

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0838-16T1

H.W.,

Plaintiff-Respondent,

v.

Y.S.,

Defendant-Appellant.

Argued November 28, 2017 — Decided January 17, 2018

Before Judges Hoffman and Gilson.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Somerset
County, Docket No. FV-18-0265-17.

Michael B. Roberts argued the cause for
appellant (Roberts & Teeter, LLC, attorneys;
Michael B. Roberts, on the brief).

Andrew M. Shaw argued the cause for respondent
(The DeTommaso Law Group, LLC, attorneys;
Andrew M. Shaw, on the brief).

PER CURIAM

Defendant appeals from a September 15, 2016 final restraining
order (FRO) entered under the Prevention of Domestic Violence Act
(PDVA), N.J.S.A. 2C:25-17 to -35, based on a predicate act of

harassment, N.J.S.A. 2C:33-4. He also appeals from an October 19, 2016 order awarding attorney's fees to plaintiff. We are constrained to vacate both orders and remand for a new trial because defendant was not informed of his due process right to retain legal counsel, nor did he waive that right.

I.

The incident that gave rise to plaintiff's request for a restraining order occurred on September 4, 2016. At that time, the parties had been married for just over twenty years and were involved in a divorce action. They had one child, a son who was born in 2001.

Plaintiff alleged that on September 4, 2016, defendant threw a cup of soda at her and that the cup hit her arm. She sought and was granted a temporary restraining order (TRO). On September 8, 2016, she amended her TRO to add information concerning prior acts of domestic violence. Plaintiff also amended her complaint on the day of trial to add the alleged predicate act of simple assault.

The matter was tried on September 15, 2016. Plaintiff was represented by counsel, and defendant appeared without counsel. At the beginning of the trial, the judge appropriately informed defendant of the significant consequences that could occur if an FRO was entered against him. The judge did not, however, inform defendant of his right to retain counsel. Nor did defendant waive

his right to retain counsel. Specifically, the judge engaged in the following colloquy with defendant:

THE COURT: Are you ready to proceed with trial of this matter today?

[DEFENDANT]: Yes.

THE COURT: All right. Do you understand I have not heard any testimony nor have I reviewed any evidence so I do not know whether a final restraining order will enter or not, but if one does enter it carries with it significant penalties and consequences. They include a fine of between [\$]50 and \$500, a requirement that you be photographed and fingerprinted by our sheriff's office.

Also, your name would be included on a central registry of domestic violence offenders. Inclusion of your name on that registry would limit your ability to seek certain types of employment, serve in certain types of volunteer organizations, and might hinder your ability to travel internationally freely as people on that list are often detained for questioning by our Immigration and Customs authorities.

More importantly, if you violate any final restraining order that is entered today or in the future it becomes a criminal matter prosecuted by the prosecutor's office and could potentially result in the imposition of incarceration or a fine.

Do you understand all of these potential penalties?

[DEFENDANT]: Yes.

THE COURT: Knowing these potential penalties are you still ready to proceed with your case today?

[DEFENDANT]: Yeah. I'm innocent.

THE COURT: Okay. You're ready to represent yourself in the trial that we're about to begin. Is that correct?

[DEFENDANT]: Right. Right.

At trial, plaintiff testified that she got into an argument with her fifteen-year-old son regarding his drinking soda with high amounts of sugar. She then testified that defendant became involved in the argument. According to plaintiff, defendant threw a cup of soda at her, the cup hit her arm, and the soda spilled on the kitchen counter. Plaintiff also explained that their son was present during the incident.

Plaintiff also testified about a history of abuse by defendant, which included defendant punching her, pushing her, hitting her in the back of her neck, calling her derogatory names, locking her out of the marital home, and secretly recording her having sex with her boyfriend.

Defendant disputed plaintiff's description of what took place on September 4, 2016. He testified that plaintiff started the argument while he was eating his lunch. He then contended that plaintiff poured the contents of a bottle of Snapple down the drain and pounded the empty bottle on the counter. He also testified that plaintiff was verbally harassing him and that he

stood up and threw half a cup of soda into the sink to try to stop plaintiff from harassing him.

