

NOT DESIGNATED FOR PUBLICATION

No. 124,450

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

M.G.,
Appellant,

v.

C.H.,
Appellee.

MEMORANDUM OPINION

Appeal from Johnson District Court; ROBERT G. SCOTT, magistrate judge. Opinion filed September 1, 2023. Reversed and remanded with directions.

Catherine A. Zigtema, of Zigtema Law Office LC, of Shawnee, for appellant.

C.H., appellee pro se.

Before ARNOLD-BURGER, C.J., GREEN and HILL, JJ.

PER CURIAM: M.G. appeals from the denial of her petition for a protection from stalking (PFS) order. The magistrate court found that M.G. failed to meet her burden of proof and dismissed the petition. On appeal, M.G. first argues that the magistrate committed an error of law in finding that C.H. had a legitimate purpose for his behavior—sending hundreds of pages of unwanted letters and postcards to M.G., leaving dozens of unwanted voicemails, and driving by M.G.'s residence repeatedly and taking photographs of the house and cars in the driveway—because M.G.'s husband had written to C.H. She also argues that the magistrate judge committed an error of law in finding that C.H.'s behavior in driving past the residence and taking photographs was a

constitutionally protected activity. Finally, she argues that the magistrate court's arbitrary 20-minute time limit to present evidence violated her due process rights. Because the magistrate court erred as a matter of law in finding that M.G. did not meet her burden of proof, we reverse and remand for further proceedings consistent with this opinion.

FACTS

The central issue in M.G.'s appeal involves a petition for protection from stalking. Under Kansas law, "stalking" is defined as "an intentional harassment of another person that places the other person in reasonable fear for that person's safety." K.S.A. 2022 Supp. 60-31a02(d). For the purposes of the protection from stalking statutes, "[h]arassment" means a knowing and intentional course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate purpose." K.S.A. 2022 Supp. 60-31a02(d)(1). "Course of conduct" is also defined, and it "means conduct consisting of two or more separate acts over a period of time, however short, evidencing a continuity of purpose which would cause a reasonable person to suffer substantial emotional distress." K.S.A. 2022 Supp. 60-31a02(d)(2). The definition of "course of conduct" does not include constitutionally protected activity. K.S.A. 2022 Supp. 60-31a02(d)(2).

After a person files a petition for protection from stalking, the district court must hold an evidentiary hearing within 21 days unless the hearing is continued. K.S.A. 2022 Supp. 60-31a05(a). The court may issue temporary relief orders before the hearing on the petition. K.S.A. 2022 Supp. 60-31a05(b).

M.G. filed a verified petition for protection from stalking against C.H. on June 30, 2021. M.G. alleged that she had received multiple harassing voicemail messages from C.H. about his plans for disrupting her wedding. She alleged that her attorney told C.H. not to travel to Lawrence, Kansas, on August 11, 2018, but that C.H. defied that request

and "traveled 3 hours from his home to stay in the same hotel as [the] wedding guests." M.G. stated that C.H. attempted to get close to the rehearsal dinner venue on foot and that she filed a police report. She also alleged that on March 3, 2021, she received a homemade postcard from C.H. in which he wrote that she was the "product of a one-night stand," and that he was "still paying the price for [her] mother's mistake." C.H. wrote that "11 days after [M.G.] was born he was arrested on rape charges," and "that he has previously sent 3 people to the hospital with his bare hands." M.G. stated that C.H. told her in a voicemail message and in other letters that he has also shot someone before.

Under the "Additional Incident(s)" portion of her petition, M.G. alleged that C.H. claimed to have tracked down her college associates, and that he admitted driving to Lawrence, Kansas, on the day of her wedding shower to puncture her mother's tire. She also alleged that C.H. found out where she worked and tried to visit her there.

