SUMMARY
December 7, 2023

2023COA117

No. 22CA1612, *People v. Zoller* — Criminal Law — Mandatory Protection Order — Modification Requests; Constitutional Law — Fourteenth Amendment — Due Process Clause — Right to Parental Association

A division of the court of appeals considers the due process standards that apply when a criminal defendant moves to modify a mandatory protection order that infringes on the fundamental constitutional right to parental association. Relying on federal and state law concerning conditions of probation, the division concludes that when a defendant challenges such an infringement pursuant to section 18-1-1001(6), C.R.S. 2023, the district court may not deny the motion without first finding that (1) the infringement is justified by compelling circumstances, and (2) the purpose of the infringement cannot be accomplished by less restrictive means.

Because the district court did not make the latter finding, the division reverses the order denying modification and remands for additional findings.

COLORADO COURT OF APPEALS **2023COA117**

Court of Appeals No. 22CA1612
El Paso County District Court No. 19CR7654
Honorable Eric Bentley, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Kyle Andrew Zoller,

Defendant-Appellant.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE RICHMAN*
Freyre and Yun, JJ., concur

Announced December 7, 2023

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 In this appeal, we are asked to decide whether the district court made findings sufficient to support its denial of Kyle Andrew Zoller's motion to modify a no-contact provision issued as part of a mandatory protection order (MPO) under section 18-1-1001(1), (3)(a)(II), C.R.S. 2023. As relevant to Zoller's motion, the MPO prevents Zoller from "contacting or directly or indirectly communicating with" his minor daughter — a victim and witness of his domestic crimes — until he has completed his prison and parole sentences. The court found that the order was justified for the daughter's safety and refused to modify it before Zoller's sentence is complete.

¶ 2 Addressing an issue of first impression, we conclude that to maintain the challenged no-contact provision of Zoller's MPO, additional findings are required. Because the court did not specifically find that the purpose of this infringement on Zoller's fundamental constitutional right to parental association could not be accomplished by less restrictive means, we must reverse the court's order and remand the case for additional proceedings.

I. Background

¶ 3 Zoller's neighbors reported a domestic disturbance at Zoller's home, where Zoller lived with his wife, H.Z., and their young daughter, E.Z. When police arrived at the neighbors' residence, they found H.Z. lying on the floor with multiple facial injuries and a "copious amount of blood on [her] person." E.Z. was not with her. But E.Z. met officers at the door of the Zoller home, and officers removed her. She was not injured.

¶ 4 H.Z. was transported to a hospital, where she was diagnosed with serious bodily injury including a brain bleed, a bilateral nasal fracture, and a broken finger. She reported that her memory of the incident was incomplete because she had been choked until she lost consciousness, but she remembered that Zoller had punched her at least a dozen times with his fist.

¶ 5 Officers later entered the Zoller home to arrest Zoller, who smelled of alcohol, had fresh injuries on his knuckles, and had dried blood on his face, hands, and sweatshirt. The officers observed blood throughout the house, but they deduced that the altercation had occurred primarily in E.Z.'s bedroom based on "holes in the drywall and blood throughout the room."

¶ 6 Among other counts, Zoller was charged with (1) first degree assault – intent to disfigure, a class 3 felony; (2) second degree assault – strangulation, a class 4 felony; and (3) misdemeanor child abuse – no injury. Pursuant to section 18-1-1001(1), the district court entered an MPO protecting H.Z. and E.Z. from Zoller. Because this was a domestic violence case, the court exercised its discretion to include in the MPO a provision specifically prohibiting Zoller from contacting or directly or indirectly communicating with his wife or daughter — the victims of his charged crimes — "until final disposition or further order of the court." *See* § 18-1-1001(3)(a)(II).

¶ 7 Zoller entered an *Alford* plea to (1) an additional charge of second degree assault – serious bodily injury and (2) the child abuse charge in exchange for dismissal of the remaining counts.[1] In accordance with the plea agreement, the district court sentenced Zoller to serve five years in the custody of the Department of

[1] Under an "*Alford* plea," an individual accused of a crime "may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

Corrections, concurrent with a 364-day jail sentence, followed by a mandatory parole period of three years.

