NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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August 26, 2021

Rebecca Wade
500 Montgomery Street, Suite 575
Alexandria, VA 22314

James A. DeVito
2111 Wilson Blvd., Suite 700
Arlington, VA 22201

Re: *Ashley Ewer* v. *Jayson Ewer*, JA 2021-12

Dear Ms. Wade and Mr. DeVito:

This matter is before the court on Petitioner's motion of July 19, 2021 to reconsider the court's denial of a protective order against Respondent; Respondent filed an opposition on July 26, 2021.

BACKGROUND

On June 29, 2021, on an appeal from the Juvenile & Domestic Relations District Court, this court denied Petitioner's petition for protective order because Petitioner had not proven, by a preponderance of the evidence, that, on more than one occasion, she was placed "in reasonable fear of death, criminal sexual assault, or bodily injury" (Code § 18.2-60.3(A)) by Respondent's conduct.

The petition was brought pursuant to Code § 16.1-279.1(A):

> In cases of family abuse, . . . the court may issue a protective order to protect the health and safety of the petitioner and family or household members of the petitioner.

For purposes of Code § 16.1-279.1(A), "family abuse" is defined by Code § 16.1-228 as:

OPINION LETTER

> [A]ny act involving violence, force, or threat that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury and that is committed by a person against such person's family or household member. **Such act includes**, but is not limited to, . . . **stalking**, . . . (emphasis added).

Petitioner asserted that Respondent had engaged in "stalking," which is a crime defined by Code § 18.2-60.3(A):

> Any person . . . who on more than one occasion engages in conduct directed at another person with the intent to place, or when he knows or reasonably should know that the conduct places that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's family or household member is guilty of a Class 1 misdemeanor. . . .

ANALYSIS

The Elements Of Stalking

The first issue raised by Petitioner is that the court "applie[d] the incorrect standard in its ruling" when the court held that one of the elements of stalking that Petitioner must show is that she was placed "in reasonable fear of death, criminal sexual assault, or bodily injury . . . ." *Motion To Reconsider* at 1. Petitioner argues that the second element of stalking is that Respondent "intended to cause fear or knew or should have known that his conduct would cause fear" and that third element of stalking is that Respondent's "conduct caused the victim, or the victim's family or household members, to experience reasonable fear of death, criminal sexual assault, or bodily injury." *Id.* at 1-2.

In support of her position, Petitioner cites to *Stephens v. Rose*, 288 Va. 150 (2014) and *Parker v. Commonwealth*, 24 Va. App. 681 (1997). Petitioner has misconstrued those cases.

In *Parker*, the earlier of the two cases, the Court of Appeals held:

> In order to obtain a conviction under Code § 18.2-60.3, the Commonwealth must prove three elements. First, the Commonwealth must prove the defendant engaged in multiple instances of conduct directed at a person or that person's spouse or child. Second, the Commonwealth must prove that this conduct caused that person or their spouse or child to experience reasonable fear of death, criminal sexual assault, or bodily injury. Third, the Commonwealth must prove that the defendant either intended to cause this fear or knew that it would result from his or her conduct.

24 Va. App. at 685.

Parker is, therefore, consistent with the plain wording of the statute, which requires that "the conduct places that other person in reasonable fear of death, criminal sexual assault, or bodily injury . . . ." Accordingly, *Parker* makes clear that the second element requires proof that the conduct of Respondent "caused" Petitioner "to experience reasonable fear of death, criminal sexual assault, or bodily injury." Petitioner thus errs in arguing that second element merely requires proof that Respondent "intended to cause fear or knew or should have known that his conduct would cause fear . . . ."

Furthermore, *Parker* indicates that the third element requires proof that Respondent "either intended to cause this fear or knew that it would result from his or her conduct,"[1] not, as Petitioner argues, that Respondent's "conduct caused the victim, or the victim's family or household members, to experience reasonable fear of death, criminal sexual assault, or bodily injury." Again, *Parker*'s understanding of the statute is consistent with the plain language of the statute.

The more recent case relied upon by Petitioner, *Stephens v. Rose*, 288 Va. 150 (2014), held that *Parker* "correctly identified three elements necessary to prove stalking under this statute . . . ." 288 Va. at 155. Unfortunately, however, in affirming the holding of *Parker*, *Stephens'* explanation reversed the order of the second and third elements as described in *Parker*, holding that the second and third elements are:

> (2) the defendant intended to cause fear or knew or should have known that his or her conduct would cause fear; and (3) the defendant's conduct caused the victim "to experience reasonable fear of death, criminal sexual assault, or bodily injury."

288 Va. at 155.

The result of this reversal is that the "fear" mentioned in *Parker*'s third element -- *i.e.*, the "fear" the defendant intended to be caused by his conduct (or that the defendant knew or reasonable should have known was caused by his conduct), which *Parker* states as "this fear" -- is not linked in *Stephens* to the "reasonable fear of death, criminal sexual assault, or bodily injury" as in *Parker*'s second element. This missing linkage makes *Stephens* appear to hold that the victim must simply be put in fear, without limiting the fear to "reasonable fear of death, criminal sexual assault, or bodily injury . . . ." In view, however, of *Stephens'* explicit statement that *Parker* "correctly identified three elements necessary to prove stalking under this statute," this court does not view

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[1] In 2001, the General Assembly amended Code § 18.2-60.3(A) to add "knows or reasonably should know" (2001 Acts of Assembly, Ch. 197) and thus to overturn *Bowen v. Commonwealth*, 27 Va. App. 377, 379-380 (trial court erred in holding that "Code § 18.2-60.3 did not require proof that Bowen had actual knowledge that his conduct would place D.M. in reasonable fear of death, criminal sexual assault, or bodily injury, but rather required only proof that he 'reasonably should have known' that such fear would result").

