicating guilt and placed appellant on five years' community supervision in each case. The State later moved to adjudicate guilt, alleging appellant violated the conditions of his community supervision. Following a hearing, the trial judge adjudicated appellant guilty and sentenced him to seven years' confinement in each case....

The trial judge set appeal bonds at \$15,000 in each case and on April 29, 2005, appellant posted the bonds. Several conditions were set on the bonds, including that appellant not go within 1000 feet of a place where children generally gather and that appellant appear for all court hearings. On May 5, 2005, the State moved to revoke appellant's bonds, alleging that he had gone into two daycare facilities.

Ex parte Tello, 2005 WL 2009570 (Tex.App. 2005), *Appx.* at 27. In a second appeal, the convictions and sentences were affirmed. *Tello v. State*, 2005 WL 2625486 (Tex.App. 2006), *Appx.* at 29. As a result, John was placed permanently on the Texas sex offender registry. TEXAS DEP'T PUBLIC SAFETY, PUBLIC SEX OFFENDER REGISTRY, *Appx.* at 31.

II. Texas Protective Order and Termination of Parental Rights

Before the convictions, Tamara got a protective order against John in Texas. *In the Matter of the Marriage of Tamara Tello and John Tello* and *In the Interest of Nicholas Paul Tello and Sarah Elizabeth Tello*, Rockwall Cnty. TX Dist.Ct. No. 01-03-207, PROTECTIVE ORDER (May 7, 2003), *Appx.* at 1. The Texas protective order extended until April 16, 2005, by which time it is believed John was incarcerated.

As a part of his criminal convictions, John voluntarily relinquished his parental rights over the two children. *In the Interest of Nicholas Paul Tello and Sarah Elizabeth Tello*, Rockwall Cnty. TX Dist. Court. No. 1-03-207 ORDER OF TERMINATION and FATHER'S AFFIDAVIT FOR VOLUNTARY RELINQUISHMENT (Mar. 5, 2004), *Appx.* at 18, affirmed by *In re N.P.T. and S.E.T.*, 169 S.W.3d 677 (Tex.App. 2005), *Appx.* at 22. Consequently the Milford District Court found that his rights had been

terminated, DOMESTIC VIOLENCE FINAL ORDER OF PROTECTION ¶11 (June 20, 2011, reaffirmed July 25, 2011), *Appx.* at 58, and John concedes it. JOHN TELLO BRF. at 3.

Despite the termination, and also despite the Texas and New Hampshire restraining orders, in his brief John twice writes: “John intends to communicate with his son and daughter.” JOHN TELLO BRF. at 3, 4.

III. John Gets Out of Texas Jail

In May 2011 Tamara received a letter from Texas authorities informing her that John’s projected release date was July 7, 2011, that he had served the maximum sentence, and that therefore the “Board of Pardons and Parole will no longer have authority” over him. LETTER FROM THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE TO TAMARA TELLO (May 9, 2011), *Appx.* at 34.

The letter also noted that because John “is the subject of a protective order and is confined or imprisoned on the date the protective order expires [Texas law] mandates that the protective order be extended for one year from the date the offender is released.” *Id.*

IV. Credible Threat to Tamara’s Safety

Because by 2011 Tamara had long ago left Texas to start a new life away from John in New Hampshire, rather than apply to Texas for an extension, soon after she got the to-be-released letter she commenced the current proceeding with a petition in the Milford District Court.

In her petition, Tamara alleged that John’s is a “sociopathic, anti-govt, anti-tax, anti-IRS, Patriot [who] loves guns [and] knives,” and who “follows no rules or laws but HIS.” DOMESTIC VIOLENCE PETITION (May 27, 2011), *Appx.* at 35. She alleged that John “has threatened to kill me and the children,” and that he has money and access to guns. DEFENDANT INFORMATION SHEET (May 27, 2011), *Appx.* at 39. She noted that back in Texas, he hit her and was arrested for it. Because he

was not incarcerated before his plea, Tamara alleged that “[w]hen in court or at home, we had to be escorted by police for protection (including the judge).” Tamara believes that “[h]e knows where we are at, my family in N.Dak[ota], Wisconsin and N.H. [and] all fear his presence.” *Id.*

Tamara believes John is “a danger to any boy 6-12 and my family,” that she expects “[h]e will be coming here to try to get his children,” and that they are fearful of him as well. “While in prison, [John] sent package to Sarah against [Texas’s] protective order. We thought it was a bomb!” *Id.* John admits he sent a box to the younger child, and admits he intends to communicate with both children. JOHN TELLO BRF. at 3, 4.²

