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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JUSTIN CHARLES NEUMANN, Defendant and Appellant.	B268826 (Los Angeles County Super. Ct. No. VA109267)

APPEAL from an order of the Superior Court of Los Angeles County, Yvonne Sanchez, Judge. Reversed.

John Alan Cohan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Justin Charles Neumann appeals from the issuance of a post-conviction criminal protective order (issued when his probation was revoked), directing that he stay away from the victim of his underlying offense for 10 years. For the reasons discussed below, the protective order is reversed.

FACTUAL BACKGROUND[1]

On January 30, 2009, 13-year-old Alexis Y. was asleep in a bedroom at her grandmother's house. Neumann was visiting the house to see Alexis's aunt. After entering the bedroom in which Alexis was sleeping, Neumann rubbed her chest and vagina over her pajamas. This entire "touching" incident lasted no more than 30 seconds. Alexis woke up and said, " 'What the fuck are you doing?' " Neumann immediately stopped, "backed off and then he said, 'Oh, I have the wrong room.' " Alexis told Neumann to get out of her room and an argument ensued:

"A. I was like, 'Get out.' [¶] He said, 'No, you can't tell me what to do. Go back to sleep.' [¶] I said, 'No,' and I said, 'You can't tell me what to do.' Just back and forth like that, but mostly just 'Get out.'

"Q. Did he ever say anything to you about not telling anyone what happened?

"A. He said if you tell anybody, I'm going to do something to you and your aunt.

"Q. What did you interpret that as? What did you think he was talking about?

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1 The following facts are taken from testimony at Neumann's April 8, 2009 preliminary hearing because he ultimately waived his right to a trial and pled no contest.

"A. Like harm, like something like coming after us or coming to get us or something like that."

Detective Steve French testified he interviewed Neumann, who said "that he had tried to cuddle up next to the person that was in the bed" because "he thought it was Denise, his girlfriend." Neumann acknowledged touching Alexis's chest, but denied touching her vagina: "He told me that once his hands were on Alexis' breasts, . . . once he realized it was the chest of a 13-year-old and not [an] older woman, he took his hands off of her."

PROCEDURAL HISTORY

Initially charged with the felony of attempting to dissuade the witness or victim of a crime (Pen. Code, § 136.1, subd. (b)(1))[2] and two counts of child molestation (§ 288, subd. (a)), Neumann ultimately pled no contest on June 15, 2009, to the felony dissuading charge and to one count of misdemeanor lewd conduct (§ 647, subd. (a)). Imposition of sentence was suspended and Neumann was placed on five years probation with the condition that he serve 365 days in county jail. As another probation condition, he was required to accept a "stay away" protective order with respect to Alexis. The trial court ordered Neumann to "stay away, have no contact with the victim in this case, the victim's place of residence."[3]

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[2] All further statutory references are to the Penal Code unless otherwise specified.

[3] Neumann's waiver and plea form, which indicated that he was being granted probation, stated: "Other Terms: 5 years probation. Stay away order."

Neumann's probation was revoked on November 16, 2015, because he had been convicted in December 2010 of a felony. (Neumann had been serving time in prison for this new conviction from 2010 until 2015.) After revoking his probation, the trial court sentenced Neumann to state prison for 16 months on the dissuading a witness conviction. In addition, the trial court terminated the June 15, 2009 protective order and, over defense objection, issued a new protective order directing Neumann to stay away from Alexis for the next 10 years.

Neumann filed a timely notice of appeal, challenging the issuance of the new protective order.

CONTENTION

The 2015 protective order had purportedly been issued pursuant to three different statutes: sections 136.2, subdivision (a), 136.2, subdivision (i)(1), and 1203.097. Neumann contends this new protective order was not actually authorized by any of the specified statutes, and that he was denied due process because he was not given fair notice and time to prepare for the court's ruling.

DISCUSSION

The protective order must be reversed because it was issued without authority.

Neumann argues the 2015 protective order must be reversed because it was issued without proper authority. We agree.

