

1998

State of Utah v. Shaun B. Nocross : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

SHAUN B. NORCROSS

Defendant/Appellant,

BRIEF OF APPELLANT

Case No. 980146-CA

BRIEF OF APPELLANT

Appeal from a judgment of conviction for: Count I, violation of a protective order, a Class A misdemeanor, in violation of Utah Code Ann. Section 76-5-108; in the Fifth Judicial District Court in and for Washington County, State of Utah, the Honorable G. RAND BEACHAM, Judge, presiding.

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UTAH COURT OF APPEALS
BRIEF

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction in this matter pursuant to Section 78-2a-3 (2)(e) Utah Code Annotated, 1953, as amended.

STATEMENT OF THE ISSUES

1. Did the trial court err in finding that Appellant was served with a protective order? Statement of Facts pgs 25-26, 33, 39 and 57.

2. Did the trial court err in finding Appellant guilty of a violation of a protective order where the plain language of the order did not prohibit Appellant's actions as demonstrated by the evidence? Statement of Facts pgs 8-10, 15-18, 21-22 and 59-60.

3. Was the protective order in the instant case violative of Appellant's due process rights in that the order was vague, ambiguous and failed to put Appellant on notice of acts that would constitute a violation? Statement of Facts pgs 52, 53 and 57 through 59.

STANDARD OF REVIEW

When the Appellate court reviews a bench trial for sufficiency of evidence it must affirm the conviction rendered unless the order of conviction is against the clear weight of evidence or if the Appellant Court otherwise reaches a definite and firm "conviction" that a mistake has been made. State v Walker, 743 P.2d 191, 193 (Utah 1987). As concerns the factual findings of a court the reviewing or appellate court applies the "clearly erroneous" standard. "To find clear error the reviewing court must decide that the factual findings made by the court are not adequately supported by the record. Joufflas v Fox Television Stations, 927 P.2d 170, 174 (Utah 1996).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

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STATEMENT OF THE CASE

Appellant Norcross was charged in an Information with Count I, Violation of a Protective Order, a Class A misdemeanor.

The charges were taken to a bench trial before the Honorable G. Rand Beacham, on February 2, 1998. After a bench trial, Appellant Norcross was found guilty of Count I, Violation of a Protective Order, a Class A misdemeanor, and on February 26, 1998, was sentenced and placed on 24 months of bench probation.

STATEMENT OF FACTS

Appellant testified that he was unaware of the outcome of a protective order hearing held on or about December 19, 1996. Ms. Norcross testified that both she and the Appellant were at the protective order hearing held on December 19, 1996 and that subsequent to the hearing she saw Appellant return from speaking with the sheriff carrying some papers. The trial court found that the Appellant had been served with the protective order. Statement of Facts pgs 25,

26 and 57.

Appellant testified that he rode his bike past the victim's home looking for a bike path. Ms. Norcross and Ms Delong testified that Appellant had stopped his bike in front of the victim's home for a few minutes staring at her home. The court found that Appellant had violated the protective order both by riding past the home and by stopping on someone else's property and staring at the victim's home. Statement of Facts pgs 8-10, 15-18 and 21-22.

Appellant's trial counsel argued that the form protective order was insufficiently clear to put Appellant on notice as to what he was prohibited from doing and that it was not specific enough in its terms. The trial court found that the order was of the type prescribed by statute and sufficient clear. Statement of Facts pgs 52 through 53.

SUMMARY OF THE ARGUMENT

The court in this case was the sole trier of fact and found by taking judicial notice of its own files and by the evidence presented during trial that Appellant was served with the relevant protective order.

The evidence was insufficient to find Appellant guilty of violation of a protective order. The terms of the protective order, notwithstanding the court's statements to the contrary, were insufficiently clear to find that Appellant intentionally failed to "stay away from" victim's residence.

Trial counsel did not formally object to the form of the protective order and only raised his concerns in closing argument.

ARGUMENT

POINT I. DID THE TRIAL COURT ERR IN FINDING THAT APPELLANT WAS SERVED WITH A PROTECTIVE ORDER?