Tamara believes that John had engaged in financial crimes, including “[f]orgery, many passports, [and] embezzlement.” DOMESTIC VIOLENCE PETITION (May 27, 2011), *Appx.* at 35. She believes that he took marital funds and the kids’ college money, and forged signatures for those purposes. Even though he was awarded the marital condominium in their divorce, he did not pay the fees, and the condo association has held her liable. Tamara believes that John “wants my life insurance funds, and has been open about it.” *Id.*

Tamara alleged that John poses a current threat because “[h]e blames me for all of his dealings.” “I have fought hard to keep him in prison with the parole board and each time the board has had no problem protecting us and keeping him locked up.” Upon his release from prison she fears for her life and for her kids. *Id.*

²It is believed John made an attempt to use this Court to contact the children by sending cards to the Court in the hopes they would be forwarded. Sup.Ct.Order (Dec. 6, 2011) (“On December 1, 2011, the court received John Tello’s brief, along with two cards that Mr. Tello addressed to individuals who are not parties to this appeal. The two cards are being returned to Mr. Tello with this order.”). In addition, during the pendency of this appeal, Tamara has received mailings which John has admitted were intended for the children. *See* ENVELOPES FROM JOHN TELLO TO NICHOLAS TELLO AND SARAH TELLO (postmarked Dec. 13, 2011), *Appx.* at 85; LETTER FROM JOHN TELLO TO CLERK, MILFORD DISTRICT COURT (Dec. 13, 2011), *Appx.* at 86. In separate domestic violence dockets related to the two children, John has admitted sending packages to them.

Based on this Tamara requested “any extra protection we can get for as long as we can get,” and “[w]ould like the protective order extended in N.H. where we live.” *Id.*

Tamara’s son Nicholas, the now-grown boy who had been John’s victim, filed his own petition for a restraining order on the grounds that “8 years ago ... my father sexually molested me [] and one of my closest friends.” DOMESTIC VIOLENCE PETITION, 11-DV-30 (May 27, 2011).³

³During the pendency of this appeal, both children sought and have been granted domestic violence protection orders in the Milford Court.

STATEMENT OF THE CASE

I. Domestic Violence Petition Filed

Tamara filed her domestic violence petition on May 27, 2011, and got a temporary order the same day. DOMESTIC VIOLENCE PETITION (May 27, 2011), *Appx.* at 35; DOMESTIC VIOLENCE TEMPORARY ORDER OF PROTECTION (May 27, 2011), *Appx.* at 41. Nicholas's petition was also filed that day. Also on May 27 in Tamara's case the court issued a notice of hearing, scheduling the hearing for June 20, 2011. DOMESTIC VIOLENCE TEMPORARY ORDER AND NOTICE OF HEARING (May 27, 2011), *Appx.* at 43. On the same day the Milford District court faxed the temporary order to the Merrimack District Court because "no judge here today," to the Milford Police Department, and to the FBI's National Crime Information Center (NCIC). DOMESTIC VIOLENCE ORDER TRANSMISSION COVER SHEETS (May 27, 2011), *Appx.* at 44.

II. Service on John Tello

Although undated, it is clear the court made efforts to find John. It located him in the Texas correctional system using the on-line Texas inmate locator, and noted that orders were sent to him at the "Thomas Goree Unit" of the Texas "Correctional Institutions Division" in Huntsville, Texas. OFFENDER INFORMATION SEARCH (undated) (handwritten note on computer screenshot printout), *Appx.* at 52.

Based on its research, the Milford District Court noted that "Defendant to be served by: Rusk County TX Sheriffs Office (upon approval of AOC for \$50.00 sheriff fee.)" DOMESTIC VIOLENCE ORDER TRANSMISSION COVER SHEET (May 27, 2011), *Appx.* at 47. The fee was apparently approved, as a copy of the check is in the record, although it was later returned from the Rusk County Sheriff in Henderson, Texas with a notation that "[t]here is no fee for a protective order." CHECK TO RUSK

COUNTY SHERIFF (June 3, 2011) (returned uncashed and voided, June 27, 2011), *Appx.* at 63; ODYSSEY CASE MANAGER, MISCELLANEOUS CASE FOR REVOLVING FUND TRANSACTION (July 6, 2011) (crediting uncashed check), *Appx.* at 65. It is further apparent from the amount of the check – \$100 – that the Texas sheriff was given two petitions to serve, \$50 for Tamara’s, and \$50 for Nicholas’s.

