

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff and Appellee,)	
)	Supreme Court No. 2009020
vs.)	
)	Dist. Ct. No. 09-08-K-1016
Scott Thomas Boyle,)	
)	
Defendant and Appellant.)	
_____)	

APPELLEE’S BRIEF

Appeal from the January 7, 2009, Criminal Judgment and Commitment
East Central Judicial District
the Honorable Steven L. Marquart, Presiding

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[¶3] STATEMENT OF ISSUES

[¶4] Whether the Defendant's assertion that his telephone messages to Carter were constitutionally protected constitutes an impermissible collateral attack on the Restraining Order.

[¶5] Whether there was competent evidence presented during the trial which could have allowed the jury to draw an inference reasonably tending to prove the Defendant was guilty of violating the Restraining Order.

[¶6] STATEMENT OF CASE

[¶7] By a jury verdict, the Defendant was convicted of violating the Disorderly Conduct Restraining Order (“Restraining Order”) issued in Civil Court No. 09-07-C-4409. The conviction was based on phone messages he left for Jennifer Carter, the person protected by the Restraining Order. (Defendant’s Appendix “Def. App.” at 3 and 7.) The Defendant appeals from his conviction, contending that his phone messages to Carter were constitutionally protected and that there was insufficient evidence to support his conviction. The State asserts that the Defendant cannot collaterally attack the Restraining Order through an appeal of his conviction for violating the Restraining Order and that there was sufficient evidence supporting the jury’s verdict. The State requests that this Court affirm the criminal judgment.

¶8] STATEMENT OF FACTS

¶9] On November 15, 2007, Cass County District Court Judge Cynthia Rothe-Seeger issued the Restraining Order in Civil Court No. 09-07-C-4409. (Def. App. at 4.) The Restraining Order provided, in pertinent part, that the Defendant would be in violation of the order if he were to “[c]all, write or have messages delivered to the Petitioner, Jennifer Carter through anyone other than [his] attorney, including via email[.]” (Def. App. at 4.) The Defendant subsequently appealed from Judge Rothe-Seeger’s issuance of the Restraining Order. See Hutchinson v. Boyle, 2008 ND 150, ¶ 1, 753 N.W.2d 881. The Restraining Order was not stayed pending the appeal. (Def. App. at 1-2; Brief of Defendant at ¶ 12.)

¶10] By an Information filed in Criminal Court No. 09-08-K-1016 on March 12, 2008, the Defendant was charged with committing the offense of violation of a disorderly conduct restraining order (Def. App. at 1.) The State alleged that on about February 20, 2008, and February 21, 2008,¹ the Defendant “called and/or left messages” for Jennifer Carter in violation of the Restraining Order. (Def. App. at 3.)

¶11] On July 28, 2008, this Court issued an opinion reversing Judge Rothe-Seeger’s issuance of the Restraining Order and remanding the matter for further findings. See Hutchinson v. Boyle, 2008 ND 150, ¶ 10, 753 N.W.2d 881. This Court directed Judge Rothe-Seeger to address the Defendant’s constitutional claims. Id. at

¹ The Amended Information was filed on January 5, 2009, and it more narrowly limited the alleged offense dates than the original Information.

¶ 10.

[¶12] On January 6, 2009, a jury trial regarding the Defendant's alleged violation of the Restraining Order was held before Judge Marquart. Fargo Police Officer Daniel Hanson testified: that he spoke with the Defendant on about January 15, 2008 (Transcript of Jury Trial "T." at 31, lines "ll." 12-16; T. at 32, ll. 24-25; T. at 33, ll. 1-2); that the Defendant told Officer Hanson, "I don't care what the [Restraining] Order says" (T. at 31, l. 25; T. at 32, ll. 1-2); and that the Defendant felt the Restraining Order imposed on his parental rights (T. at 32, ll. 2-4).

[¶13] Jennifer Carter² also testified at the trial. She indicated: that the Restraining Order had been issued against the Defendant on November 15, 2007 (T. at 18, ll. 18-20; T. at 19, l. 25; T. at 20, l. 1); that the Restraining Order was effective for two years (T. at 20, ll. 2-3); that the Defendant was aware of the Restraining Order because he was present in court when it was issued (T. at 20, ll. 4-12); and that the Defendant left two messages directed at Carter during February of 2008 and Carter retained recordings of the messages (T. at 21, ll. 20-25; T. at 22, ll. 1-15.)

