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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Flavia Brown,

Appellee/Plaintiff,

v.

Nathanael D. Brown,

Appellant/Respondent.

Supreme Court Case No. 20190390
District Court Case No. 13-2019-DM-00014

APPELLANT'S REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE DUNN COUNTY DISTRICT COURT, THE HONORABLE RHONDA R. EHLIS,

ORAL ARGUMENT REQUESTED

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[¶3] **LAW AND ARGUMENT**

[¶4] **I. Pursuant to N.D.C.C. § 14-07.1-02 the Appellant, Nathanael Brown, did have a right a full hearing that included the right to testify and cross-examine.**

[¶5] In his concurring opinion in Skadberg v. Skadberg, 2002 ND 97, ¶ 20, 644 N.W.2d 873, 877 Justice Sandstrom explained that "Sandbeck v. Rockwell, 524 N.W.2d 846 (N.D.1994), relied on by the majority, remains a blight on our jurisprudence." The Appellee, Flavia Brown (Flavia) relies on that blight on our jurisprudence, Sandbeck, to argue that it was not an error for the District Court to deny Nathanael the right to testify or cross examine witnesses at the domestic violence protection order hearing and then further argues for this court to consider Sandbeck to the exclusion of Gullickson v. Kline, 2004 ND 76, 678 N.W.2d 138 and Wetzel v. Schlenvogt, 2005 ND 190, 705 N.W.2d 836.

[¶6] Regarding a domestic violence protection order N.D.C.C. § 14-07.1-02(1) states that "[a]n action for a protection order commenced by a verified application alleging the existence of domestic violence may be brought in district court . . .." Before a District Court may issue a domestic violence protection order N.D.C.C. § 14-07.1-02(4) requires in relevant part that "[u]pon a showing of actual or imminent domestic violence, the court may enter a protection order after due notice and full hearing."

[¶7] The North Dakota Supreme Court in Sandbeck determined that despite the language of the statute calling the proceeding for a domestic violence protection order an "action" and further requiring a "full hearing" instead of just a "hearing" the proceeding was not an "action" but rather is only a "hearing" and therefore evidence is to be heard according to N.D.R.Civ.P. 43 for a hearing which allows for hearing the matter on affidavits and doing so would be considered a "full hearing." Justice Sandstrom

explained the majority's mistake in his dissent in Sandbeck and Nathanael argues it is now time to correct the blight on our jurisprudence and instead continue to follow the path set by the North Dakota Supreme Court in Gullickson v. Kline, 2004 ND 76, 678 N.W.2d 138 and Wetzel v. Schlenvogt, 2005 ND 190, 705 N.W.2d 836 and apply the same due process requirements to domestic violence protection order proceedings as are applied to disorderly conduct restraining order proceedings.

> [¶8] The United States Supreme Court has recognized cross-examination is "the 'greatest legal engine ever invented for the discovery of truth.' " Lilly v. Virginia, 527 U.S. 116, 124, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (citing California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970)).
>
> This Court has stated: "The right [to cross-examine] is absolute and the denial of the right as to material evidence is prejudicial error requiring a new trial." State v. Bartkowski, 290 N.W.2d 218, 219 (N.D.1980) (citations omitted). The "complete denial of cross-examination" is "constitutional error of the first magnitude." Id. (citing Brookhart v. Janis, 384 U.S. 1, 3, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966)). Not only is this right guaranteed in criminal cases, it is also cognizable in civil cases. See Knoepfle v. Suko, 108 N.W.2d 456 (N.D.1961); see also Millang v. Hahn, 1998 ND 152, ¶¶ 8–9, 582 N.W.2d 665 (concluding denial of cross-examination in a remedial or punitive sanction contempt hearing is an abuse of discretion).

Peters-Riemers v. Riemers, 2001 ND 62, ¶¶ 36-37, 624 N.W.2d 83, 92 (Justice Sandstrom concurring and dissenting). Justice Sandstrom in Peters-Riemers continued to explain how it is a denial of due process to deny cross examination in a domestic violence protection order proceeding noting that "[t]he lack of lucidity in the majority's analysis is striking. A civil litigant is afforded the right to cross-examine. Id.; see also Millang, 1998 ND 152, ¶ 8, 582 N.W.2d 665." Justice Sandstrom in Peters-Riemers also reiterated from his dissent in Sandbeck that "Respondents in a domestic violence action have the right to testify and present relevant evidence." Peters-Riemers, ¶ 47.

[¶9] Note that

> unlike the respondent in Sandbeck v. Rockwell, 524 N.W.2d 846 (N.D.1994), Riemers was permitted to testify even though he had not previously filed an affidavit. The temporary domestic violence protection order served on Riemers stated he could appear at the hearing on March 14, 2000, to "explain why [Peters–Riemers'] request for a permanent domestic violence protection order should not be granted."