It is also apparent that the court staff spent some time on the phone with Texas authorities regarding difficulties serving John, and there are several handwritten notes, but their meaning and import is unclear. HANDWRITTEN PAGE OF NOTES (various dates), *Appx.* at 66.

Whatever service problems may have occurred, it is clear that John had actual notice within 19 days of Tamara’s petition. The Texas sheriff certified that he served “the foregoing protective order” on June 15, 2011. SHERIFF’S RETURN OF SERVICE (received June 13, 2011) (served June 15, 2011) (certified June 21, 2011) (returned June 27, 2011), *Appx.* at 67. Moreover, John wrote a letter to and filed a pleading with the court in which he concedes he had actual service of the petition on June 15, 2011. LETTER FROM JOHN TELLO TO MILFORD DISTRICT COURT CLERK (June 16, 2011), *Appx.* at 68; DEFENDANT’S RESPONSE TO THE COURT and MOTION FOR CONTINUANCE (June 16, 2011) (Response and Motion separately captioned but contained in same document), *Appx.* at 69.

III. John Tello Cannot be in Court on June 20

In his pleading John denied the allegations in Tamara’s petition and requested the court deny her requested relief. RESPONSE TO THE COURT (June 16, 2011), *Appx.* at 69. He also denied molesting a child. He explained the impossibility of attending the June 20 hearing because his release date was in July and he was engaged in prison out-processing which involved bussing from facility to facility and which made communications unreliable. He names the facilities to which he was bussed, and one

of them is the “Goree Unit,” which is the same as that revealed by the court’s on-line research. He notes that he “will be released July 7, 2011.” *Id.*

In his continuance, he requested a “hearing at a date after the defendant is released” from Texas custody. MOTION FOR CONTINUANCE (June 16, 2011), *Appx.* at 69. The court granted the continuance in accord with John Tello’s needs. *Id.* (above Judge Martha Crocker’s signature, “Continuance is granted. Reschedule for a date after July 7, 2011”).

IV. June 20 First Hearing and Conditional Order

In accord with the hearing notice that had issued, the court held a hearing on June 20, 2011. The hearing took just 11 minutes, and no witnesses testified. Based on the pleadings alone the court issued a conditional protective order. During the hearing the court said:

We have an indication, and I’m stating this for the record, that Mr. [Tello] was served by the authorities in Texas, however they apparently don’t keep track of those things in writing, so I have a note, a telephone note, indicating that he was served. But he ... is incarcerated at this point in time.... So what I am going to do is I am going to issue final orders in this matter; however ... I’m going to put a proviso on ... here, which I ordinarily do not place, and that is that if released from incarceration and Mr. Tello requests a hearing on the final orders, that ... I will grant that; I will reopen the case and give him his hearing as if he was in court today. Because ... I believe that due process requires that he at least be given that opportunity because he obviously was not free to be here today.

TRANSCRIPT OF HEARING (June 20, 2011). Accordingly, on the protective order itself the court wrote:

As defendant is currently incarcerated, upon release if he would like a hearing on these orders he may file a request *with the court*, and the court will schedule the matter for hearing. However all orders remain in full force and effect *until* modified by the *court*.

DOMESTIC VIOLENCE FINAL ORDER OF PROTECTION ¶ 19 (June 20, 2011) (emphasis in original), *Appx.* at 58.

The conditional order found that Tamara had been abused and, with citation to the Texas cases, that John had given up his legal rights to the children. The court restrained John from abusing Tamara and the children; from contact with them by any means; from entering the premises where they live, work and go to school; and from taking, converting, or damaging their property. It ordered John to relinquish his guns. The court styled the restraining order as a continuation of the similar Texas order, and noted that it would be in effect from June 20, 2011 until June 20, 2012. *Id.*

V. John Got a Continuance

Because John had requested a continuance, because the court had granted the continuance, and because the court had directed that the clerk schedule it for a date after John's release, on June 29 the court issued a notice of hearing scheduling a second hearing on July 25, 2011. NOTICE OF HEARING (June 29, 2011), *Appx.* at 71.

In response John filed a pleading noting that he had received the June 20 order. He disputed Tamara's version of the facts, and objected on the grounds of jurisdiction, "non-judicial decision-making," that "'money' used in New Hampshire is different from the 'money' used elsewhere in 'this state,'" and that he's "not liable in the capacity identified." He also requested a copy of the file, appointment of a lawyer, and a new trial. VERIFIED STATEMENT WITH OBJECTIONS AND REQUESTS (signed July 1, 2011) (received by Milford District Court July 11, 2011) ("noted" by Judge July 18, 2011), *Appx.* at 72.