¶ 8 Zoller was released from prison after serving less than two years of his sentence. About three months later, he moved to modify the MPO to allow contact with E.Z., asserting that continued restraint violated "his rights as a parent under *Troxel v. Granville*, 530 U.S. 57 (2000)." At a hearing on the matter, Zoller noted that he knew E.Z. was not in Colorado and suggested that contact could start slowly.

¶ 9 After a hearing, the district court ruled that due to the extraordinary circumstances of this case, it would not, in accord with its usual practice, defer to the domestic relations court on the issue of parenting. Instead, the court confirmed that the MPO would "remain in place unmodified through the conclusion" of Zoller's parole for the victims' safety and security.

II. Due Process Requires Specific Findings

¶ 10 On appeal, Zoller contends that the district court erred by failing to make the specific findings required to maintain the no-contact order because it infringes on his fundamental constitutional right to familial association with his daughter. Zoller does not

challenge the district court's authority or discretion under section 18-1-1001 to impose the original no-contact order or to continue the imposition of the no-contact order until his parole is discharged. As we read his arguments on appeal, he raises a purely constitutional challenge.

¶ 11 We conclude that the court must reconsider its order.

A. The MPO Statute and Standard of Review

¶ 12 By operation of section 18-1-1001(1), an alleged witness to or alleged victim of any title 18 offense is granted a protection order "against any person charged with a criminal violation." The MPO prohibits "harassing, molesting, intimidating, retaliating against, or tampering with" the witness or victim. *Id.* Additional special restrictions, including the no-contact order here, are permitted in cases that involve domestic violence. *See* § 18-1-1001(3)(a)(II).

¶ 13 The district court retains jurisdiction over an MPO, and the MPO remains in place, "until final disposition of the action." § 18-1-1001(1), (3)(a). For Zoller, the final disposition of the action is when he is discharged from parole supervision. *See* § 18-1-1001(8)(b). However, section 18-1-1001(6) explicitly allows

Zoller to "request a hearing before the court to modify the terms" of the MPO.

¶ 14 Both parties acknowledge that the district court's denial of Zoller's motion to modify the MPO presents a mixed question of fact and law. We defer to the court's factual findings unless they are clearly erroneous. *See People v. Ortega*, 2015 COA 38, ¶ 9. But we consider de novo whether the district court's order is constitutional. *See People v. Cooley*, 2020 COA 101, ¶ 26; *see also People v. Matheny*, 46 P.3d 453, 462 (Colo. 2002) (Where constitutional rights are concerned, the application of a law "is a matter for de novo appellate review.").

B. Similarity to Conditions of Probation

¶ 15 The findings required in the context of an MPO present a matter of first impression. But our court, like many other courts, has found that certain procedural protections apply in the analogous circumstance of probation conditions that infringe on fundamental constitutional rights. *See, e.g.*, *Cooley*, ¶ 36.

¶ 16 The "Conditions of probation" statute — section 18-1.3-204, C.R.S. 2023 — and section 18-1-1001 both serve to protect witnesses and victims from intimidation and harassment by

criminal defendants. *See* § 18-1.3-204(1)(a); § 18-1-1001(1). Section 18-1.3-204 also broadly provides for discretionary conditions "reasonably necessary to ensure that [a probationer] will lead a law-abiding life," thereby protecting the public at large. § 18-1.3-204(1)(a); *see People v. Ressin*, 620 P.2d 717, 719 (Colo. 1980) ("Probationary conditions serve the dual purpose of enhancing the reintegration of the offender into a responsible life style and affording society a measure of protection against recidivism."). While we recognize that there are significant differences between the probation conditions statute and the MPO statute, we see no reason why this should affect the standards that apply to the constitutional issue raised here.

