

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT**

Matter of Irena K. v. Francesco S.

2019 NY Slip Op 05066 (N.Y. Ct. App. 2019) · No. 9695, 9694 · Decided June 25, 2019

SUMMARY

The Appellate Division, First Department modified a Family Court order finding that respondent committed several family offenses and granting a five-year order of protection. The court vacated the findings of assault in the second degree, criminal obstruction of breathing or blood circulation, and one count of sexual misconduct, while affirming findings of harassment, coercion, one count of sexual misconduct, and the order of protection.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Renwick, J.P.; Manzanet-Daniels, J.; Webber, J.; Oing, J.
JURISDICTION	New York
DECIDED	June 25, 2019
DOCKET	9695, 9694
DISPOSITION	other
PROCEDURAL POSTURE	Respondent appealed from a Family Court order following a fact-finding determination that he committed multiple family offenses and the issuance of a five-year order of protection.
STANDARD OF REVIEW	The family-offense findings were reviewed for support by a fair preponderance of the hearing evidence; the Family Court's credibility determinations were accepted unless unsupported by the record.
PRECEDENTIAL VALUE	Published Appellate Division opinion
PARTIES	Francesco S. v. Irena K.

TOPICS

domestic violence

family law procedure

immigration

remedies

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the evidence supported the Family Court's findings that respondent committed harassment in the second degree and coercion in the second degree.
2. Whether the evidence supported the finding of two counts of sexual misconduct.
3. Whether the evidence supported the finding of assault in the second degree based on respondent's biting petitioner's earlobe.
4. Whether the evidence supported the finding of two counts of criminal obstruction of breathing or blood circulation.
5. Whether the five-year order of protection was appropriate.

HOLDINGS

1. The findings that respondent committed harassment in the second degree and two counts of coercion in the second degree were supported by a fair preponderance of the hearing evidence.
2. The record supported only one count of sexual misconduct, requiring vacatur of one of the two sexual-misconduct findings.
3. The finding of assault in the second degree was unsupported because the evidence did not establish that respondent's teeth constituted a dangerous instrument or that he intended to cause serious physical injury.
4. The findings of two counts of criminal obstruction of breathing or blood circulation were unsupported because the evidence did not establish that respondent intended to impede petitioner's normal breathing or blood circulation.
5. The five-year order of protection was appropriate because aggravating circumstances constituted an immediate and ongoing danger to petitioner.

KEY QUOTATIONS

*“Nevertheless, her testimony fails to establish that respondent intended to impede her normal breathing or blood circulation” ([*2])*

FACTUAL BACKGROUND

Respondent threatened petitioner that he would take steps necessary to cause her to lose her immigration status and rights to the child if she stopped prostituting herself to him. Petitioner testified that respondent engaged in sexual conduct with her, including biting her earlobe and covering her nose or mouth during sex. She acknowledged that she expected payment during the first alleged rape incident and did not communicate nonconsent, and she did not tell respondent she was having trouble breathing during the two relevant incidents.

PROCEDURAL HISTORY

Family Court, New York County, found that respondent committed assault in the second degree, two counts of criminal obstruction of breathing or blood circulation, two counts of sexual misconduct, two counts of coercion in the second degree, and harassment in the second degree. The court issued a five-year order of protection in favor of petitioner. The Appellate Division modified the order on the law by vacating the findings of assault, both obstruction counts, and one sexual-misconduct finding, and otherwise affirmed.

DISPOSITION

other

CASES CITED

- Matter of Everett C. v. Oneida P., 61 A.D.3d 489 (1st Dep't 2009)
- Matter of Lisa S. v. William V., 95 A.D.3d 666 (1st Dep't 2012)
- Matter of Kenrick C., 143 A.D.3d 600, 601 (1st Dep't 2016)

OPINION

PER CURIAM.

Matter of Irena K. v Francesco S. (2019 NY Slip Op 05066) Matter of Irena K. v Francesco S. 2019 NY Slip Op 05066 Decided on June 25, 2019 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on June 25, 2019 Renwick, J.P., Manzanet-Daniels, Webber, Oing, JJ. 9695 9694 [*1]In re Irena K., Petitioner-Respondent, vFrancesco S., Respondent-Appellant.

Law Offices of Paul W. Matthews, New York (Paul W. Matthews of counsel), for appellant. Beth E. Goldman, New York Legal Assistance Group, New York (Amanda M. Beltz of counsel), for respondent. Order, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about August 28, 2018, which, upon a fact-finding determination that respondent father committed the family offenses of assault in the second degree, criminal obstruction of breathing or blood circulation (two counts), sexual misconduct (two counts), coercion in the second degree (two counts), and harassment in the second degree, and granted a five-year order of protection in favor of petitioner, unanimously modified, on the law, to vacate the findings of assault in the second degree, criminal obstruction of breathing or blood circulation (both counts), and sexual misconduct (one count), and otherwise affirmed, without costs.

The findings that respondent committed the family offenses of harassment in the second degree (Penal Law § 240.26[3]) and coercion in the second degree (two counts) (Penal Law § 135.60[9]) are supported by a fair preponderance of the hearing evidence (see generally Matter of Everett C. v Oneida P., 61 AD3d 489 [1st Dept 2009]; Family Court Act § 832).

The record shows, inter alia, that respondent threatened petitioner that he would take the steps necessary to cause her to lose her immigration status and rights to the child if she stopped prostituting herself to him, thereby evincing respondent's intent to harass and alarm petitioner (Penal Law § 240.26[3]) and his inducing petitioner to engage in a sexual relationship with him by instilling fear in her (Penal Law § 135.60[9]).

The court's credibility determinations are supported by the record, and there is no basis for disturbing them (see *Matter of Lisa S. v William V.*, 95 AD3d 666 [1st Dept 2012]). The record supports a finding of one count only of sexual misconduct (Penal Law § 130.20[1]).

Although the family offense petition alleges that respondent raped petitioner twice, petitioner admitted at the hearing that, during the first incident, she was expecting payment in exchange for sex and never showed respondent, either physically or verbally, that she did not consent to sex.

However, the finding of assault in the second degree (Penal Law § 120.05[2]) is not supported by evidence that, when respondent bit petitioner's ear lobe during sex, his teeth constituted a dangerous instrument, i.e., that he intended to cause petitioner a serious physical injury (Penal Law § 10.00[10], [13]). Nor does the evidence support the finding of criminal obstruction of breathing or blood circulation (two counts) (Penal Law § 121.11[b]).

Petitioner testified that she had difficulty breathing when respondent covered her nose or mouth during sex. However, she admitted that, when she told him to stop or told him that she was in pain, he stopped immediately. Petitioner did not tell respondent that she was having trouble breathing on the two relevant occasions when he covered her mouth during sex.

We acknowledge that she may have been afraid or uncomfortable. Nevertheless, her testimony fails to establish that respondent intended to impede her normal breathing or blood circulation (compare *Matter of Kenrick C.*, 143 AD3d 600, 601 [*2][1st Dept 2016] [sustaining finding of criminal obstruction of breathing or blood circulation against appellant who "threw his sister to the floor and began squeezing' her neck until she could barely breathe"]).

The issuance of a five-year order of protection was appropriate in view of the presence of aggravating circumstances constituting an immediate and ongoing danger to petitioner (Family Court Act § 827[a][vii]). THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: JUNE 25, 2019 CLERK