

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 38286

STATE OF IDAHO,)	2011 Unpublished Opinion No. 621
)	
Plaintiff-Respondent,)	Filed: September 15, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
JASON A. SHEPPERD,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Kathryn A. Sticklen, District Judge. Hon. James S. Cawthon, Magistrate.

District court’s order on intermediate appeal affirming the magistrate’s order denying motion to modify no-contact order, affirmed.

Alan E. Trimming, Ada County Public Defender; Dylan J. Orton, Deputy Public Defender, Boise for appellant. Dylan J. Orton argued.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent. Jessica M. Lorello argued.

GRATTON, Chief Judge

Jason A. Shepperd appeals from the district court’s order denying his motion to modify a no-contact order. We affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Shepperd was charged with felony stalking for violating no-contact orders entered in two separate cases. Idaho Code §§ 18-7905, 18-7906. Thereafter, the matter was remanded to the magistrate court and consolidated with another case. Shepperd pled guilty and the magistrate placed Shepperd on probation and entered a no-contact order, prohibiting Shepperd from having any contact with a number of individuals, including Shepperd’s son. The no-contact order expired on March 29, 2010.

Shepperd filed motions to modify the no-contact order on March 31, 2009, and June 25, 2009. Although both of the motions were denied, a hearing was held on January 26, 2010, at which the magistrate allowed Shepperd to proceed on the motion to modify the no-contact order. After hearing argument from both sides, the magistrate once again denied Shepperd's motion.

Shepperd appealed to the district court, arguing that the magistrate abused its discretion by failing to make specific findings of fact in the denial of his modification motion. The State filed a response on July 9, 2010, arguing the appeal was moot because the no-contact order had expired on March 29, 2010. In his reply brief, Shepperd argued that exceptions to the mootness doctrine applied and therefore the case could still be heard. The district court agreed that Shepperd's appeal was moot, but alternatively affirmed the magistrate's decision on the merits. Shepperd timely filed a notice of appeal from the district court's decision.

II.

ANALYSIS

The no-contact order was issued on March 29, 2006; it expired, as scheduled, on March 29, 2010. The State contends that because the no-contact order had already expired, the issues presented in this appeal are moot and not within any exception to the mootness doctrine. Thus, the State asserts this Court should decline to consider the merits of Shepperd's claim and dismiss this appeal. Shepperd argues that the issues presented fall within all three of the exceptions to the mootness doctrine, and therefore this Court is free to rule on the merits.

Justiciability issues, such as mootness, are freely reviewed. *State v. Manley*, 142 Idaho 338, 342, 127 P.3d 954, 958 (2005). "An issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded by judicial relief." *State v. Barclay*, 149 Idaho 6, 8, 232 P.3d 327, 329 (2010) (internal quotations omitted). There are three exceptions to the mootness doctrine: "(1) when there is the possibility of collateral legal consequences imposed on the person raising the issue; (2) when the challenged conduct is likely to evade judicial review and thus is capable of repetition; and (3) when an otherwise moot issue raises concerns of substantial public interest." *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist.*, 141 Idaho 849, 851-52, 119 P.3d 624, 626-27 (2005).

The issues raised by Shepperd on appeal do not fall under any exception to the mootness doctrine. The Court looks to the collateral legal consequences suffered by the party raising the issue under the first exception. *Barclay*, 149 Idaho at 8, 232 P.3d at 329. Shepperd asserts he

“may face the possibility of collateral legal consequences in both the family courts and the criminal courts.” For example, “at future child custody hearings a court may hear evidence of the lower court’s ruling and base its custody ruling, in part, on that evidence.” Similarly, he argues that criminal courts may hear such evidence and choose to place another no-contact order between Mr. Shepperd and his son. Shepperd does not, however, cite any direct authority to support his argument that these are the types of collateral consequences this exception was meant to include. Generally, “collateral legal consequences” have been found to include civil disabilities associated with criminal convictions such as being “barred from holding certain offices, voting in state elections, and serving as a juror.” *United States v. Mercurris*, 192 F.3d 290, 293 (2d Cir. 1999). The legal consequences Shepperd claims he may suffer are abstract and speculative, by comparison, and are not within those contemplated by the exception.

Even if the first exception is interpreted to include the types of consequences Shepperd might suffer, Shepperd is challenging only the district court’s refusal to modify the no-contact order; he is not challenging the order itself. Therefore, the adverse consequences Shepperd contemplates would still be possible even with a favorable outcome on appeal. Evidence of the prior no-contact order might be admitted in proceedings in civil or criminal court whether or not it was modified. Furthermore, evidence of Shepperd’s prior conviction for violation of a no-contact order, if admitted in civil or criminal court proceedings, would likely present much greater adverse consequences than the magistrate’s refusal to modify the no-contact order. Shepperd fails to demonstrate that the magistrate’s refusal to modify the no-contact order would be more damaging evidence than the entry of the order in the first place or his conviction for violating a no-contact order.