The hearing was held on October 1, 2021. It is not apparent from the record why the hearing was not held within 21 days of the petition's filing, but that is not at issue. The transcript of the hearing is incomplete due to technical issues with the recording. M.G. submitted a statement of proceedings under Supreme Court Rule 3.04 (2023 Kan. S. Ct. R. at 24), to which C.H. did not object.

- "2. [M.G.] testified that [C.H.] engaged in a pattern of continued and harassing contact that occurred by phone, voicemail, text and paper mail to her residence.
- "3. [M.G.] testified that [C.H.] had threatened to cause difficulties with her mother's employment at [a hospital].
- "4. [M.G.] testified that [C.H.] discussed prior acts of violence he committed against other individuals. He references prior incidents of sexual assault that he was not prosecuted or punished for. He referred to prior acts of violence where he placed individuals in hospital care.
- "5. [M.G.] testified that [C.H.] sent her photographs of her home she recently moved into after she told him to stop contacting her.

- "6. "[M.G.] testified that since he attended her wedding after being told by herself and law enforcement to not be present at the wedding or venue [and] he has driven by her home, left her 30 separate threatening messages, and threatened to contact her friends and family to disparage her. [M.G.] testified she found the conduct threatening and harassing.
- "7. [M.G.] moved to admit the voicemails and letters received by [C.H.]. [The] Court admitted them into evidence but they were not published to the Court due to time constraints.
- "8. [C.H.] admitted he drove by [M.G.'s] residence and took pictures of the cars and home.
- "9. [C.H.] testified that he keeps track of the vehicles at [M.G.'s] residence and the license plate numbers of those vehicles.
- "10. [C.H.] testified that despite being told to not attend [M.G.'s] wedding he travelled several hours to Lawrence, KS where the wedding was scheduled to be held.
- "11. [C.H.] testified and admitted that he walked back and forth outside of the window of the venue where the rehearsal dinner was held the night before the wedding. [C.H.] testified he did so to observe [M.G.] and to be observed by her.
- "12. [C.H.] admitted to using a telephoto lens to watch and take pictures of [M.G.'s] wedding. This was after being told he was not allowed to be present at the venue by law enforcement. [C.H.] described having law enforcement contact because of his behavior and there being a dispute about if he could be 100 feet from the venue to set up his tripod or 300 feet to set up his tripod to take pictures.
- "13. [C.H.] admitted to sending the letters received by [M.G.] and admitted into evidence.
- "14. [C.H.] admitted to telling [M.G.] that he sent three people to the hospital with his bare hands. He clarified that he had actually only sent two people to the hospital even though he told her he put three people in the hospital.
- "15. [C.H.] testified that he contacted [M.G.] after her mother ceased contact with him and that he wanted to discuss his complaints about her mother and herself with [M.G.].
- "16. In one of the admitted exhibits, [C.H.] mentioned he was accused of rape. He confirmed he was previously accused of rape by a former girlfriend.
- "17. [C.H.] testified that he told [M.G.] about the rape allegation to be 'open and honest' with her."

Along with the statement of proceedings, there is a partial transcript. M.G. testified that C.H. had written to her that he had found out the names, addresses, and workplaces of her friends that were in her wedding party, and he had threatened to contact them if his demands were not met.

In addition to her testimony, M.G. moved to admit the unwanted letters she had received from C.H. They were received by the court. Additionally, several video and audio exhibits were offered and admitted at the trial. The videos consisted of security camera recordings of C.H. driving and pausing in front of M.G.'s residence and occasionally taking photographs of the house or of the cars in the driveway, or both, from his car. The audio exhibits consisted of voicemail messages that C.H. had left on M.G.'s phone. None of the audio or video was published to the magistrate due to time constraints.

