Supreme Court
State of Washington

Case 32671-0-II
and 32811-9-II

Karyn

Petitioner-Respondent

versus

Brian Patrick Carr

Respondent-Appellant

Petition for Review

Brian P. Carr
11301 NE 7th St, Apt J5
Vancouver, WA
503-545-8357

Respondent:
Karyn

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Identity of the Petitioner

The Respondent / Appellant, Brian P. Carr, asks this court to accept review of the Decision described below.

Decision

On May 6, 2006, the Court of Appeals, Division II entered an Unpublished Opinion in 32671-0-II and 32811-9-II affirming the various Decisions and Orders of the Clarke County Superior Court in 04-2-08824-4 and 04-2-08908-9. The Opinion was by the Honorable Penoyar with concurrence of the Honorable Bridgewater and the Honorable Hunt.

Preliminary Statement

The courts in Clark County made admirable efforts to speed and simplify the processing of domestic violence cases, but, unfortunately, went too far in ignoring the requirements of the constitutions and statutes. Rather than addressing these issues as presented to it, the Court of Appeals chose to ignore them.

Issues Presented for Review

The Court of Appeals, Division II abused its discretion in not addressing several due process issues which were presented to the Court to include:

1. Can the Superior Court in any given county make more than three valid simultaneous appointments of Commissioners who aren't Family Court Commissioners? The trial court answered in the affirmative.
2. Can a court grant an Order of Protection under RCW 26.50 without taking any evidence (testimony) from either party when there are conflicting allegations about points of substance? The trial court

answered in the affirmative.

3. Does an in chambers review of a Petition under RCW 26.50 where the Petitioner is not present constitute an 'ex parte hearing in person or by telephone' as required under RCW 26.50.070 (3)? The trial court answered in the affirmative.
4. Must an Order of Protection with no contact provisions explicitly allow attendance at court hearings or sessions where the Respondent is scheduled to appear? The trial court answered in the negative.
5. Can a Petition for an Order for Protection under RCW 26.50 be denied for FTA (failure to appear) while there is a pending Motion to Reschedule the hearing and while the Petitioner is prohibited by court order from appearing? The trial court answered in the affirmative.

As well as other issues raised by the Appellant. The Court of Appeals affirmed all these answers without directly addressing any of them in the Opinion for which review is requested.

Statement of the Case

Mr. Carr had attended Mensa social functions for many years and met Karyn at one such function in October of 2002 (10/27/04 RP 7, CP 103, 108). The parties were married on August 16, 2003, but there were problems in the marriage and Karyn filed for divorce on August 18, 2004 (CP 108).

Karyn filed a Petition for an Order for Protection on October 15, 2004, case 04-2-08824-4. (10/27/04 RP 5,6 CP 46-52). The Temporary Order was granted by the Honorable Eiesland, one of more than three Superior Court Commissioners in Clark County (CP 51-52, 160-167).

On October, 27, 2004, a hearing was held before the Honorable Melnick one of more than three Superior Court Commissioners in Clark County (10/27/04 RP 1-12 CP 160-167). The Honorable Melnick granted an Order for Protection before Mr. Carr had closed and without taking any testimony, no statements were taken under oath (10/27/04 RP 3-8).

In both the Petition and at the hearing, Karyn asked that Mr. Carr be precluded from attending Mensa functions, but in both Orders there were no such prohibitions (10/27/04 RP 7 CP 47, 50-56). On November 5, 2004, Mr. Carr was attending a Mensa function when, apparently, one of Karyn's friends called her to inform her of Mr. Carr's presence (CP 5). Karyn went to the restaurant but did not enter and instead called the police (CP 5). Mr. Carr was never aware of her presence until after the police were escorting him out of the facility (CP 5). Mr. Carr was arrested and incarcerated until the evening of November 8, 2004 (CP 5). The matter was not pursued by the Multnomah County District Attorney due to a lack of evidence that Mr. Carr's violation was willful, but remains on his criminal record while the expungement is appealed.

