

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MARSHALL FOLETTA,

Plaintiff and Respondent,

v.

CHRISTOPHER ELLIS,

Defendant and Appellant.

A153079

(Solano County
Super. Ct. No. FCS048177)

MEMORANDUM OPINION¹

Christopher Ellis appeals from an order issued after a hearing enjoining him from harassing his neighbor, Marshall Foletta, for a period of three years. (Code of Civ. Proc., § 527.6.) We affirm.

The parties own adjoining parcels of rural property on Nicholas Lane in Solano County. An easement runs through Foletta's property. In early 2015, Foletta made a complaint to county authorities regarding unlicensed commercial activities taking place on Ellis's property. The county issued violation notices and the harassing conduct leading to the instant restraining order began.

¹ We resolve this case by memorandum opinion pursuant to California Standards of Judicial Administration, section 8.1. (See also *People v. Garcia* (2002) 97 Cal.App.4th 847, 853–855.) We note that appellant's brief does not comply with rule 8.204 (a)(1)(C) of the California Rules of Court. Nonetheless, we consider the claims on their merits as presented. (Cal. Rules of Court, rule 8.204 (e); see *In re S.C.* (2006) 138 Cal.App.4th 396, 408–412.)

Shortly after the code violation was reported, Ellis began grading and developing the easement on Foletta's property, often performing work late at night. A neighbor of both parties spoke to Ellis after he began working on the easement and Ellis said he intended to get back at Foletta for turning him in to the county. Ellis and his wife began using the easement to access their property, even though they had previously used another road. They invited friends to use the easement, and those people drove all-terrain vehicles, motorcycles and golf carts down the easement, sometimes at excessive speeds.

Ellis and his wife also began playing very loud music on an almost-daily basis that could be heard inside Foletta's house with the windows closed and the television on. The same song was played repeatedly. Foletta eventually borrowed a decibel meter from a friend, which measured the music as high as 86 decibels, well above the 50-55 decibels allowed in rural areas under the county noise ordinance. An equine veterinarian employed by Foletta found the music distracting and thought it was stressful to the horses on Foletta's property.

A drone that came from Ellis's backyard flew directly at Foletta about six to ten feet over his head while he was moving horses on his property. On four or five occasions, Ellis had flown his motorized paraglider over the Foletta property, circling for 25 minutes on the longest instance. Ellis would often engage in "stalking" type behavior where he lurked around the edges of the Foletta property staring at Foletta and his wife. Sometimes Ellis would stop at the end of the Foletta driveway and block it as Foletta or his wife were leaving.

The Folettas moved to an apartment in Vacaville for several months to escape the "relentless" harassment. While there, their tires were slashed on two separate occasions.

In late 2016, after the Folettas had moved back to their property, Ellis placed an ad on Craigslist advertising free facilities to shoot skeet, ride dirt bikes, fly drones, walk dogs, play with remote controlled cars or hunt rabbits. Foletta learned of the ad when he confronted a man with a shotgun walking across his property. Also in this time frame,

Ellis began to fire an orchard cannon,² for an hour at a time, every couple of days. The orchard cannon gave off a loud boom, deeper than a shotgun, and sounds something like a sonic boom. Ellis was not using his property in any way that required an orchard cannon.

Foletta petitioned for a restraining order against Ellis under Code of Civil Procedure section 527.6, barring him, among other things, from playing loud music, flying drones or paragliders over the Foletta property, using the orchard cannon or allowing other people to use the easement. Following a contested hearing, the court issued a three-year restraining order. It found Ellis's denial of the objectionable conduct to be lacking in credibility and further found that while Foletta's conduct toward Ellis was "not always [] neighborly, the court finds it did not rise to the level of harassment."

Ellis complains that the order is invalid to the extent it prohibits him from flying drones or paragliders over the Foletta property because air space use is governed by the Federal Aviation Administration (FAA). Ellis presented no evidence that the federal government had approved the use of the drone and paraglider over Foletta's property. We agree with Foletta that the appropriate question is whether the federal government's regulation of air space generally is intended to preempt the authority of the states to regulate harassment that involves that air space. We conclude there is no preemption. (See *Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 100 [claims for personal injury and nuisance not preempted by federal aviation law]; *People v. Valenti* (1984) 153 Cal.App.3d Supp. 35, 40 [federal law does not preempt state prosecution for negligent operation of aircraft].)

Ellis also challenges the order to the extent it prevents persons other than family members from using an easement over the Foletta property. He contends that because the rights to that easement are being litigated in a separate proceeding, this determines an issue that has yet to be tried. We disagree. The order states, "[Ellis] shall not permit any person other than family members to use the easement for any purpose *unless otherwise*

² An orchard cannon is a device use to scare away birds from fruit or almond trees.

ordered in the civil case currently pending.” The order thus contemplates that the scope of the easement, and the right of others to its use, shall be determined in the other proceeding.

Ellis argues the restraining order erroneously prohibits him from using an orchard cannon in a rural county where its use is otherwise allowed. Again we disagree. Ellis did not establish that he had any legitimate purpose in using the device, and the court explicitly found that its use was a form of harassment. That it can be legally used for a purpose other than harassment does not mean that its use cannot be barred when there is sufficient evidence to support the implied finding it was reasonably probable the harassment would continue. (See *Harris v. Stampolis* (2016) 248 Cal.App.4th 484, 500–501.)

Finally, we reject Ellis’s argument the court should have excluded testimony regarding decibel readings. Over an objection based on lack of foundation, Foletta testified that he acquired a sound meter from his friend, pointed it in the direction of the music, and used it to measure the decibel levels of the noise. Ellis argues the evidence was inadmissible because there was no foundation that the sound meter had been properly calibrated or that Foletta was trained as to how to use it. But even if we accept Ellis’s argument that testimony about the decibel level was somehow inappropriate, the court *heard* a multitude of tape recordings of the music, recorded by Foletta in support of his claim and introduced at the hearing as exhibits. Under the circumstances, the precise decibel level was not dispositive and Ellis was not prejudiced.

We affirm. Costs are awarded to respondent Foletta.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

(A153079)