

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

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| ELIOTT EDELSTEIN, | : | APPEAL NO. C-220626 |
| | : | TRIAL NO. DV2200816 |
| Plaintiff-Appellee, | : | |
| | : | <i>OPINION.</i> |
| vs. | : | |
| KIMBERLY EDELSTEIN, | : | |
| Defendant-Appellant. | : | |

Appeal From: Hamilton County Court of Common Pleas, Domestic Relations Division

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: July 21, 2023

Elliott Edelstein, pro se,

Kimberly Edelstein, pro se.

KINSLEY, Judge.

{¶1} Defendant-appellant Kimberly Edelstein appeals the issuance of a domestic violence civil protection order (“DVCPO”) against her by the Hamilton County Domestic Relations Court. She raises two assignments of error, both of which relate to objections she filed with the trial court after a magistrate issued the DVCPO. Finding no error in the proceedings below, we affirm the decision of the trial court.

Factual and Procedural Background

{¶2} On July 29, 2022, plaintiff-appellee Elliott Edelstein, Kimberly’s¹ husband, filed a petition for a DVCPO and requested an ex parte civil protection order. The magistrate issued an ex parte DVCPO that same day and scheduled a full hearing on the petition for August 5, 2022.

{¶3} On August 3, 2022, Kimberly filed a motion to continue the August 5, 2022 hearing or, alternatively, to dismiss the petition and order. Also on August 3, 2022, the magistrate noticed a hearing on Kimberly’s motion to continue for August 5, 2022. The magistrate also attempted to facilitate a phone conference between the parties to address whether to continue the full hearing, but court staff was unable to reach Kimberly, and the phone conference never occurred.

{¶4} Elliott was present at the August 5, 2022 hearing, along with his attorney and a witness, but Kimberly did not attend. Despite Elliott’s objection, the magistrate granted Kimberly’s motion for a continuance. The full hearing was then rescheduled for August 26, 2022.

¹ Because Elliott and Kimberly Edelstein share a last name, we refer to them by their first names in this opinion.

{¶5} Service of the order continuing the full hearing to August 26, 2022, was attempted on Kimberly on August 10 and 12, 2022, but was not effectuated. But Kimberly contacted the court and was informed the full hearing was set for August 26, 2022. Kimberly then moved to appear telephonically at that hearing or, alternatively, to renew her motion to dismiss. The magistrate denied Kimberly's motion to appear telephonically on August 25, 2022, due to the court staff's previous difficulties in contacting her. Kimberly alleges she did not receive this order, and the record reflects that service did not occur. However, Kimberly was clearly aware of the August 26, 2022 hearing, because she filed a motion to participate in it by telephone.

{¶6} Despite being aware of the hearing, Kimberly did not attend or attempt to call in. At the hearing, the magistrate denied Kimberly's motion to dismiss. Elliott and Avi Edelstein, the Edelsteins' oldest son, testified at the hearing.

{¶7} Elliott testified that he feared Kimberly and believed she would harm him. Elliott also testified to a number of incidents involving Kimberly, including times when she came to the private break room at his work to spy on his coworkers, followed him to his rabbi's house, and scratched the paint on his car because he would not come out of work to speak with her. Elliott testified that Kimberly has a firearm in the home and threatened to kill him. Avi corroborated Elliott's testimony that Kimberly followed Elliott's coworkers and threatened to use the firearm in her possession.

{¶8} The magistrate found Kimberly's behavior constituted menacing by stalking as defined in R.C. 2903.211. The magistrate further found that Kimberly's behavior conveyed a threat of force that placed Elliott in reasonable fear of imminent serious physical harm. Accordingly, the magistrate concluded the facts demonstrated

that Kimberly committed an act of domestic violence, as defined in R.C. 3113.31(A)(1)(a)(ii), and that a DVCPO was necessary.