The trial court in this case was the sole trier of fact and as such was empowered to determine which testimony to believe and which not to believe and what inferences, if any, to draw from the facts as it believed. State v Bagley, 681 P.2d 1242, 1244 (Utah 1984). In the present case Ms. Norcross testified that both she and the Appellant were at the protective order hearing held on December 19, 1996 and that subsequent to the hearing she saw Appellant return from speaking with the sheriff carrying some papers. Ms. Norcross also testified that she had seen Appellant's signature numerous times and in fact recognized Appellant's signature on an acceptance of service of the protective order which was introduced into evidence during the trial. State of Facts pgs 25-26 and 29-30. Appellant testified that although he was present at the protective order hearing held on or about December 19, 1996 he was unaware of the outcome. The court believed the testimony of Ms. Norcross concerning Appellant's signature and found therefore that the acceptance of service of the protective order was sufficiently identified. Further, the Court took judicial notice of its own files finding that all parties were present at the hearing and that Judge Shumate had discussed the terms of the order and that the record reflected that the bailiff had given a copy of the protective order to the parties. Statement of Facts page 57. It appears therefore that the standard set out in Joufflas has been met as to this issue concerning service of the protective order.

**POINT II. DID THE TRIAL COURT ERR IN FINDING APPELLANT
GUILTY OF A VIOLATION OF A PROTECTIVE ORDER WHERE
THE PLAIN LANGUAGE OF THE ORDER DID NOT PROHIBIT
APPELLANT'S ACTIONS AS DEMONSTRATED BY THE
EVIDENCE?**

The statute at issue in this matter is Section 76-5-108 which states in relevant part as follows:

"(1) Any person who is the respondent or defendant subject to a protective order or ex parte protective order issued under Title 30...., who intentionally violates that order after having been properly served, is guilty of a class A misdemeanor,....

In the instant case, Appellant was given notice by the protective order of prohibited conduct as follows:

"3. The Respondent is prohibited from directly or indirectly contacting, harassing, telephoning, or otherwise communicating with the petitioner.

4. The Respondent shall be removed and excluded, and shall stay away, from Petitioner's residence, and its premises, located at: 263 N 200 E Ivins, UT."

There does not appear to be a lot of case law directly on point concerning this particular issue. It is important to examine the terms of this particular protective order to determine whether Appellant's actions were violative of the protective order. Perhaps it may be of assistance to consider several contempt cases and apply the reasoning to the instant case.

In Von Hake v Thomas, 759 P.2d 1162 the court affirmed the finding of contempt by noting that the appellant knew what was required, had the ability to comply with the order, yet intentionally failed or refused to comply with the order. Here, it is clear that the prohibited

conduct is set out in the protective order, but there was insufficient evidence to support the court's judgment of conviction. The trial court erroneously extended the definition of prohibited terms to include Appellant's actions. In determining what the terms of the order are the court should consider the entire order on its face. Mellor v Cook, 597 P.2d 882.

In R/L Association Inc. v City of Seattle, 780 P.2d 838 the court held that the plain meaning of the order can be determined by reading the order in light of the issues and purposes surrounding its entry. However, Johnston v Beneficial Management Corp. of America, 638 P.2d 1201 also emphasizes that the order will not be expanded beyond the meaning of the order's terms when read in light of the issues and purposes of the order. The court went further to state that strict construction is required, and the facts must constitute a plain violation. Arguably these two cases constitute persuasive authority, albeit by analogy, for the proposition that the terms of the protective order in the present case must be expanded upon by the trial court and must be strictly read. Here, the trial court considered only briefly what was meant by the terms "be excluded", "stay away", "residence" and "premises". Reviewing the issues and purposes for which the protective order was entered it is reasonable to conclude that the prevention of domestic violence and harassment were paramount. However, it is equally clear that the trial court in the instant case expanded the terms beyond their ordinary meaning. The evidence found to be credible by the court showed that Appellant was off of the residence and premises of the alleged victim. In fact, the Appellant was at the residence and on the premises of the alleged victim's neighbor across the street. As argued by trial defense counsel, it is difficult to be on the public street or even trespassing on the neighbor's property and still be in violation of the protective order here. The court in State Ex Rel. Emery v Andisha, 805 P.2d 718 (Or. App. 1991) considered a violation of temporary restraining order case where the

standard for a finding of contempt was beyond a reasonable doubt; the court in considering the terms of the order looked to the definition of the terms as found in the statute. Unfortunately, the statute, like the Utah statute Section 30-6-1 et al of the Utah Criminal Code, contained insufficient definitions; and so the court there look to the dictionary for definitions. Likewise, it may assist this court to look to dictionary definitions of the terms or words found in the protective order in the instant case.

