REBECCA HRONEK, APPELLEE, V. MICHAEL BROSNAN, APPELLANT.

823 N.W.2d 204

Filed October 16, 2012. No. A-11-897.

1. **Injunction.** A protection order pursuant to Neb. Rev. Stat. § 42-924 (Reissue 2008) is analogous to an injunction.
2. **Judgments: Appeal and Error.** The grant or denial of a protection order is reviewed de novo on the record. In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court.
3. ____: ____. Where the credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Judgments: Pleadings.** The contested factual hearing in protection order proceedings is a show cause hearing, in which the fact issues before the court are whether the facts stated in the sworn application are true.
5. **Judges: Trial.** A judge must be impartial, his or her official conduct must be free from even the appearance of impropriety, and a judge's undue interference in a trial may tend to prevent the proper presentation of the cause of action. A judge must be careful not to appear to act in the dual capacity of judge and advocate.
6. **Judges: Witnesses: Due Process.** Neb. Rev. Stat. § 27-614(1) (Reissue 2008), the statute governing calling and interrogation of witnesses by a judge, gives judges the right to call witnesses, but it also gives the parties the right to cross-examine such witnesses.
7. **Trial: Appeal and Error.** A ruling regarding the extent, scope, and course of the cross-examination rests within the discretion of the trial court and will not be disturbed absent an abuse of discretion.
8. **Trial: Witnesses: Due Process.** A trial court may not enforce a blanket policy denying a party the right to call nonparty witnesses, because such affects the requirements of procedural due process.

Appeal from the District Court for Douglas County: MARCELA A. KEIM and JEFFREY MARCUZZO, County Judges. Reversed and remanded with directions.

John J. Heieck and Matthew Stuart Higgins, of Higgins Law, for appellant.

Vicky L. Amen and Matthew S. McKeever, of Copple, Rockey, McKeever & Schlecht, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

MOORE, Judge.

INTRODUCTION

Rebecca Hronek applied for a domestic abuse protection order against her ex-husband, Michael Brosnan, and an ex parte protection order was issued. A show cause hearing was subsequently held, after which the district court for Douglas County extended the protection order for 1 year. Michael appeals, asserting that the trial court denied him his due process rights to a fair hearing and erred in continuing the ex parte protection order. Because we find that the district court erred in denying Michael's counsel the right to examine Michael and cross-examine Rebecca, we reverse, and remand the cause with directions to set aside the protection order and dismiss the protection order proceedings.

BACKGROUND

On September 19, 2011, Rebecca, acting pro se, applied for a domestic abuse protection order against Michael. The Protection from Domestic Abuse Act, Neb. Rev. Stat. § 42-901 et seq. (Reissue 2008 & Cum. Supp. 2010), allows any victim of domestic abuse to file a petition and affidavit for a protection order pursuant to § 42-924. Abuse is defined under § 42-903(1) as the occurrence of one or more of the following acts between household members:

> (a) Attempting to cause or intentionally and knowingly causing bodily injury with or without a dangerous instrument;
>
> (b) Placing, by physical menace, another person in fear of imminent bodily injury; or
>
> (c) Engaging in sexual contact or sexual penetration without consent as defined in section 28-318.

In the application, Rebecca described three incidents in which Michael allegedly forced her "to p[er]form sexual[l]y to see [their] children" and repeatedly contacted her "asking for sex," which she claimed justified issuance of a protection order. The trial court issued an ex parte protection order that same day. Michael was served with a copy of the order and informed that he had the right to appear and show cause why the order should not remain in effect.