¶ 17 We conclude that the procedural protections that apply when conditions of probation infringe on a fundamental constitutional right should also apply in the context of a challenged MPO.

C. Fundamental Right to Parental Association

¶ 18 "[T]he relationship between parent and child is constitutionally protected." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). The United States Supreme Court has long recognized a parent's interest in the companionship, care, custody, and control of his

children as a fundamental substantive due process right. *See Troxel*, 530 U.S. at 65-67; *see also Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972). And our supreme court has recognized the same. *See, e.g.*, *L.L. v. People in Interest of R.W.*, 10 P.3d 1271, 1275-76 (Colo. 2000) (first citing *Stanley*, 405 U.S. at 651; and then citing *Troxel*, 530 U.S. at 65).

¶ 19 Because parents possess "a fundamental right to maintain family relationships free from governmental interference," a government infringement of that right must meet certain due process standards. *Id.*; *see also United States v. Burns*, 775 F.3d 1221, 1223 (10th Cir. 2014); *United States v. Bear*, 769 F.3d 1221, 1229 (10th Cir. 2014) ("[R]estrictions on a defendant's contact with his own children are subject to stricter scrutiny."). The greater the deprivation of the right, the greater the procedural protection required. *L.L.*, 10 P.3d at 1275. When a supervised release (probation or parole) condition infringes on a parent's fundamental right, it must be supported by specific findings that (1) compelling circumstances require its imposition and (2) less restrictive means are not available. *See Cooley*, ¶ 36; *see also Burns*, 775 F.3d at 1224.

¶ 20 The no-contact order challenged here infringes on Zoller's fundamental right to parental association. For the MPO provision to survive a constitutional challenge, we conclude that the district court must find that (1) it is justified by compelling circumstances, and (2) the purpose of the order cannot be accomplished by less restrictive means. *See People v. Salah*, 2022 COA 134M2, ¶ 15 (holding that the right to familial association "can be infringed only upon a finding of compelling circumstances"; collecting cases) (*cert. granted* July 17, 2023); *Cooley*, ¶ 36 (collecting cases); *see also United States v. Lonjose*, 663 F.3d 1292, 1302-03 (10th Cir. 2011) (discussing that conditions of supervised release must not be overly broad).

D. Analysis

1. Compelling Circumstances

¶ 21 A state government has a compelling interest in the protection of its citizens. *See Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 945 (Colo. 1993) (citing with approval *Int'l Brotherhood of Elec. Workers, Local 1245 v. Skinner*, 913 F.2d 1454, 1462 (9th Cir. 1990)). The legitimate purpose of a no-contact order in cases of domestic violence is to provide for the safety and protection of a victim or

witness. *See* § 18-1-1001(3)(b). Zoller argues that because E.Z. was not physically harmed, the evidence of violence against H.Z. did not present compelling circumstances to infringe his right to associate with E.Z. In other words, he argues that the court's findings suggest merely a *threat* of injury to E.Z., and this is not enough. We disagree.

¶ 22 First, we note that (1) E.Z. was both a victim of child abuse and a witness to domestic violence and (2) the no-contact order authorized by section 18-1-1001(3)(a)(II) applies to both victims and witnesses. Next, we conclude that the district court made sufficient findings regarding compelling circumstances.

¶ 23 The district court found, with record support, that nearly two-year-old E.Z. was in the room while Zoller conducted "an incomprehensible level of violence" against her mother, and she was left in a pool of her mother's blood. The court said that it had heard "countless arguments regarding protection orders in cases in which there is also a divorce proceeding," yet it found that the extraordinary circumstances of this case warranted a departure from its usual practices. It noted that "in the scope of things, a very short period of time had passed" since the event and explained that

the purpose of maintaining the no-contact order was to assure the victims that they would remain safe for a period of about five years.

