2019 IL App (2d) 180306-U
No. 2-18-0306
Order filed February 13, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ERIC ERICSON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 17-CM-1331 Honorable Divya K. Sarang, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Birkett and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court that issued a stalking no-contact order had personal jurisdiction of defendant, as the return of summons was *prima facie* proof of proper service, and defendant did not rebut that proof with clear and convincing evidence; (2) the trial court properly denied defendant's motion for a recusal or substitution of judge: defendant had no right to a recusal, he did not properly invoke section 114-5, and he did not show bias; (3) on appeal from his conviction of violating a stalking no-contact order, defendant could not challenge the order as unconstitutional; (4) defendant did not establish that the Stalking No Contact Order Act is unconstitutional, as he relied on *Relerford*, which invalidated only part of a separate statute; in any event, defendant's conviction was not necessarily for a violation of the equivalent part of the Act.

¶ 2 Following a bench trial, defendant, Eric Ericson, was convicted of violating a stalking no-contact order (740 ILCS 21/125 (West 2016)). He appeals, contending that (1) he was never properly served with notice of the action seeking the no-contact order; (2) the order violates his first amendment rights; (3) the Stalking No Contact Order Act (the Act) (740 ILCS 21/1 *et seq.* (West 2016)) violates the first amendment; and (4) the trial court violated his right to a substitution of judge. We affirm.

¶ 3 On May 11, 2017, in case No. 17-OP-265, the trial court entered a stalking no-contact order (SNCO) in favor of Steve Case and against defendant. On May 19, 2017, the court amended the order, directing defendant to remove from his property all signs that faced Case's property and listing several specific examples, including signs stating, " 'Warning illegal tear down,' " " 'House made with staples, sawdust, glue,' " and " 'House made by illegal alien labor.' " The amended order prohibits defendant from harassing anyone at Case's address by any means, "including written signs or verbal abuse." Defendant was personally served with a copy of the order on May 19, 2017.

¶ 4 On May 24, 2017, the State charged defendant in case No. 17-CM-1331 with violating the SNCO. The complaint alleged that defendant, having been served with the order, knowingly violated it by "not removing signs from his property." The State later amended the complaint to provide additional details. The amended complaint contains six counts, one for each of six signs.

¶ 5 The case was assigned to Judge Divya K. Sarang. On February 26, 2018, the morning of trial, defendant orally requested the judge to "recuse" herself. Defendant gave as reasons that he had subpoenaed the judge to testify, that "the order I'm challenging is your order as invalid," that he had had *ex parte* communications with the judge, and that the judge had "signed a prior stalking no contact summons against the State's witness for me." The prosecutor noted that

Judge Hallock had quashed the subpoena earlier in the morning and ordered the case to proceed to trial. The court denied the motion for recusal.

¶ 6 The record on appeal does not contain transcripts of most of the trial testimony. The only portion that defendant included with the record is defendant's narrative testimony, in which he denied being served with the SNCO. We also do not have a complete record of the civil proceeding in which the SNCO was issued. The jury found defendant guilty of all six counts.

¶ 7 Defendant filed three posttrial motions in which he argued, *inter alia*, that the court had erred by denying his motion pursuant to "725 ILCS 5/114-5(d)" for recusal. He also argued that the statute authorizing the SNCO was unconstitutional pursuant to *People v. Relerford*, 2017 IL 121094, and that the trial court that issued the SNCO lacked personal jurisdiction over him.

¶ 8 The court denied the motions. It noted that defendant had never filed a written motion for substitution and that the supreme court rule governing judicial recusals did not apply. The court further held that the SNCO statute at issue here was distinct from the criminal stalking statute declared unconstitutional in *Relerford*. The court also noted that it had personal jurisdiction to enter the SNCO because the file contained a return of service signed by "A. Drozd," who attested that defendant had been personally served with the petition for the SNCO. The court sentenced defendant to 2 years' probation and 160 days in jail. The jail sentence was stayed pending compliance with the rest of the order. The record does not include a complete transcript of the sentencing hearing. Defendant timely appealed.

¶ 9 On appeal, defendant contends that (1) the court that entered the SNCO lacked personal jurisdiction over him because he was not served with the petition, (2) the SNCO violated his first amendment rights, (3) the Act is unconstitutional, and (4) the trial court erred in denying his motion for substitution of judge. As we must avoid disposing of the case on constitutional

grounds if possible (*In re E.H.*, 224 Ill. 2d 172, 180 (2006)), we first consider defendant's nonconstitutional arguments.