At the show cause hearing, Michael appeared with counsel and Rebecca was present pro se. At the start of the hearing, the trial judge asked each party if he or she was going to testify and each responded affirmatively. The judge then administered the oath to both parties. Michael's counsel asked the court for a 30-day continuance due to a pending criminal investigation, which request was denied. The trial court proceeded to address Rebecca as follows:

> THE COURT: [Rebecca], you filed an affidavit in this matter. I've marked a copy of that affidavit as Exhibit 1. It's a four-page document wherein you allege, on August 17th that [Michael] forced you to perform sexually in order for you to see his children, your children. And you allege that he threatened to withhold the children from you unless you p[er]formed for him sexually. Again, on September 13th, you say he repeatedly contacted you text messaging asking for sex and you refused. And you asked him not to contact you and he still persisted in contacting you. And you ended up having to call the police. And again on September 18th, he again asked you for sexual favors. He referred to you as a bitch. Is that about correct?
>
> [Rebecca]: Yes.
>
> THE COURT: Are you asking that I receive a copy of your affidavit into evidence as Exhibit 1?
>
> [Rebecca]: Yes.

At this point, Michael's counsel objected to the receipt of the affidavit as containing hearsay. The court overruled Michael's objection and received the exhibit into evidence.

The trial judge then asked Rebecca if she had anything else to say. Rebecca responded that she had some police reports and text messages between the parties. The judge asked Rebecca if she wanted to offer the documents as exhibits, and Rebecca said, "Yes." Michael objected to all of these exhibits as containing hearsay and lacking foundation. In overruling the objection, the judge stated, "There is some hearsay in these matters, in these exhibits, but for the purposes of this hearing, those exhibits will be received."

The trial judge next asked Michael whether there was anything he would like to say regarding the affidavit, to which Michael replied that he did not. The judge also asked whether Michael had "anything else," to which Michael replied, "No." The trial judge did not ask Michael or his counsel whether they had any questions of Rebecca.

The trial judge indicated that he was going to affirm the protection order based upon the testimony and exhibits presented. Michael's counsel interjected, asking whether he would have an opportunity to call a witness or enter evidence, to which the judge responded, "Sure." Counsel asked if he could call Michael, and the judge again responded, "Sure . . . ." Michael's counsel then offered four exhibits, more text messages between the parties and a handwritten note from Rebecca, which were received into evidence by the court. The following conversation was then had on the record.

> [Michael's counsel]: A few questions for [Michael] and that will be it, if I may, Judge.
>
> THE COURT: Well, I'll allow you to call someone. Is there anything — I asked him if there was anything he wanted to say.
>
> [Michael's counsel]: Your Honor, perhaps it's a defect in my knowledge of the Court's procedures. I didn't understand that that was my moment to speak up and say I need to question [Michael].
>
> THE COURT: Well, you can allow him to say whatever he would like to say. I'm not going to have you examine or cross-examine any of the witnesses.

Again, Michael did not make any statement. Rather, Michael's counsel requested permission to make an offer of proof as to what examination of Michael would yield, which offer of proof the court allowed. The offer of proof referenced the text messages offered by Michael and essentially indicated that Michael would testify that the sexual relationship between the parties was consensual.

The court then questioned Rebecca about the exhibits offered by Michael. Rebecca confirmed that she authored exhibits 8 and 11, two of the text messages, and was allowed

to make a statement to explain them. Rebecca testified that she and Michael had tried to get back together and that her messages to him "were to try to encourage him to get into more of [a] monogamous relationship instead of having me on the side with a girlfriend." Rebecca stated that when Michael does not like what she has to say, he becomes forceful, and that if she does not have sex with him, she does not get to see her children.

After this testimony, the trial judge asked Michael's counsel whether he had anything else, to which he responded, "No, sir." At that time, the court affirmed the protection order for 1 year. An order was entered to that effect by the court on October 20, 2011. Michael timely appeals.

ASSIGNMENTS OF ERROR

Michael asserts, restated, that he was denied due process of law because (1) he was denied a hearing before an impartial decisionmaker, (2) he was not permitted to confront and cross-examine the adverse witness, and (3) he was denied a meaningful opportunity to be heard. Michael also alleges that the trial court erred (4) in admitting hearsay evidence and (5) in affirming the protection order based upon insufficient evidence.

STANDARD OF REVIEW

[1-3] A protection order pursuant to § 42-924 is analogous to an injunction. See *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010). Accordingly, the grant or denial of a protection order is reviewed de novo on the record. *Id*. In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. However, where the credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999).

