Filed 11/26/18 Emerson v. Powers CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DENISE EMERSON, Plaintiff and Respondent, v. WILLIAM H. POWERS III, Defendant and Appellant.	2d Civ. No. B284650 (Super. Ct. No. 15CVP-0299) (San Luis Obispo County)

This is the third appeal in this ongoing litigation.[1] In the first appeal, William H. Powers III challenged the trial court's order denying his motion to strike Denise Emerson's petition for a civil harassment restraining order under the anti-SLAPP (strategic lawsuit against public participation) statute. We affirmed.

[1] See *Powers v. Emerson* (Dec. 20, 2017, B280286) [nonpub. opn.]; *Emerson v. Powers* (Dec. 20, 2016, B269529) [nonpub. opn.].

In this appeal, Powers contests the trial court's issuance of a civil harassment restraining order prohibiting him from annoying and harassing Emerson and her husband Philip. As with Powers's second meritless appeal, the respondent has chosen not to file a brief.

Powers contends there is insufficient evidence to support the restraining order. The record, however, includes neither a reporter's transcript of the evidentiary hearing nor a settled statement. These omissions are fatal to Powers's claims. We affirm.

FACTS AND PROCEDURAL BACKGROUND

In 2015, Emerson filed a request for a temporary restraining order (TRO) against Powers, along with a petition for a civil harassment restraining order. Emerson alleged, among other things, that Powers has been "harassing, intimidating, stalking, and annoying [Emerson and her husband] for approximately seven months. The harassment includes yelling profanities at [Emerson and her husband] whenever they walk out of their home, stalking and watching [them] on their property with surveillance equipment aimed in their private yard, making obscene gestures when [they] walk outside their home or drive by [Powers's] home, making false statements to [Emerson's] employer in an attempt to get her fired, purposefully annoying [Emerson and her husband] by playing music extremely loud (even when not home), filming [them] whenever they leave their home, and persistently driving by their home, on the dirt road located directly in front of their house, and 'burning out' in order to kick up dust while playing music at extremely high levels."

The trial court issued a TRO against Powers. After we upheld the trial court's denial of Powers's anti-SLAPP motion to strike Emerson's civil harassment petition under Code of Civil

Procedure section 425.16[2] (*Emerson v. Powers*, *supra*, B269529), the court held a one-day evidentiary hearing on the petition. Finding nine corroborated instances of harassment, the court determined by clear and convincing evidence that Powers had harassed Emerson as defined by section 527.6, subdivision (b). It issued an order restraining Powers from harassing, molesting and annoying Emerson and her husband, and also imposed a "no contact provision."

Most of the corroborated instances of harassment involved the blasting of loud and annoying music from Powers's property. In addition, Powers posted a Craigslist ad claiming that Emerson was trying to film him having sex with his girlfriend. Powers also made an uncorroborated report to the Sheriff's Department that Emerson had tried to run him off the road and then falsely accused Emerson of brandishing a handgun at him while she was driving by in her car.

The trial court observed that "[*i*]*f* everything that each party says about the other actually has happened, it is a terrible and upsetting situation for all parties concerned. *If* everything that each party says about the other actually has happened, there is and can be no end. Nevertheless, law enforcement and the Court are committed to keeping the peace. The parties must understand this. Actions can have negative consequences or rewards. Mr. Powers is already experiencing the negative consequences. The reward of a peaceful life could happen if each party would stay out of the other's business."

---

[2] All further statutory references are to the Code of Civil Procedure.

DISCUSSION

Standard of Review

Section 527.6 authorizes a person who has suffered harassment to obtain a TRO and injunction against the harassing conduct. (*Id.*, subd. (a)(1).) Harassment is defined as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be that which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner." (*Id.*, subd. (b)(3); *Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762.) The elements of harassment must be proven by clear and convincing evidence. (§ 527.6, subd. (i); *Schild*, at p. 762.)

We review a trial court's decision to grant a restraining order for substantial evidence. (*Harris v. Stampolis* (2016) 248 Cal.App.4th 484, 497.) We are required "'to resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge in all legitimate and reasonable inferences to uphold the finding of the trial court if it is supported by substantial evidence which is reasonable, credible and of solid value.' [Citation.]" (*Id.* at p. 499.) "'But whether the facts, when construed most favorably in [Emerson's] favor, are legally sufficient to constitute civil harassment under section 527.6, and whether the restraining order passes constitutional muster, are questions of law subject to de novo review.' [Citation.]" (*Id.* at p. 497.)

