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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

CAROL BLACKWELL,

Plaintiff and Respondent,

v.

DAVID CAREY,

Defendant and Appellant.

F068121

(Super. Ct. No. 684960)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Timothy W. Salter, Judge.

Fox, Shjeflo, Hartley & Babu, Walter E. Shjeflo and Dennis Scott Zell, for Defendant and Appellant.

No appearance on behalf of Plaintiff and Respondent.

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Plaintiff Carol Blackwell obtained an anti-harassment temporary restraining order (TRO), and subsequently a restraining order, for herself and her family against defendant David Carey, pursuant to Code of Civil Procedure section 527.6. Carey had been a customer at Blackwell's Cafe in Newman and had begun harassing her there and at her home. Carey now argues that we should reverse because the trial judge made an

improper settlement proposal during the hearing on the restraining order. He also makes two arguments limited to the TRO: There was insufficient evidence to support the TRO, and a provision of the TRO forbidding him to possess firearms violated his rights under the Second Amendment. We affirm.

FACTS AND PROCEDURAL HISTORY

Blackwell filed a request for a restraining order against Carey on June 25, 2013. In an attached declaration, Blackwell stated that she first encountered Carey in October 2012, when she served him at her cafe. Carey made Blackwell uncomfortable by asking repeatedly if she was married, and, upon hearing that she was, asking if she was happily married. A cafe employee stated that Carey asked Blackwell many questions and made many comments, including the comment that Blackwell should change the lighting in the cafe to make her look prettier. The employee believed Carey was fixated on getting Blackwell's attention and that Blackwell was uncomfortable.

Blackwell's declaration described several other incidents. Once Carey followed her home from the cafe. Often he drove by her house and parked his car near her house or the cafe. Blackwell's husband asked Carey to stop coming to their house and Blackwell asked him to stop coming to the cafe. The day after she asked him not to come to the cafe, he was across the street "leering" at Blackwell. That evening, Carey followed the Blackwells to a charity event and stared at them. One day, after the time when Blackwell's husband asked Carey to stop coming to the Blackwells' house, Carey parked across the street from the house as Blackwell was arriving home and stared at her with his arms crossed. At the Blackwells' request, two Newman police officers told Carey that the Blackwells wanted him to leave them alone and that they planned to obtain a restraining order. Carey continued to appear and park his car across from the Blackwell's house and cafe. On one occasion, Carey got in his car and drove "directly at" Blackwell's husband, forcing the husband to get out of the way quickly.

The trial court issued a TRO against Carey on June 26, 2013, valid until the hearing scheduled for July 18, 2013. The TRO directed Carey to stay at least 100 yards away from Blackwell, her family, her home, and her workplace. It also forbade him to possess any guns and directed him to turn over to the police or sell any guns he possessed.

The trial court conducted a hearing on July 18, 2013, as planned. No court reporter was present, and there is no reporter's transcript of the hearing in the appellate record. The court granted a restraining order valid for one year. Carey was ordered to stay at least 100 yards away from Blackwell, her family, and her home. He also was ordered to stay at least 20 yards away from Blackwell's "job, workplace, [and] other downtown Newman locations." The order continued the prohibition on gun possession.

Carey filed a motion for a new trial. In his brief, he argued that (1) the order was not supported by sufficient evidence of wrongdoing on his part; (2) a police report unknown to him at the time of the hearing constituted newly discovered evidence warranting a new trial; and (3) the trial court denied him a fair trial by proposing, after the close of Blackwell's evidence and before the defense presented its case, a settlement in which Carey would admit wrongdoing and submit to a six-month restraining order. The brief also argued that the restraining order was excessively restrictive, as Newman was a small town and Carey would be unable to engage in most of his usual activities if required to stay 20 yards away from all locations in downtown Newman.

At the hearing on the motion on September 10, 2013, which was reported, the court described its recollection of the previous proceedings:

"All right. Well, my tentative ruling was to deny the motion for new trial. I do recall this case vividly because it consumed a much greater period of time than these normally do. And so we had a rather extensive evidentiary hearing.

"And I know that one of your points was that we had held improper settlement discussions. But the one thing that I wanted just to put on the record, from my recollection of the settlement discussions, was that the

proposed settlement involved merely continuing the hearing for a period of four months and if at that—the end of that four months there had been no new accusations of impropriety, the matter would be dismissed.