The clerk noted that a copy of the pleading was mailed to Tamara on July 18, and a copy of the temporary order and return of service was mailed to John on July 19. *Id.* (handwritten notation on bottom of page 1). Also on July 19 the court issued a notice formalizing that it had provided those items to the parties. NOTICE (July 19, 2011) ("See enclosed Verified Statement with Objections and

Requests, which has been noted. Defendant please find enclosed copy of Temporary Order as requested, with proof of service of same from the Rusk County Sheriff's Office"), *Appx.* at 75.

On July 18 the court received an undated letter from John again requesting a copy of the file and a lawyer, and reporting his new address which indicates he was no longer incarcerated. LETTER FROM JOHN TELLO TO MILFORD DISTRICT COURT (undated) (received by court July 18, 2011), *Appx.* at 76. The following day the court wrote a letter to John at his new address informing him that a court-appointed attorney is not available, and enclosing materials on "Legal Services Programs." LETTER FROM 9TH CIRCUIT - DISTRICT DIVISION - MILFORD TO JOHN TELLO (July 19, 2011), *Appx.* at 77.

VI. July 25 Second Hearing and Final Order

On July 25 the court held a second hearing in accord with the court's earlier promise and John's request. Tamara was present with a lawyer, but John did not show up. The hearing lasted just 5 minutes. No witnesses testified, and the merits of the case were not discussed. During the hearing the court said:

[T]he status of this file is the fact that we understood that Mr. Tello was incarcerated upon the date of the final hearing. We granted the final hearing, with the understanding that Mr. Tello would be entitled to a hearing on the petition upon his release. He requested that hearing. We scheduled it for today. He has failed to appear. Final orders are reaffirmed.

INFORMAL TRANSCRIPTION OF PORTION OF HEARING (July 25, 2011). The court re-issued the protective orders with a handwritten notation above Judge Crocker's signature: "7-25-11 Δ FTA Final orders are reaffirmed @ 11:37AM." It is understood this means that at the July 25 hearing Mr. Tello failed to appear and the final orders were reaffirmed at 11:37AM.

A day after the hearing the court received a pleading from John wherein he again expressed

his disagreement with Tamara and his intent to resume communications with the children, claimed there was no physical abuse and no risk to her safety, denied the events that led to his conviction and incarceration, and objected to the parties' resulting divorce. He took issue with the tax system, objected to the proceedings on a variety of grounds including jurisdiction, "non-judicial decision-making," the value of money in New Hampshire, and maritime law. He also requested a further continuance or a telephonic hearing. JOHN TELLO'S FIRST VERIFIED MOTION FOR EXTENSION OR CONTINUANCE (signed July 22, 2011) (received by court July 26, 2011), *Appx.* at 78.

Importantly here, however, in his pleading John conceded that he got service of the conditional orders on July 21, in time to make it to the hearing. *Id.* The court appears to have taken no action on the pleading.

John Tello appealed.

SUMMARY OF ARGUMENT

Quoting the statute, Tamara Tello first notes the District Court has jurisdiction over domestic violence restraining orders. She also notes that both New Hampshire's long-arm statute and John Tello's constitutional rights have been satisfied by the exercise of jurisdiction. She explains that John got notice and enjoyed an opportunity for a hearing. Tamara argues that regardless of a hearing, the facts are not capable of dispute, and thus any error is harmless. Finally, she notes the judge who issued the order was duly appointed.

ARGUMENT

I. Subject Matter Jurisdiction

The District Court has jurisdiction over domestic violence petitions. RSA 173-B:2, I (“All district courts shall have concurrent jurisdiction with the superior court over all proceedings under this chapter.”). Jurisdiction is shared with the Superior Court, *Id.*, and the Family Division. RSA 173-B:2, IV. (“In any county where the family division is located, the family division shall have jurisdiction over domestic violence cases.”).

The Supreme Court has jurisdiction over an appeal from a domestic violence petition. RSA 490:4 (“The supreme court shall have general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses . . . and shall do and perform all the duties reasonably requisite and necessary to be done by a court of final jurisdiction of questions of law and general superintendence of inferior courts.”).