Powers Has Failed to Provide an Adequate Record on Appeal

Powers, who is appearing in pro per, contends there was no clear and convincing evidence that he harassed Emerson within

the meaning of section 527.6. Specifically, he argues the evidence adduced at the hearing on Emerson's petition fails to show (1) that his conduct was directed at Emerson, (2) that his conduct caused Emerson to suffer substantial emotional distress, (3) that a reasonable person would feel harassed by the conduct, (4) that the conduct served no legitimate purpose and (5) that the conduct consisted of activity that was not constitutionally protected. In the absence of a reporter's transcript or settled statement, we must reject these claims.

Powers acknowledges "[t]here is no Reporter's Transcript since no recordings of any kind were made of trial court hearings." Noting that he "had shorthand-proficient court-watchers present" at the evidentiary hearing, Powers proposes to augment the record "with the transcript prepared from those notes." Because he provides no authority that would allow us to consider an unofficial transcript prepared by a party, we deny the request. (See *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 906, fn. 2 [denying motion to augment the record with a transcript prepared by a person who was not certified as a court reporter and who was working from a videotape of the hearing made by a defendant].)

Although the trial court granted Powers's motion for permission to prepare a settled statement of the evidentiary hearing, Powers did not file and serve a proposed settled statement as directed by the court. Thus, there is no reporter's transcript or settled statement for us to review.

"[I]t is settled that: 'A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the

constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, italics omitted.) When reviewing a trial court ruling we do not reweigh the evidence, make our own factual inferences that contradict those of the trial court, or second guess the trial court's credibility determinations. (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.)

As a result, "[w]here no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters.* To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence." (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992 (*Fain*); *Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 154.)

Here, the trial court found, by clear and convincing evidence, that Powers harassed Emerson as defined by section 527.6, subdivision (b). As Powers concedes, "[t]he appropriate test on appeal is whether the findings (express and implied) that support the trial court's entry of the restraining order are justified by substantial evidence in the record." (*R.D. v. P.M.* (2011) 202 Cal.App.4th 181, 188.) Powers, as the appellant, bears the burden of presenting an adequate record that would allow us to review those findings. He has failed to do so. We presume the unreported hearing testimony would demonstrate the absence of error and would provide substantial evidence for the issuance of the restraining order. (*Fain*, *supra*, 75 Cal.App.4th at p. 992; *Wagner v. Wagner* (2008) 162 Cal.App.4th

249, 259.) Since we do not know the content of the testimony presented at the hearing, we cannot conclude that the order lacks substantial evidence.

Section 527.6 Passes Constitutional Muster

In what he describes as a case of first impression, Powers argues that section 527.6 is unconstitutional and must be invalidated. We have considered each of his arguments on this point and find them unpersuasive.

The Legislature enacted section 527.6 to protect an individual's state constitutional right to pursue safety, happiness, and privacy. (*Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1113.) Without citation to any relevant authority, Powers contends that the statute is facially unconstitutional, impinging on several constitutional rights, such as the right to privacy, the right to bear arms, the right to due process and the right to freedom of speech. Since section 527.6 expressly provides that "[c]onstitutionally protected activity is not included within the meaning of 'course of conduct,'" it is not facially unconstitutional. Neither is it as applied in this case. Injunctions based upon past unlawful conduct do not violate the constitution, not only because the past conduct was unlawful, but also because the restrictions do not involve censorship of speech but merely limit the time, place and manner of speech. (*Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1995) 10 Cal.4th 1009, 1019.)

Moreover, "although the procedures set forth in the harassment statute are expedited, they contain certain important due process safeguards. Most notably, a person charged with harassment is given a full opportunity to present his or her case, with the judge *required* to receive relevant testimony and to find the existence of harassment by 'clear and convincing' proof of a 'course of conduct' that actually and reasonably caused

substantial emotional distress, had 'no legitimate purpose,' and was not a 'constitutionally protected activity.'" (*Schraer v. Berkeley Property Owners' Assn.* (1989) 207 Cal.App.3d 719, 730-731.) These statutory safeguards were satisfied in this case. Powers was given notice of the hearing on the petition and appeared. He presented evidence, testified, and confronted and cross-examined witnesses. The court then issued its ruling. Powers's assertion that there was a lack of due process is unfounded.

DISPOSITION

The restraining order is affirmed. In the absence of an appearance by respondent, no costs are awarded on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Donald G. Umhofer, Judge
Superior Court County of San Luis Obispo

William H. Powers III, in pro. per, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.