ANALYSIS

Michael asserts that he was denied due process of law at the show cause hearing because he was not permitted a reasonable

opportunity to confront and cross-examine witnesses or to present evidence. Michael also asserts that he was denied a hearing before an impartial decisionmaker.

[4] The contested factual hearing in protection order proceedings is a show cause hearing, in which the fact issues before the court are whether the facts stated in the sworn application are true. *Mahmood v. Mahmud, supra*. In *Mahmood v. Mahmud*, the show cause hearing involved whether a harassment protection order should be continued. Because there was no sworn testimony or exhibits offered and accepted at the hearing, but, rather, only an informal discussion, the Supreme Court held that the record did not support issuance of the protection order, and reversed, and remanded with directions to dismiss the protection order. The court noted that while the intrusion on the respondent's liberty interests is limited and "the procedural due process afforded in a harassment protection hearing is likewise limited," nevertheless, some evidence must be presented. *Id*. at 397, 778 N.W.2d at 432.

Michael argues that the foregoing proposition regarding limited due process should not apply in a domestic abuse protection order because the intrusion on the respondent's liberty interests is greater than in a harassment protection order. However, Michael does not provide any authority for this assertion, and we have found none. The relief provided by each type of protection order is similar in many respects. See Neb. Rev. Stat. §§ 28-311.09(1) (Reissue 2008) and 42-924(1). We see no reason why the same rule regarding limited due process should not apply to a hearing concerning a domestic abuse protection order. We now turn to the question on whether due process violations occurred in this case as argued by Michael.

[5] We first address Michael's argument that he was denied a hearing before an impartial decisionmaker by virtue of the trial judge's actions in assisting Rebecca in the presentation of evidence. In *Sherman v. Sherman*, 18 Neb. App. 342, 781 N.W.2d 615 (2010), this court discussed the trial judge's actions in connection with a pro se petitioner. In that case, the petitioner filed a petition and affidavit to obtain a domestic abuse protection order against her ex-husband. At the hearing, the petitioner

appeared pro se and the ex-husband appeared with counsel. Counsel moved to dismiss the ex parte domestic abuse protection order, and in response, the court, sua sponte, requested that the bailiff retrieve a harassment protection order, stating that the petitioner "'want[ed] to amend it to that.'" *Id.* at 344, 781 N.W.2d at 618. After taking judicial notice of the allegations in the petition and affidavit to obtain the domestic abuse protection order and considering letters corroborating the affidavit, but which were not received in evidence, the court entered a harassment protection order. Because the trial court erroneously took judicial notice of disputed facts and did not receive the exhibits into evidence, we found the evidence insufficient to support the harassment protection order and, accordingly, reversed, and remanded with directions to vacate the protection order. We noted also that the judge, in making the determination of which type of protection order to pursue, rather than allowing the petitioner to make that choice herself, crossed the line into advocacy. We stated:

> "'A judge must be impartial, his or her official conduct must be free from even the appearance of impropriety, and a judge's undue interference in a trial may tend to prevent the proper presentation of the cause of action. [Citation omitted.] A judge must be careful not to appear to act in the dual capacity of judge and advocate. . . .'"

Id. at 347, 781 N.W.2d at 620.

In *State v. Fix*, 219 Neb. 674, 365 N.W.2d 471 (1985), the Nebraska Supreme Court recognized that the statutory authority for a trial court to ask questions is contained in Neb. Rev. Stat. § 27-614 (Reissue 2008) and that in certain instances, it may be necessary for the trial judge to interrogate the witness in order to develop the truth. We conclude that the trial judge's actions in the present case did not cross the line into advocacy. While the judge asked Rebecca whether she wanted to offer exhibits into evidence and conducted some questioning of Rebecca, these actions did not unduly interfere with the hearing. The judge gave Michael the same opportunity to offer exhibits and give testimony, albeit without examination by counsel. Michael's argument that he was deprived of an impartial decisionmaker is without merit.