Peters-Riemers v. Riemers, 2001 ND 62, 624 N.W.2d 83, 88. Unlike Riemers, Nathanael was not permitted to testify even though he had been served a temporary domestic violence protection order that stated he "may appear and explain why the Petitioner's request for a permanent domestic violence protection order should not be granted." The District Court stated on the record that that "the statute does not require a full hearing. The statue requires you - the ability to request an evidentiary hearing." T 6:4-6. This further shows that the District Court denied Nathanael due process at every opportunity and misinterpreted N.D.C.C. § 14-07.1-02(4) which actually states that a "full hearing" is required before the court can enter a protection order.

[¶10] The same factors that brought the North Dakota Supreme Court to determine that due process requires the right to have testimony and cross examine witnesses in a disorderly conduct restraining order proceeding apply to a domestic violence protection order proceeding. A disorderly conduct restraining order "typically restricts the respondent's right to be in certain places and subjects the respondent to criminal penalties and arrest without a warrant." Gullickson v. Kline, 2004 ND 76, ¶ 8, 678 N.W.2d 138, 140 (citing N.D.C.C. § 12.1–32.1–01(7), (8)). The same is true for a domestic violence protection order only that a subsequent violation is a felony. N.D.C.C. § 14-07.1-06. Copies of both orders are sent to local law enforcement agencies, which are authorized to disseminate the information to all of their officers. N.D.C.C. § 12.1–31.2–01(9);

N.D.C.C. § 14-07.1-02(10). Clearly if these interests create a due process right to a full and fair hearing that includes the right to testify and cross examine witnesses before issuance of a disorderly conduct restraining order beyond the fourteen-day temporary order they must also create a due process right to a full and fair hearing that includes the right to testify and cross examine witnesses before issuance of a domestic violence protection order beyond the fourteen-day temporary order.

[¶11] Flavia argues that Nathanael had no right to testify at the hearing and basically was only allowed to present evidence by affidavit. The District Court stated on the record that Nathanael could proceed by affidavit or an evidentiary hearing and because he did not file a timely affidavit or timely request an evidentiary hearing he got neither. T. 4:15-6:10. The District Court did not explain the deadline to request an evidentiary hearing and simply stated it was the same as the deadline to file an affidavit however none of the hearing notices indicate there is a deadline to request an evidentiary hearing. The District Court heard no testimony and used the petition to prove the allegation, did not allow Nathanael to testify, cross examine, or even make a closing argument. This was an abuse of discretion, "[a] district court abuses its discretion when it acts arbitrarily, capriciously, or unreasonably." Wetzel v. Schlenvogt, 2005 ND 190, ¶ 22, 705 N.W.2d 836, 843.

[¶12] As previously argued the hearing procedures that provide due process for a disorderly conduct restraining order proceeding should also apply to a domestic violence protection order proceeding.

> Before a restraining order may be granted, the petitioner's case must be proven before the court in a full hearing. N.D.C.C. § 12.1–31.2–01(4). This Court has stated that the "full hearing" that must accompany a disorderly conduct restraining order is a " 'special summary proceeding,'

> intended to 'quickly and effectively combat volatile situations before any tragic escalation.' " Gullickson, 2004 ND 76, ¶ 8, 678 N.W.2d 138 (quoting Skadberg, 2002 ND 97, ¶ 13, 644 N.W.2d 873). This Court also noted, because of the restraint and stigma that a restraining order places on the respondent, due process requirements must be met. Id. The petitioner must prove his petition through testimony, rather than by affidavits alone, with an opportunity for cross-examination. Cusey v. Nagel, 2005 ND 84, ¶ 15, 695 N.W.2d 697. Furthermore, petitions and affidavits themselves are inadmissible hearsay under N.D.R.Ev. 801(c). Id.

Wetzel v. Schlenvogt, 2005 ND 190, ¶ 23, 705 N.W.2d 836, 843–4. Because the District Court allowed the petitioner, Flavia, to prove her petition by the petition alone and did not allow Nathanael to cross examine Flavia or testify the District Court abused its discretion and denied Nathanael due process. The procedure used by the District Court was not a full hearing, Nathanael was not provided an opportunity to even object to the Court using the petition to prove the allegation and the District Court used inadmissible hearsay (because Falvia did not testify, N.D.R.E. 801(c)) and did not provide Nathanael an opportunity to object or make a closing argument. Id.