1. *The protective order was not authorized by any of the cited statutes.*

The new protective order was issued on Judicial Council of California form CR-160 (revised July 1, 2014). This form, entitled "Criminal Protective Order – Domestic Violence,"

contains multiple boxes that can be checked to indicate the statutory bases for the order. Neumann's form had boxes checked indicating the order had been issued under sections 136.2, 1203.097, and 136.2, subdivision (i)(1). As the Attorney General properly acknowledges, the order was not authorized by either section 136.2, subdivision (a),[4] section 136.2, subdivision (i)(1),[5] or section 1203.097.[6]

While agreeing with Neumann that the 2015 protective order was not authorized by any of the cited statutes, the Attorney General nevertheless asserts the order was proper

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[4] Both parties assume that the protective order was referring to section 136.2, subdivision (a), which provides: "(1) Upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, a court with jurisdiction over a criminal matter may issue orders, including, but not limited to, [stay-away orders]." However, as the Attorney General properly acknowledges, this provision is operative only as a prejudgment order during the pendency of the criminal proceeding (*People v. Therman* (2015) 236 Cal.App.4th 1276, 1278), and "[h]ere, the November 16, 2015, protective order was issued in a post-conviction proceeding."

[5] Section 136.2, subdivision (i)(1), is applicable only to the crimes of domestic violence or rape, or any crime where the defendant is required to register as a sex offender. Neumann was not convicted of any such crime.

[6] A probation condition order pursuant to section 1203.097 is applicable only if the defendant has been convicted of a domestic violence offense and placed on probation. (*People v. Selga* (2008) 162 Cal.App.4th 113, 119.) Neumann was not convicted of a domestic violence crime and he was sentenced to prison, not placed on probation.

because it could have been authorized either by section 1201.3, or by the trial court's inherent authority. We are not persuaded.

2. *The protective order was not authorized under section 1201.3, subdivision (a).*

Section 1201.3, subdivision (a),[7] authorizes a protective order for a period of up to 10 years when the defendant has been convicted of a sexual offense involving a minor victim. (*People v. Robertson* (2012) 208 Cal.App.4th 965, 996.) This statute appears to be generally applicable to Neumann because he was convicted of a sexual offense (misdemeanor lewd conduct) against a victim who was 13-years-old at the time of the offense.

However, in order for a court to issue such a protective order, subdivision (c) of section 1201.3 requires: "Notice of the intent to request an order pursuant to this section shall be given to counsel for the defendant . . . by the prosecutor or the court *at the time of conviction* . . . and counsel shall have adequate time in which to respond to the request before the order is made." (Italics added.) The Attorney General acknowledges this subdivision was violated (because Neumann was given notification when his probation was revoked, not when he was originally convicted), but tries to sidestep the problem by suggesting the violation can be remedied simply by giving Neumann more time to respond. The Attorney General argues: "Respondent notes that section 1201.3, subdivision (c) provides

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[7] Section 1201.3, subdivision (a) states in pertinent part: "Upon the conviction of a defendant for a sexual offense involving a minor victim . . . the court is authorized to issue orders that would prohibit the defendant . . . , for a period up to 10 years, from harassing, intimidating, or threatening the victim or the victim's family members or spouse."

that notice of a request for a protective order authorized by that statute shall be given to a defendant's counsel 'at the time of the conviction' and that counsel 'shall have adequate time in which to respond to the request before the order is made.' Here, notice of the request for the protective order was given at the time appellant admitted the probation violation [i.e., six years *after* his conviction]. Should this Court find that counsel did not have adequate time to respond to the request for the protective order, Respondent submits the matter should be remanded to allow the parties to provide arguments regarding the protective order."

But this argument ignores the fact that subdivision (c) contains two requirements: notice be given "at the time of conviction"[8] *and* defense counsel "shall have adequate time in which to respond to the request before the order is made." (§ 1201.3, subd. (c).) " 'If there is no ambiguity in the language of the statute, "then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs." ' [Citation.] Therefore, if a statute is unambiguous, it must be applied according to its terms. Judicial construction is neither necessary nor permitted." (*Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 492–493.) In light of such unambiguous language, we conclude the protective order issued by the trial court in 2015 was invalid because Neumann was convicted in 2009.

