In The

Supreme Court of Virginia

RECORD NO. 131780

JEFFREY STEPHENS,

Appellant,

v.

SHELLIE RAE ROSE,

Appellee.

BRIEF OF APPELLANT

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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 131780

JEFFREY STEPHENS

Appellant,

v.

SHELLIE REA ROSE

Appellee.

BRIEF OF APPELLANT

JEFFREY STEPHENS, (hereinafter Jeffrey) the Appellant herein, asks this Court to vacate the April 10, 2013, protective order entered against him by the Honorable Lorraine Nordlund, and to dismiss the Petition for a Protective Order filed by the Appellee.

STATEMENT OF THE CASE

Following Jeffrey's appeal of a protective order entered by the Fairfax County General District Court, a trial *de novo* was conducted in the Fairfax County Circuit Court on April 10, 2013, at the conclusion of which, a

protective order was entered against Jeffrey. Jeffrey's notice of appeal was timely filed on May 9, 2013.

ASSIGNMENT OF ERROR

The trial court erred in issuing a Protective Order pursuant to Va. Code § 19.2-152.10, absent evidence of any act of violence, force or threat, as defined in Va. Code § 19.2-152.7:1. (Issue preserved at App. pp. 116-18; 169-78, 210).

STATEMENT OF FACTS

Jeffrey Stephens and Shellie Rose (hereinafter Shellie) dated for three or four years, ending in 2007. At the time their relationship ended, they had been planning to marry, but had decided to put their relationship on hold while each attended graduate school, with the possibility that they would get back together in the future. Following their breakup, the parties continued to talk and exchange emails. (App. pp. 46-47, 68, 133-34).

Sometime in approximately 2007, Shellie asked Jeffrey not to call her, preferring email contact instead, telling Jeffrey that graduate school was stressful and she didn't have the time. (App. pp. 135-37). Shellie stopped emailing Jeffrey in 2008. Jeffrey continued to occasionally email his former fiancé, while attending graduate school in Vancouver, British Columbia. Jeffrey also contacted Shellie on social media sites Facebook, Linked-in and Google+. (App. pp. 49-51, 55, 142).

After the breakup, Shellie continued to have occasional contact with Jeffrey's mother. Shellie never told Jeffrey that their relationship was permanently ended and that he was to have no contact with her. (App. at pp. 49, 74, 135).

While on his way from Vancouver to visit his parents in Connecticut during a semester break in January 2013, Jeffrey stopped at Shellie's parent's home in Ohio. Having previously enjoyed a friendly relationship with them, he stopped at their home to say hello and wish them a happy holiday. (App. p. 146).

Arriving at the Rose residence at about 6:30 a.m., on January 2, 2013, Jeffrey observed Shellie's father, Gary Rose walking to his car. Jeffrey greeted Mr. Rose and they had a short conversation that Jeffrey described as cordial. Jeffrey inquired as to how Shellie was doing, and was told by Mr. Rose that she lived in Pittsburgh. Since it was cold out, he asked Mr. Rose if they could go inside. Mr. Rose declined and advised Jeffrey to "move on". Jeffrey left immediately and has not returned to the Rose residence in Ohio, nor has he contacted Mr. Rose in any way since January 2, 2013. (App. p. 149).

Mr. Rose testified that he told Jeffrey he needed to find some other endeavor, to go on with his life and not to bother Shellie. "I don't want you seeing her, and I don't want to see you here again." (App. p. 35).

Prior to January 2, 2013, Mr. Rose had never told Jeffrey that he was not welcome at his home. Jeffrey left when Mr. Rose asked him to leave, he committed no act of violence, and made no threats toward Mr. Rose or toward Shellie, instead offering to shake hands, which Mr. Rose declined. (App. pp. 42-3).

After leaving the Rose residence, Jeffrey was stopped by local police and advised that Mr. Rose had complained about him trespassing. The police officer advised him that he could contact Shellie, and that only Shellie could tell him not to contact her. (App. pp. 160-61).

Mr. Rose called Shellie and reported Jeffrey's visit to her. Shellie testified that she became upset, was crying and was scared. When she returned to her home after the Christmas break she brought her boyfriend with her. Upon arriving home, she began receiving phone calls and messages, and she recognized Jeffrey's voice from her answering machine. (App. p. 57).

During the period from January 5 through January 9, 2013, Jeffrey made 40 calls to Shellie's phone, the vast majority of which were under a

minute, and most of which, according to Jeffrey, were dropped calls. Jeffrey left four voice messages. (App. pp. 109, 112, 157). He also left a message or messages on her work voice mail, spoke with one of her coworkers, and sent flowers to her work address. (App. pp. 66-7).

Having collaborated with Shellie in the past, Jeffrey was attempting to contact her for assistance with research for a paper he was writing for one of his classes. Because the due date for the paper was looming, there was some urgency in Jeffrey's efforts to contact Shellie. (App. pp. 150-51, 153).