On November 12, 2004, Mr. Carr filed a Petition for an Order of Protection (CP 1-5). All of the parties seeking Temporary Orders waited in a District Court room, but no judge or commissioner spoke to any party (CP 32, 129). Mr. Carr's Petition, case 04-2-08908-9, was denied citing 'Action Stale', but it was not signed (CP 2, 32, 129). While the record never indicated the deciding authority, an informal inquiry by Mr. Carr determined that the clerk routinely notes the initials of the deciding authority outside the formal record when a Petition is denied and that his Petition was denied by the Honorable Melnick (CP 32,33).

On December 30, 2004, Mr Carr filed a Motion to Revise with hearing scheduled for January 28, 2005 in case 04-2-08824-4 seeking, amongst other things, permission to attend court hearings where he was scheduled to appear (CP 74, 75). This case was not under appeal at the time (CP 142).

On January 7, 2005 in case 04-2-08908-9 which was under appeal at that time (CP 9) and where no motion was before the court, Judge Johnson informed Mr. Carr via letter that Judge Nichols had modified the decision to schedule a hearing on January 19, 2005 (CP 23-26, 137, 138). On January 10, 2005, Mr. Carr submitted a motion to have this hearing rescheduled to the hearing of January 28, 2005 as the current Order in case 04-2-08824-4 prevented him from knowingly remaining within 300 feet of Karyn and the physical dimensions of court rooms would not permit him to be present with Karyn (CP 16-25, 54).

On January 19, 2005, the Petition in case 04-2-08908-9 was again denied, this time for 'FTA' (which is assumed to be Failure to Appear) by the Honorable Eiesland who was still one of more than three Superior Court Commissioners in Clark County (CP 34, 40-45, 168, 169). The hearing of January 28, 2005 was canceled without notifying Mr. Carr and, on January 31, 2005, Mr. Carr rescheduled the hearing for February 18, 2005 as motions were not being heard on February 11 (CP 74, 156). On February 16, 2005 Judge Johnson issued a written decision in both cases (they were mirror of each other) summarily denying all requests by Mr. Carr two days before the scheduled hearing (CP 35-37, 188-190).

Arguments Why Review Should be Accepted

1. More Than Three Commissioners

The Opinion states on Page 7, first paragraph of section III::

> Carr argues that his due process rights and his right to have a judge adjudicate his case were violated because Clark County allegedly appointed more than three court commissioners. However, a family law commissioner is not a "commissioner" within the meaning of the constitutional provision limiting the number of court commissioners in counties.

Unfortunately this misconstrues the question before the court of:

> Can the Superior Court in any given county make more than three valid simultaneous appointments of Commissioners who aren't Family Court Commissioners?

While this question is rather laborious, it clearly specifies that Family Court Commissioners should not be considered in the Constitutional numeric limits. *Ordell v. Gaddis,* 99 Wn.2d 409, 409-10, 662 P.2d 49 (1983) only notes that Family Court Commissioners and Pro Tempore Commissioners should not be considered in this numerical limit but there are no indications in the record that any of the Commissioners referred to are either Family Court Commissioners or Pro Tempore Commissioners. Indeed, *Ordell v. Gaddis,* 99 Wn.2d 409 clearly indicates that other than those particular exceptions, the Superior Court can not exceed the numerical limits established in Article 4, Section 23 of the Washington State Constitution and that an appeal is the preferred method of contesting such jurisdictional questions *Barnes v. Thomas*, 96 Wn.2d 316, 318, 635 P.2d 135 (1981), *State Ex Rel. Maurer v. Superior Court*, 122 Wash. 555, 211 P. 764 (1922); *State Ex Rel. Waterman v. Superior Court*, 127 Wash. 37, 220 P. 5 (1923). .

The Opinion misuses the term 'allege' which is defined as 'To assert

without or before proof'[1] and then ignores the evidence of such appointments included in the record. In particular there were Orders and Oaths for four Superior Court Commissioners in Clark County under Article 4, Section 23 of the Washington State Constitution and RCW 2.24.040 for 2004 and 2005 (CP 40-45, 160-169). These Orders did not state Family Court Commissioners, Pro Tempore Commissioners, or reference RCW 26.12. Further, these Orders were supported by a sworn affidavit that they were received from the Clark County Superior Court Chief Administrator's Office (CP38, 158). If there were any problems with this evidence, then it should have been addressed by the Court rather than just ignored in the Opinion.