[¶14] The recordings of the messages and transcripts were admitted into evidence. (T. at 22-23.) The transcripts indicated that on February 20, 2008, the Defendant left the following message:

I really appreciate you not worrying about (inaudible) my parental rights. Like you've been doing since you premeditated your little plan, with the disorderly conduct restraining order to alienate me from my

² Jennifer Carter's full legal name is "Jennifer Carter Osmundson." (T. at 17, l. 15.)

daughter. And one of your co-workers told me that you were talking about a custody battle in January of 2004, six months before I got served the paperwork that you planned out real well. You're interfering with my constitutional right. Your attorney and you have engaged in a conspiracy against my rights. You have influenced the court to ah, become a part of your hoax, and impose onto my rights. Not only my rights, but my daughter's rights. That's two people who you are imposing on her constitutional rights of familial association and ah, and you're going to need to stop. And I will see that the court takes care of it. As they misunderstood everything last time I'll make sure that they see and understand it this time. There's no excuse for your intentional games, your alienation, your um, treating people like dirt. Your [sic] not above any one. Your [sic] not better than anyone, so why don't you treat people like you want to be treated? Remember that golden rule: Do unto others as you would have others do unto you? You should read the bible rather than just talk about going to church all the time. Anybody can say they go to church. Anyone can just go to church just to go so if you don't exercise what they teach in church, then all you are is just an actress on the stage. Just like you have done in the courtroom with your little victim deal with the ah, the disorderly conduct restraining order that you have abused our daughter and I with rather than ah, using it as an aid from abuse. You have never been abused, all you do is abuse. I'd appreciate it if you would call me back. I am sure you're not going to do that since you don't care.

(Def. App. at 5.)

[¶15] Further, on February 21, 2008, the Defendant left the following message:

This is a prime example of, of all that was talked about in the courtroom when you don't return calls, you don't, when the line gets disconnected to the connection, it just happened and I have called back twice, I wanted to talk to my daughter. You didn't return the call last night nor would you answer the call for me to speak to her last night and well, tonight I spoke to her for what? Ah, eight seconds and the phone cut off and you don't answer the phone then. That's alienation.

Unless there's some time factor it should be possible to say goodnight to her. I'm telling you that tomorrow I will be at Rainbow Bridge at 4:00 o'clock. Why don't you tell her that. (Inaudible) leave her a message so that you can listen to it because this isn't for you. I don't

care if I ever talk to you again. I have to speak to my daughter. That's who this call is for. And you keep interfering and keeping me from talking with her. Call me back so I can talk to my daughter.

(Def. App. at 5.)

[¶16] After completion of the evidence, Judge Marquart gave instructions to the jury. The instructions included one entitled, “Defendant’s Right to Have Contact with his Child” which provided:

Under the Disorderly Conduct Restraining Order, the Defendant has a right to have contact with their child through Jennifer Carter. If you find that Defendant's contact with Jennifer Carter was for that purpose, the Defendant is not guilty of violating the Disorderly Conduct Restraining Order.

(Def. App. at 6.)

[¶17] The jury returned a verdict of guilty. Judge Marquart subsequently issued a Criminal Judgment. The Defendant appealed.

[¶18] LAW AND ARGUMENT

[¶19] I. **The Defendant’s assertion that his telephone messages to Carter were constitutionally protected constitutes an impermissible collateral attack on the Restraining Order.**

[¶20] The Defendant contends that Judge Marquart erred in concluding the Defendant’s phone messages to Carter were not constitutionally protected. Because the Restraining Order expressly prohibited such contact, the Defendant necessarily attacks the constitutionality of the Restraining Order itself.

[¶21] A court can lawfully impinge on a person’s rights if grounds exist for issuance of a restraining order. See generally Meier v. Said, 2007 ND 18, ¶¶ 24-25,

726 N.W.2d 852 (noting a “disorderly conduct restraining order significantly restricts a person’s liberty” and upholding the order at issue); Svedberg v. Stamness, 525 N.W.2d 678, 682-83 (N.D. 1994) (noting permissible restrictions on First Amendment rights may be imposed and upholding the order at issue).

[¶22] A person subject to a court order cannot lawfully disobey such order based on a belief that the order is erroneous. See State v. Manning, 2006 ND 125, ¶ 9, 716 N.W.2d 466. “An alleged contemnor who feels that an order is erroneous has an adequate remedy to have it reviewed by way of appeal, and absent a stay, is required to comply promptly with the order pending appeal.” Id. (citing Am. Jur. 2d). “[O]rders must be obeyed until reversed, modified, or set aside.” State v. Zahn, 2007 ND 2, ¶ 6, 725 N.W.2d 894 (citing Am. Jur. 2d).

