2024 IL App (2d) 230300-U
No. 2-23-0300 & 2-23-0301 cons.
Order filed September 30, 2024

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DAVID A. BERTHA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. Nos. 22-CM-1056 22-CM-1168 Honorable Philip G. Mongomery, Judge, Presiding.

PRESIDING JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Kennedy concurred in the judgment.

ORDER

¶ 1 *Held*: In prosecution for violating stalking no-contact orders, defendant had no right to challenge the constitutionality of the underlying orders, and he made no argument that the orders were invalid, *i.e.*, that the trial court lacked jurisdiction to enter them. Defendant's various other claims of error were based on matters irrelevant to whether he was guilty of violating the underlying orders.

¶ 2 Following a jury trial in the circuit court of Kane County, defendant, David A. Bertha, was found guilty of 10 counts of violating stalking no-contact orders (720 ILCS 5/12-3.9(a) (West 2020)). Defendant appeals, *pro se*, arguing that (1) the underlying stalking no-contact orders were invalid because they were based on conduct protected under the first amendment (U.S. Const.,

amend. I), (2) the trial court erred in barring him from referring during trial to the invalidity of the stalking no-contact orders or to his prior arrests and a pattern of harassment by the Kane County State's Attorney's Office and Sheriff's Department, (3) the trial court erred in denying his motion to dismiss certain separate prosecutions, and (4) the State violated his right to due process by failing to disclose information about a protected party's employment status and a criminal complaint made against defendant by the De Kalb County State's Attorney for threatening a public official. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Jameson Eisenmenger (Jameson), married to Kane County State's Attorney Jamie Mosser, and Ashley Hain (Ashley), married to Kane County Sheriff Ron Hain, filed separate petitions in the circuit court of Kane County for stalking no-contact orders against defendant. Jameson's petition was docketed as case No. 22-OP-41. Ashley's petition was docketed as case No. 22-OP-42. On February 4, 2022, the trial court issued plenary stalking no-contact orders in both cases, providing, *inter alia*, that defendant "may not contact the Petitioner[s] in any way, directly or indirectly or through third parties, including, but not limited to, phone, written notes, mail, email, or fax." In addition, the order entered in Jameson's case named "Performance Health and their affiliates" as protected parties. (Jameson's petition alleged that he was a corporate attorney and worked for Performance Health.)

¶ 5 On August 16, 2022, defendant was charged in case No. 22-CM-1056 with six counts of violating stalking no-contact orders. On September 7, 2022, defendant was charged in case No. 22-CM-1168 with four counts of violating stalking no-contact orders. Lake County State's Attorney Eric Rinehart was appointed special prosecutor.

¶ 6 At trial, the State presented evidence that on, July 11, 2022, July 14, 2022, August 26, 2022, and August 31, 2022, defendant sent e-mails to Ron Hain, Jamie Mosser, and various coworkers of Jameson and Ashley (including Jameson's coworkers at Performance Health). All of the e-mails included links to online videos apparently created by defendant that described Jameson and Ashley in vulgar and disparaging terms.

¶ 7 On July 26, 2022, Jamie Mosser and Ron Hain were speakers at an event held at the Aurora Public Library. Defendant attended the event and shouted derogatory remarks about Jameson and Ashley. One witness who attended the event believed that everyone could hear defendant.

¶ 8 During closing argument, the prosecution contended that, although the e-mails were not addressed to Jameson and Ashley, by sending the e-mails to their spouses and coworkers, defendant indirectly contacted Jameson and Ashley in violation of the stalking no-contact orders. The jury found defendant guilty of all charges. Defendant moved to vacate the convictions. As pertinent here, defendant attached a police report indicating that, in an e-mail to De Kalb County State's Attorney Rick Amato's sister, defendant threatened Amato. According to the report, Amato had been appointed special prosecutor in two Kane County prosecutions of defendant for harassment through electronic communications. The trial court denied the motion. This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 Section 15 of the Stalking No Contact Order Act (Act) (740 ILCS 21/15 (West 2020)) provides that a victim of stalking who is not entitled to relief under the Illinois Domestic Violence Act of 1986 (750 ILCS 60/101 *et seq.* (West 2020)) may petition for a stalking no-contact order. For purposes of the Act, "stalking" is defined, in pertinent part, as follows:

> " 'Stalking' means engaging in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to fear for his or her safety, *** or suffer emotional distress. Stalking does not include an exercise of the right to free speech or assembly that is otherwise lawful[.]" 740 ILCS 21/10 (West 2020).