2. No Testimony Taken at Hearing

The Court of Appeals was presented with the question of:

> Can a court grant an Order of Protection under RCW 26.50 without taking any evidence (testimony) from either party when there are conflicting allegations about points of substance? The trial court answered in the affirmative.

STATE v. KARAS - 108 Wn. App. 692 interprets RCW 26.50 as requiring that the Respondent be given the opportunity to testify at the hearing to meet the requirements of due process (Fourteenth Amendment), but in Clark County hearing testimony is routinely eliminated thereby violating due process. The Opinion completely ignores the question except on page 3, paragraph 1:

> On October 27, Carr and Karyn each testified about whether the temporary protective order should be extended to a period of one year.

This is a misuse of the term 'testified' which is defined as 'To make a declaration of truth or fact under oath'[2] while it is quite clear in the record

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that at no time during the hearing were either party under oath or subject to the penalty of perjury. It was an error by the Court of Appeals to simply ignore this issue and list as facts Karyn's allegations. The ownership of the marital residence (Washington is a community property state) was an important contested issue as was the distance Mr. Carr moved (a trivial check of the distance between the two addresses shows it was over two miles and on a completely different road versus the 'just down the street' listed as fact in the Opinion). Similarly, the timing and rationale for Mr. Carr's job change is ignored and the distance between the workplaces is simply wrong. The evening of September 28, 2004, when Mr. Carr 'forced himself into the house' was during the period when he still resided at the marital residence and his apartment was not yet inhabitable (utility services lacking) and the use of any force is contested. These and numerous other issues required the trial court to take testimony so that erroneous allegations are not listed as facts as in the case of this Opinion.

3. No ex parte hearing

RCW 26.50.070 (3) requires an ex parte hearing in person or by telephone but no such hearing was held. The Court of Appeals was presented with:

> Does an in chambers review of a Petition under RCW 26.50 where the Petitioner is not present constitute an 'ex parte hearing in person or by telephone' as required under RCW 26.50.070 (3)? The trial court answered in the affirmative.

but the trial court completely ignored this question. The fact that the deciding authority can not be determined from the record (the denied Order was not signed) is indicative of this problem. Had there been an ex parte hearing, the identity of the deciding authority could have been determined with assurance. It is questionable if any of the Temporary Orders for Protection issued under RCW 26.50 in Clark County were

valid as the Commissioners processing the Petitions routinely omitted this required hearing.

The Court of Appeals created a new rationale for denying the Petition through finding 'that Karyn's actions did not constitute domestic violence' while there was no such finding by the Superior Court. There was a finding, possibly by the Honorable Melnick, of 'Action Stale' but this decision was unsigned. The only signed decision lists 'FTA' (assumed to be Failure to Appear) was by the Honorable Eiesland. The finding of the Court of Appeals is particularly egregious as it based on ignoring the majority of the circumstances cited by Mr. Carr in justifying the request for an Order for Protection. This misunderstanding highlights the need for the ex parte hearing required under RCW 26.50.070 (3) as it permits the Petitioner to correct any such omissions or misunderstandings.

4. Attendance at Court Hearings

An important question before the Court was:

> Must an Order of Protection with no contact provisions explicitly allow attendance at court hearings or sessions where the Respondent is scheduled to appear? The trial court answered in the negative.

The Opinion of the Court of Appeals completely ignores this question. The fact that the trial court scheduled a joint hearing[1] in case 04-2-08908-9 after the Notice of Appeal was filed and while there was no motion before the court and after Mr. Carr had requested the ability to attend such joint hearings in case 04-2-08824-4, demonstrates the necessity of including that allowance in all such orders. Mr. Carr's

1 In the footnote on Page 3 of the Opinion this hearing is listed as being initiated by Mr. Carr but a review of the 'temporary protective order ' of January 19, 2005 shows that it was completely initiated by Judge Nichols (CP 27, 23-26)

Petition in case 04-2-08908-9 was denied for 'FTA' at a hearing which he had not scheduled and which he was prohibited from attending. The Court of Appeals should have addressed this Due Process issue in its Decision and found that the lack of these provisions violate the requirements of the Fourteenth Amendment of the United States Constitution.