Stephens' statement of the second and third elements as intending to overturn *sub silentio Parker*'s statement of those elements.

In light of the above review of *Parker* and *Stephens*, the court concludes that it applied the correct standard and that Petitioner had to prove, by a preponderance of the evidence, that, on more than one occasion, she was "in reasonable fear of death, criminal sexual assault, or bodily injury . . . ."

Based upon the evidence adduced at trial, the court finds that Petitioner did not prove, by a preponderance of the evidence, that, on more than one occasion, she was "in reasonable fear of death, criminal sexual assault, or bodily injury . . . ."

The Time Frame Of The Evidence Of Respondent's Conduct

Petitioner next argues that the court limited the time frame of the evidence of Respondent's conduct to conduct committed "after the issuance of the protective order" in the J&DR court or to conduct committed "after the issuance of the custody order" and that such a limitation was "incorrect." *Motion To Reconsider* at 2.

In fact, the court did not so limit the evidence it considered. Indeed, the court agrees that "Petitioner has no burden to prove that [Respondent] committed acts of family abuse after the issuance of the protective order in the [J&DR] court" or that Petitioner has to show evidence of Respondent's conduct only "after the issuance of the custody order . . . ." *Id.* at 2-3. Rather, in the quotation referenced by Petitioner, the court merely observed that there was "no evidence" of Respondent's conduct after the protective order went into effect, nor was there any evidence of Respondent's conduct after the custody and visitation order went into effect; the court did not, however, limit consideration of evidence of Respondent's conduct to conduct which occurred after those dates:

> [I]n fact **there was no evidence** at all **other than** what happened in the past before the protective order went into place and most importantly before the custody and visitation order went into place that he had done anything to harm her physically and that she had any reasonable fear that he was going to harm her physically.

Tr. at 153-154 (emphasis added).

Petitioner's Evidence Of Fear

Petitioner argues that she presented evidence that met the statutory standard. In particular, she states that, when asked if she was "afraid of" Respondent, she testified: "Very much so" (Tr. at 68) and that, when she was asked of what she was afraid, she testified:

> He's shown himself repeatedly capable and willing to act out physically on the children and myself. You know, with the shoving, the grabbing, screaming, the threats, you know, things about throwing the children through the wall, ripping their arms off.

Id.

Finally, when Petitioner was asked how she felt when she saw Respondent at church, she testified that she was "intimidated and frightened . . . ." *Id.* at 34.

As discussed, *supra*, Petitioner must show, *inter alia*, that Respondent's conduct, on more than one occasion, placed her "in reasonable fear of death, criminal sexual assault, or bodily injury . . . ." It is not enough that Respondent's conduct placed her in fear; that fear must be "reasonable" and it must be fear of death, criminal sexual assault, or bodily injury. In the court's view, the above evidence does not show that Petitioner had a reasonable fear of death or of criminal sexual assault or of bodily injury.

As to Petitioner's testimony that Respondent has "shown himself repeatedly capable and willing to act out physically on the children and myself," the fact that Respondent was "capable and willing" to "act out physically" does not prove that Petitioner had a "reasonable" fear of death or of criminal sexual assault or of bodily injury. Moreover, Petitioner points to nothing in the record to support that statement, *i.e.*, evidence of shoving or grabbing which would have caused her reasonably to fear that Respondent would, on more than one occasion, cause her death or would criminally sexually assault her or would cause her bodily injury.

Finally, Petitioner points to no evidence in the record that Respondent "engaged in multiple instances of conduct directed at [Petitioner]" (*Parker*, 24 Va. App. at 685) "with the intent to place" Petitioner in "reasonable fear of death, criminal sexual assault, or bodily injury" (Code § 18.2-60.3(A)) or which Respondent "kn[ew] or reasonably should [have known]" "place[d]" Petitioner in "reasonable fear of death, criminal sexual assault, or bodily injury . . . ." *Id.*

The instances recounted in Petitioner's motion ("driving by the home on two occasions, sending a courier to her home, approaching her at church, waiting for her in the church parking lot, and approaching her with a caterpillar in a jar at a school function") (*Motion To Reconsider* at 3) are not sufficient to prove that Respondent had "the intent to place" Petitioner in "reasonable fear of death, criminal sexual assault, or bodily injury" (Code § 18.2-60.3(A)) or that Respondent "kn[ew] or reasonably should [have known]" that he "place[d]" Petitioner in "reasonable fear of death, criminal sexual assault, or bodily injury . . . ."

CONCLUSION

In light of the above, Petitioner's motion to reconsider is DENIED.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ASHLEY EWER)
Petitioner)
)
v.) JA 2021-12
)
JAYSON EWER)
)
Respondent)

ORDER

THIS MATTER came before the court on the motion of Petitioner, filed July 19, 2021, to reconsider the court's denial of a protective order against Respondent.

IT APPEARING to the court, for the reasons stated in the court's letter opinion of today's date, that Petitioner's motion to reconsider the court's denial of protective order against Respondent should be denied, it is hereby

ORDERED that Petitioner's motion to reconsider the court's denial of a protective order against Respondent is DENIED.

ENTERED this 26th day of August, 2021.

[redacted]
Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copy to:

Rebecca Wade
Counsel for Petitioner

James A. DeVito
Counsel for Respondent