¶ 10 As noted, the record on appeal is incomplete, as we lack a complete record of the civil proceeding in which the SNCO was issued although certain documents were introduced as exhibits in the criminal action. We will resolve any doubts resulting from the incompleteness of the record against defendant. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (appellant must present a sufficiently complete record and, absent such a record, we resolve any doubts arising from the incompleteness of the record against appellant).

¶ 11 Defendant first contends that the court issuing the SNCO lacked personal jurisdiction because he was never served with a summons. The court in the criminal case (17-CM-1331) found that jurisdiction was proper because the file in the civil case contained a return of service showing personal service.

¶ 12 The sheriff's return of service is *prima facie* proof of service and should not be set aside unless it is impeached by clear and satisfactory evidence. *Freund Equipment, Inc. v. Fox*, 301 Ill. App. 3d 163, 166 (1998). As courts are required to indulge every presumption in favor of the return of service, a defendant's uncorroborated testimony that he was never served will not overcome the presumption of service. *Id.* Here, the trial court properly relied on the return of service. Given the incomplete record, defendant can point to nothing save his own testimony to attempt to prove that he was not served. That evidence is insufficient to overcome the presumption attaching to the return of service.

¶ 13 Defendant also contends that the court erred by denying his motion for a substitution of judge. As the State points out, defendant appears to confuse the distinct concepts of recusal, substitution as of right, and substitution for cause, arguing at one point that the judge " 'refused

to recuse herself and substitute an unbiased judge and thus deprived the defendant of his absolute right to a substitute judge.' "

¶ 14 "[R]ecusal and substitution for cause are not the same thing." *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 45. Whether a judge should recuse himself or herself rests exclusively within the discretion of the individual judge, subject only to the canons of judicial ethics. *Id.*; see Ill. S. Ct. R. 63(C) (eff. Feb. 2, 2017). Thus, defendant had no enforceable personal right to require the judge to recuse herself.

¶ 15 Defendant argues that his motion should have been transferred to another judge for hearing pursuant to section 114-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-5 (West 2016)). That section governs both motions for substitution as of right (*id.* § 114-5(a)) and motions for substitution for cause (*id.* § 114-5(d)). However, defendant did not properly invoke section 114-5 in the trial court. His oral motion never specifically mentioned section 114-5. Moreover, section 114-5(a) requires a motion in writing, which defendant never filed. Section 114-5(d), governing substitutions for cause, requires a motion supported by affidavit. Defendant never submitted an affidavit.

¶ 16 In *People v. Flynn*, 341 Ill. App. 3d 813, 823 (2003), the defendant filed a posttrial " 'Motion of Recusal.' " On appeal, the defendant argued that the judge should have transferred the motion for hearing pursuant to section 114-5. We noted that, like the defendant in *People v. Antoine*, 335 Ill. App. 3d 562 (2002), the defendant never mentioned section 114-5 in his motion, failed to meet the affidavit requirement, and never asked to have the motion transferred to another judge for hearing. *Flynn*, 341 Ill. App. 3d at 823-24 (citing *Antoine*, 335 Ill. App. 3d at 570).

¶ 17 Defendant argues that Judge Sarang was biased against him because he had subpoenaed her to testify in this case. However, that subpoena was quashed prior to trial. Defendant does not argue that the decision to quash the subpoena was erroneous, and he does not explain how the mere issuance of a subpoena prejudiced the judge against him.

¶ 18 Defendant appears to argue that the judge was biased because she had previously issued the SNCO against him. However, a judge's previous rulings almost never constitute a valid basis for a claim of judicial bias. *In re Estate of Wilson*, 238 Ill. 2d 519, 554 (2010); see *People v. Moore*, 199 Ill. App. 3d 747, 768 (1990) (that judge has in a previous proceeding ruled adversely to the defendant does not disqualify the judge).

¶ 19 Having considered defendant's nonconstitutional arguments, we turn to his contention that the SNCO violated his first amendment rights insofar as he was ordered to remove certain yard signs. Defendant contends that the SNCO banning signs from his yard (or at least the portion facing Case's property) poses a broad and permanent ban on a significant avenue of self-expression. He maintains that the supreme court recently invalidated analogous language in the criminal stalking statute. See *Relerford*, 2017 IL 121094.

¶ 20 Citing *People v. Berrios*, 2018 IL App (2d) 150824, the State responds that defendant could not simply ignore the SNCO, even if he believed that it was erroneous. According to the State, the proper course was to challenge the order, either in a direct appeal or a collateral attack, and, having chosen to do neither, defendant was properly convicted of disobeying the order. The State further points out that *Relerford* considered not the Act but the distinct criminal stalking statute (and cyberstalking statute). Further, *Relerford* did not invalidate the stalking statute entirely, but struck only from the definitional section language making it a crime to " 'communicate[] to or about' " someone. *Relerford*, 2017 IL 121094, ¶ 63.

