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STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	APPEAL FROM MAGISTRATES COURT ELEVENTH JUDICIAL CIRCUIT
Andrew Davis Desilet, Appellant,	)	Case Nos. 2020-CP-32-01226 and 2020-CP-32-01227
vs.	)	**AFFIRMED**
Laura Lobaugh Lesslie and Leonard Lesslie, Respondents.	)	

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SC Court of Appeals

This matter comes before the Court on appeal from the judgment of the magistrates court in the above referenced actions. This matter was heard via remote hearing with the consent of all parties on September 23, 2020. Present for the Appellant Andrew Davis Desilet ("the Appellant") was Martin R. Banks, Esq., and present for the Respondents was John Carrigg, Esq. Appellant appeals the issuance of a temporary restraining orders against him in favor of Respondents. For the reasons below, this Court affirms the magistrate's judgment and hereby dismisses this appeal.

Factual Summary

The twin cases comprising this matter arose out of a divorce filed in family court between the Appellant and the daughter of the Respondents. As a result of ongoing hostilities between the parties spawned by the divorce litigation, the Respondents sought restraining orders against Appellant on January 31, 2020.

A hearing was scheduled for February 12, 2020. The Appellant was never personally served with the complaint, but spoke with court staff by telephone to inform them that he was aware of the date and time of the hearing, and would not be attending and that the court should proceed to issue the restraining orders against him. The record on appeal supports the

Respondent's contention that the Appellant was intentionally avoiding service of process, and was well aware of the hearing's date, time, and purpose. Counsel for the Appellant appeared at the scheduled date and time of the February 12, 2020, hearing, at which time he informed the court he was solely present to make special appearance to contest service of process as a "favor" to his client. Counsel for Appellant informed the court that he did not represent Appellant in the matter, but was representing him in the parallel family court litigation. The court denied Appellant's motion to dismiss based on defective service, and both parties agreed to reschedule the hearing for February 21, 2020, as a family court hearing was scheduled for February 20, 2020, that could possibly resolve this matter. At that time, counsel for Appellant advised the court that while he would not accept service on behalf of his client. However, counsel for Appellant stated he would notify his client of the rescheduled hearing and ensure his client picked up the complaint from the courthouse. Appellant never contacted the court or attempted to pick up the paperwork. On February 20, 2020, after the family court hearing, the Appellant was finally served personally with the complaint. The Appellant and his counsel appeared at the February 21, 2020 hearing, and raised a pretrial motion contesting subject matter jurisdiction. Appellant argued that the February 21, 2020 hearing was not within the statutory requirements of S.C. Code Ann. § 16-3-1760, therefore divesting the court of jurisdiction. This motion was denied. During the hearing, both the Appellant and Respondents consented to the issuance of the restraining order, and the magistrate issued the restraining orders against the Appellant until February 21, 2021.

On appeal, Appellant alleges: 1) the magistrate lacked jurisdiction to issue the restraining orders against Appellant due to defective service of process, 2) the Appellant's constitutional right to confrontation was denied, and 3) the Appellant's due process rights were violated. For

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the reasons below, this Court affirms the judgment of the magistrates court and dismisses this appeal.

Standard of Review

Section 18-7-170 of the South Carolina Code of Laws governs the standard of review applicable in the instant case. *Parks v. Characters Night Club*, 345 S.C. 484, 490, 548 S.E.2d 605, 608 (Ct. App. 2001) (recognizing that case originating in magistrate's court and appealed to circuit court is governed by section 18-7-170). This code section states:

> "Upon hearing the appeal the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact." S.C. Code Ann. § 18-7-170 (1985).

Section 18-7-170 provides that in an appeal from magistrate's court in a civil action, the circuit court may make its own findings of fact. *Parks*, 345 S.C. at 490, 548 S.E.2d at 608; see Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp., 280 S.C. 232, 234, 312 S.E.2d 20, 21 (Ct. App. 1984) ("Sections 18-7-140 and 18-7-170 give the Circuit Judge sitting in an appellate capacity the ability to make a determination in the same manner as Circuit Courts in trials without a jury and to reverse a judgment for errors of fact even though the Circuit Judge may not have had the opportunity to observe the demeanor of the witnesses."); *Rogers v. State*, 358 S.C. 266, 269 n.1, 594 S.E.2d 278, 279 n.1 (Ct. App. 2004).

Analysis

A. Whether the Appellant was given sufficient notice of the hearing so as to comply with the statutory notice requirements and with the requirements of due process

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Appellant first argues the magistrate lacked the jurisdiction to issue the restraining orders as the Appellant was never properly served with the complaint to provide notice of the hearing. This Court disagrees, and finds that Appellant was given sufficient notice of both the original and the rescheduled hearing date so as to comply with the notice requirements of both the statute and the requirements of due process. The South Carolina Code establishes procedural guidelines regard restraining orders. S.C. Code Ann. § 16-3-1760(c) states: "In cases not provided in subsection (A), the court shall cause a copy of the complaint and motion to be served upon the defendant at least five days before the hearing in the same manner required for service as provided in the South Carolina Rules of Civil Procedure." "Rule 4, SCRCP, serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action." *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995). However, "personal service of process should not become a game of wiles and tricks" *BB & T v. Taylor*, 369 S.C. 548, 554, 633 S.E.2d 501, 504 (2006) (citing 62B Am.Jur.2d Process § 190 (2005). The critical question is whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings. *Roche*, at 209–10 456 S.E.2d at 899 (1995).