Subject to the procedural requirements for the issuance of emergency and plenary stalking no-contact orders, section 80(a) of the Act (*id.* § 80(a)) requires a court to issue a stalking no-contact order if it finds that the petitioner has been the victim of stalking. The procedural requirements for the issuance of plenary stalking no-contact orders are specified in section 100 of the Act (*id.* § 100), which states that a court shall issue a plenary order if the respondent has been served notice of the hearing for that order and

> "(1) the court has jurisdiction ***;
>
> (2) the requirements of Section 80 are satisfied;
>
> (3) a general appearance was made or filed by or for the respondent or process was served on the respondent ***; and
>
> (4) the respondent has answered or is in default."

The order may prohibit the respondent from having any contact with the petitioner. *Id.* § 80(b)(2).

¶ 11 This appeal does not arise from the civil proceedings in which the stalking no-contact orders protecting Ashley and Jameson were issued. Rather, this appeal arises from defendant's criminal prosecution for violating those orders. Nonetheless, defendant attempts to use this appeal to challenge the issuance of the orders themselves. Thus, defendant argues that "[t]he State failed to prove beyond a reasonable doubt that the civil petitioners for the stalking no[-]contact orders, *** were ever the victims of stalking." The thrust of defendant's argument is that the State failed

to prove that his acts leading to the issuance of the orders were not protected speech under the first amendment. As will be shown, however, the State's burden of proof in this proceeding did not encompass establishing the constitutionality of the underlying stalking no-contact orders, which were issued in entirely separate proceedings at which defendant presumably had a fair opportunity to litigate any constitutional objections to the orders.

¶ 12 We stress that, although section 12-7.3 of the Criminal Code of 2012 (Code) (720 ILCS 5/12-7.3 (West 2022)) makes stalking a crime, defendant was not prosecuted under that provision. Rather, defendant was prosecuted under section 12-3.9 of the Code (*id.* § 12-3.9) for violating a stalking no-contact order. Section 12-3.9 provides, in pertinent part, as follows:

> "(a) A person commits violation of a stalking no contact order if:
>
> (1) he or she knowingly commits an act which was prohibited by a court or fails to commit an act which was ordered by a court in violation of:
>
> (A) a remedy in a *valid* stalking no contact order of protection authorized under Section 80 of the Stalking No Contact Order Act ***;
>
> *** and
>
> (2) the violation occurs after the offender has been served notice of the contents of the order, under the Stalking No Contact Order Act, Article 112A of the Code of Criminal Procedure of 1963, or any substantially similar statute of another state, tribe, or United States territory, or otherwise has acquired actual knowledge of the contents of the order." (Emphasis added.) *Id.*

¶ 13 Significantly, the requirement that the stalking no-contact order be "valid" does not invite a challenge based on first amendment principles. Section 12-3.9(a) provides that "[a] stalking no contact order issued by a state, tribal, or territorial court shall be deemed valid if the issuing court

had jurisdiction over the parties and matter under the law of the state, tribe, or territory." *Id.* § 12-3.9(a). Our state constitution confers the circuit courts with subject matter jurisdiction over all justiciable matters. Ill. Const. 1970, art. VI, § 9. There is no question that whether defendant stalked Ashley and Jameson, entitling them to stalking no-contact orders against defendant, was a justiciable matter. Moreover, as our supreme court has explained, "Generally, once a court has acquired jurisdiction, no subsequent error or irregularity will oust the jurisdiction thus acquired. Accordingly, a court may not lose jurisdiction because it makes a mistake in determining either the facts, the law or both." *People v. Davis*, 156 Ill. 2d 149, 156 (1993). This principle generally applies to constitutional errors as well as ordinary errors of law. See *People v. Raczkowski*, 359 Ill. App. 3d 494, 497 (2005). Furthermore, defendant does not argue that the court that issued the stalking no-contact orders lacked personal jurisdiction over him.

