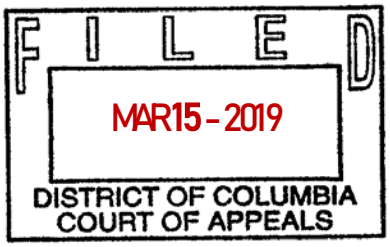
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 17-FM-1245



THEODOSIA VILLATORO-SORTO, APPELLANT,

v.

RAUL VILLATORO-SORTO, APPELLEE.

Appeal from the Superior Court
of the District of Columbia
(CPO-3417-17)

(Hon. Herbert B. Dixon, Jr., Trial Judge)

(Argued November 14, 2018 Decided March 15, 2019)

Before GLICKMAN and BECKWITH, *Associate Judges*, and STEADMAN, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: On July 25, 2017, appellant Ms. Theodosia Villatoro-Sorto filed a petition for a twelve-month civil protection order ("CPO") against appellee Mr. Raul Villatoro-Sorto in the Domestic Violence Unit of the Superior Court. The parties married in 1995 and have three children, in their late teens and twenties.[1] On August 28, 2017, both parties testified at a hearing before Judge Herbert B. Dixon, who denied the CPO at the end of the hearing. On October 7, 2017, the trial court denied appellant's motion to alter or amend the judgment. Appellant appeals the trial court's August 28 and October 17 rulings, arguing that the court relied on erroneous legal principles and abused its discretion. Because the trial court's rulings are unclear, and we cannot discern the bases for its exercise of discretion, we must remand for clarification and further consideration.

[1] The parties were still married at the time of the civil protection order hearing on August 28, 2017; the current marital status of the parties is unknown.

A.

Under the Intrafamily Offenses Act ("Act"), a person "who alleges . . . that he or she is the victim of interpersonal, intimate partner, or intrafamily violence, stalking, sexual assault, or sexual abuse" may seek a CPO against the offender. D.C. Code §§ 16-1001 (12); 16-1003 (2012 Repl.).[2] "If, after a hearing, the [court] finds that there is good cause to believe the respondent has committed or threatened to commit a criminal offense against the petitioner . . . the [court] may issue a protection order." D.C. Code § 16-1005(c) (2012 Repl.). The trial court's decision to issue a CPO thus requires a two-step analysis. *See Murphy v. Okeke*, 951 A.2d 783, 789-90 (D.C. 2008). First, the trial court must find that the petitioner showed, by a preponderance of the evidence, that "there is good cause to believe that the respondent has committed or threatened to commit a criminal offense against the petitioner." *J.O. v. O.E.*, 100 A.3d 478, 481 (D.C. 2014) (quoting § 16-1005(c)). If the trial court makes such a finding, then it must use its "informed discretion" to decide whether to enter a CPO[3] and, if so, what acts should be prohibited.[4] *Murphy*, 951 A.2d at 789-90.

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[2] Interpersonal, intimate partner, or intrafamily violence each includes "any act punishable as a criminal offense," so long as the offender and the victim have a certain personal relationship as defined in the statute – all relationships include marriage. *Richardson v. Easterling*, 878 A.2d 1212, 1216 (D.C. 2005) (internal quotation marks omitted); D.C. Code § 16-1001 (6), (7), (9). By contrast, persons who allege stalking, sexual assault, or sexual abuse need not have a prior relationship with the offender. *A.R. v. F.C.*, 33 A.3d 403, 404 (D.C. 2011).

[3] We have explained that "a CPO should only be entered against a party for reasons consistent with the underlying purpose of the Intrafamily Offense Act." *Murphy*, 951 A.2d at 789-90.

[4] The Intrafamily Offense Act lists a dozen options relating to the terms of the CPO, if issued. D.C. Code § 16-1005(c) (June 2018 Cum. Supp.).

B.

Appellant's petition here was based on three alleged incidents of unwanted sexual touching that occurred in July 2017.[5] She alleges that the incidents constitute the crime of misdemeanor sexual abuse under D.C. Code § 22-3006 (2012 Repl).[6] The essential elements of this offense are: "(1) that the defendant committed a 'sexual act' or 'sexual contact' as defined in D.C. Code § 22-4101 and (2) that the defendant knew or should have known that he or she did not have the complainant's permission to engage in the sexual act or sexual conduct." *Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001). "Sexual contact" is defined in D.C. Code § 22-3001(9) as "the touching . . . of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."