In one voicemail, C.H. threatened to "come there and really cause you some problems." In another voicemail, C.H. told M.G. that her mother was on her way to see her and he "won't be too far behind her." In 2020, C.H. left M.G. a voicemail in which he stated that he had previously been arrested for rape, previously shot someone, and previously put two other people in the hospital. C.H. then stated, "I'm a pretty easy-going guy but when people jack with me"

M.G.'s uncontested Rule 3.04 statement of proceedings further indicated:

- "19. The [magistrate] Court found [C.H.] received a letter from [M.G.'s] husband therefore the written correspondence from [C.H.] was appropriate.
- "20. The [magistrate] Court found that [C.H.] has a legitimate purpose to engage in his behavior.
- "21. The [magistrate] Court found that the travel on a public roadway was constitutionally protected and permitted [C.H.'s] behavior in driving by [M.G.'s] home and taking photographs of the residence and maintaining a log of vehicles

and license plates. The Court also found that the photographing from across the street was also on a public roadway.

"22. The [magistrate] Court denied the petition for protection from stalking and dismissed the case after finding the behavior were [*sic*] constitutionally protected."

The magistrate found that M.G. failed to meet her preponderance of evidence burden of proof and denied her PFS petition. M.G. timely appeals.

ANALYSIS

Did the magistrate court err by denying M.G.'s petition after finding that she failed to meet her burden of proof?

M.G. argues that the magistrate court erred in finding that she failed to prove by a preponderance of the evidence her allegations of stalking against C.H.

The Protection from Stalking Act, K.S.A. 2022 Supp. 60-31a01 et seq. (the Act), requires a plaintiff to prove his or her allegation of stalking by a preponderance of the evidence. K.S.A. 2022 Supp. 60-31a05(a). "Stalking" and related terms "harassment" and "course of conduct" are defined in K.S.A. 2022 Supp. 60-31a02(d). Taken together,

"a valid stalking claim (not involving the use of an aerial drone) would require proof of:

- "• At least two separate acts;
 - "• Directed at a specific person;
 - "• Intentionally done;
 - "• Showing a continuity of purpose that would cause a reasonable person to suffer substantial emotional distress;
 - "• Placing the person in reasonable fear for his or her safety;
 - "• Through conduct that seriously alarmed, annoyed, tormented, or terrorized the person;
- and
- "• That served no legitimate purpose and was not constitutionally protected." *C.M. v. McKee*, 54 Kan. App. 2d 318, 322, 398 P.3d 228 (2017).

The Act provides that it is to be liberally construed to protect victims of stalking and to facilitate access to judicial protection for those victims, whether they are represented by counsel or proceeding pro se. K.S.A. 2022 Supp. 60-31a01(b); see also *Wentland v. Uhlarik*, 37 Kan. App. 2d 734, 736, 159 P.3d 1035 (2007) (stalking act construed liberally to protect victims).

M.G. asks this court to employ unlimited review of the magistrate court's decision. Nevertheless, it is significant that the magistrate court made a negative finding—that M.G. failed to sustain her burden of proof. When the magistrate court makes a negative finding, appellate review is as follows:

"The effect of a negative finding by a trial court is that the party upon whom the burden of proof is cast did not sustain the requisite burden. Absent arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion or prejudice the finding of the trial judge cannot be disturbed." *Paida v. Leach*, 260 Kan. 292, 298, 917 P.2d 1342 (1996).

A review of the record shows that there was little disputed evidence. C.H. admitted to the conduct complained of by M.G. The exhibits contained writings, audio recordings, and video recordings that corroborate M.G.'s testimony. C.H. did not dispute that he sent the writings, left the voicemails, and appeared on camera driving past M.G.'s residence and taking photographs of the house and driveway. C.H. only disputed whether M.G. told him not to contact her.

The allegations made at trial meet the definition of stalking, and only arbitrary disregard of the undisputed evidence could support the magistrate's finding that M.G. failed to meet her burden of proof. Unless, that is, C.H.'s activities were found to be constitutionally protected or done for a legitimate purpose. See *C.M. v. McKee*, 54 Kan. App. 2d at 322.

