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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Flavia Brown, Appellee/Petitioner, vs. Nathanael D. Brown, Appellant/Respondent.	)))))))))	Supreme Court Case No. 20190390 District Court No.: 13-2019-DM-00014

APPELLEE'S BRIEF

The Honorable Rhonda R. Ehlis, Judge of the District
Dunn County, Southwest Judicial District

Mark C. Sherer, #06749
Covenant Legal Group, PLLC
235 Sims Street
Dickinson, ND 58601
Telephone: (701) 483-3884
mark@covenantlegalgroup.com
Attorney for Flavia Brown

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STATEMENT OF FACTS

¶1 The Petitioner/Appellee, Flavia C. Brown, filed her Petition for Protective Relief on the 24th day of September, 2019 with the Dunn County Clerk of Court, seeking a domestic violence protective order against her husband, Nathanael D. Brown, on behalf of herself and her minor child, A.L., pursuant to N.D.C.C. §14-07.1. (see Dkt. #1; see also Appellant's Appendix 4)

¶2 On September 25, 2019, the District Court signed the Temporary Domestic Violence Protection Order, and the Order for Hearing Procedure. (see Dkt. #5 and Dkt. #6)

¶3 The Temporary Domestic Violence Protection Order set a hearing date for October 9, 2019 at 2:45 p.m. (see Dkt. #5, pg. 3)

¶4 On September 29, 2019, the Respondent/Appellant, Nathanael D. Brown, was served with the Petition for Protection Order; Order for Hearing Procedure; Temporary Domestic Violence Protection Order by the Dunn County Sheriff. (see Dkt. #8)

¶5 Nathanael's attorney filed a Notice of Appearance, dated October 7, 2019, on the 8th day of October, 2019. (see Dkt. #12)

¶6 Nathanael, through his attorney, filed a Request to Continue on the 8th day of October, 2019. (see Dkt. #13)

¶7 Nathanael filed his Notice of Cross Examination on the 9th day of October, 2019. (see Dkt. #16)

¶8 A hearing was held before the Judge Rhonda Ehlis, District Court Judge, Southwest Judicial District, on the 9th day of October, 2019. Following the Hearing, a Domestic Violence Protective Order, with Addendum, was entered by the Court. (see Dkt. #16, see also Appellee's Appendix, pg. 8)

LAW AND ARGUMENT

¶9 The Respondent/Appellant, Nathanael D. Brown (hereinafter "Nathanael") appeals the District Court's decision to enter a Protective Order against him and in favor of the Petitioner/Appellee, Flavia C. Brown (hereinafter "Flavia"). Specifically, he raises two issues in this appeal: 1. Whether the District Court erred by denying him a "full hearing and the right to be heard" as set forth in N.D.C.C. §14-07.1-02; and 2. Whether the District Court erred by restricting his ability to use or possess firearms as a part of the protective order. The District Court did not err, and the Protective Order issued by it should remain in place and the appeal denied.

I. Nathanael D. Brown was not Denied a Full Hearing as Provided for Under N.C.C.C. §14-07.1-02

¶10 N.D.C.C. §14-07.1-02 establishes the circumstances, criteria and procedure under which a domestic violence protective order can be issued. It states, in pertinent part, as follows:

> (1) An action for a protection order commenced by a verified application alleging the existence of domestic violence may be brought in district court by any family or household member or by any other person if the court determines that the relationship between that person and the alleged abusing person is sufficient to warrant the issuance of a domestic violence protection order….
> (2) Upon receipt of the application, the court shall order a hearing to be held not later than fourteen days from the date of the hearing order, or at a later date if good cause is shown….
> (4) Upon a showing of actual or imminent domestic violence, the court may enter a protection order after due notice and full hearing.
> N.D.C.C. §14-07.1-02(1), (2) and (4)

¶11 Nathanael asserts that he was denied his right to a "full hearing". His claim is misplaced. It is true that Nathanael was not allowed to present testimony at the hearing itself, and he was not permitted to cross examine Flavia at the hearing. However, this was not a result of a denial of his rights by the District Court. Instead, it was due solely because he failed to avail himself of the opportunity present evidence and cross-examine Flavia. He failed to comply with the Order for Hearing Procedure signed by the District Court on September 26, 2019 and which was served upon

him on the 29th day of September, 2019 along with the Petition and Temporary Restraining Order. (see Dkt. #'s 6, and 8). That Order set the deadlines that both he and Flavia had to follow in order to present evidence to the district court and to cross examine opposing witnesses. Nathanael chose to forego drafting and presenting an affidavit to the court prior to the hearing in order to preserve his right to present his side of the story. Nathanael chose to file a Notice of Intent to Cross-Examine after the deadline had expired. The District Court clearly told both parties the procedures they had to follow. Nathanael ignored that Order.

