

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 16-297

Judge:

Complainant:

ORDER

The complainant alleged a pro tem superior court judge improperly upheld an order of protection.

The responsibility of the Commission on Judicial Conduct is to impartially determine if the judge engaged in conduct that violated the provisions of Article 6.1 of the Arizona Constitution or the Code of Judicial Conduct and, if so, to take appropriate disciplinary action. The purpose and authority of the commission is limited to this mission.

The commission does not have jurisdiction to review the legal sufficiency of the judge's rulings. In addition, the commission found no evidence of ethical misconduct and concluded that the judge did not violate the Code in this case. Accordingly, the complaint is dismissed in its entirety, pursuant to Rules 16(a) and 23(a).

Dated: December 7, 2016

FOR THE COMMISSION

/s/ George A. Riemer

George A. Riemer
Executive Director

Copies of this order were mailed to the complainant and the judge on December 7, 2016.

This order may not be used as a basis for disqualification of a judge.

CONFIDENTIAL

Arizona Commission on Judicial Conduct
1501 W. Washington Street, Suite 229
Phoenix, Arizona 85007

FOR OFFICE USE ONLY

2016-297

COMPLAINT AGAINST A JUDGE

Name: _____ Judge's Name: _____

Instructions: Use this form or plain paper of the same size to file a complaint. Describe in your own words what you believe the judge did that constitutes judicial misconduct. Be specific and list all of the names, dates, times, and places that will help the commission understand your concerns. Additional pages may be attached along with copies (not originals) of relevant court documents. Please complete one side of the paper only, and keep a copy of the complaint for your records.

PLEASE SEE ATTACHED DOCUMENTS

Re:

I. Witnesses:

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II. Allegations:

1. committed violation of Rule 2.5(A) of the Code of Judicial Conduct by failing to conduct her judicial duties completely and competently by not making a legally-required inquiry, thus denying the Defendant due process.
2. committed violation of Rule 1.1 of the Code of Judicial Conduct committing reversible errors of law, applying incorrect legal standards, and abusing discretionary standards.
3. committed violation of Rule 2.2 of the Code of Judicial Conduct by upholding the issuance of the order after the Plaintiff failed to meet the burden of proof. Additionally, failed to act impartially and in fact showed favoritism to the Plaintiff by "leading her" to specific testimony of additional information which she used as the basis for her ruling.
4. committed violation of Rule 2.2 and 2.5(A) of the Code of Judicial Conduct in that when valid statutory and case law authority was presented via Defendant's Motion to Reconsider, instead of reversing her decision or even reevaluating it under the proper legal standard, she ignored the law and persisted in upholding an improper ruling.

III. Relevant Facts:

On Petitioner petitioned the for an Order of Protection against her ex-husband, Petitioner specifically requested that be ordered to stay away from Petitioner's home, place of employment, her parents' home, and their child, school. Petitioner also requested that be ordered not to possess firearms or ammunition, and that he be required to participate in domestic violence or other counseling. Petitioner did not allege that had been present at any of the above-listed locations without lawful reason, nor did she allege that had committed any criminal acts. Instead, she merely referenced strongly-worded texts and e-mails exchanged as part of their parenting plan, and claimed that these texts were made in a ' Petitioner claimed that but provides no evidence of an actual threat against her. Instead, Petitioner seems to rely on statement that contested this hearing.

On presided over an Order of Protection Hearing in which the complainant, was the defendant. limited the Defendant's time to present his case by " with what she referred to as " delaying the Defendant's presentation of evidence, and allowing her clerk to ' labeling or searching for evidence. went on to re-examine the Plaintiff by leading her to testify to specific information the Judge wanted to hear on the record to be used as the basis for her ruling. After the presentation of all testimony and evidence, Judge ruled that

Judicial Complaint Statement

Re:

() also stated that In support of her ruling, stated that At no point during the hearing did ask the Petitioner about use of or access to firearms. Nor did indicate a finding that posed a **Credible Threat** to Petitioner's safety. Finally, the Court provided no support for the finding that would commit an act of domestic violence in the future.

Subsequently issued a written Minute Entry. The Minute Entry affirmed in-court rulings that

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The written ruling further stated that
' *Id.* at p. 3. Again, the written Minute Entry contained no finding that posed a credible threat to Petitioner's safety.

On the Court reviewed the Defendant's Motion to reconsider timely filed on Even when valid statutory and case law authority was presented, instead of reversing her decision or even reevaluating it under the proper legal standard, she ignored the law and persisted in upholding an improper ruling.