¶ 14 We note that section 12-3.9(a) of the Code (720 ILCS 5/12-3.9(a) (West 2020)) further provides that "[t]here shall be a presumption of validity when an order is certified and appears authentic on its face." The State admitted certified copies of the stalking no-contact orders into evidence, and there is no question of their authenticity. Accordingly, defendant's argument that those orders were entered in violation of his first amendment rights is no defense to his convictions of violating the orders.

¶ 15 Defendant further argues that the trial court erred in granting certain portions of a motion *in limine* filed by the State. In the motion, the State sought, *inter alia*, to "prohibit[ ] the defense from referring to in opening statements, asking any witness questions about, cross examining in regard to, seeking to introduce any evidence of [various enumerated] irrelevant, immaterial, improper, and inflammatory matters, *before the jury*[.]" (Emphasis added.) As pertinent here, the State sought to bar any reference to (1) the validity of the stalking no-contact orders,

(2) defendant's prior arrests in Kane County, or (3) any pattern of harassment of defendant by the Kane County State's Attorney's Office or Sheriff's Department. We note that it does not appear that defendant raised any issue in his posttrial motion concerning these portions of the motion *in limine*. Accordingly, he has not preserved any such issues for appellate review. See *People v. Barnwell*, 285 Ill. App. 3d 981, 989 (1996). In any event, defendant's argument is meritless.

¶ 16 Concerning the validity of the stalking no-contact orders, we reiterate that the only basis on which defendant could have challenged those orders is a lack of personal jurisdiction. During the hearing on the State's motion *in limine*, defendant identified no basis for such a challenge. Nor has he done so in this appeal. More importantly, while the trial court barred defendant from referring to the validity of the orders, it made clear that if the State offered them into evidence, defendant would have an opportunity to object and explain the basis for his objection outside the presence of the jury. Thus, defendant had a fair opportunity to challenge the validity of the orders.

¶ 17 Nor was it error to bar defendant from discussing, *in the jury's presence*, his prior arrests and any pattern of harassment in Kane County. Defendant contends that these matters were germane to his affirmative defense of "malicious prosecution." The State responds that malicious prosecution is not a recognized affirmative defense; indeed, we find no authority for such a defense. The State acknowledges that engaging in a *vindictive* prosecution—one "undertaken '[t]o punish a person because he has done what the law plainly allows him to do' " (*People v. Hall*, 311 Ill. App. 3d 905, 911, (2000) (quoting *United States v. Goodwin*, 457 U.S. 368, 372 (1982))—violates due process. However, the remedy for a vindictive prosecution is dismissal of the charges. *Id.* The State's motion *in limine* sought only to prevent defendant from making reference "before the jury" to arrests or alleged harassment. If defendant was the victim of a vindictive prosecution, he was free to ask the trial court to dismiss the charges.

¶ 18 Defendant further argues that the trial court erred by denying his motion to dismiss two other prosecutions on speedy trial grounds. (Apparently, the charges in those cases were ultimately nol-prossed.). We cannot discern any basis for exercising jurisdiction over those prosecutions in this appeal. In addition, defendant contends that the State violated his due process rights by failing to disclose that Jameson's employment with Performance Health "was terminated before charges for violating the stalking no contact order were filed on August 16, 2022." That information has no bearing on the charges against defendant. Nothing in the stalking no-contact order made Jameson's continued employment with Performance Health a condition of the directive that defendant have no contact with its other employees. Finally, defendant complains that the State failed to disclose a criminal complaint that De Kalb County State's Attorney Rick Amato made against defendant for threatening Amato. Defendant asserts that he was not ultimately prosecuted for that offense and that the complaint was, therefore, evidence of a pattern of harassment against him by public officials. Again, we find it difficult to see how that pertains to defendant's guilt or innocence of the charges in this case.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 21 Affirmed.