DISTRICT OF COLUMBIA COURT OF APPEALS

No. 08-FM-863

MICHAEL E. KENNEDY, APPELLANT,

v. CPO1163-08

ALFRED DURHAM, APPELLEE.

Appeal from the Superior Court
of the District of Columbia,
Family Division

(Hon. Linda D. Turner, Trial Judge)

(Submitted December 10, 2009 Decided March 8, 2010)

Before: WASHINGTON, *Chief Judge*, and FERREN and STEADMAN, *Senior Judges.*

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: In this appeal, appellant Michael Kennedy challenges the entry of a Civil Protection Order (CPO) against him. He argues the evidence was insufficient to establish that appellee Alfred Durham, an Assistant Chief of Police in the District, was entitled to such an order under relevant statutes and case law. Because we agree with appellant that the issuance of the CPO was in error, we reverse.[1]

The trial court may issue a CPO if it finds good cause to believe a person has committed or is threatening to commit an "intrafamily offense." D.C. Code § 16-1005(c) (2008 Supp.) At the time of the hearing in this case, included in the definition of "intrafamily offense" was "an act punishable as a criminal offense committed by an offender upon a person . . . who had been stalked or is being stalked by the offender." D.C. Code § 16-1001 (5) (2008 Supp.). In issuing the CPO against appellant, the court stated, "The Court finds that the petitioner has demonstrated good cause to believe that an intrafamily offense occurred, that offense of course being stalking."

The evidence presented to the trial court contained only one instance of any direct contact by appellant with the appellee; namely, an e-mail on March 14, 2008. All of the remaining evidence consisted of accusations, arguably defamatory if untrue, of appellee's misconduct made to third

[1] Since Durham did not file a brief with this court, the case was submitted on the appellant's brief and the record alone. Although it was not determinative in our analysis in this case, we have cautioned that "an appellee's failure to file a brief is a factor that we may appropriately consider in our calculus." *Hobley v. Law Office of S. Howard Woodson, III*, 983 A.2d 1000, 1004 n.6 (D.C. 2009) (internal citations and quotation marks omitted).

parties in blogs on various websites, in a complaint filed with the Metropolitan Police Department, in e-mails to various persons within the Department, and testimony by appellant before the District of Columbia Council. In *Richardson v. Easterling*, 878 A.2d 1212 (D.C. 2005), we held that defamatory statements made to third parties "do not implicate the Intrafamily Offenses Act" because "a defamatory statement is not . . . a criminal act" and a complainant "ha[s] an obvious remedy in tort." *Id.* at 1217.[2] With respect to the single e-mail directed to appellee, the offense of stalking requires action "on more than one occasion" and "repeatedly." D.C. Code § 22-404(b). *See Washington v. United States*, 760 A.2d 187, 198 (D.C. 2000) (stalking is "defined as a series of incidents that are part of a course of conduct extending over a period of time"). Because the evidence at its most favorable for Durham showed one non-defamatory communication, the trial court abused its discretion in finding that appellant had committed stalking, and thus the court erred in issuing the CPO.

Accordingly, we reverse and remand with instructions to the trial court to vacate the CPO.

ENTERED BY DIRECTION OF THE COURT

Garland Pinkston, Jr.
Clerk of the Court

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[2] We also noted that "an order prohibiting [respondent] from making representations to others regarding [petitioner's] allegedly culpable conduct at least arguably constitutes constitutionally impermissible prior restraint of speech; ordinarily, 'equity does not enjoin a libel or slander.'" *Id.* at 1217-18 (internal citation omitted).