¶12 At the same time as he was notified of the Petition and the issuance of the Temporary Protective Order, Nathanael was served with a copy of the Order for Hearing Procedure. In that Order, both he and Flavia were put on notice of their rights and responsibilities, which include the following:

> The moving party's affidavits [Flavia's] must be served and filed no later than ten days prior to the commencement of the hearing. Respondents affidavits [Nathanael's] must be served and filed no later than three days prior to the commencement of the hearing….A party wishing to exercise his or her right to cross-examine any affiant must notify the party proffering the affidavit testimony at least 24 hours before the start of the hearing or shall be considered to have waived the right to cross examination.
> (see Appellant's Appendix pg. 7)

He had seven (7) days after being served to prepare and submit an Affidavit, and he had nine (9) days to notify the Court of his intention to cross-examine Flavia and her witnesses at the hearing.

¶13 Nathanael points to this Court's decisions in Gullickson vs. Kline, 2004 ND 76, 678 N.W.2d 138 and Wetzel vs. Schlenvogt, 2005 ND 190, 705 N.W.2d 836 as instructive in this case. He argues that both cases support the contention that he was denied a full hearing by the District Court. While each provide some guidance which is applicable to this case, neither is fully controlling in this case. Neither of those cases involve a domestic violence protective order

proceeding. Instead, they address a disorderly conduct protective order proceeding. see Gullickson at ¶1, Pg. 139; Wetzel at ¶1, pg. 838. The procedures and applicable principles are slightly different between those two types of protective order proceedings. Those cases also have very different controlling facts and circumstances from the case before the Court.

¶14 In Gullickson, the North Dakota Supreme Court stated: "This Court has characterized the procedure under the statute as a 'special summary proceeding,' intended to 'quickly and effectively combat volatile situations before any tragic escalation." Gullickson at ¶8, 140 (citing Skadberg vs. Skadberg, 2002 ND 97, ¶13, 644 N.W.2d 873) The decision went on to say: "Clearly these interests create a due process right to a full and fair hearing before issuance of a disorderly conduct restraining order beyond the fourteen-day temporary order." Id. Notwithstanding those statements, the facts as set forth in Gullickson differ substantially from the facts before the Court in this case. As such, the applicability of the case only goes so far here.

¶15 Instead, the more relevant and applicable decision is Sandbeck vs. Rockwell, 524 N.W.2d 846. In it, the North Dakota Supreme Court was reviewing a district court decision to grant a Petition for Domestic Violence Protective Order. Sandbeck at 847. At the outset of the opinion, the Court stated: "We conclude that the protection order was based on sufficient evidence at a 'full hearing' of Sand beck's motion, when Rockwell failed to timely file an opposing affidavit. We affirm." Id.

¶16 In explaining the factual background, this Court noted that a Temporary Domestic Violence Protective Order was granted and a hearing was set within fourteen (14) days as required by statute. "[T]he trial court ordered Rockwell to 'personally appear and show cause' on April 20, 1994, at 10:00 A.M., 'why the relief sought…should not be granted.'" Sandbeck at 848. It should also be noted that the Respondent, Rockwell appeared at the hearing, but did not file an Affidavit in

advance. "'If you wanted evidence presented today, it should have been by affidavit filed before yesterday,' the trial court told Rockwell." Id. He was apparently permitted to cross examine the petitioner. Id.

¶17 In analyzing the case on appeal, the North Dakota Supreme Court analyzed the proceeding. "The scope of a hearing often depends on whether the procedure is an action or a special proceeding. A domestic violence proceeding is described as an 'action' in NDCC 14-07.1-02(1), and we said in Steckler vs. Steckler, 492 N.W.2d 76, 80 (N.D. 1992), it is a civil action for injunctive relief." Sandbeck at 848. After undergoing an extensive analysis of the differences between the two, the North Dakota Supreme Court stated: "'An order to show cause is merely a quick way of bringing a motion on for hearing'…. The order-to-show-cause hearing for a protection order is not a trial; it is simply a motion hearing." The Court went on to say: "For the special proceeding of a protection order, the trial court is thus authorized under the rules to hear the evidence on affidavits or, as here, partly on affidavits and partly by cross-examination of each affiant." Sandbeck at 850.

¶18 Nathanael's argument suggests that the proceedings as outlined by the Court's Order for Hearing Procedure did not provide him the opportunity for a full hearing as required by the statute. However, based upon the analysis in Sandbeck, as set out above, that is clearly not the case. This Court has clearly determined that the submission of evidence through affidavits, with the opportunity for cross-examination, is sufficient to afford the Respondent in a proceeding such as this to the full hearing provided for by the statute.

¶19 To further emphasize the applicability of Sandbeck to this case, the Supreme Court noted: "The rules stress that an opposing affidavit must be filed at least one day before the hearing. 'When a motion is supported by affidavit…opposing affidavits may be served not later than one day

before the hearing unless the court permits them to be served at some other time.' NDRCivP 6(d)." Id. In the instant case, the Court's Order for Hearing Procedure required Nathanael to have filed his Affidavit at least three days prior to the hearing of March 9, 2019. He did not file any affidavit. He had the right to cross-examine Flavia.