Moreover, a protective order authorized by section 1201.3, subdivision (a), only entitles a trial court "to issue orders that

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[8] Probation revocation is not the same thing as a conviction. (See, e.g., *People v. McGavock* (1999) 69 Cal.App.4th 332, 339 [result of a probation revocation hearing is not a "conviction"].)

would prohibit the defendant . . . from harassing, intimidating, or threatening the victim or the victim's family members or spouse." (§ 1201.3, subd. (a).) Here, the trial court ordered Neumann to "have no personal, electronic, telephonic, or written contact with" Alexis, to "have no contact with [her] through a third party, except an attorney of record," and "not [to] come within 100 yards of [her]."

Hence, the 2015 protective order fell outside the proper scope of section 1201.3.

3. *The protective order was not authorized by the trial court's inherent authority.*

The Attorney General asserts that, under the authority of *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, and the California Constitution, it was proper for the trial court to issue the 2015 protective order using its "inherent authority." The Attorney General argues: "Based on *Townsel* and the California Constitution, which provides victims have the right '[t]o be reasonably protected from the defendant and persons acting on behalf of the defendant' (Cal. Const. § 28, subd. (b)(2)), a trial court has the inherent power, on a good cause showing, to order a defendant sentenced to state prison not to contact a victim or a victim's immediate family. Here, the trial court's protective order was proper as an exercise of its inherent authority." We do not agree.

As explained by *People v. Ponce* (2009) 173 Cal.App.4th 378:

"The Attorney General argues that . . . trial courts, independent of statute, have inherent authority to issue appropriate protective orders to protect trial participants. (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1091 . . . .)

Even had the court relied on 'inherent judicial authority' to issue its order, the result would not change. An existing body of statutory law regulates restraining orders. " '[I]nherent powers should never be exercised in such a manner as to nullify existing legislation. . . .' " (*People v. Municipal Court (Runyan)* (1978) 20 Cal.3d 523, 528 . . . italics omitted.) Where the Legislature authorizes a specific variety of available procedures, the courts should use them and should normally refrain from exercising their inherent powers to invent alternatives. [Citation.]

"Moreover, even where a court has inherent authority over an area where the Legislature has not acted, this does not authorize its issuing orders against defendants by fiat or without any valid showing to justify the need for the order. [Citation.] The Attorney General relies on *Townsel* where our Supreme Court held that a trial court in a criminal case had inherent authority to order the defendant's appellate counsel not to contact trial jurors without first obtaining its approval. But there the court held that the trial court's exercise of discretion to limit contact with jurors was supported by 'circumstances' that raised 'serious concerns about juror safety.' [Citation.] The court noted that the defendant had been convicted of murdering one victim 'because she was a witness to a previous crime . . . .' [Citation.] It said defendant 'was also convicted of attempting to prevent or dissuade a witness.' [Citation.] Consequently the trial court's order was justified because of the defendant's history of interfering with the judicial process by killing or threatening witnesses. [¶] . . . [¶] Here there was no evidence that *after being charged* Ponce had threatened, or had tried to dissuade any witness, or had tried to unlawfully interfere with the criminal proceedings. The prosecutor did not make an offer of proof or any

argument to justify the need for a protective order. He simply said, '[W]e'd also like to have a stay-away order in this case. . . ' But a prosecutor's wish to have such an order, without more, is not an adequate showing sufficient to justify the trial court's action. [Citation.]" (*Id*. at pp. 383–385, italics added; accord *People v. Robertson* (2012) 208 Cal.App.4th 965, 996, italics added ["Here, the prosecutor did not make an offer of proof or argument justifying the need for a no-contact order. The trial was finished and appellant was sentenced to prison. *There was no evidence that after being charged appellant had threatened a witness or had tried to unlawfully interfere with the criminal proceedings*. '[A] prosecutor's wish to have such an order, without more, is not an adequate showing sufficient to justify the trial court's action.' [Citation.] Accordingly, we agree with the parties that the no-contact order is unauthorized and must be stricken. [Citations.]"].)

Similarly, in the case at bar, the prosecutor merely asked the trial court to issue a new protective order without saying why it was necessary. Hence, even assuming arguendo the trial court had some Constitution-based inherent authority to issue the 2015 protective order, there was no "good cause showing" here (which the Attorney General concedes would be a requisite element of such an inherent authority) and, therefore, the order was invalid.

DISPOSITION

The November 16, 2015 protective order is reversed.

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EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.