“So there was no proposal that involved the imposition of a permanent order or, you know, a final order against your client. And I found, as a result of weighing all of the evidence, that defendant had engaged in a pattern which demonstrated a fixation upon the plaintiff, his repeated activities of going to her home and encountering her husband in the driveway, going to their place of business, and in sitting at a park bench almost immediately opposite their home was the evidence that I relied upon in reaching my decision.”

After hearing the arguments of counsel, the court denied the motion. Its written order included a clarification about the settlement discussion and a modification of the original restraining order:

“The settlement discussions that were held in no way influenced the Court in its decision.

“The modification to the Restraining Order applies to the Stay Away Orders: The Defendant shall stay 100 yards away from Plaintiff, except when in town the Defendant shall stay 20 yards away from Plaintiff.”
(Bolding omitted.)

Carey appealed. After Carey filed his opening brief, Blackwell submitted to this court a copy of a substitution-of-attorney form that had been filed in the trial court, indicating that Blackwell no longer was represented by her trial counsel and was now representing herself. She did not file a respondent’s brief in this court.

DISCUSSION

I. Court’s settlement proposal

Carey argues that his right to due process of law was infringed by the court’s discussion of settlement at the hearing on July 18, 2013. He relies on cases such as *Pacific etc. Conference of United Methodist Church v. Superior Court* (1978) 82 Cal.App.3d 72, 81-88, in which it was held that a judge revealed improper bias or

prejudgment during the pendency of a case by sending the parties a letter appraising their positions and making a settlement proposal.

As Carey acknowledges, it is impossible for us to scrutinize directly the comments made at the hearing on July 18, 2013, since that hearing is unreported. To the extent Carey's argument depends on facts not included in the appellate record, we must reject it, for a judgment is presumed correct and must be affirmed in the absence of a record adequate to demonstrate error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.) We can, however, rely on the trial judge's recollection, of which he made a record in the reporter's transcript of the hearing on September 10, 2013. (See *Malcolmson v. Harris* (1891) 90 Cal. 262, 263, 265 [where trial was unreported, new trial motion and appeal from denial of motion can be based on settled statement of evidence derived from trial judge's recollection].)

To the extent the record shows what the court said at the July 18, 2013 hearing, we conclude that, even if its remarks were error, they were not prejudicial. The court stated that it proposed an agreement to a four-month continuance, at the end of which time the case would be dismissed if Blackwell complained of no further incidents. The court further stated that it did not suggest entering a final order against Carey as part of this proposed agreement. There is nothing in the court's statement of its recollection to support Carey's contention that the court wanted to extend the TRO during the four-month continuance. The TRO expired the day of the hearing and the court said nothing about an agreement to extend it. As far as the record shows, the proposal was for the parties to do nothing and for the court to issue no order for four months. This proposed course of action showed no bias or prejudgment on the part of the judge. It did not reflect any view of the merits of the parties' positions and would not have been detrimental to Carey.

II. TRO

Carey first maintains that the TRO was not supported by sufficient evidence. Next, he contends that the order in the TRO to possess no firearms violated the Second Amendment because it was part of a standard form issued by the Judicial Council, and the court subjected him to it without any individualized finding that a firearms prohibition was appropriate under the circumstances. Carey gave no indication as to why he limited these arguments to the TRO.

As Carey is aware, a TRO is like a preliminary injunction: “a provisional remedy which ceased to have any operational effect once the permanent injunction was granted” (*Pacific Gas & Electric Co. v. City of Berkeley* (1976) 60 Cal.App.3d 123, 126 fn. 4.) This means the TRO is merged in the final restraining order the court issued, and the appeal from it is moot. (*People’s Ditch Co. v. Foothill Irrigation Dist.* (1930) 103 Cal.App. 321, 325-326.)

Carey argues that we have discretion to consider his contentions in spite of this, and should do so. He says “the standard under which Courts may issue a temporary restraining order under Code of Civil Procedure section 527.6 is an important issue; elucidating that standard would assist both practitioners and judges.”

We see nothing special about this case that requires elucidation of Code of Civil Procedure section 527.6. Many published cases exist interpreting that section. We have nothing to add to them in this case.

The constitutional avoidance doctrine is a further reason not to address the moot question of the correctness of the TRO, including Carey’s Second Amendment claim. “Principles of judicial self-restraint ... require us to avoid deciding a case on constitutional grounds unless absolutely necessary” (*Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 671.) Therefore, since the validity of the TRO is moot, there is no necessity of reaching Carey’s Second Amendment claim here.

DISPOSITION

The judgment is affirmed. Respondent Blackwell is awarded costs on appeal.

Oliver, J.

WE CONCUR:

Cornell, Acting P.J.

Gomes, J.