

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Tracy Thom

Court of Appeals No. E-08-073

Appellee

Trial Court No. 2008-DV-0007

v.

David J. Mulvin

DECISION AND JUDGMENT

Appellant

Decided: July 31, 2009

* * * * *

Carl W. Anderson, for appellee.

Shelly L. Kennedy, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, David J. Mulvin, appeals a civil protection order issued by the Erie County Court of Common Pleas, Domestic Relations Division. For the reasons that follow, we affirm.

{¶ 2} On January 16, 2008, appellee, Tracy K. Thom, filed a petition for a domestic violence civil protection order pursuant to R.C. 3113.31. Following an ex parte hearing before a magistrate, the court issued a temporary protection order and set a final hearing date on the petition. After the hearing, the magistrate continued the protection

order until January 2013, finding that appellant had committed domestic violence against appellee by recklessly causing and attempting to cause her physical harm. Appellant filed timely objections to the magistrate's decision. On December 12, 2008, the trial judge affirmed the magistrate's decision in its entirety. Appellant now appeals setting forth the following assignments of error:

{¶ 3} "I. The trial court erred in issuing a civil protection order as there was no current incident of domestic violence between the parties sufficient to support a finding that appellee was in danger of domestic violence at the time of the filing of her petition.

{¶ 4} "II. The trial court erred in issuing a domestic violence protective order based upon R.C. 3113.31(A)(1)(b) due to the lack of competent and credible evidence to establish a pattern of conduct that caused an imminent fear of physical harm and/or evidence to establish that appellant cause appellee mental distress.

{¶ 5} "III. The trial court abused its' discretion when it prohibited the appellant from possessing or using deadly weapons and ordering the appellant "Brady disqualified."

{¶ 6} Appellant's first two assignments of error will be addressed together. Pursuant to R.C. 3113.31, one who is the subject of domestic violence may petition a domestic relations court or a common pleas court for a protection order. "Domestic violence" occurs, inter alia, when one attempts to cause, or recklessly causes, bodily injury to a family or household member or places such person in fear of imminent serious physical harm by threat of force, R.C. 3113.31(A)(1)(a)(b), or engages in a pattern of

conduct that the actor knows will cause the family or household member to believe that the actor will cause physical harm or mental distress to such person. Id., R.C. 2903.211. "Immediate and present danger of domestic violence to the family or household member constitutes good cause for purposes of this section. Immediate and present danger includes, but is not limited to, situations in which the respondent has threatened the family or household member with bodily harm * * *." R.C. 3113.31(D)(1). A person seeking a civil protection order must demonstrate by a preponderance of the evidence that they are in danger of domestic violence. *Felton v. Felton* (1997), 79 Ohio St.3d 34.

{¶ 7} First, appellant contends that the alleged incidents of domestic violence between the parties were not recent enough to warrant a civil protection order. Appellant contends that there was no evidence to establish that he used a threat of force to instill a fear of imminent serious physical harm on the day the petition was filed.

{¶ 8} Appellee testified that she and appellant have been cohabitating off and on for approximately five years. During an argument in May 2006, appellee testified that appellant picked her up and threw her against a wall. After appellant left, appellee was locking all of her doors when appellant climbed in through a window. He once again picked appellee up and threw her across the room where she hit her head on a cedar chest. Appellee also testified regarding an incident in January 2007, when the parties once again argued. As appellee attempted to leave, she testified that appellant grabbed her from her car and threw her on the gravel driveway. Appellee testified that she sustained injuries to her leg as a result of this incident.

{¶ 9} "While no part of the statute refers to the examination of past acts of domestic violence in present cases, courts have held that it is permissible in certain circumstances for a court to consider such past behaviors when determining whether there was an act of domestic violence. *Eichenberger v. Eichenberger* (1992), 82 Ohio App.3d 809, 816. That is because in a situation * * * where the alleged offending act is one that places the assumed victim in fear of harm, '[t]he fear * * * and the reasonableness of that fear could and should be determined with reference to [a petitioner's] history with [the respondent].' Id. However, while the court may consider past acts to determine whether the incident at issue constitutes domestic violence, the issuance of a civil protection order cannot be based solely on previous incidents of alleged domestic violence. *Bruner v. Bruner* (Sept. 22, 2000), 7th Dist. No. 99CA285. Rather, the petitioner must establish by a preponderance of the evidence that an act of domestic violence occurred on the date set forth on the petition for a civil protection order. Id.; *Eichenberger*, 82 Ohio App.3d at 816. However, in so doing the petitioner may rely on past acts to establish a genuine fear of violence in the present situation. See id. at 816." *Solomon v. Solomon*, 157 Ohio App.3d 807, 2004-Ohio-2486, ¶ 22 and 23.

{¶ 10} In addition to testifying about prior incidences, appellee testified that on January 16, 2008, the day she filed for the protection order, she got into an argument with appellant. Appellee testified that because of the prior incidences of domestic violence, she was in fear for her safety and that is why she filed the protection order. She testified that she is afraid that appellant will cause her "serious imminent harm" because every

time she has tried to leave appellant, he gets physically violent with her. Accordingly, we find appellant's argument regarding the timing of the domestic violence incidents to be without merit. We further find that there was competent and credible evidence to establish a pattern of conduct that caused an imminent fear of physical harm and/or evidence to establish that appellant caused appellee mental distress. Appellant's first two assignments of error are found not well-taken.

{¶ 11} In his third assignment of error, appellant contends that the court abused its discretion in prohibiting appellant from possessing, using or purchasing any deadly weapons for the duration of the protection order.

{¶ 12} R.C. 3113.31(E)(1)(h) permits the trial court to grant relief that it deems fair and equitable. A trial court has broad discretion when imposing restrictions pursuant to a civil protection order. *Maag v. Maag* (Mar. 28, 2002), 3d Dist. No. 16-01-16.

However, "[r]estrictions must bear a sufficient nexus to the conduct that the trial court is attempting to prevent." *Id.*

{¶ 13} Other witnesses testified that they have witnessed appellant act unnecessarily violent and combative towards other people and animals. Appellee testified that appellant possesses several guns, one of which he keeps in his vehicle "to scare people." Appellee noted that even after the temporary protection order was issued which prohibited appellant from possessing any weapons, he failed to turn in all of his guns to the sheriff. Based on the foregoing, we do not find that the trial court abused its

discretion in restricting appellant's possession and use of weapons. Appellant's third assignment of error is found not well-taken.

{¶ 14} On consideration whereof, the court finds that substantial justice has been done the party complaining the judgment of the Erie County Court of Common Pleas, Domestic Relations Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

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