¶ 21 The parties agree that an SNCO is essentially an injunction. Generally, "[u]nless it has been overturned or modified by orderly processes of review, an injunction must be obeyed, even if it is erroneous." *People v. Nance*, 189 Ill. 2d 142, 145 (2000). Some cases have stated that even an unconstitutional injunction must be obeyed until it is successfully challenged in the same proceeding. See *Berrios*, 2018 IL App (2d) 150824, ¶ 27.

¶ 22 In *Berrios*, the defendant was subject to an order that he not associate with gang members. Like defendant here, the defendant did not appear in the civil action in which the order was originally entered. When he was prosecuted for violating that order, he contended that the order violated his constitutional right to association. We held that the defendant should have challenged the order in the original proceeding and, having failed to do so, could not escape criminal liability for violating it. *Berrios*, 2018 IL App (2d) 150824, ¶¶ 27-29. We held that, under the circumstances, "compliance with the court order must prevail over the frustration of defendant's constitutional liberties." *Id.* ¶ 27. Thus, pursuant to *Berrios*, if defendant believed that the SNCO violated his constitutional rights, it was incumbent upon him to appear in the civil proceeding and challenge the order there rather than simply ignore it.

¶ 23 In *In re N.G.*, 2018 IL 121939, the court noted that Illinois law allows a void judgment to be " ' "impeached at any time in any proceeding whenever a right is asserted by reason of that judgment, and it is immaterial *** whether or not the time for review by appeal has expired." ' " *Id.* ¶ 43 (quoting *People v. Meyerowitz*, 61 Ill. 2d 200, 206 (1975), quoting *Reynolds v. Burns*, 20 Ill. 2d 179, 192 (1960)). Moreover, challenges to void judgments are not subject to forfeiture or other procedural restraints. *Id.*

¶ 24 With this particular argument, however, defendant is not challenging his convictions on the basis that they stemmed from a statutory scheme that is void *ab initio*. He is instead

challenging the constitutionality of the trial court's order in the underlying case. *Berrios* thus governs, and defendant was required to challenge the injunction in the original proceeding. See *Berrios*, 2018 IL App (2d) 150824, ¶ 27.

¶ 25 Finally, defendant argues that the Act is unconstitutional in light of the supreme court's decision in *Relerford*, in which the supreme court held the criminal stalking statute facially unconstitutional as unreasonably restricting the right to free speech. The State responds that the Act is distinct from the statute at issue in *Relerford* and that, in any event, *Relerford* invalidated only the portion of the statute that made it a crime to "communicate to or about" someone. In his reply brief, defendant contends that the Act contains the identical language that *Relerford* found objectionable and, further, that the order prohibiting him from maintaining signs could have been based only on that portion of the statute.

¶ 26 Statutes are presumed constitutional, and the party challenging a statute carries the burden of proving it unconstitutional. *People v. Hollins*, 2012 IL 112754, ¶ 13. We have a duty to construe a statute in a way that upholds its validity and constitutionality if reasonably possible. *Id.* Whether a statute is constitutional is a question of law, which we review *de novo*. *Relerford*, 2017 IL 121094, ¶ 30.

¶ 27 The legislature passed the Act in 2010 "to provide a remedy for victims who have safety fears or emotional distress as a result of stalking." *McNally v. Bredemann*, 2015 IL App (1st) 134048, ¶ 10; see 740 ILCS 21/5 (West 2016). Under the Act, "stalking" is defined as "engaging in a course of conduct directed at a specific person" that the respondent knows or should know "would cause a reasonable person to fear for his or her safety or the safety of a third person or suffer emotional distress." 740 ILCS 21/10 (West 2016).

¶ 28 Initially, we note that defendant has forfeited any argument that the Act is unconstitutional. Defendant fails to cogently explain why the Act violates his first amendment rights. See *Williams v. Danley Lumber Co.*, 129 Ill. App. 3d 325, 325 (1984) (reviewing court is entitled to have the issues clearly defined with pertinent authorities cited and cohesive legal argument presented; appellate court is not simply a depository in which the appealing party may dump the burden of argument and research). Defendant cites *Relerford*, but fails to explain why a case invalidating only a small portion of the criminal stalking statute renders all of the Act unconstitutional.