¶20 As in Sandbeck, Nathanael failed to file affidavit within the applicable time frame. As such, his right to present evidence was voluntarily waived. He had notice of the applicable deadlines ten (10) days prior to the hearing, and he had a full seven (7) days to prepare and file an Affidavit after receiving service. He chose not to avail himself of the opportunity to present evidence. In denying the assertion that he was denied a full hearing, the Supreme Court stated that "Rockwell had a full opportunity to present his evidence by a timely filed affidavit." Id. at 851.

¶21 Nathanael also asserts that he was denied a full hearing, in part, because he was not allowed to cross-examine Ms. Brown. However, this is a misplaced and misleading assertion. It is true that the Court did not allow cross examination. However, the reason was due entirely to his own failure to timely file a Notice of Intent to Cross-Examine. He had notice of the procedures and the deadlines to take advantage of those procedures. Nathanael failed to file a timely notice of intent to cross-examine. His inability to present evidence or cross-examine Flavia was due to his own failures, not error by the Court.

¶22 The facts in Gullickson which led to the Supreme Court reversing the District Court's decision are different from the facts here. "We recognize that the court may impose reasonable restrictions on the length of the hearing or the number of witnesses allowed. However, when the court employs a procedure which fails to afford a party a meaningful and reasonable opportunity present evidence on the relevant issues, the court has abused its discretion and violated the party's due process rights." Gullickson at ¶17, 142. "Requiring one party to present evidence through

counsel's abbreviated offer of proof, rather than live testimony of witnesses, was meaningless under these circumstances…." Gullickson at ¶17, 142-43. That was a vastly different situation than what occurred here. Namely, Nathanael failed to act to preserve his rights within the applicable deadlines set by the Court.

II. NATHANAEL BROWN FAILED TO OBJECT TO THE INCLUSION OF THE FIREARMS PROHIBITION, WAIVING THE ISSUE FOR APPEAL

¶23 Nathanael also asserts that the Court erred in requiring him to surrender his firearms because there was no evidence presented on the issue to permit the Court to find probable cause as set forth in N.D.C.C. §14-07.1-02(4)(g) However a review of the transcript shows that while a discussion on the issue of surrendering his firearms was held (see Tr. Pg. 10, Lines 22-25, Pg. 11, Lines 1-6, Pg. 18, Lines 1-23) was does not reveal that Nathanael raised any objection to the Order prohibiting him from possessing or using any firearms. Because no objection was raised at the District Court proceeding, the issue was not preserved for this appeal. It was waived. "It is well established that an issue not presented to the trial court will not be considered for the first time on appeal." Peters-Riemers vs. Riemers, 2001 ND 62, ¶23; 624 N.W.2d 83, 90.

CONCLUSION

¶24 Nathanael was afforded the opportunity for a full hearing under the statute. At the same time that he was served with the Petition and the Temporary Protective Order, he was also served with document entitled Order for Hearing Procedure which was signed by the Judge. The record reveals that these documents were served on Nathanael ten (10) days prior to the hearing. He had seven (7) days before the deadline expired to submit evidence in the form proscribed by the Court, Affidavits. He did not act. He also failed to file a timely Notice of Intent to Cross-Examine Flavia at the hearing. The Court clearly set out the procedures that Nathanael was to follow. He chose not to follow those procedures, and because of those choices, limitations were imposed at the time

of the hearing. He was notified of the steps he would need to take advantage of his opportunity to contest the Petition, and warned of the consequences. Now, because he failed to meet the deadlines, he blames the Court instead of himself. No error occurred and the appeal should be denied.

Dated: April 28, 2020.

COVENANT LEGAL GROUP, PLLC

By: /s/ Mark C. Sherer

Mark C. Sherer, #06749
235 Sims Street
Dickinson, ND 58601
Telephone: (701) 483-3884
mark@covenantlegalgroup.com
Attorney for Flavia Brown

CERTIFICATE OF ELECTRONIC SERVICE

¶25 I certify that on the 28th day of April, 2020, I served the Appellee's Brief via electronic mail upon the following:

Thomas F. Murtha, IV
Murtha Law Office
P.O. Box 1111
Dickinson, ND 58602-0111
murthalawoffice@gmail.com

Dated: April 28, 2020.

COVENANT LEGAL GROUP, PLLC

By: /s/ Mark C. Sherer
Mark C. Sherer, #06749
235 Sims Street
Dickinson, ND 58601
Telephone: (701) 483-3884
mark@covenantlegalgroup.com
Attorney for Flavia Brown

CERTIFICATE OF COMPLIANCE

¶26 Pursuant to N.D.R.App.P. 32(e), I certify that the Appellee's Brief does not exceed thirty-eight (38) pages. The foregoing Brief consists of thirteen (13) pages, including the cover page, table of contents, table of authorities, the written brief, the certificate of service and the certificate of compliance.

Dated: April 28, 2020.

/s/ Mark C. Sherer

Mark C. Sherer, #06749
Covenant Legal Group, PLLC
235 Sims Street
Dickinson, ND 58601
Telephone: (701) 483-3884
mark@covenantlegalgroup.com
Attorney for Flavia Brown