In its order denying the CPO, the trial court specifically recognized that the "standard that a court is going to consider is whether or not there is good cause to believe that [appellee] has committed or threatened to commit a criminal offense." Appellant testified that, on three separate occasions in July 2017, appellee touched her on one or more of the body parts specified in the statute and that on each occasion he did so after she told him to stop, assertions for which appellee's somewhat rambling testimony may be seen to provide certain support.[7] The trial court acknowledged, without reference to any specific incident, that it was "satisfied that there was sexual touching that occurred. Indeed, [appellee] so much as admitted it." The trial court, however, concluded that it was "not satisfied that there is good cause to believe that [appellee] committed or threatened to commit a

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[5] Appellant also asserted that in the third incident, appellee had slapped her, but the trial court was not convinced that an assaultive slapping had taken place. Appellant testified to a prior incident some twenty years ago, recognized by the trial court, where appellee burned appellant with a cigarette and other incidents of assault not mentioned by the trial court in its ruling.

[6] She also asserts that the incidents constitute nonviolent sexual touching assault, D.C. Code § 22-404 (2012 Repl.), which is a lesser-included offense of misdemeanor sexual abuse. *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001).

[7] Appellant also testified that, at the time of the incidents, she had been sleeping apart from appellee for three to five weeks and that they were separated.

criminal offense under these circumstances and therefore the petition for the civil protection order is denied."

C.

The trial court on several occasions remarked that this was a "difficult case" to judge. Here, the parties generally agree on the applicable legal principles but dispute how we are to understand the trial court's rulings. Appellant argues that the trial court's rulings improperly required proof of violence for a CPO, assumed that marriage gives irrevocable consent, and considered only the parties' length of marriage, reconciliation, and shared children, and not the history of abuse, before denying the CPO. Appellee contends that the trial court denied the CPO because appellant did not provide sufficient credible evidence that a criminal offense occurred.

Our own difficulty is in ascertaining the bases upon which the trial court ultimately denied the CPO. In particular, the remarks of the trial court in orally setting forth its reasoning indicate that it may have blended the two discrete parts of the requisite analysis: i.e., whether a criminal offense occurred or was threatened and then whether a CPO should issue. *See Murphy*, 951 A.2d at 789-90. Since the trial court found that sexual touching had occurred, it seems that the only possible issue in determining whether a criminal offense occurred or was threatened was that of consent. *See Mungo*, 772 A.2d at 244-45. The trial court made no square finding on the consent element of the offense or, for that matter, no findings in any detail as to exactly what it concluded had occurred in each of the three incidents. The trial court did note the length of the marriage and that both parties acknowledged that "during the good times of the marriage they did touch each other sexually." But while the fact of marriage may be relevant to the issue of consent, both parties acknowledge that the status of marriage alone is not determinative and that a spouse is entitled to protection from clearly unwanted sexual advances by the other spouse. *See* D.C. Code § 22-3019 (2012 Repl.) (providing that an actor is not immune from prosecution of misdemeanor sexual abuse because of marriage with the victim).

The trial court also mentioned a number of other considerations that would appear to apply more to the second step, if at all, in determining whether a CPO should issue and, if so, on what terms. It mentioned the three children of the couple and how one had acted out. It mentioned the fact that the couple had separated at least once and came back together and reconciled. It mentioned

allegations of infidelity. It mentioned that none of the three incidents had risen to "a level of violence, either where there was an intent to injure or there was an intent to physically overcome the other's will." Again, both parties agree that such actual violence is not a requisite to a finding of a criminal offense or the issuance of a CPO. *See Richardson v. Easterling*, 878 A.2d 1212, 1216-17 (D.C. 2005). Possibly the trial court implicitly based its refusal to issue the CPO on such considerations that may relate to the second step of the analysis rather than, as the order explicitly states, failure to establish good cause that a criminal offense had occurred or been threatened. We simply cannot know from what is before us whether it did so nor how it weighed these and other factors in examining the "entire mosaic" of the case to determine whether a CPO was appropriate. *See Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. 1991).

We review the trial court's decision denying a CPO for an abuse of discretion. *Murphy*, 951 A.2d at 789. To affirm, we must find that the trial court based its decision on correct legal principles, a sufficient factual basis, and substantial reasoning. *J.O. v. O.E.*, 100 A.3d at 481. Further, we must find that the trial court considered "all relevant factors and [did] not rely on any improper factors." *Id.* A real possibility that the trial court abused its discretion is grounds for reversal. *Id.* at 482-83.

The essence of review of a discretionary decision is that the appellate court have a clear understanding of all the elements that went into the trial court's ultimate decision. *See generally Johnson v. United States*, 398 A.2d 354, 363 (D.C. 1979). We simply do not have that understanding here. Accordingly, the case is remanded to the trial court for further consideration. Given the lapse of time since this petition was originally filed, the trial court may need to conduct additional proceedings and make additional findings as to new developments that are relevant to appellant's right to relief.

So ordered.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

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