¶ 29 Forfeiture aside, defendant's argument misses the mark. Defendant is mistaken in his belief that *Relerford* invalidated the criminal stalking statute in its entirety. To obtain a conviction under that statute, the State must prove that a defendant engaged in a " 'course of conduct,' " which is defined as:

> "2 or more acts, including but not limited to acts in which a defendant directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, engages in other non-consensual contact, or interferes with or damages a person's property or pet. A course of conduct may include contact via electronic communications." 720 ILCS 5/12-7.3(c)(1) (West 2016).

¶ 30 *Relerford* held only the "communicates to or about" language unconstitutional; the remainder of the definition of "course of conduct" was unaffected. *Relerford*, 2017 IL 121094, ¶ 63; see *People v. Gauger*, 2018 IL App (2d) 150488, ¶ 21.

¶ 31 The Act contains a similar definition of "course of conduct." See 740 ILCS 21/10 (West 2016). Thus, defendant is incorrect that the entire Act is unconstitutional under the reasoning of *Relerford*.

¶ 32 In his reply brief, defendant argues for the first time that the directive in the SNCO to remove signs "fall[s] squarely within the framework of" communicating to or about a person and "cannot fall under any other portion of the statutory definition [of 'course of conduct']." However, points not raised in an initial brief are forfeited and cannot be argued for the first time in a reply brief. *Burlington Northern & Santa Fe Ry. Co. v. ABC-NACO*, 389 Ill. App. 3d 691, 717 (2009) (citing Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006)).

¶ 33 In any event, defendant is confusing conduct that triggers the application of the Act with the relief that a court may grant to protect a victim once the court determines that the Act has been violated. Section 80(a) of the Act provides that "[i]f the court finds that the petitioner has been a victim of stalking, a stalking no contact order shall issue." 740 ILCS 21/80(a) (West 2016). "Stalking" is defined as "engaging in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to fear for his or her safety or the safety of a third person or suffer emotional distress." *Id.* § 10. "Course of conduct" is defined as:

> "2 or more acts, including but not limited to acts in which a respondent directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, engages in other contact, or interferes with or damages a person's property or pet." *Id.*

"Contact" is defined in the Act to include any contact with the victim that is initiated or continued without the victim's consent or in disregard of the victim's expressed desire that the

contact be avoided or discontinued, including being in the victim's physical presence or appearing within the victim's sight or at the victim's residence or workplace. *Id.*

¶ 34 Once the trial court is satisfied that "stalking," as defined by the statute, has occurred, the court must enter an SNCO containing one or more of the following provisions:

> "(1) prohibit[ing] the respondent from threatening to commit or committing stalking;
>
> (2) order[ing] the respondent not to have any contact with the petitioner or a third person specifically named by the court;
>
> (3) prohibit[ing] the respondent from knowingly coming within, or knowingly remaining within a specified distance of the petitioner or the petitioner's residence, school, daycare, or place of employment, or any specified place frequented by the petitioner; ***
>
> (4) prohibit[ing] the respondent from possessing a Firearm Owners Identification Card, or possessing or buying firearms; and
>
> (5) order[ing] other injunctive relief the court determines to be necessary to protect the petitioner or third party specifically named by the court." *Id.* 80(b).

¶ 35 The SNCO ordered defendant to "stay at least 100 feet away from [Case] and [his] residence, school, daycare, [and] employment" and prohibited him from entering Case's residence and from contacting Case "in any way directly indirectly, or through third parties, including, but not limited to, phone, written notes, mail, e-mail, or fax." The order further prohibited defendant "from threatening to commit or committing stalking personally or through [a] third party." Finally, in a paragraph entitled "[o]ther injunctive relief," defendant was required to remove the yard signs. Thus, nothing on the face of either the May 11, 2017, SNCO

or the May 19 amendment to that order suggests that defendant's acts of "stalking" were limited to "communicat[ing] to or about" Case. To the contrary, the order indicates that Case was a victim of "two or more acts of following, monitoring, observing, surveilling, threatening, communicating or interfering or damaging property or pets" by defendant.

¶ 36 Furthermore, while we do not know the full circumstances leading to the issuance of the SNCO, due to defendant's failure to provide a complete record, we note that, in the course of sentencing defendant, the court found that "defendant's conduct caused or threatened serious harm," in that "he in fact chased a property owner away from their [*sic*] home and subjected them to a lot of emotional distress." This suggests that defendant indeed did more than "communicate[ ] to or about" Case.

¶ 37 The judgment of the circuit court of Kane County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 38 Affirmed.