Appellant contends that the failure to strictly comply with the service requirements under the statute invalidate the magistrate's order. The record sufficiently establishes that not only was Defendant aware of the first and second hearings scheduled in this matter, but that he actively attempted to avoid service of process and even contacted the court to alert them he would not be attending the initial hearing. Counsel for Appellant was present at the initial hearing on February 12, 2020, albeit solely for the purpose making a special appearance to contest service of process. Counsel informed the court that although he would not accept service of process on behalf of his

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client, he would inform his client of the proceedings and of the need for the Appellant to obtain the documents from the court. Counsel for Appellant then agreed to reschedule the hearing for the February 21, 2020. Counsel now asserts that because the February 21, 2020 hearing was outside the fifteen day time requirement required by S.C. Code Ann. § 16-3-1760, the magistrate's order is fatally defective. This Court disagrees, and finds that: 1) not only did Appellant have sufficient notice of both the first and the subsequent hearings to comply with the requirements South Carolina law, but 2) Appellant should not benefit from the windfall of arguing through counsel that the initial hearing needed to be rescheduled to provide sufficient notice to the Appellant, and then at the subsequent hearing, nine days later, raise a claim that the hearing was held beyond the time permitted by the statute and therefore the magistrate was without the jurisdiction to issue the restraining order.

This Court also fails to find a violation of the Appellant's due process rights. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Seabrook v. Knox*, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). Due process requires, at a minimum: adequate notice; adequate opportunity for a hearing; the right to introduce evidence; and the right to confront and cross-examine witnesses. *In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003). Considering the facts of this case, this Court fails to see how a *de minimus* departure from the statute, caused primarily by the Appellant's own willful conduct, deprived the Appellant of any due process.

Moreover, it is a well settled principle of South Carolina law "that when a defendant becomes the actor in an event which contemplates, in effect impliedly acknowledges, the

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jurisdiction of the court before disposition of a prior special appearance to test the jurisdiction of his person, he waives the objection raised in the special appearance and becomes subject to the jurisdiction of the court." *S.C. State Highway Dep't v. Isthmian S. S. Co.*, 210 S.C. 408, 416, 43 S.E.2d 132, 135 (1947). Here, the Appellant, through his counsel, obtained a continuance and then proceeded to consent to the issuance of the consent order at the rescheduled hearing. By seeking a continuance at the initial hearing through his counsel, and subsequently consenting to the issuance of the consent order, the Appellant has waived any objection to any defects in service. Thus, this Court finds the Appellant was provided sufficient notice of the hearings to comply with the service requirements imposed by South Carolina law and the requirements demanded by due process.

B. Whether the Appellant's Confrontation Clause rights were violated

Appellant next contends that the magistrate erred in issuing the restraining orders because Erin L. Lesslie, the Appellant's wife and Respondent's daughter, is listed as a party on the initial compliant seeking a restraining order, she is therefore an "indispensable witness" to the allegations which resulted in the restraining orders against the Respondents, and her absence from the hearing deprived the Appellant of his constitutional right to confront his accusers. This Court disagrees, and finds the fact that Appellant's wife did not testify at the hearing or obtain a restraining order against the Appellant did not violate his constitutional rights. Appellant's spouse did not offer any testimony before the Court, did not submit any evidence, and was not subpoenaed as a witness to the hearing. Most significantly, Appellant consented to the issuance of the restraining orders in favor of Respondents at the hearing. This Court further finds sufficient evidence on the record to support the magistrate's issuance of the restraining orders, regardless of the Appellant's consent.

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The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him...." U.S. Const. amend. VI. This constitutional right, which applies to the states through the Fourteenth Amendment, guarantees a defendant in a criminal trial the right to cross-examine the witnesses against him. *Pointer v. Texas*, 380 U.S. 400, 403–04, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965). Additionally, even if this Court were to accept Appellant's argument that his wife's failure to testify despite being an "indispensable witness" was a violation of his right to confront his accusers, such a violation is subject to a harmless error analysis. "A violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis." *State v. Gracely*, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012) (quotations omitted). The Confrontation Clause is not invoked when an alleged witness does not testify, and presents no evidence to the court. Here, Erin L. Lesslie, the Appellant's spouse, offered no testimony, was not subpoenaed as a witness, and did not submit any evidence to the court. This Court fails to see how the absence of her testimony at the hearing violates the Appellant's Confrontation Clause rights, even if one ignores the fact that the Appellant consented to the issuance of the restraining orders at issue.

THEREFORE, IT IS ORDERED THAT this Court finds no error of law or fact meriting the reversal of the magistrate's order, which is hereby affirmed, and this appeal is hereby DISMISSED.

IT IS SO ORDERED.

____
Debra R. McCaslin
Circuit Court Judge

Lexington, SC
October 6, 2020

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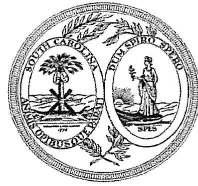

Lexington Common Pleas

Case Caption: Andrew Davis Desilet VS Leonard G Lesslie , defendant, et al

Case Number: 2020CP3201227

Type: Appeal/Affirmed

So Ordered

Debra R. McCaslin

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