¶ 24 These findings outline compelling circumstances to justify infringing Zoller's right to parental association. The court found extraordinary violence against a family member and a relatively short passage of time since Zoller assaulted H.Z. in E.Z.'s presence. *See Lonjose*, 663 F.3d at 1303 (describing a compelling circumstance as one where the record supports a finding "that the defendant is a danger to his own family members"); *see also Bear*, 769 F.3d at 1229 (discussing passage of time as a factor relevant to the determination of compelling circumstances). That is enough.

2. Less Restrictive Means

¶ 25 Although Zoller did not specifically argue to the district court that E.Z.'s physical safety could be protected by less restrictive constitutional infringements, he alerted the court to the fundamental due process right at issue, cited relevant case law, and noted that his contact could start slowly. We conclude, and the People do not disagree, that this provided the court an adequate opportunity to make findings on the issue and thus preserved the argument for our review. *See Cooley*, ¶¶ 18, 24.

¶ 26 On appeal, Zoller suggests that the court could order video-chat-only contact or supervised visits. The People argue that under the circumstances of this case, a less restrictive order would not provide for E.Z.'s safety. However, they do not articulate how E.Z.'s safety would be threatened by allowing some contact — like remote communication — between Zoller and his daughter.

¶ 27 We recognize that the district court was not directly asked to make a finding on less restrictive means — a finding not required by existing case law. We can conceive of findings that would or would not support a determination that Zoller's no-contact order amounts to no greater deprivation than is reasonably necessary — in other words, a determination that no less restrictive order would suffice. But in this case, the district court did not make these constitutionally required findings. Accordingly, we must reverse for further proceedings.

III. Other Arguments

A. Additional Findings Not Required

¶ 28 Zoller argues that, in addition to the findings discussed above, the district court should make specific findings pursuant to section 14-10-129, C.R.S. 2023 ("Modification of parenting time"), and

People v. Brockelman, 933 P.2d 1315, 1319 (Colo. 1997) (describing five factors to consider before imposing geographic conditions on a probationer). We disagree.

¶ 29 Section 14-10-129 does not govern the operation or modification of MPOs under section 18-1-1001. Thus, it would be inappropriate for the district court to make findings under that statute in the context of this case.

¶ 30 Moreover, we do not fault the district court for not analyzing the condition-of-probation factors listed in *Brockelman*, 933 P.2d at 1319.[2] As noted in Part II.B, the statute governing probation conditions and the MPO statute contain significant differences. Because *Brockelman* interpreted the parameters of a district court's statutory discretion and authority to impose geographic conditions of probation, and did not address any constitutional concerns, we conclude that that case does not control the resolution here. In the context of an MPO, the *Brockelman* factors are not applicable. *See*

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[2] *People v. Brockelman*, 933 P.2d 1315 (Colo. 1997), interpreted the probation statutes as they existed in March 1997, when they were located in title 16. *See, e.g.*, § 16-11-204, C.R.S. 1996. Section 18-1.3-204, C.R.S. 2023, is the current "Conditions of probation" statute.

id. (directing district courts to consider, among other things, whether a probation restriction "is punitive to the point of being unrelated to rehabilitation"); *cf. People v. Forsythe*, 43 P.3d 652, 654-55 (Colo. App. 2001) (applying the *Brockelman* factors to a constitutional issue with a probation restriction); *People v. Bolt*, 984 P.2d 1181, 1183-84 (Colo. App. 1999) (same); *Cooley*, ¶¶ 31-39 (same).

B. The Record

¶ 31 Zoller also argues that the record does not contain the necessary evidence for the district court to sustain the no-contact order. We do not decide this issue.

¶ 32 As we have already determined, there is record support for the court's finding of compelling circumstances. We do not invade the province of the district court by inquiring, for the first time on appeal, whether the existing record could also support the newly required finding that the purpose of the no-contact order cannot be achieved by less restrictive means. Indeed, because this is the first Colorado case to require that finding, we order that the district court may, in its discretion, hold an additional evidentiary hearing on remand to address this issue.

IV. Disposition

¶ 33 The order is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUDGE FREYRE and JUDGE YUN concur.