IV. Law:

EVIDENTIARY STANDARDS:

A petition for an Order of Protection "**shall state**...[a] specific statement, including dates, of the domestic violence alleged." A.R.S. § 13-3602(C)(3) (emphasis added). "The court shall issue an order of protection...if the court determines that there is reasonable cause to believe...[t]he defendant may commit an act of domestic violence...[or] [t]he defendant has committed an act of domestic violence within the past year." A.R.S. § 13-3602(E). "If the court find that the defendant is a **credible threat** to the physical safety of the plaintiff or other specifically designated persons, [the court may] prohibit the defendant from possessing or purchasing a firearm for the duration of the order." A.R.S. § 13-3602(G)(4).

"We review an order of protection for an abuse of discretion." *Savord v. Morton*, 235 Ariz. 256 ¶ 10, 330 P.3d 1013 (App. 2014) *citing Cardoso v. Soldo*, 230 Ariz. 614, 619, ¶¶ 15-16, 277 P.3d 811, 816 (App. 2012). A trial court abuses its discretion when it makes an error of law in reaching a discretionary conclusion or "when the record, viewed in the light most favorable to upholding the trial court's decision, is **devoid of competent evidence** to support the decision." *Id. citing Mahar v. Acuna*, 230 Ariz. 530, 534, ¶ 14, 287 P.3d 824, 828 (App. 2012). "It is well settled that the issuance of an order of protection is a very serious matter." *Id. citing Cardoso*, 230 Ariz. At 619, ¶ 14, 277 P.3d at 816. "Therefore, granting an order of protection when the allegations fail to include a statutorily enumerated offense constitutes error by the court." *Id.*

BRADY:

"When issuing an Order of Protection, *ex parte* or after a hearing, the judicial officer **must ask** the plaintiff about the defendant's use of or access to firearms to determine whether the defendant poses a credible threat to the safety of the plaintiff or other protected persons." Ariz. R. Protect.

Judicial Complaint Statement

Re:

Ord. Proc. Rule 23(i)(1) (emphasis added). "A higher standard of review applies when a court's order implicates a defendant's right to possess firearms under the Second Amendment to the United States Constitution or under Article 2, Section 26, of the Arizona Constitution. *Savord* at 260, ¶ 20, 330 P.3d 1013 *citing Mahar*, 230 Ariz. at 536, ¶ 20, 287 P.3d at 830. "A firearm restriction under the federal gun Control Act is triggered by an order of protection **"only if** the order 'includes a finding that [the] person represents a credible threat to the safety of [the] intimate partner or child.'" *Id. citing* 18 U.S.C. § 922(g)(8)(C)(ii). "A restriction against firearms does not automatically follow an order of protection." *Id.* "Before a court may restrict the possession of firearms or ammunition... 'the judicial officer shall ask the plaintiff about the defendant's use of or access to weapons or firearms.'" *Mahar*, 230 Ariz. at ¶ 18, 287 P.3d 824. "The purpose of this rule is explained as follows: '[t]his inquiry shall be made to determine if the defendant poses a credible threat to the physical safety of the plaintiff or other protected persons.'" *Id. citing* A.R.S. § 13-3602(G)(4). "[O]rders concerning firearms should be based on a court's assessment of credible threats of physical harm by the specific person whose rights would be affected by the order. *Id.* at ¶ 20 *citing* A.R.S. § 13-3602(G)(4). An example of a "credible threat of physical harm" includes a defendant who "had threatened to shoot [the petitioner], had access to a gun safe with multiple firearms, and wore a gun on his hip." *Rozum v. Rozum*, 2015 Ariz. App. Unpub. LEXIS 1575, ¶ 21 (App. 2015). On the other hand, offensive or inappropriate behavior that does not rise to the level of a criminal act does not warrant the issuance of an Order of Protection. See *McDaniel v. Sundberg*, 2016 Ariz. App. Unpub. LEXIS 905 (App. 2016) (overturning the issuance of an Order of Protection where a defendant consumed alcohol and drove with minor children where no proof offered to show impairment or endangerment). The *McDaniel* Court also held that the trial court's failure to "ask Mother about Father's use of or access to firearms" was reversible error." *Id.* Likewise, "using the 'reasonable' cause test... rather than the 'credible threat' test" constitutes an abuse of discretion. *Mahar*, 230 Ariz. at ¶ 19, 287 P.3d 824. The *Savord* Court held that "the absence of the appropriate inquiries" "as to the [defendant's] use of or access to weapons or firearms" and the "lack of evidence supporting" a credible threat to the petitioner's safety "entitled [the defendant] to have the PBI quashed." *Savord* at 260, ¶ 22-23.

