

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002314-ME

NATHAN LEE BARKER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LUCINDA CRONIN MASTERTON, JUDGE
ACTION NO. 10-D-00898

ANGELA RENEE PERKINS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

WINE, JUDGE: Nathan Barker appeals from a domestic violence order (“DVO”) entered by the Fayette Family Court. On appeal, Barker contends that the appellee, Angela Perkins, did not have standing to seek a protective order against him

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

because the parties did not cohabit. Upon a review of the record, we affirm the Fayette Family Court.

On October 20, 2010, Perkins filed a petition for an emergency protective order (“EPO”) against Barker for acts of domestic violence occurring on that same date. The petition alleged that Barker held Perkins down while holding a kitchen knife at her throat and stated that he wanted to slash her throat and kill her. During the same incident, as Perkins was leaving the home, Barker kicked her in the back, threatened damage to her house and car, and threatened that he would “get her.” The EPO was granted and Barker was restrained from having any communication with Perkins, was ordered to stay 500 feet away from Perkins and from her place of employment, and was ordered not to dispose of or damage any of the parties’ mutual property.

On November 22, 2010, after granting a continuance at Barker’s request from November 1, 2010, the Fayette Family Court held a domestic violence hearing. Although Barker attempted to continue the hearing again, the trial court did not allow it and the hearing proceeded. Both parties testified at the hearing.

Perkins’s testimony was that the parties lived together and that the parties had separate residences to which the other party had full access. Perkins further testified that both parties used both houses, even when the other party was

not there. Perkins testified that this use of the properties was not merely occasional. She further testified that the parties had been a couple for two years and had lived together during that time period.

Barker's testimony was conflicting. He acknowledged that Perkins had a key to his home, but stated that it was only for use on one specific occasion when she missed an airplane flight. However, Barker later admitted that Perkins had a key prior to this occasion. Barker also testified that he did not have a key to Perkins's home and did not have access to Perkins's home, although he later testified that he had a garage opener giving him free access to Perkins's home. Barker's testimony also conflicted concerning the nature of his relationship with Perkins and whether they currently cohabitated or had cohabitated in the past. Both parties confirmed that they were engaged to be married.

The trial court acknowledged that the issue of cohabitation was one of "he said/she said," and found that Perkins's testimony was more reliable than Barker's. The court found that Barker's testimony lacked credibility. Further the court stated, "[Perkins testified] that they kind of lived in both of each other's houses . . . I believe her." The judge further noted, "I think it comes down to credibility." The court then found that the parties *did* cohabit and entered a DVO.²

² Although the court failed to check the box on the DVO form stating the parties were "unmarried, currently or formerly living together," the court's finding that the parties cohabitated is clearly referenced in the video record.

Barker filed no motion to alter, amend, or vacate on the issue of standing and cohabitation. Nonetheless, he now appeals to this Court. On appeal he contends that Perkins had no standing to seek a protective order against him because the parties did not cohabit.

We find Barker's argument on appeal to be without merit. To begin, the trial court found that the parties did cohabit. As has been acknowledged many times before, a "family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it." *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky.App. 2007). Indeed, "[a] family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses." *Id.* As a reviewing court, we will not disturb such findings absent clear error. *Id.*

Because Perkins's testimony was that the parties lived together, the trial court was not clearly erroneous in finding that the parties cohabited. In order for there to be a finding of cohabitation, our Supreme Court has "held that there at a minimum, be proof that 'the petitioner seeking a DVO shares or has shared living quarters with the respondent.'" *Rivers v. Howell*, 276 S.W.3d 279, 282 (Ky. App. 2008), quoting *Barnett v. Wiley*, 103 S.W.3d 17 (Ky. 2003). There was certainly testimony at the hearing by Perkins for the trial court to find as such.

Accordingly, it is not even necessary to reach the question of standing raised by Barker. Indeed, if the parties cohabited, then Perkins was well within her rights to seek a DVO against Barker for domestic abuse. Kentucky Revised

Statutes (“KRS”) 403.720 and 403.725. Thus, we do not address the issue of standing or the issue of whether standing was even preserved for our review.

In light of the foregoing, we hereby affirm the DVO entered by the Fayette Family Court.

ALL CONCUR.

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