5. Failure to Appear

The Court of Appeals was presented with the question of:

> Can a Petition for an Order for Protection under RCW 26.50 be denied for FTA (failure to appear) while there is a pending Motion to Reschedule the hearing and while the Petitioner is prohibited by court order from appearing? The trial court answered in the affirmative.

but this question was only peripherally addressed in the Opinion with 'Carr's motions did not comply with Civil Rule (CR) 7(b)(1), which requires an application for order to state with particularity the grounds for the motion, and to set forth the relief or order sought.' The Brief (Br 35) cited the precise pages in the record where the grounds for the motion were listed (that Mr. Carr was prohibited from attending if Karyn was present, CP 18-19) and the relief sought (rescheduling of the hearing to a hearing which Mr. Carr could attend, CP 16-17). It was an error for the trial court to deny the Petition for 'FTA' while there was a pending Motion to Reschedule and an error for the Court of Appeals to affirm without addressing this issue or the other issues raised in Mr. Carr's Brief.

Argument Why Review Should Be Accepted

In accordance with RAP 13.4 (b) (3), review is warranted as there are significant questions of law under the Constitution of the State of Washington (Article 4, Section 23) and of the United States

(Fourteenth Amendment, Section 1). Beyond the obvious questions of what are the implications of appointing too many Superior Court Commissioners and denying the Appellant's right to be heard (due process), there is also the issue of due process of the Court of Appeals not addressing central questions properly put before it and ignoring evidence that was in the record. Indeed, if it were found that Court of Appeals discretion allowed ignoring due process questions put before it, the appeal process itself would not meet the due process requirements of the Fourteenth Amendment.

Due to the number and complexity of the issues involved in this case, it is likely that it will be presented to the federal courts. There is a distinct lack of Washington state case law to resolve the questions cited such as the circumstances, if any, when an RCW 26.50 Order for Protection can be issued without taking testimony from either party. It would be helpful to have state court guidance in these matters before the federal courts review these proceedings. Further, these issues are of substantial public interest that should be determined by the Supreme Court as provided by RAP 13.4 (b) (4).

Conclusion

The Court of Appeals denied the Appellant's request for oral argument citing, in particular, that the Appellant's Brief adequately covered the rights of Washington citizens to be heard by Judges rather Commissioners within the numerical limits of the Washington State Constitution, Article 4, Section 23. For the Court of Appeals to then misconstrue the question before it concerning the numerical limits (specifically excluding Family Court Commissioners from the totals) is

an abuse of the Appellant's rights to due process.

It had been the intent of the Appellant to present at oral argument the dangers of allowing expediency to take precedence over legality. While the Clark County Superior Court was clearly trying to simplify and speed the processing of Domestic Violence matters (an admirable goal), they went too far by ignoring the requirements of the Constitution and statutes. The Appellant is a graduate of West Point, class of 1975, and knows that a significant majority of the officers in the U.S. military put legality above expediency. However, there is also a significant minority of the officers who put expediency above legality (as commonly associated with Colonel North). This focus on expediency is a greater danger to our form of government than the terrorism associated with Osama bin Laden. If a significant majority of U.S. military officers were to put expediency before legality, Appellant's expects that within a decade we would no longer have a government of law but instead a military dictatorship.

The devotion of military officers to legality is a reflection of the values of our society such that when the courts choose expediency over legality it undermines the very foundation of our democracy. It was wrong for the Clark County Superior Court to decide to ignore the numerical limits of the Washington State Constitution and for the Court of Appeals, Division II, to ignore this transgression. To fix such problems is difficult and painful proposition, but such challenges are essential to maintaining a government of law.

Due to the serious dangers of putting expediency above legality, the

Appellant will be requesting that various organizations which might have an interest in maintaining the sanctity of a government of law such as the A.C.L.U. submit Amicus Curiae memorandum in this matter and the Supreme Court is requested to permit these inputs into this important matter.

/s *Brian P. Carr*

Dated: June 2, 2006

Location: Vancouver, WA

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