Shellie did not answer any of Jeffrey's calls. Shellie's boyfriend, whose name the trial judge would not permit to be disclosed in open court, testified that he spoke with Jeffrey twice on the telephone. He falsely identified himself to Jeffrey as Robert Rose, and falsely told Jeffrey that he was married to Shellie Rose, who was probably not the same person Jeffrey was looking for. When Jeffrey called back ten or fifteen minutes later with more detailed questions, the unidentified boyfriend terminated the phone call. (App. pp. 92-3).

On January 9, 2013, Jeffrey came to Shellie's residence, knocked on the door, and was observed standing outside with flowers. (App. p. 97). Shellie called police, and then proceeded to the magistrate's office. Police responded to Shellie's residence and, upon learning that a warrant had

been issued, arrested Jeffrey*. Jeffrey was polite and cooperative during the arrest and didn't cause any trouble. (App. pp. 87-9).

Shellie testified that she called police because she was scared. When asked why, she replied: "Because I thought this was over. I thought Mr. Stephens had moved on, and I didn't know what else to expect of him . . . I'm scared because I don't know how he's going to react in the future. I don't know if this is going to happen again. I need some sort of documentation that it has happened to protect me in an event that harm should occur." (App. pp. 67-8).

No evidence was presented of any "Act of violence, force, or threat" as defined in Va. Code § 19.2-152.7:1. Shellie's testimony was that Jeffrey had never hit her, never physically abused her in any way, never threatened her, never threatened any member of her family and never physically abused or threatened her boyfriend; and, that she never told Jeffrey to stop contacting her. (App. pp. 76-7). In closing argument, Shellie's attorney conceded that there had been no threats. (App. pp. 168-69).

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* Jeffrey was found not guilty of stalking. A second charge of causing telephone or pager to ring with intent to annoy, was resolved with a peace bond.

Finding that Jeffrey's actions placed Shellie in reasonable apprehension of acts of violence as set forth in Va. Code § 19.2-152.7:1, the trial court entered the protective order, pursuant to Va. Code § 19.2-152.10(A)(ii), from which this appeal ensues.

ARGUMENT

The trial court erred in issuing a Protective Order pursuant to Va. Code § 19.2-152.10, absent evidence of any act of violence, force or threat, as defined in Va. Code § 19.2-152.7:1.

Standard of Review

Whether the court erred in issuing the Protective Order pursuant to Va. Code § 19.2-152.10, absent evidence of any act of violence, force or threat, as defined in Va. Code § 19.2-152.7:1, is a question of law. Questions of law are subject to *de novo* review.

The issuance of a protective order pursuant to Va. Code § 19.2-152.10(A)(ii) requires a finding that the petitioner is or has been, within a reasonable period of time, subjected to an act of violence, force or threat by a preponderance of the evidence. Va. Code § 19.2-152.9(D).

"Act of violence, force, or threat" is defined in Va. Code § 19.2-152.7:1, as meaning: "any act involving violence, force, or threat that results in bodily injury or places one in reasonable apprehension of death,

sexual assault, or bodily injury." Absent such a finding, a protective order may not issue.

That Jeffrey committed no act involving violence, force or threat, is corroborated by Shellie, and by her father, Gary Rose. (App. pp. 42-3, 76). And, the trial court offered to make a specific finding that no actual acts of violence had been visited on the Petitioner or her family. (App. p. 196).

This Court has held that a threat, in the criminal context, is recognized to be a communication avowing an intent to injure another's person or property. *Summerlin v. Commonwealth*, 37 Va. App. 288, 297, 557 S.E.2d 731, 736 (2002). That Jeffrey made no threat is again corroborated by Shellie, by her father, Gary Rose, and is conceded by Shellie's counsel in her closing argument. (App. pp. 42-3, 76, 168).

Shellie's articulated reasons for being scared –

> **"Because I thought this was over. I thought Mr. Stephens had moved on, and I didn't know what else to expect of him . . . I'm scared because I don't know how he's going to react in the future. I don't know if this is going to happen again. I need some sort of documentation that it has happened to protect me in an event that harm should occur." (67-68).**

– simply do not constitute an act of violence, force or threat as defined in § 19.2-152.7:1, for which a protective order may issue.

While Jeffrey's conduct might be characterized as odd or annoying, it is not conduct involving violence, force or threat proscribed by the statute. The General Assembly could have included other conduct in the statute, but did not. It is a fundamental principle of statutory construction that "where a statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute." *Commonwealth v. Brown*, 259 Va. 697, 704-05, 529 S.E.2d 96, 100 (2000). Thus conduct which is arguably annoying, odd, or unusual does not fall within the specific, defined conduct that authorizes issuance of a protective order under this section of the Virginia Code.

