



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880

TTY: (800) 947-3529

Facsimile (608) 267-0640

Web Site: www.wicourts.gov

DISTRICT IV

November 16, 2023

To:

Hon. Ann Peacock
Circuit Court Judge
Electronic Notice

Brian D. Hamill
Electronic Notice

Petitioner

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP1848

Petitioner v. Aaron Smidl (L.C. # 2022CV2259)

Before Blanchard, Graham, and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Aaron Smidl appeals a ten-year domestic abuse injunction order. He argues that the circuit court violated his right to due process in finding that there was a substantial risk that he may commit first-degree or second-degree homicide against the petitioner. The petitioner has not filed a respondent's brief. We previously ordered this appeal submitted for review based solely upon Smidl's brief and the record. We now conclude that the appeal may be decided based solely upon his brief and the record. Further, based on our review of the brief and the record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2021-22).¹ We affirm.

A domestic abuse injunction generally lasts up to four years, with limited exceptions. WIS. STAT. § 813.12(4)(c) and (d). As relevant here, there is an exception that allows the injunction to last up to ten years if the circuit court finds by the preponderance of the evidence that “[t]here is a substantial risk that the respondent may commit first-degree intentional homicide under [WIS. STAT. §] 940.01, or 2nd-degree intentional homicide under [WIS. STAT. §] 940.05, against the petitioner.” Sec. 813.12(4)(d)1.a.

Smidl states that, although he disagrees with the circuit court’s award of a domestic abuse injunction to the petitioner, he is not arguing on appeal that the court erred by issuing an injunction. Rather, he challenges only whether the court properly ordered the injunction to last for a ten-year period based on the statutory exception for a substantial risk of homicide. He argues that the court violated his right to due process in finding that the petitioner satisfied this exception.

To put Smidl’s more specific arguments in context, we first summarize additional background. We then explain why we reject his arguments.

In her petition for a domestic abuse injunction, the petitioner alleged all of the following facts. She alleged that Smidl became verbally aggressive with her about two weeks after they started dating. She alleged that when she did not want to have sex, Smidl would threaten to hit her, push her down the stairs, and “run [her] over.” She alleged that one time when she tried to go to a gas station, Smidl pulled her hair, twisted her arm, pushed her up against the wall, and would

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

not let her leave. She alleged that another time when she asked Smidl to take her to her apartment, he pulled a gun on her, pointed it at her face, hit her in the head with the gun, dislocated her shoulder by pushing her up against the wall, and screamed at her for trying to leave. She also alleged that she “need[ed] this restraining order because I fear for my life.”

The petitioner also checked a box on the petition relating to the statutory exception for a ten-year injunction. In checking the box, the petitioner indicated that she was requesting that the court “[o]rder the Injunction, which is in effect for not more than 10 years, if the Court finds a substantial risk the respondent may commit 1st or 2nd degree intentional homicide, or 1st, 2nd or 3rd degree sexual assault against the petitioner.”

At the injunction hearing, the petitioner testified that the facts alleged in her petition were all true and correct. She also testified that there were additional threats Smidl had made to her life or physical wellbeing. She also testified that she was afraid of Smidl and of the threats he had directed at her. She testified that there were times when Smidl had weapons in the house and “threatened killing himself and me for trying to leave.” When questioned about whether Smidl’s threats had continued after their brief relationship ended, the petitioner testified that Smidl could no longer contact her because she had him “blocked on everything,” but that a few of his friends tried to contact her and warn her that he had been “telling them all that he’s actively searching for me and that he wishes to harm me.”

During her testimony, the petitioner did not expressly reference the check-box request in her petition for a ten-year injunction or otherwise expressly address the length of the injunction she was seeking. She also did not expressly assert that she believed that there was a substantial risk that Smidl may commit first-degree or second-degree homicide against her.

Smidl also testified. He denied pulling a gun on the petitioner or engaging in any abuse of her. He also testified that he “had her blocked on everything,” that he was not looking for her, and that he had not sent friends to talk to her. He testified that he lived in Oshkosh and that he had never gone to Madison, where he believed the petitioner lived.

Separately, a friend of Smidl’s testified that he was at Smidl’s home on a near-daily basis throughout the day during the parties’ relationship and that he never saw Smidl throw or punch anything, lay a hand on anybody, or become aggressive with anybody.

At the conclusion of the injunction hearing, the circuit court generally credited the petitioner’s testimony and found that there were grounds for a domestic abuse injunction. The court then proceeded to engage in an exchange with the petitioner that forms the basis for Smidl’s due process claim. The exchange proceeded as follows:

THE COURT: For what period of time are you requesting [the injunction]?