[¶23] Here, the evidence supporting issuance of the Restraining Order was presented in the proceedings, including the proceedings after remand, in Civil Court No. 09-07-C-4409. In this criminal case, such evidence was expressly objected to by the Defendant and, indeed, was irrelevant to the issues at hand. (Transcript of Pretrial Conference at 16-18.) Moreover, the Defendant was permitted a favorable jury instruction which expressly recognized his right to have contact with his child through Carter. (Def. App. at 6.)

[¶24] The Defendant was required to abide by the terms of the Restraining Order pending his appeal. See State v. Manning, 2006 ND 125, ¶ 9, 716 N.W.2d 466; State v. Zahn, 2007 ND 2, ¶ 6, 725 N.W.2d 894. The Defendant could not lawfully

violate the Restraining Order and then attack the issuance of the Restraining Order as a defense to the criminal charge for violating the Restraining Order. “No one may be permitted to deliberately violate any court order which he personally might believe to be invalid.” State v. Heath, 177 N.W.2d 751, 755 (N.D. 1970). “To condone deliberate violation of court orders would imperil our public peace and safety.” Id. The Defendant cannot now in his criminal appeal collaterally attack the issuance of the Restraining Order.

[¶25] II. **There was competent evidence presented during the trial which could have allowed the jury to draw an inference reasonably tending to prove the Defendant was guilty of violating the Restraining Order.**

[¶26] The Defendant argues that there was insufficient to sustain his conviction. “When the sufficiency of evidence to support a criminal conviction is challenged, this Court merely reviews the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction.” State v. Coppage, 2008 ND 134, ¶ 24, 751 N.W.2d 254. This Court has further explained that “[a] conviction rests upon insufficient evidence only when, after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact finder could find the defendant guilty beyond a reasonable doubt.” State v. Bertram, 2006 ND 10, ¶ 5, 708 N.W.2d 913 (citation omitted). The Court does not weigh conflicting evidence or judge the credibility of witnesses. Id.

[¶27] A person commits the crime of violation of a disorderly conduct restraining order if the person knows a disorderly conduct restraining order has been issued and thereafter willfully violates such order. See N.D.C.C. § 12.1-31.2-01(8).

[¶28] In this case, there is ample evidence supporting the jury's guilty verdict. Regarding the Defendant's knowledge, Carter testified that the Defendant was physically present in court when Judge Rothe-Seeger issued the Restraining Order. Officer Hansen testified that, prior to leaving the phone messages at issue, the Defendant criticized the Restraining Order and admitted he did not care what the Restraining Order provided. A jury, accordingly, could have reasonably concluded that the Defendant knew the Restraining Order had been issued.

[¶29] There also was ample evidence that the Defendant willfully violated the Restraining Order. Carter explained that she received two phone messages from the Defendant. The recordings and transcripts of those messages show that the Defendant was communicating with Carter, attacking her for past conduct and for obtaining the Restraining Order. The Defendant alleged: that "one of your co-workers told me that you were talking about a custody battle in January of 2004, six months before I got served that paperwork that you planned out real well[;]" that "[y]our attorney and you have engaged in a conspiracy against my rights[;]" that "[y]ou have influenced the court to ah, become a part of your hoax[;]" and "[j]ust like you have done in the courtroom with your little victim deal with the ah, the disorderly conduct restraining order[.]" (Def. App. at 5.)

[¶30] The transcripts likewise show that the Defendant was lecturing Carter regarding how to live. The Defendant advised Carter to remember the golden rule, to read the Bible, and to practice what is taught in church. Specifically, the Defendant stated:

There's no excuse for your intentional games, your alienation, your um, treating people like dirt. Your [sic] not above any one. Your [sic] not better than anyone, so why don't you treat people like you want to be treated? Remember that golden rule: Do unto others as you would have others do unto you? You should read the bible rather than just talk about going to church all the time. Anybody can say they go to church. Anyone can just go to church just to go so if you don't exercise what they teach in church, then all you are is just an actress on stage.

(Def. App. at 5.)

[¶31] Moreover, Officer Hansen testified that the Defendant admitted he did not care what the Restraining Order provided. Under such circumstances, the jury could have reasonably concluded that the Defendant willfully violated the Restraining Order.

[¶32] **CONCLUSION**

[¶33] The State respectfully requests that this Court affirm the district court's judgment.

Respectfully submitted this 19th day of May, 2009.

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[¶34] **CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was sent by e-mail on 19th day of May, 2009, to Monty Mertz at: momertz@nd.gov.

Reid A. Brady