As to the second exception, Shepperd argues that the issues he raises are likely to evade judicial review because no-contact orders are “temporary” and as such are “relatively short” in duration when compared to the “lengthy” appeals process. In this case, however, the duration of the no-contact order was four years, hardly a short time period within which a party could appeal from or seek modification of a district court’s order. Shepperd did not appeal from the original entry of the order, and only sought modification three years into the order’s four-year term. It was Shepperd’s own action or inaction that caused the issue to become moot. There is nothing intrinsic in the nature of a no-contact order that renders it “likely to evade judicial review.” No-

contact orders can and do exist for extended periods of time, as in this case, making the second exception inapplicable.

Shepperd argues that the third exception to the mootness doctrine is also applicable because “[i]t is in the public’s best interest to have court decisions that are supported by findings of fact.” Shepperd’s argument is without merit. First, the public interest exception does not apply simply because a ruling would give the lower courts guidance in issuing and modifying no-contact orders. The district court’s decision in this particular case has little bearing on the interests of the general public, much less a substantial interest. Prior cases where the public interest exception has been used have involved matters of much wider public interest. *See, e.g., Ameritel Inns*, 141 Idaho at 852, 119 P.3d at 627 (finding whether public entities can use public funds to campaign in elections to be an issue of substantial public interest). Thus, Shepperd is really “asking this Court to issue an advisory opinion in order to avoid the issue in future cases,” which is “an exercise this Court will not undertake.” *Barclay*, 149 Idaho at 9, 232 P.3d at 330. The Idaho Supreme Court has previously refused to give advisory opinions on moot issues under either the collateral consequences or public interest exception. *See id.* at 8-9, 232 P.3d at 329-330; *Koch v. Canyon County*, 145 Idaho 158, 163, 177 P.3d 372, 377 (2008). Because the issue on appeal here does not rise to the level of a substantial public interest, the third exception does not apply.

Second, Shepperd’s argument presupposes the validity of his assertion that the magistrate’s decision was not supported by findings of fact. Shepperd argues that the magistrate erred by not making specific findings of fact, but has provided no direct authority requiring the court to make specific written or oral findings of fact in this context. Shepperd cites to *State v. Zavala*, 134 Idaho 532, 5 P.3d 993 (Ct. App. 2000), as an instance where the district court “had not made the necessary findings of fact to support its conclusion.” However, *Zavala* is distinguishable because it dealt with a motion to suppress evidence rather than a no-contact order. *See Zavala*, 134 Idaho 532, 5 P.3d 993. In *State v. Cobler*, 148 Idaho 769, 229 P.3d 374 (2010), the Idaho Supreme Court found the district court abused its discretion when it denied Cobler’s motion to modify a no-contact order without providing legal grounds for its denial. *Id.* at 772, 229 P.3d at 377. Without indicating the grounds upon which the district court denied the motion, it “neither acted consistently with the legal standards applicable to the specific choices available to it nor did it reach its decision by an exercise of reason.” *Id.*

In this case, as the district court noted, the record contains “substantial reasoning and findings by the magistrate,” which satisfies the applicable standards. The magistrate expressly provided the grounds for its denial. The magistrate, after listening to Shepperd’s arguments and acknowledging all evidence presented by both sides, stated its concern was two-fold: First, the magistrate was concerned about Shepperd’s ability to comply with conditions which would be imposed on any exception to the no-contact order. Second, the magistrate stated it was concerned about Shepperd’s ability to have contact only with his five-year-old son, without initiating some form of contact with his ex-wife. The magistrate indicated the grounds upon which it denied Shepperd’s motion; it perceived the issue as one of discretion, acted consistently with the legal standards applicable to the specific choices available to it, and reached its decision by an exercise of reason. Therefore, Shepperd’s assertions that the magistrate failed to make findings and abused its discretion in denying Shepperd’s motion to modify the no-contact order are not supported by the record.

III.
CONCLUSION

The issues Shepperd raises on appeal are moot and not within any exception to the mootness doctrine. Furthermore, the magistrate provided the grounds for its denial of Shepperd’s motion to modify the no-contact order and did not abuse its discretion in denying the motion. The district court’s order affirming the magistrate’s order denying Shepperd’s motion to modify the no-contact order is affirmed.

Judge LANSING and Judge GUTIERREZ **CONCUR.**