We next turn to the question of whether Michael was denied due process by the trial court's denial of his counsel's right to examine Michael and cross-examine Rebecca. A similar issue was addressed by the Nebraska Supreme Court in *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999). In that case, the petitioner applied for and received an ex parte protection order against her husband. At the show cause hearing, the petitioner appeared with counsel and her husband appeared pro se. The trial court asked the petitioner whether the affidavit and application were correct, to which she responded that they were. The trial court then had the husband sworn and questioned him about the incidents described in the application. Thereafter, the petitioner's attorney asked leave to question the husband, but the request was denied. The trial court then called the petitioner, had her sworn, and questioned her about the incidents described in the application and affidavit. The petitioner's counsel requested an opportunity to ask questions and was again denied. The court then stated that it was extending the protection order for 1 year. The petitioner's attorney again requested leave to ask a few questions, but that request was denied, and the parties were excused.

[6,7] On appeal, although the case was moot because the protection order expired before the appeal was decided, the court in *Elstun v. Elstun, supra*, addressed the husband's claim that he was denied due process of law when he was not permitted a reasonable opportunity to refute or defend against the action, to confront and cross-examine adverse witnesses, and to present evidence, under the public interest exception. The court recognized that § 27-614(1) provides that "'[t]he judge may, on his own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.'" 257 Neb. at 825, 600 N.W.2d at 839. The court noted that although the husband did not request to offer additional evidence or to cross-examine the petitioner, the trial court's repeated denial of the petitioner's counsel's request to examine and cross-examine the parties "certainly chilled any thoughts [the husband] may have had, as pro se, to cross-examine [the petitioner]." *Id.* As such, the court found that the husband's rights to cross-examine the petitioner under

§ 27-614 were violated. The court went on to note, however, that a ruling regarding the extent, scope, and course of the cross-examination rests within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Elstun v. Elstun, supra*.

[8] This court also recognized a trial court's right to take an active role in controlling the procedure in a protection order hearing in *Zuco v. Tucker*, 9 Neb. App. 155, 609 N.W.2d 59 (2000). However, we found that a trial court may not enforce a blanket policy denying a party the right to call nonparty witnesses, because such affects the requirements of procedural due process. Because the respondent did not make the substance of the excluded witnesses' testimony apparent to the trial court through an offer of proof, we found no error and affirmed the extension of the protection order.

In the case at hand, Michael's counsel requested to examine Michael, which request was ultimately denied. In denying this request, the court stated that it was not going to allow counsel to examine or cross-examine any witnesses. Although counsel did not specifically ask to cross-examine Rebecca after her subsequent testimony, the trial court's blanket statement effectively shut the door to this possibility, making any such request futile. We conclude that Michael's due process rights were violated when his counsel was not allowed to examine Michael or cross-examine Rebecca. In reaching this conclusion, we note that the trial court did not ask Michael or his counsel whether they had any questions for the court to ask Rebecca.

Because we conclude that the trial court's procedure at the show cause hearing deprived Michael of his due process rights, we need not address Michael's remaining assignments of error. The protection order will expire on October 20, 2012. See § 42-924. We reverse the district court's entry of the protection order and remand the cause with directions to set aside the protection order and to dismiss the protection order proceedings.

CONCLUSION

We find that the district court denied Michael his right to procedural due process at the show cause hearing on Rebecca's

application for a domestic abuse protection order by denying Michael's counsel the opportunity to examine Michael or cross-examine Rebecca. We reverse the order of the district court which extended the protection order for 1 year, and we remand the cause with directions to set aside the protection order and to dismiss the protection order proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM J. MOSER, JR., APPELLANT.
822 N.W.2d 424

Filed October 16, 2012. No. A-11-951.

1. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. Determinations regarding whether counsel was deficient and whether this deficiency prejudiced the defendant are questions of law that an appellate court reviews independently of the lower court's decision. An appellate court reviews factual findings for clear error.
2. **Postconviction: Pleas: Effectiveness of Counsel.** In a postconviction proceeding brought by a defendant convicted on a plea of guilty or no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
3. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
4. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
5. **Effectiveness of Counsel: Pleas: Proof.** Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial.
6. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were