CRIMINAL CULPABILITY STANDARDS:

"A person commits threatening or intimidating if the person threatens or intimidates by word or conduct... to cause physical injury to another person...." A.R.S. § 13-1202(A)(1). "According to Webster's Dictionary, a person 'threatens' another by uttering 'an expression of intent to inflict evil, injury, or damage.'" *In re Kyle M.*, 200 Ariz. 447, 450-51, ¶ 18, 27 P.3d 804 (App. 2001) *quoting Webster's Ninth New Collegiate Dictionary* 1228-29 (1989)." However, "the legislature did not intend to criminalize such speech" as "expressions of political hyperbole and those made in jest or during idle talk." *Id.* "To avoid such preposterous results... the legislature intended only to criminalize *genuine* expressions of intent to either inflict bodily harm or seriously damage property of another." *Id.* (emphasis in original). "[A] statute... which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly. What is a threat must be distinguished from what is constitutionally protected speech." *Id.* at ¶ 20 *quoting Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399 (1969). "Thus, in order for the government to establish a **'true threat,'** it must demonstrate that the defendant made a statement in a context or under such circumstances wherein **a reasonable person** would foresee that the statement would be interpreted by those to whom the maker communicates the statement **as a serious expression of an intention** to inflict bodily harm upon or to take the life of [a person]." *Id.* at ¶ 21 (emphasis added) *citing United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990) *quoting United States v. Hoffman*, 806 F.2d 703, 707 (7th Cir. 1986). The *Kyle M.* Court upheld a statement that an individual had a "hit list" and "planned to bring a gun to school to kill two students in a 'Columbine thing'" as a true threat. *Id.* at ¶ 24.

Judicial Complaint Statement

Re:

"A person commits harassment if, **with intent to harass** or with knowledge that the person is harassing another person, the person...[a]nonymously or otherwise contacts, communicates or causes a communication with another person...in a manner that harasses." A.R.S. § 13-2921(A)(1). "[H]arassment' means conduct that is directed at a specific person and that would cause a **reasonable person** to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person." A.R.S. § 13-2921(E) (emphasis added). The Arizona Court of Appeals has held that the intent requirement was a vital element to the constitutionality of Arizona's harassment statute. See *State v. Brown*, 207 Ariz. 231, 235, ¶ 9, 85 P.3d 109 (App. 2004) citing *State v. Hagen*, 27 Ariz. App. 722, 725, 558 P.2d 750 (App. 1976). Furthermore, "criminal liability...is based on the 'manner' in which certain communication is conveyed **and the underlying purpose for the communication.**" *Id.* at ¶ 10. "This is made clear by the statute's requirement that the communication must have been made with the specific 'intent to harass.'" *Id.* quoting A.R.S. § 13-2921(A). The *Brown* Court went on to state that "the statute only criminalizes communications made with a specific, deliberate purpose." *Id.* The types of conduct that have been upheld as "harassment" by Arizona Courts include repeated, unwanted calls to a former romantic partner seeking to rekindle the relationship after being asked to stop multiple times (*Brown*), and multiple calls to a courthouse employee the day after a judge's death where the defendant shouted about God striking the judge down, and the defendant calling back seconds later after the employee hung up in shock and disbelief (*United States v. Schipke*, 2011 U.S. Dist. LEXIS 43017 (D. Ariz. 2011) affirmed by *United States v. Schipke*, 446 Fed. Appx. 51 (9th Cir. 2011)).

CASE LAW:

In re Harris, JC-96-0002 (September 20, 1996) A city magistrate was enjoined from seeking election or appointment as a judge in Arizona in a stipulated resolution. The charges against the judge involved allegations that she failed to follow administrative directives, ignored state laws, exceeded her authority when issuing orders of protection and injunctions prohibiting harassment, and engaged in improper *ex parte* communications.

V. Conclusion:

committed a reversible error of law by failing to make the necessary inquiries for a ruling that restricts Second Amendment rights, and committed an additional reversible error by applying the wrong legal standard to its ruling. Additionally, the communications that the Court found to be "threats" were Constitutionally-protected speech under the First Amendment, and not unlawful threats. Likewise, what the Court held to be "harassment" did not constitute a crime because did not have the requisite intention or knowledge required by the statute, and because the communication did not meet the "reasonable person" standard. As such, there is no reasonable cause to believe that committed a crime of domestic violence, nor reasonable cause to believe that he would commit a crime in the future. *In re Harris, JC-96-0002 (September 20, 1996)* A city magistrate was enjoined from seeking election or appointment as a judge in Arizona in a stipulated resolution. The charges against the judge involved allegations that she failed to follow administrative directives, ignored state laws, exceeded her authority when issuing orders of protection and injunctions prohibiting harassment, and engaged in improper *ex parte* communications. Similarly, failed to conduct her judicial duties completely and competently by not making a legally-required inquiry, following administrative rules for

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COMPLAINT ON ITS WEBSITE.**

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COMPLAINT IN THIS MATTER,
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