M.G. argues that the magistrate committed an error of law when it found that C.H.'s activity was done for a "'legitimate purpose.'" The magistrate found that C.H. "received a letter from [M.G.'s] husband therefore the written correspondence from [C.H. to M.G.] was appropriate" and that "[C.H.] ha[d] a legitimate purpose to engage in his behavior." But a review of the letters from M.G.'s husband to C.H. reveals that they were intended to communicate a desire to end the harassing conduct by C.H. M.G.'s husband wrote: "Your behavior is strange and worrying. [M.G.] doesn't want you around her. She goes out of her way to avoid you. Please respect her wishes and stay away. . . . Do not contact me, do not contact [M.G.], do not contact my family."

What constitutes a legitimate purpose? Exemption of behavior based on a legitimate purpose does not mean that any claimed excuse will justify harassment. The purpose claimed must be supported by evidence and be objectively reasonable. See *Smith v. Martens*, 279 Kan. 242, 252, 106 P.3d 28 (2005). "Purpose" is defined as "[a]n objective, goal, or end." Black's Law Dictionary 1493 (11th ed. 2019). "Legitimate" is defined as "[c]omplying with the law." Black's Law Dictionary 1084 (11th ed. 2019). Thus, the legal definition of "'legitimate purpose'" requires an objectively valid reason for the action that is not itself harassment. See *Smith*, 279 Kan. at 252.

In *Baker v. Regan*, No. 118,780, 2018 WL 6005406, at *5 (Kan. App. 2018) (unpublished opinion), a panel of this court found that following the mother of one's child to their daughter's medical appointment and to a church to watch the daughter in a play were legitimate purposes and did not constitute harassment. Unlike the exercise of parenting, C.H. has no right to involve himself in M.G.'s life. Responding to a letter asking for contact to stop is not a legitimate purpose.

In *State v. Whitesell*, 270 Kan. 259, 275-76, 13 P.3d 887 (2000), our Supreme Court found that Whitesell engaged in a course of conduct that constituted criminal stalking when he repeatedly drove by the victim's residence, watched her home from a

field nearby, sent her and her friends and family threatening or disparaging letters, and watched her child in a public place. Similarly, C.H. admitted to driving by M.G.'s residence, keeping track of the license plates of cars in her driveway, and sending her and her friends and family threatening or disparaging letters. The evidence overwhelmingly demonstrated that C.H.'s purpose for calling M.G., driving by her house, interfering with her wedding, and sending her copious letters and postcards was to harass her. So, the magistrate erred as a matter of law in finding that C.H. had a legitimate purpose to contact M.G.

M.G. also argues that the magistrate court committed an error of law when it found that C.H.'s behavior in driving past M.G.'s house was a constitutionally protected right. The magistrate court "found that the travel on a public roadway was constitutionally protected" and that C.H.'s "behavior in driving by [M.G.'s] home and taking photographs of the residence and maintaining a log of vehicles and license plates" was permitted.

"In addition to the explicitly recognized right to interstate travel, the Supreme Court has hinted at a right to freedom of local movement." *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1080 (10th Cir. 2020) (citing *City of Chicago v. Morales*, 527 U.S. 41, 54, 119 S. Ct. 1849, 144 L. Ed. 2d 67 [1999]). Yet the Tenth Circuit Court of Appeals has concluded that the constitutionally protected right to freedom of movement "appl[ies] only to interstate travel." *D.L. v. Unified School Dist. No. 497*, 596 F.3d 768, 776 (10th Cir. 2010). "While the United States Supreme Court and Kansas Supreme Court have recognized a fundamental right to interstate travel, neither has recognized a fundamental right to drive a motor vehicle on public roadways—even if done solely for personal pleasure." *State v. Richmond*, No. 124,973, 2023 WL 4145056, at *4 (Kan. App. 2023) (unpublished opinion). Even in other jurisdictions that have recognized a right to intrastate travel, "there is no right to remain on a specific piece of public property." *McCraw*, 973 F.3d at 1081 (citing *Williams v. Town of Greenburgh*, 535 F.3d 71, 76 [2d

Cir. 2008]). Thus, even if there were a right to travel within Lawrence, Kansas, there is no right to travel down and remain on the street where M.G. lives.