The record reflects that the trial court had a different understanding of the law to be applied in this case. The trial court made reference to this case having been brought under the "stalking statute", and referred to this as a stalking case, however did not cite what code section was being referenced. (App. pp. 3, 20). Prior to July 1, 2011, Va. Code § 19.2-152.10 was titled: *Protective order in cases of stalking, sexual battery and acts of violence*, having been amended effective that date, so that the statute applicable in the instant case is simply titled: *Protective order*.

The crime of stalking, set forth in Va. Code § 18.2-60.3, provides in subsection (D) for entry of an order prohibiting contact between the

defendant and the victim or the victim's family or household members *upon finding a person guilty under this section.* (Emphasis supplied). However, the instant case was not before the trial court as a criminal stalking case.

Interrupting Jeffrey's counsel during opening statement, the court opined that "the case law is pretty clear that [the type of behavior described by counsel for petitioner in her opening statement] is sufficient under the case law to have caused fear in the mind of a reasonable person…. this is conduct that would cause fear in a reasonable person. My understanding of the law – I've done stalking cases *ad nauseum* – is that this kind of behavior can cause fear in a reasonable person." (App. pp. 18-20).

Under Va. Code § 19.2-152.7:1, it is not *any* conduct which causes any fear that authorizes the court to issue a protective order. It must be specific, serious, violent and hostile conduct – an act of violence, force or threat – that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury. The only fear that Shellie testified to was fear of some unarticulated subjective potential harm. (App. pp. 67-8). And, were this a criminal stalking case, that statute, too, requires that the perpetrator engage in conduct that he knows or reasonably should know places the other person in reasonable fear of death, criminal sexual assault, or bodily injury. Va. Code § 18.2-60.3.

It is serious, violent and hostile conduct that is proscribed, not conduct that makes one uncomfortable or is annoying. The entry of a protective order against an individual has serious implications. Pursuant to Va. Code § 18.2-308.1:4, a person subject to a protective order may not lawfully purchase or transport any firearm while the order is in effect, and must surrender any concealed handgun permit.

A proceeding for a protective order is not wholly or even primarily civil. Because a protective order, by its very nature, forbids certain conduct, the punishment for violating it most closely resembles criminal contempt. Further reinforcing this inference is that, pursuant to the express terms of the statutory scheme, once a protective order has been issued and served on the party against whom it was entered, any violation of the order subjects the party to both liability for contempt of court and to the explicit penalty of being found guilty of (at least) a Class 1 misdemeanor.

Evidence was offered that entry of the protective order would likely prevent Jeffrey from renewing his student visa and returning to Canada to complete his Ph.D. studies at the University of Vancouver. (App. pp. 154-56).

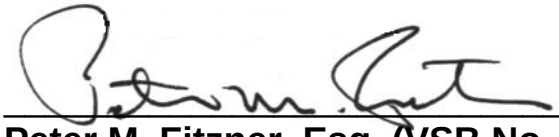
In addition to causing harm to Jeffrey, expanding the scope of the protective order statute beyond acts of violence, force or threat as defined

in the Virginia Code would open the door for anyone feeling aggrieved by another's annoying, bothersome, unpleasant or odd behavior to seek a protective order. Statistical and anecdotal evidence indicates that since the amendment to Va. Code § 19.2-152.10 took effect in 2011, this is already happening. Mark Bowes and Chris I. Young, *Protective order requests explode with new Virginia law*, RICHMOND TIMES DISPATCH, February 19, 2012. For these reasons it is important that the requirements of the protective order statute be carefully applied by the trial court, and that these orders are only entered when the evidence establishes that the petitioner is or has been, within a reasonable period of time, subjected to an act of violence, force or threat.

CONCLUSION

The trial court erroneously applied the law to the facts of this case, and entered a protective order against Jeffrey absent the requisite evidence that the petitioner is or has been, within a reasonable period of time, subjected to an act of violence, force or threat. The April 10, 2013 protective order should be vacated, and the petition filed herein on January 9, 2013, should be dismissed.

Respectfully submitted,



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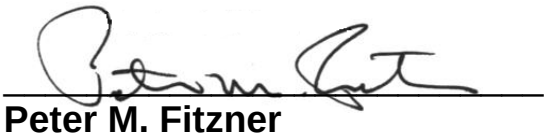
CERTIFICATE

Pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, counsel for Appellant certifies that fifteen (15) copies of the Brief of Appellant and ten (10) copies of the appendix with ten (10) electronic copies on CDs of both were hand-filed with the Clerk of the Supreme Court of Virginia on this 28th day of March, 2014. On this same day, three (3) copies of the brief with one (1) copy of the appendix and one (1) electronic copy of both, on CD, were served, via UPS Ground Transportation, to Mehagen D. McRae, Counsel for Appellee, Roeder, Cochran & Haight, PLLC, 8280 Greensboro Drive, Suite 601, McLean, Virginia.

Counsel does not desire to waive oral argument.



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