> [¶13] We have held that a trial court conducts a "full hearing" on a disorderly conduct restraining order petition by accepting affidavits and allowing cross-examination, at least when the parties raise no objection to the form of the hearing. Skadberg, 2002 ND 97, ¶ 14, 644 N.W.2d 873. Cusey did not object to the form of the hearing. Nevertheless, we believe the better practice is to allow the petitioner to present evidence through his own or other persons' testimony, rather than through the affidavit accompanying the petition. The "primary purpose of an evidentiary hearing is to allow the parties to present evidence through testimony and allow the factfinder to hear and view the witnesses, assess their credibility, and thereby resolve factual disputes." Gullickson, 2004 ND 76, ¶ 17, 678 N.W.2d 138. This purpose is undermined when one of the parties to the proceeding is limited to presenting evidence in his case in chief only by affidavit. Also the affidavits often contain hearsay, which must be disregarded. While a petitioner cannot through testimony raise new allegations without notice to the respondent, id. at ¶ 12, the allegations in the petition should be established through sworn testimony of the petitioner and other witnesses at the time of the hearing, and the respondent and other witnesses should have an opportunity to respond to the petitioner's allegations with admissible evidence. The petition and affidavit itself is hearsay, since it is

> an out-of-court statement made to prove the truth of the allegations, and is not admissible in evidence under N.D.R.Ev. 801(c). No written response of the respondent is provided for in N.D.C.C. § 12.1–31.2–01(5), and a hearing on the petition should, at a minimum, require the petitioner to prove the allegations by admissible evidence at the hearing, and provide an opportunity for the respondent to appear and contest the issuance of a restraining order by offering admissible evidence in opposition to the petitioner's claims. Although the disorderly conduct restraining order statute "seek[s] to quickly and effectively combat volatile situations before any tragic escalation," Skadberg, at ¶ 13, the concern for expeditious proceedings should not override the need to fairly resolve factual disputes.

Cusey v. Nagel, 2005 ND 84, ¶ 15, 695 N.W.2d 697, 702–03. There is no requirement for a written response from the respondent in a proceeding pursuant to N.D.C.C. § 14-07.1-02 therefore the District Court should have allowed Nathanael some due process but instead used a procedure that resulted in making a decision based on inadmissible hearsay. The order of the District Court must therefore be reversed.

[¶14] **II. Nathanael did not waive an appeal issue by not making an objection to the District Court's Order at the hearing.**

[¶15] Consistent with her argument to deny Nathanael due process Flavia argues that Nathanael never objected to the Order prohibiting him from possessing firearms and therefore waived the issue on appeal. Appellee's Brief ¶23. Flavia's argument is frivolous and has no foundation in law or fact because once the District Court made her order there is no requirement that an objection be made to the conditions imposed by the order or the litigant waives the issue on appeal; that is the purpose of an appeal. Further, Flavia's argument has no credibility because she fabricated a requirement that Nathanael had to object to the District Court's Order or he waived the appeal issue that there was no probable cause to issue the order by conflating her fabrication with her citation to Peters-Riemers v. Riemers, 2001 ND 62, ¶23. As a factual matter the proceeding was supposed

to be an opportunity for the parties to have the Court decide a disputed matter and Flavia never contended in her petition that Nathanael should be prohibited from possessing firearms so her factual argument to the contrary is specious as best.

[¶16] Nathanael had argued that pursuant to N.D.C.C. § 14-07.1-02(4)(g) before the District Court can require a respondent in a Domestic Violence Protection Order to surrender for safekeeping any firearm the District Court must first find probable cause to believe that the respondent is likely to use, display, or threaten to use the firearm or other dangerous weapon in any further acts of violence. Flavia did not respond to the merits of Nathanael's argument therefore it can be assumed Flavia agrees with Nathanel and the District Court's order should be reversed because there was no evidence presented at the hearing to support a finding that there was probable cause to believe that Nathanael is likely to use, display, or threaten to use a firearm or dangerous weapon in any further acts of violence.

[¶17] **CONCLUSION**

[¶18] As Nathanel has explained the District Court misinterpreted the domestic violence statute and that interpretation is a question of law, fully reviewable on appeal. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence supports it, or if, on the entire record, the reviewing court is left with a definite and firm conviction a mistake has been made. Based on the forgoing arguments and law Nathanael respectfully requests that the District Court's Order for a Domestic Violence Protection Order be reversed.

Dated: May 12, 2020

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CERTIFICATE OF COMPLIANCE

[¶19] The undersigned certifies that pursuant to N.D.R.App.P. 32(a)(8)(A), that the Brief of Appellant contains 12 pages.

[¶20] This brief has been prepared in a proportionally spaced typeface (Times New Roman 12 point font) using the software program Microsoft Office Word.

Dated: May 12, 2020

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Cordell James Zeien,

Appellant/Petitioner,

v.

Thomas Sorel, Director of the North Dakota Department of Transportation,

Appellee/Respondent.

Supreme Court Case No. 20190264
District Court Case No. 53-2019-CV-00168

CERTIFICATE OF SERVICE

[¶21] Thomas F. Murtha IV is an attorney licensed in good standing in the State of North Dakota, Attorney ID 06984, and states that on May 12, 2020 he electronically served the following on the Clerk of the North Dakota Supreme Court through the North Dakota Supreme Court's E-filing Portal, and the Appellee's attorney Mark Sherer to the email address mark@covenantlegalgroup.com:

APPELLANT'S REPLY BRIEF

Dated: May 12, 2020

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