The principal terms or words requiring clarification and their definitions are as follows:

1. contact(ing) - instance of meeting, connecting or communicating with someone. Websters Third New International Dictionary, page 490 (1993).
2. exclude - preventing entrance, shut out, retrain entrance, bar from participation, or expel from a place previously occupied. Websters Third New International Dictionary, page 793 (1993).
3. harass(ing) - to vex, trouble or annoy continually or chronically. Harassing - causing or tending to cause harassment. Websters Third New International Dictionary, page 1031 (1993).
4. premises - a specified piece or tract of land with structures on it. Websters Third New International Dictionary, (1993).
5. residence - temporary or permanent dwelling place. Websters Third New International Dictionary, page 1931 (1993).
6. stay away - "stay out" means to remain to or beyond the end of. Websters Third New International Dictionary, page 2231 (1993). Given these definitions it is clear that Appellant did not violate the terms of the protective order. The Court's factual findings are not adequately supported by the record. Joufflas supra. There is no evidence that while Appellant was standing in front of Ms Norcross's (the alleged victim) home on the property belonging to someone other

than the alleged victim for those few minutes that he was harassing or attempting to harass Ms. Norcross. There was no credible evidence presented that Appellant failed to "stay away" or be "excluded" from Ms Norcross' residence and its premises.

In the instant case the order of conviction is against the clear weight of evidence and this Court should reach a definite and firm "conviction" that a mistake has been made. State v Walker, supra.

POINT III. WAS THE PROTECTIVE ORDER IN THE INSTANT CASE VIOLATIVE OF APPELLANT'S DUE PROCESS RIGHTS IN THAT THE ORDER WAS VAGUE, AMBIGUOUS AND FAILED TO PUT APPELLANT ON NOTICE OF ACTS THAT WOULD CONSTITUTE A VIOLATION?

Both the 5th Amendment of the United States Constitution and Article 1 Section 7 of the Utah Constitution required that a defendant in a criminal case be afforded due process. However, since Appellant's counsel did not file an objection to the protective order at issue or raise a timely objection during the trial of this case this particular issue was not properly preserved for appeal and cannot be raised for the first time on appeal. State v Webb, 790 P.2d 65, 77 (Utah Ct. App. 1990) and State v Schweitzer, 943 P.2d 649, 654 n.3 (Utah Ct. App. 1997).

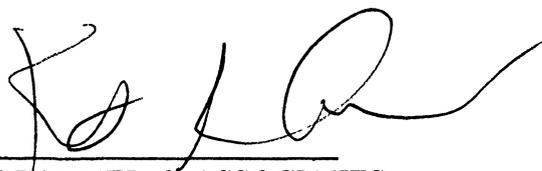
CONCLUSION

For the reasons herein alleged, the Appellant was denied a fair trial in Case No. 971501307, and the judgment and sentence should be set aside and Appellant granted a new trial.

ADDENDUM

Please see Addendum

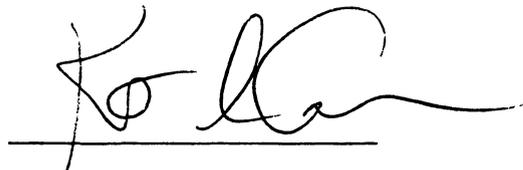
DATED on this the 13th day of Nov., 1998



SHERRI PALMER & ASSOCIATES
By: Kenneth L. Combs
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief has been served on the Office of the Attorney General, by delivery of a true copy to him via regular mail on the 13th day of Nov., 1998.



KENNETH L. COMBS

ADDENDUM NO. 1

Section 30-6-1 of the Utah Criminal Code: (Cohabitant Abuse Act) Definitions

(11) "Protective order" means a restraining order issued pursuant to this chapter subsequent to a hearing on the petition, of which the petitioner has given notice in accordance with this chapter.

ADDENDUM NO. 2

Section 76-5-108 Protective orders restraining abuse of another - Violation.

(1) Any person who is the respondent or defendant subject to a protective order or ex parte protective order who intentionally violates that order after having been properly served, is guilty of a class A misdemeanor...

ADDENDUM NO. 3

Amendment V of the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ADDENDUM NO. 4

Article I Section 7 of the Utah Constitution:

No person shall be deprived of life, liberty, or property, without due process of law.