II. Long-Arm Jurisdiction

New Hampshire courts may issue domestic violence restraining orders against non-resident abusers consistent with the long-arm statute. RSA 510:4; *McNair v. McNair*, 151 N.H. 343 (2004). Contacts with New Hampshire for constitutional purposes are satisfied when a domestic violence defendant makes threatening phone calls from another state to New Hampshire. *McNair*, 151 N.H. at 350. If the threatening contact is made while the plaintiff is in New Hampshire, New Hampshire courts have jurisdiction over the defendant. *Hemenway v. Hemenway*, 159 N.H. 680, 686 (2010).

Here John concedes he mailed a box to Tamara’s residence, addressed to her young daughter, over whom he had lost his parental rights. His criminal history against Tamara’s son, his open-ended threats against Tamara and her entire family, and his stated intention to resume communications with

both children are sufficient grounds for the court to understand the package mailed to Tamara's address in New Hampshire was intended as and reasonably understood as a threat. Long-arm jurisdiction was thus conferred.

III. John had Notice and an Opportunity to be Heard

Although John was incarcerated at the time of the first hearing, the court issued a conditional order which gave him an opportunity to request another hearing. He did. The hearing was scheduled, but John did not appear at it. John was not incarcerated at the time of the second hearing, and got notice of the second hearing in sufficient time for him to make arrangements and travel to New Hampshire if he wished. The court did not err.

IV. Harmless Error

If there were any error, it was harmless. Although factual disputes can be important in domestic violence restraining order proceedings, *see e.g., Fillmore v. Fillmore*, 147 N.H. 283 (2001) (defendant and defendant's threats too far away in time and geography for issuance of restraining order), there is no such dispute here.

John was convicted and served a lengthy period of incarceration for sexually molesting Tamara's son and the son's friend. He mailed a box to Tamara's home, showing he has the ability to track her down and currently contact her. He addressed the box to Tamara's daughter, over whom John's parental rights have been terminated, showing he intends further involvement with the young child. The daughter is now roughly the same age as the children who John sexually assaulted in Texas.

Even ignoring Tamara's allegations concerning threatening statements, John's convictions remain. Whatever protestations or explanations John may have offered at a hearing, they cannot undo those acts. Thus, even if there were no hearing at all, it is clear "the defendant represents a credible

threat to the safety of the plaintiff.” RSA 173-B:5, I.

V. Non-Judicial Decision-Making

Martha Crocker is a judge of the Milford District Court, duly appointed by the Governor and Executive Counsel. *Martha Crocker, Jim Leary Confirmed to District Court*, N.H. BAR NEWS (July 26, 2002), *Appx.* at 84. No grounds for recusal have been advanced or proved.

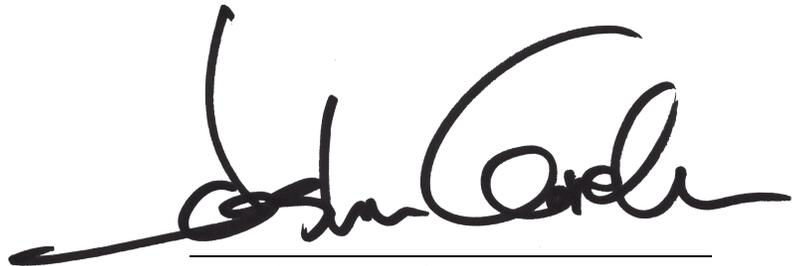
CONCLUSION

Based on the forgoing, the judgment of the District Court should be affirmed.

Respectfully submitted,

Tamara Ann Tello
By his Attorney,

Law Office of Joshua L. Gordon

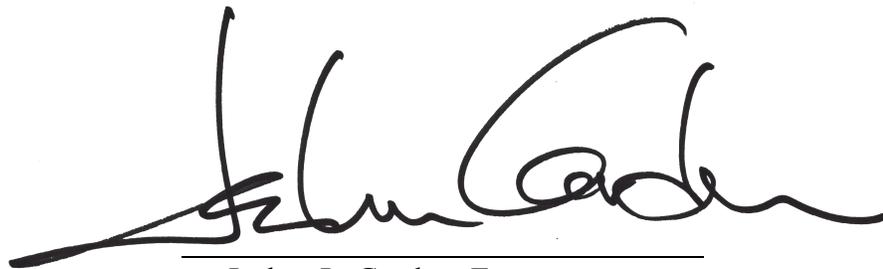


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CERTIFICATION

I hereby certify that on February 2, 2012, copies of the foregoing will be forwarded to John Thomas Tello, PO Box 460335, Garland, TX 75046-0335



Dated: February 2, 2012

Joshua L. Gordon, Esq.