M.G. argues that the magistrate court's reference to a right to travel may have actually been a comment upon the right to "loiter" or remain in a public place. A panel of this court has previously considered whether presence on a public street was constitutionally protected conduct in a stalking case. See *State v. Robinson*, No. 122,560, 2021 WL 5991928, at *3-4 (Kan. App. 2021) (unpublished opinion). Robinson parked in front of A.S.'s home two nights in a row. The first night he pulled up and talked to A.S.'s daughter, although she could not understand what he said. The second night, A.S. pulled up behind Robinson and then followed him for a few miles until he pulled over. Robinson justified his behavior by telling A.S. it was a public street. The two parted ways, but A.S. got Robinson's license plate number. Later that same night Robinson drove past A.S.'s house honking. Soon after Robinson was parked in a parking lot near A.S.'s house, where police stopped him and arrested him. The Robinson panel held that "even if there were a constitutional right to remain in public places in some instances, Robinson's acts were not constitutionally protected. Constitutional rights cannot be used as a shield to violate the rights of others." 2021 WL 5991928, at *4 (citing *Whitesell*, 270 Kan. at 272). The United States Supreme Court has "recognized the right to loiter only extends to situations when doing so 'is entirely harmless in both purpose and effect.'" 2021 WL 5991928, at *4 (quoting *Morales*, 527 U.S. at 53 n.20).

Similarly, C.H.'s actions were not constitutionally protected. The evidence showed that there was no purpose to C.H.'s actions other than to harass M.G. The magistrate erred as a matter of law in concluding that C.H. had a constitutionally protected right to drive down M.G.'s street and photograph her home or cars in her driveway.

In conclusion, the magistrate court arbitrarily disregarded the uncontroverted facts that showed M.G. had proven by a preponderance of the evidence that C.H.'s actions

constituted stalking. We reverse and remand with directions to enter a final protection from stalking order against C.H.

Did the magistrate court's arbitrary trial time limits violate M.G.'s due process rights?

M.G. argues that the magistrate court hearing protection cases in Johnson County has issued a standing order limiting all trials to 20 minutes per side. She included in her Appendix a document titled "Protection Trial Procedures." But that document is not in the record on appeal. See Supreme Court Rule 6.02(b) (2023 Kan. S. Ct. R. at 36) (the optional appendix can contain only limited extracts from the record). The agreed statement of proceedings that was filed pursuant to Supreme Court Rule 3.04 includes a statement that the "Trial Court has a local court rule establishing a time limit for all protection cases." But it does not state what the time limit is. Further, this issue was not raised in the lower court.

M.G. argues that we can consider the argument for the first time on appeal because "[c]onsideration of this issue is necessary to serve the ends of justice and prevent denial of fundamental rights to due process." There are limited exceptions to the general rule that appellate courts cannot consider constitutional issues raised for the first time on appeal. *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). But an appellant must include an explanation as to "why the issue is properly before the court." Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36). The three recognized exceptions are:

"(1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the district court is right for the wrong reason.' [Citations omitted.]" *Godfrey*, 301 Kan. at 1043.

M.G. argues that we should consider the issue because "it affects a fundamental right of [M.G.]" and "because this is the standing order of a magistrate court which presides over a high-volume caseload with pro se litigants, consideration of this issue is necessary to protect fundamental rights of others." M.G. fails to explain why she did not raise this issue below. And to consider this issue would require the development of facts outside our appellate record. For those reasons, we will not exercise our discretion to hear this claim. See *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020) (The decision to review an unpreserved claim under an exception is a prudential one.). Thus, we decline M.G.'s invitation to consider this issue for the first time on appeal.

Reversed and remanded with directions.