[PETITIONER]: The longest period you got. I heard you could go up to 10 years, so—

THE COURT: Well, I do have to make findings that there is a danger of first—first or second degree intentional homicide or sexual assault.

....

So what I have to find is there’s a substantial risk that the respondent may commit first or second degree intentional homicide; or first, second, or third degree sexual assault, that I have to find that by a preponderance of the evidence.

So are you alleging that you are in substantial risk of first or second degree intentional homicide?

[PETITIONER]: Yes.

THE COURT: You are alleging that? Okay. All right. So, I will go ahead and find by a preponderance of the evidence there is

a risk given the nature of the allegations that have been made, the threats to harm, the use of the weapon. And so I will order a 10-year domestic abuse restraining order.

According to Smidl, this exchange shows that the circuit court violated his right to due process by finding that there was a substantial risk that he may commit homicide against the petitioner based on testimony the petitioner provided after the close of evidence that he lacked the opportunity to challenge. He argues that he did not have the opportunity to cross-examine the testimony or otherwise respond to this new evidence that was required for the court to impose an injunction lasting ten years. He also argues that the record shows that the court did not consider the petitioner to have met her burden to show a substantial risk of homicide. Finally, he contends that there was no admissible evidence that the court could have relied upon to show that he was a future threat because the only testimony on this topic was inadmissible hearsay about what his friends allegedly told the petitioner.

Smidl did not raise his due process argument or otherwise object on any of these grounds during the injunction hearing. He acknowledges this lack of an objection and, in effect, concedes that his due process claim has been forfeited. He argues that we should review his due process claim based on the plain error doctrine. He argues that the due process violation is plain error because it goes to the heart of his fundamental constitutional rights to be heard and to cross-examine a witness. We are not persuaded.

“Due process claims raise questions of law that we review de novo.” *City of S. Milwaukee v. Kester*, 2013 WI App 50, ¶13, 347 Wis. 2d 334, 346, 830 N.W.2d 710. “Procedural due process requires that a party whose rights may be affected by government action be given an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.” *Id.* (quoted source omitted). “An opportunity to be heard

in court at a meaningful time and in a meaningful manner’ satisfies procedural due process.” *Id.* (alteration brackets and quoted source omitted).

“Under the doctrine of plain error, an appellate court may review error that was otherwise waived [or forfeited] by a party’s failure to object properly or preserve the error for review as a matter of right.” *State v. Mayo*, 2007 WI 78, ¶29, 301 Wis. 2d 642, 734 N.W.2d 115. The doctrine “‘should be used sparingly and only in cases ... where a basic constitutional right has not been extended to the accused.’” *State v. King*, 205 Wis. 2d 81, 91, 555 N.W.2d 189 (Ct. App. 1996) (quoted source omitted).

Here, there are three main reasons why we are not persuaded by Smidl’s due process and plain error arguments. First, as noted above, the petitioner checked a box on the petition indicating that she was requesting the injunction for up to ten years if the court found that there was a substantial risk that Smidl may commit first-degree or second-degree intentional homicide or other qualifying crimes. Accordingly, Smidl had notice, prior to the injunction hearing, that the petitioner had taken the position that the court should impose a ten-year injunction based on this alleged risk, and Smidl was free to present evidence relating to the relevant legal standards for a ten-year injunction. On a related point, some allegations in the petition provided support for this position.

Second, we disagree with Smidl’s interpretation of the record as showing that the circuit court did not consider the petitioner to have met her burden to show the requisite risk of homicide based on the testimony that she presented during the hearing, and that the petitioner provided additional testimony after the close of evidence. The record shows instead that the court found that the petitioner had met her burden based on the testimony the court had already heard. The

court expressly stated that its finding was based on “the nature of the allegations that have been made, the threats to harm, [and] the use of the weapon.” This statement is most reasonably read as a reference to the substantive testimony that she gave before the court’s inquiries clarifying the petitioner’s request. The substantive testimony included the petitioner’s testimony that her petition allegations were all true and correct.

Third, Smidl had a meaningful opportunity to challenge the substance of the petition allegations and the petitioner’s testimony through cross-examination of the petitioner and by offering his own testimony and his friend’s testimony. His challenge ultimately failed not because he lacked a sufficient opportunity to test the petitioner’s testimony but because the circuit court credited sufficient aspects of her testimony over his testimony and his friend’s testimony. We are not persuaded that any hearsay evidence that the court may have considered rose to the level of plain error warranting reversal.

Therefore,

IT IS ORDERED that the circuit court’s order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals