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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001916-ME
AND
NO. 2008-CA-002094-ME

CHARLES D. HENSLEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE PAULA SHERLOCK, JUDGE
ACTION NO. 08-D-502852

AMY HENSLEY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND VANMETER, JUDGES.

CLAYTON, JUDGE: Charles D. Hensley (Doug), appeals from a domestic violence order (DVO) entered against him by the Jefferson Family Court. The issue presented is whether the physical altercation between Doug's ex-wife, Amy Hensley (Amy), and his girlfriend, while he was present, qualifies as domestic violence on his part, and therefore, warrants the entry of a DVO against him.

Because we conclude that the inference drawn by the trial court regarding its factual findings was an abuse of discretion, we must vacate the order.

This case initially came before the Jefferson Family Court on September 22, 2008, for a domestic violence hearing. Prior to the hearing, on September 8, 2008, Amy sought and obtained an emergency protective order (EPO) against her ex-husband, Doug, following an incident at Amy's residence. The incident is described in Amy's petition, which was read into the record:

> We have been divorced 4 years and have 3 children ages 15, 11 and 7. Yesterday, he drove his girlfriend over to my house to attack me. They were banging on the door and when I opened the door she pushed me and scratched my neck and face and bruised my chest and pulled out my hair. He was standing and watching all of this and would not stop her. They left and I called the police and took out a warrant today. The children were already at his house and I sent a policeman there to check on them. I did go to the hospital. I am afraid of them and want them to stay away. We were married 12 years and he was violent off and on the whole time.

Doug was not present at this hearing but was represented by counsel. At the hearing, Amy, who was the sole witness, conceded that Doug never touched her and that the physical altercation was between her and Doug's girlfriend. Following the presentation of Amy's case, Doug's attorney moved for the court to dismiss the motion for a DVO for failure to state a claim. Doug's motion was based on his contention that he had not committed an act of domestic violence as defined by the statutes. The family court overruled the motion and entered a DVO. On the record, the court reasoned:

> I think the Motion is well made. But I think if you simply . . . you know, if I took an attack dog and pointed it to Ms. Hensley and let it go, you know, I think she would be afraid. And I think that she has every reason to be afraid of Mr. Hensley and I think that he had some duty to protect and intervene in this action rather than let this kind of injury be held . . . .

VCR, 9/22/08 at 8:58/59. Thus, the family court found by a preponderance of the evidence that acts of domestic violence had occurred and may occur again. In the DVO, the family court ordered that Doug restrain from committing further acts of abuse or threats of abuse, prohibited Doug from contacting Amy, and required that Doug supervise her contact with the children. Following the issuance of the DVO, Doug filed an appeal.

A second issue is this case is the child support that was ordered pursuant to the DVO. Doug and Amy had been divorced since June 28, 2004. At the time of the dissolution, they agreed to joint custody for their three children with an alternate weekly parenting schedule. Apparently, because of the nature of the custodial arrangement between the parties, neither party was required to pay child support. In the September 22, 2008 DVO hearing, the family court did not set child support or change the custodial arrangement.

But on October 9, 2008, seventeen days after the entry of the DVO, Amy filed a motion to set child support and a motion to hold Doug in contempt for alleged violation of the no-contact order. Counsel appeared at the family court's motion hour on October 13, 2008, at which time the court scheduled a hearing for October 24, 2008. Furthermore, the family court directed the parties' counsel to

meet, and with assistance from the Jefferson County Attorney's Child Support Division, set a temporary child support amount. Thereafter, a child support order was entered on October 22, 2008. The child support order ordered Doug to pay child support to Amy in the amount of $1,151.92 per month effective as of September 10, 2008. Clearly, although the order was entered on October 22, its effective date was two days after the EPO was issued, prior to the DVO hearing, approximately a month before Amy's motion to set child support under the DVO, and more than a month prior to the entry of the order.

At the October 24, 2008 hearing, Doug, through his counsel, objected to the child support motion based on the fact that it had been filed more than ten days after the final and appealable September 22 DVO. Doug did not object to the payment of child support, but insisted that the child support motion should be filed in the dissolution action where jurisdiction is properly vested for child support and custody. Subsequently, the family court did not conduct an evidentiary hearing regarding child support but, over Doug's objection, set child support in the amount requested by Amy. Further, on the other issue, violation of the no-contact order, the family court found that Doug had not violated that portion of the DVO.

Then, the family court, *sua sponte*, questioned whether Doug had paid any child support since the issuance of the DVO. Upon learning that he had not paid any child support since the DVO, the family court found him in contempt for failure to pay any child support. The family court did so, even though at the September 22, 2008 DVO hearing, no child support amount had been set. The

family court had merely entered the notation "as ordered" in the child support section of the DVO. Nonetheless, the family court instructed the parties to file any further child support action in the dissolution case.

Doug filed a second appeal challenging the contempt finding and challenging the family court's jurisdiction to set child support under these particular facts. The two appeals were consolidated on November 7, 2008. His arguments on appeal are, first, that the family court erred in its determination that Doug committed domestic violence, as defined by statute, by not intervening in the physical altercation between his ex-wife and girlfriend. Second, Doug maintains that the family court's contempt finding against Doug for failure to pay child support is improper because he did not receive notice of the child support order or written notice of the contempt order or a contempt hearing. Doug's final argument on appeal is that the family court exceeded its jurisdiction by entering a child support order beyond the ten-day jurisdictional window imposed by Kentucky Rules of Civil Procedure (CR) 59.05. We will first examine Doug's contention that his failure to intervene between his ex-wife's and girlfriend's physical altercation meets the statutory prerequisite for domestic violence.

The appellate standard of review for a family court's factual determinations is whether the findings were clearly erroneous. CR 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Findings are not clearly erroneous if they are supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). But in reviewing the decision of a trial court, the test is not only

whether the findings of the trial judge were clearly erroneous but also whether the trial judge abused her discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Abuse of discretion occurs when a court's decision is unreasonable or unfair. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994). Determination of whether the trial court's decision was reasonable or fair relates to inferences that may be drawn from a trial court's factual findings. 15 Louise E. Graham & James E. Keller, *Kentucky Practice - Domestic Relations Law* § 13:20 (3d ed. 2009).

To survey Kentucky law regarding domestic violence, we will begin with Kentucky Revised Statutes (KRS) 403.750(1), which provides that the court, following a hearing, may enter a domestic violence order, effective for up to three years, "if it finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur [.]" "Domestic violence and abuse," is defined by KRS 403.720(1) as "physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple [.]" Moreover, the preponderance of the evidence standard is met when sufficient evidence establishes that the alleged victim "was more likely than not to have been a victim of domestic violence." *Com. v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996).

In this case, we must first evaluate whether Doug's actions meet the definition for domestic violence. The facts are not disputed. In fact, Amy stipulated that Doug did not lay a hand on her. Instead, Doug stood by during a

physical altercation between the two women. Standing by, while perhaps not the most commendable behavior, does not itself inflict physical injury. Furthermore, since Doug did nothing, to infer that he inflicted fear of imminent physical injury is not supported by the evidence.

No evidence was provided to the court that Doug threatened to attack Amy. Although apparently a dispute existed as to the retrieval of the children's bicycles, and perhaps harsh words were exchanged, Amy provided no specific testimony of statements by Doug threatening to harm her or have his girlfriend harm her. Although Amy contends that Doug incited or directed the assault, she provided no such statements by him.

Bolstering the fact that Doug's inaction did not inflict fear, the record shows that the parties had a fifteen-year relationship history with no family court history of domestic violence. Further, Doug's criminal record shows no cases indicating a history of violence. While the judge analogized the situation to Doug pointing an attack dog (the girlfriend) at Amy, we do not find this analogy appropriate or accurate. Nor are we aware of any duty on the part of Doug to intervene in this situation. Indeed, we are cognizant that, had Doug intervened, he could have placed himself in legal jeopardy. In sum, the fact that Doug's girlfriend attacked Amy, his ex-wife, is too remote and attenuated to establish domestic violence on the part of Doug.

A second major consideration in this case pertains to the efficacy of entering a DVO against Doug. We acknowledge that the domestic violence

statutes were enacted "[t]o allow persons who are victims of domestic violence and abuse to obtain effective, short-term protection against further violence and abuse in order that their lives will be as secure and as uninterrupted as possible[.]" KRS 403.715(1). Issuing a domestic violence order against Doug, however, does not prevent his girlfriend from attacking Amy. The law provides other mechanisms to deal with her violent acts. And we find Amy's arguments regarding conspiracy to be unpersuasive.

Given the circumstances of the confrontation between Amy and Doug's girlfriend, we find the standards, under KRS 403.750 and *Anderson*, 934 S.W.2d 276, have not been met. Amy suffered no injury of any type by Doug. Hence, pursuant to the statutes, she was not a victim of domestic violence. The Kentucky Supreme Court in *Barnett v. Wiley*, 103 S.W.3d 17, 19 (Ky. 2003), a case interpreting the meaning of an "unmarried couple" in the context of the domestic violence statutes cautioned:

> We agree with the trial court and the Court of Appeals that the domestic violence statutes should be construed liberally in favor of protecting victims from domestic violence and preventing future acts of domestic violence. *See* KRS 500.030 ("All provisions of this code shall be liberally construed according to the fair import of their terms, to promote justice, and to effect the objects of the law."). But the construction cannot be unreasonable. *See Beckham v. Board of Education of Jefferson County*, Ky., 873 S.W.2d 575, 577 (1994)[.]

In light of this sound guidance and the statutory meaning of domestic violence, we find that holding a third party responsible for the action of another and granting a

DVO against him or her is unreasonable, and thus, an abuse of discretion. We cannot fail to note that the imposition of a DVO is a significant limitation on a person. Where there has been violence, it is appropriate, but where the statute has been stretched beyond its intent, a DVO diminishes its effectiveness and can create great harm. Indeed, Doug testified at the October 24, 2008 hearing that he lost a job because of the DVO.

Despite our usual deference to a trial court's findings, in this case, we conclude that the court abused its discretion when it decided that Amy was "more likely than not" a victim of domestic violence by a bystander. *See Anderson*, 934 S.W.2d at 278. As the Kentucky Supreme Court explained in the unreported case, *Kopowski v. Standard Life Ins. Co. of Indiana*, 2005 WL 2045448 (Ky. 2005), "[w]here the challenge involves matters of fact, or application of law to facts, however, an abuse of discretion should be found only where the factual underpinning for application of an articulated legal rule is so wanting as to equal, in reality, a distortion of the legal rule." We believe that to be the case here. Consequently, we vacate the DVO entered against Doug and remand this case to Jefferson Family Court for entry of an order dismissing the September 22, 2008 DVO. Because the DVO is vacated, the other orders are thus vacated and are rendered moot.

VANMETER, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

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