{¶9} Kimberly attempted to object to the magistrate’s decision. According to the time stamp on Kimberly’s faxed objection to the magistrate’s order, Kimberly tendered her objection on September 16, 2022. But the docket reflects that the clerk did not file her objection until September 21, 2022. Because the trial court concluded the deadline to file objections expired on September 16, 2022, the trial court dismissed Kimberly’s objection as untimely. Kimberly now appeals.

The Merits of the Objection

{¶10} Kimberly raises two assignments of error on appeal. In her first assignment of error, she argues that the trial court erred in finding her objection to be untimely. In her second assignment of error, she argues that the trial court erred in failing to consider and rule in her favor on the merits of her objection. Because we find the second issue dispositive of this appeal, we consider Kimberly’s assignments of error out of order.

{¶11} Kimberly’s second assignment of error focuses on the merits of her objection to the magistrate’s issuance of a DVCPO. In her objection, Kimberly argues that she was denied her due process right to be present at the hearing on the DVCPO, that the magistrate improperly applied R.C. 3113.31, and that the magistrate erred in ordering parenting time regarding the parties’ minor son in the DVCPO under R.C. 3113.31(E)(1)(d).

{¶12} This court reviews “a trial court’s adoption, denial or modification of a magistrate’s decision for an abuse of discretion.” *Hoffman v. Hoffman*, 1st Dist. Hamilton Nos. C-170640 and C-170641, 2018-Ohio-3029, ¶ 7. “However, where the

appeal from the trial court's action on a magistrate's decision presents only a question of law, the standard of review is de novo." *Id.*

1. Due Process

{¶13} Kimberly asserts a due process violation on the grounds that she did not receive sufficient notice of the August 26, 2022 DVCPO hearing. We disagree.

{¶14} Actual notice of a hearing is all that due process requires. *See Jefferson Cty. Child Support Enforcement Agency v. Harris*, 7th Dist. Jefferson No. 02 JE 22, 2003 Ohio App. LEXIS 496, 2 (Jan. 29, 2003) (holding that defendant's actions demonstrated he had received actual notice of the hearing).

{¶15} The magistrate did not deny Kimberly the right to be present at the hearing. To the contrary, the August 26, 2022 hearing was set for Kimberly's convenience, because she was unavailable for the August 5, 2022 hearing at which Elliott, his attorney, and a witness were present. Only Kimberly's motion to appear telephonically was denied. This denial only occurred because the court staff had repeated difficulties in contacting Kimberly. Though the docket reflects that Kimberly did not receive the order denying her motion to appear telephonically, she admits she had notice of the August 26, 2022 hearing, because she contacted the magistrate's assistant who confirmed the date and time of the hearing.

{¶16} Therefore, Kimberly had actual notice of the hearing, which is all that due process requires. *See Jefferson Cty. Child Support Enforcement Agency* at 2. Because Kimberly was not denied her due process rights, we hold that the trial court did not abuse its discretion.

{¶17} Kimberly additionally argues that her due process rights were violated because the magistrate denied her motion to dismiss in her absence.

{¶18} Because Civ.R. 12(B)(6) does not require a hearing, “the magistrate has the discretion to render a decision without a hearing.” *Percy Squire Co., LLC v. City of Youngstown*, 7th Dist. Mahoning No. 05-MA-33, 2005-Ohio-6442, ¶ 39. Thus, the magistrate was not required to hold a hearing with both parties present to rule on Kimberly’s motion. We find the magistrate acted within his discretion to render a decision in Kimberly’s absence.

{¶19} Finally, Kimberly suggests that the magistrate violated the Code of Judicial Conduct by not permitting her to participate by phone in the August 26, 2022 hearing and by being biased against her. While we disagree with this assertion, we note that appellate courts do not enforce the judicial conduct rules even where there are violations. *See In re T.D.J.*, 8th Dist. Cuyahoga No. 100972, 2014-Ohio-5684, ¶ 6. That is the exclusive province of the Ohio Supreme Court. *Id.*

2. DVCPO Standards

{¶20} Kimberly next argues the magistrate failed to properly apply R.C. 3113.31, which contains definitions of domestic violence relevant to the issuance of DVCPOs. Specifically, Kimberly argues the lack of certainty as to imminent harm and a failure to indicate specific threats of force demonstrates that she did not engage in domestic violence.