At the end of his testimony, defendant requested to call his son as a witness to the incident. The court denied that request and explained that it normally did not allow minors to testify at domestic violence trials "unless there was an absolute need for that testimony." The court then found that it could make a ruling without the son's testimony. Moreover, the court noted that the son was not present at the courthouse and declined to grant an adjournment to allow defendant to arrange to have his son give testimony.

The court made its ruling on the record. Relying on plaintiff's testimony, the court found that defendant threw a cup of soda at plaintiff and that the cup hit her. The court found that action constituted harassment both as a communication under N.J.S.A. 2C:33-4(a), and an offensive touching under N.J.S.A. 2C:33-4(b). The court also found that defendant's purpose was to harass plaintiff when he threw the cup at her. The court did not find that defendant committed the predicate act of assault.

Turning to the history of domestic violence, the court found plaintiff's testimony credible. Accordingly, the court found that defendant had previously punched plaintiff, pushed her, hit her in the back of the neck, locked her out of the marital home, and

recorded her having sex with her boyfriend. The court also found that plaintiff was in need of a restraining order against defendant. Thus, the court entered an FRO on September 15, 2016.

The trial court also permitted plaintiff to apply for counsel fees. After receiving a certificate of services from plaintiff's counsel, on October 19, 2016, the court entered an order awarding plaintiff \$4000 in counsel fees.

II.

On appeal, defendant, who is now represented by an attorney, argues that both the FRO and the order awarding counsel fees should be vacated. In support of that position, defendant makes five arguments: (1) he was denied his right to counsel; (2) the trial court erred by not permitting defendant to call his son as a witness; (3) plaintiff failed to prove harassment; (4) cumulative errors require reversal; and (5) the counsel fees award should be vacated. We need only reach the first issue because we hold that defendant was denied his procedural due process right to be informed of his right to retain legal counsel.

Parties to a domestic violence action are entitled to certain procedural due process rights. J.D. v. M.D.F., 207 N.J. 458, 478 (2011). Our Supreme Court has explained that "ordinary due process protections apply in the domestic violence context, notwithstanding the shortened time frames for conducting a final

hearing that are imposed by the statute." Ibid. (citations omitted). Thus, the Court has explained that "ensuring that defendants are not deprived of their due process rights [in a domestic violence matter] requires our trial courts to recognize both what those rights are and how they can be protected consistent with the protective goals of the [PDVA]." Id. at 479.

The right to seek counsel is an important due process right that affords defendants "a meaningful opportunity to defend against a complaint in domestic violence matters." D.N. v. K.M., 429 N.J. Super. 592, 606 (App. Div. 2013). In that regard, we held that due process does not require the appointment of counsel for indigent defendants in a domestic violence proceeding seeking an FRO. Id. at 605. Nevertheless, due process does require that a defendant understands that he or she has a right to retain legal counsel, and that a defendant is afforded a reasonable opportunity to retain an attorney. Ibid.

In D.N. v. K.M., we found that defendant, D.N., on a cross-complaint alleging domestic violence, relinquished her right to seek counsel where the trial judge "adequately questioned [her] regarding her decision to decline the opportunity to obtain legal representation." Id. at 607. In that case, the trial judge asked D.N. (1) whether she wanted the opportunity to obtain counsel, pointing out that the opposing party was represented; (2) whether

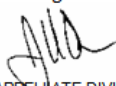
she understood what would happen if a final restraining order was entered; and (3) whether she knew that she might be subject to civil penalties and other consequences. Id. at 599-600. The judge also advised D.N. that she could request an adjournment to consult with an attorney or further prepare for the trial. Id. at 607. Given that advice, we held that D.N.'s waiver of her right to seek counsel was clear and knowing.

Here, defendant was not advised at trial that he had a right to retain legal counsel. While the judge appropriately informed defendant of the significant consequences of an FRO, nowhere in the record did he expressly advise defendant of his right to retain counsel. That failure was particularly significant in this case, because the trial was essentially a dispute between plaintiff's and defendant's versions of the incident on September 4, 2016. Defendant requested to call his son, who was the only other witness to those events, to testify. The trial court denied that request. Such testimony could have been very important in determining plaintiff's and defendant's credibility. Had defendant had counsel, counsel might have presented arguments to persuade the trial court to hear testimony from the son.

Accordingly, we vacate the FRO and the order awarding plaintiff counsel fees. The TRO is reinstated, and the matter is remanded for a new trial.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION