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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000617-ME

DAVID SCOTT CHISM — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE HUGH SMITH HAYNIE, JUDGE
ACTION NOS. 02-D-500490 AND 07-D-500490-001

STEPHANIE B. CHISM — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; ISAAC,[1] SENIOR JUDGE.

ISAAC, SENIOR JUDGE: David S. Chism appeals *pro se* from a Jefferson Family Court order reissuing a domestic violence order (DVO) pursuant to Kentucky Revised Statutes (KRS) 403.750(2). He alleges that: (1) the family court's renewal of the DVO was an abuse of discretion; (2) that its findings of fact

[1] Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

were clearly erroneous; (3) that the renewal proceedings violated his procedural due process rights; (4) that the renewal statute is unconstitutional both on its face and as applied to him; and (5) that the statutory standard for renewal of a DVO is unconstitutionally vague. We affirm.

The statutory provision at issue in this case, KRS 403.750(2), provides as follows:

> Any order [DVO] entered pursuant to this section shall be effective for a period of time, fixed by the court, not to exceed three (3) years and may be reissued upon expiration for an additional period of up to three (3) years. The number of times an order may be reissued shall not be limited. With respect to whether an order should be reissued, any party may present to the court testimony relating to the importance of the fact that acts of domestic violence or abuse have not occurred during the pendency of the order.

The original DVO in this case was issued on March 12, 2007. The parties, David and Stephanie Chism, who have four children, had been engaged in contentious dissolution proceedings since 2004. Stephanie had moved out of the marital home and was living with her parents. On February 14, 2007, David set fire to the marital residence and caused an explosion which destroyed the entire home. He was arrested two days later. Stephanie obtained an emergency protective order against David, and on March 12, 2007, the Jefferson Family Court held a hearing on her petition to obtain a DVO against David. Both parties were present and represented by counsel. Stephanie testified that David had physically assaulted her in the past and that she believed that he had attempted to injure her by setting fire to the house because he thought she would be bringing over some

clothes for the children. The trial court entered a DVO. David did not appeal from the entry of the DVO. David later entered a plea of guilty to one count of second-degree arson and one count of first-degree wanton endangerment in connection with his destruction of the marital home and was sentenced to serve ten years in prison.

On January 9, 2009, David filed a motion to vacate, set aside, amend or modify the DVO pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(e) and (f). He argued that the DVO had no practical legal application while he was incarcerated or on parole; that it served only to limit his access to educational and rehabilitative programs; and that it could have an adverse effect on his parole eligibility. He stated that the arson was actually an attempt at suicide and that he had taken responsibility by immediately seeking treatment and completing programs for depression and alcohol abuse. The trial court denied the motion on January 2, 2009. David did not appeal from the order denying his motion.

On January 22, 2010, about seven weeks before the expiration of the DVO, David submitted a memorandum to the family court opposing its renewal. He alleged, among other things, that Stephanie had initiated contact with him after the entry of the original DVO. He also contended that he was not afforded an adequate opportunity to testify at the original hearing and was entitled to an evidentiary hearing on a motion for renewal. He also expressed concern that the DVO would hamper his ability to attend his children's school functions.

On March 2, 2010, Stephanie moved the court to extend the DVO, which was due to expire on March 12, 2010. Stephanie, her counsel, and David's counsel were present at the motion hour. The trial court granted Stephanie's motion and signed an order reissuing the DVO for three years. On March 12, 2010, David filed a motion for "reconsideration of orders and/or further findings of fact and conclusions of law pursuant to CR 52.02 and CR 59.05" and a response to Stephanie's motion to renew the DVO. The trial court denied the motion and issued findings of fact and conclusions of law, stating that it had entered the 2007 DVO based on Stephanie's testimony that David had physically assaulted her in the past and had attempted to injure her by intentionally setting fire to the marital home. The court noted that after entry of the DVO, David entered a guilty plea to arson in the second degree and wanton endangerment in the first degree and was currently serving his sentence at the Green River Correctional Complex. The trial court stated that after considering all of the evidence, it believed that Stephanie continued to fear for her safety and that it was appropriate to extend the DVO. This appeal by David followed.

David argues that the family court abused its discretion in extending the DVO because he was not afforded a sufficient opportunity to testify at the original hearing in March 2007. David did not file an appeal from the entry of the original DVO, nor from the family court's denial of his CR 60.02 motion; therefore, any arguments regarding alleged deficiencies in the original hearing are res judicata and may not be raised again. "[A]n existing final judgment rendered upon the

merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies. . . ." *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 464 (Ky. 1998).

David further argues that the family court provided inadequate reasons for reissuing the DVO and that its decision to do so was, therefore, arbitrary. He contends that the court failed to consider the issues he had raised in his memorandum, such as evidence that Stephanie had tried to contact him after the issuance of the original DVO and that he had successfully completed various treatment programs. He argues that he was entitled to testify at the hearing regarding his rehabilitative efforts.

In *Kingrey v. Whitlow*, 150 S.W.3d 67 (Ky.App. 2004), this Court held that evidence of additional acts of domestic violence or abuse is not required in order to reissue a DVO:

> The statute does not state the conditions under which a DVO may be reissued. However, it does state that any party may present testimony concerning the importance of the fact that domestic violence or abuse may not have occurred during the pendency of the previous order. KRS 403.750(2). Contrary to the circuit court's interpretation, we do not read the statute as requiring proof of additional acts of domestic violence or abuse during the prior period before a DVO may be reissued. Rather, the statute makes it clear that testimony that such acts did not occur may be presented for the court's consideration in determining whether or not to reissue the order.

150 S.W.3d at 69.

Judge Knopf's concurring opinion further discussed the requirements for reissuing a DVO:

> It is important to remember that a person subject to a DVO is placed under significant restrictions. Consequently, a DVO should not be renewed merely at the request of the petitioning party. Rather, there must be some showing of a continuing need for the DVO.
>
> Under KRS 403.750(1), a court may issue a DVO "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* ...." (Emphasis added). In making the decision to renew a DVO, "the fact that acts of domestic violence or abuse have not occurred during the pendency of the order," KRS 403.750(2), is a relevant, but not a controlling factor in making such a determination. The critical issue is whether the court finds that future acts of domestic violence remain a reasonable probability. There may be other conduct or circumstances, not amounting to a violation of the prior DVO, which may nonetheless be relevant to considering the continuing need for the DVO. The trial court may also consider the nature, extent and severity of the original acts of domestic violence. In short, a court considering a motion to renew a DVO may consider the totality of the facts and circumstances in finding that acts of domestic violence and abuse may again occur if the DVO is allowed to expire.

Id. at 70 -71.

At the hearing, the family court was fully informed of David's rehabilitative efforts by David's counsel, who described David's completion of a substance abuse program, relapse prevention therapy program, cognitive behavioral skills program, intensive anger management program, and his attendance at Narcotics Anonymous meetings. A review of the family court's findings of fact in this case shows that the court was most influenced in its decision by the fact that David had

assaulted Stephanie in the past and had entered a guilty plea to two felony charges, arson and wanton endangerment, after entry of the DVO. This weighing of the evidence was fully in keeping with Judge Knopf's statement that the trial court may consider "the nature, extent and severity of the original acts of domestic violence." The family court's decision to extend the DVO was fully supported by the evidence and was not, therefore, arbitrary.

David's second argument is that the trial court's findings of fact were clearly erroneous. Specifically, he disputes its finding based on Stephanie's testimony that David had physically assaulted her in the past and had attempted to injure her by setting fire to their house. He refers extensively to testimony at the hearing of March 12, 2007. But, as we have already noted, David may not dispute these factual findings because he failed to appeal from the entry of the original DVO. Furthermore, no additional acts of domestic violence are required to justify the extension of a DVO.

David's third argument is that his due process rights were violated because he received inadequate notice of the DVO renewal hearing. The motion hour was scheduled for Tuesday, March 2, 2010. David asserts that he received Stephanie's motion on Friday, February 26, 2010, at approximately 5:00 p.m. He argues that he was left with insufficient time to submit an opposing affidavit. He does acknowledge that his father was able to retain counsel to represent him at the hearing. Stephanie argues that her motion was filed in compliance with the Jefferson Family Court rules regarding motion practice.

The family court is not required to hold a hearing at all prior to reissuing a DVO. As this Court noted in *Kessler v. Switzer*, 289 S.W.3d 228 (Ky.App. 2009),

> KRS 403.750(2) does not require proof of additional acts of violence and . . . a hearing is therefore not required before an extension of a DVO is ordered. The statute clearly does not require a hearing. Further, if a hearing was required, the process articulated in KRS 403.750(2) for extending a DVO would be rendered useless, as the process would be the same as the process for originally granting a DVO. Clearly the legislature did not intend this result or the statute would not have a procedure for extending the DVO.

289 S.W.3d at 232.

Our review of the reissuance hearing shows that David was adequately represented by counsel. Furthermore, at no time did his counsel move the court to reschedule the hearing so that David could be present. The issue is, therefore, not preserved for appeal under the "general and sound rule that this Court is limited to the review of those issues that were raised and ruled on by the trial court." *Commonwealth v. Maricle*, 15 S.W.3d 376, 379 - 380 (Ky. 2000).

David next argues that KRS 403.750(2) is unconstitutional on its face and as applied to him because it fails to provide for a hearing prior to the reissuance of a DVO. He also argues that it is unconstitutionally vague. Stephanie contends that David's arguments are barred because he failed to provide adequate notice to the Attorney General as required by KRS 418.075.

KRS 418.075(1) states that

> In any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the

> petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the petition and be entitled to be heard.

The same requirement is also contained in Kentucky Rule of Civil Procedure (CR) 24.03 which states in pertinent part as follows:

> When the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion, or other paper first raising the challenge upon the Attorney General.

David submitted the following documents to the Attorney General: (1) a letter dated January 17, 2010, with a copy of the memorandum he filed several weeks before Stephanie filed her motion to extend the DVO; (2) a letter dated March 8, 2010, with a copy of the motion for reconsideration which he filed on March 12, 2010, after the trial court had entered the order renewing the DVO; (3) a copy of the notice of appeal and his appellate briefs.

David's letter of January 17, 2010, and the accompanying memorandum do not meet the KRS 418.075(1) requirement because they were filed long before Stephanie even moved the court to renew the DVO. David lacked standing to challenge the reissuance statute because no action had been taken by Stephanie at that point to renew the DVO. Similarly, the Attorney General could not have intervened because there was no active dispute. "In order for standing to exist, a party must show a legally recognizable interest in the subject matter of the suit. Furthermore, the party's interest must be determined to be present and substantial as opposed to a mere expectancy." *General Drivers, Warehouseman & Helpers*

Local Union No. 89 v. Chandler, 968 S.W.2d 680, 683 (Ky.App. 1998) (internal citations and quotation marks omitted).

The question then is whether the motion for reconsideration submitted with his letter of March 8, 2010, constituted the "petition" for purposes of fulfilling the notice requirement of KRS 418.075(1). David did not attach a copy of Stephanie's motion, which is the petition which initiated this action. Even if we assume that the Attorney General received adequate notice of the constitutional challenge, David's arguments are without merit. David lacks standing to argue that a hearing is mandatory because he was granted a hearing where he was represented by counsel. As we have already noted, this Court held in *Kessler*, 289 S.W.3d at 232, that a hearing on reissuing a DVO is not necessary. We decline to create a further right to attend such a hearing.

As to David's argument that the reissuance provision is unconstitutionally vague, "[i]t is uncontroverted that a statute is presumed to be constitutional unless it clearly offends the limitations and prohibitions of the Constitution. 'The one who questions the validity of an act bears the burden to sustain such a contention.' *Stephens v. State Farm Mutual Auto Ins. Co*., Ky., 894 S.W.2d 624 (1995)." *Commonwealth v. Harrelson*, 14 S.W.3d 541, 547 (Ky. 2000). A statute is vague if "men of common intelligence must necessarily guess at its meaning." *State Bd. For Elementary and Secondary Educ. v. Howard*, 834 S.W.2d 657, 662 (Ky.1992) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)). Although KRS 403.750(2) affords the trial court broad discretion in

reissuing a DVO, the statutory provision is neither unintelligible nor incomprehensible; therefore, the presumption that the statute is constitutional has not been overcome.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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