{¶21} “To obtain a protection order pursuant to R.C. 3113.31, the petitioner must prove ‘by a preponderance of the evidence’ that the respondent engaged in an act of domestic violence against petitioner or petitioner’s family.” *Durastani v. Durastani*, 1st Dist. Hamilton No. C-190655, 2020-Ohio-4687, ¶ 16. R.C. 3113.31(A)(1)(a)(ii) defines “domestic violence” in part as “[p]lacing another person by the threat of force in fear of imminent serious physical harm or committing

a violation of section 2903.211 or 2911.211 of the Revised Code.” These clauses are written in the disjunctive, such that a person may commit an act of domestic violence by the threat of force or by violating the menacing by stalking statute (R.C. 2903.211), which does not require a threat of force. *See C.A.P. v. M.D.P.*, 8th Dist. Cuyahoga No. 109882, 2021-Ohio-3030, ¶ 27.

{¶22} “[W]here, as here, the weight of the evidence turns almost exclusively on credibility, the trial court must be mindful that the magistrate, as the trier of fact, is in the best position to judge the credibility of the witnesses and the weight to be given to the evidence presented.” *Durastani* at ¶ 21.

{¶23} Given Kimberly’s failure to appear at the hearing on the DVCPO, the magistrate determined she had engaged in an act of domestic violence based on Elliott’s testimony and Avi’s corroborating testimony. Together, these witnesses testified to a pattern of behavior on Kimberly’s part that meets the statutory elements of menacing by stalking, including surveilling Elliott in the private break room at his work, surveilling his car at work, following him to his rabbi’s house, sending unwanted text messages to Elliott, threatening to harm Elliott and have him killed, possessing a gun, and placing a tracking device on Elliott’s car that was disguised as being from an insurance company.

{¶24} Kimberly focuses her arguments on an alleged lack of specific threats of force, but threats of force are not required to issue a DVCPO under R.C. 3113.31(A)(1)(a)(ii). Committing a violation of the menacing by stalking statute is sufficient. *Durastani*, 1st Dist. Hamilton No. C-190655, 2020-Ohio-4687 at ¶ 21. Because the magistrate was in the best position to judge the credibility of the witnesses, and because the witnesses’ testimony met the statutory elements of

R.C. 3113.31, we hold that the trial court did not abuse its discretion in issuing the DVCPO.

3. Parenting Time

{¶25} Lastly, Kimberly argues the magistrate abused his discretion in including a provision setting parenting time for the parties' minor child in the DVCPO.

{¶26} With regard to this argument, R.C. 3113.31(E)(1)(d) specifically allows a court to temporarily allocate parenting time as part of a DVCPO proceeding where no other court has determined a child's parenting time schedule. Kimberly makes no argument that another court had determined her parenting time with her minor son prior to the magistrate's decision in this case. Her argument therefore has no merit, and the trial court's parenting time decision is affirmed.

{¶27} Because Kimberly's objection lacked merit, the trial court made no error in failing to consider it. We therefore overrule Kimberly's second assignment of error.

The Timeliness of the Objection

{¶28} In her first assignment of error, Kimberly asserts the trial court erred in dismissing her objection as untimely. Even if we agreed, this error would have no impact on the outcome of Kimberly's appeal, because we have determined that Kimberly's objection lacked merit. This assignment of error is therefore moot.

Conclusion

{¶29} Because Kimberly received her due process right to be present at the hearing on the DVCPO, and the magistrate properly applied and followed R.C. 3113.31 when he granted the DVCPO and ordered parenting time for the minor son under R.C. 3113.31(E)(1)(d), we overrule Kimberly's second assignment of error. Kimberly's

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first assignment of error regarding the timeliness of her objection is therefore moot. The judgment of the trial court issuing a DVCPO against Kimberly is therefore affirmed.

Judgment affirmed.

BERGERON, P.J., and WINKLER, J., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.