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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002425-DG

JEFFREY S. CROWLEY APPELLANT

ON DISCRETIONARY REVIEW FROM HENDERSON CIRCUIT COURT
v. HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 01-XX-00003

ANGELA LILLY APPELLEE

OPINION

VACATING AND REMANDING

** ** ** ** **

BEFORE: DYCHE, HUDDLESTON, KNOPF, JUDGES.

DYCHE, JUDGE. At issue in this case is the constitutionality of the Kentucky Domestic Violence Act, Kentucky Revised Statutes (KRS) 403.710, et. seq., both facially and as applied. This court granted discretionary review of a Henderson Circuit Court memorandum opinion that affirmed a Domestic Violence Order of the Henderson District Court entered against Jeffrey S. Crowley. We vacate and remand for additional findings of fact.

On January 17, 2001, Angela Lilly filed a Domestic Violence Petition/Motion against her ex-husband, Jeffrey S. Crowley. The District Court entered an Emergency Protective Order on January 17, 2001, which required that Crowley remain at least 500 feet away from Lilly and members of her family and household at all times and places. The order also granted temporary custody of the couple's two children to Lilly.

A hearing on the petition was held on January 26, 2001, in Henderson District Court, after which the Court entered a Domestic Violence Order (DVO) against Crowley. Crowley was ordered to: 1) remain at all times and places at least 500 feet away from Lilly and members of Lilly's family or household except for visitation exchanges and telephone calls to the children; 2) not commit further acts of domestic violence and abuse; and 3) not dispose of or damage any property of the parties. The DVO was ordered in effect until January 25, 2003.

On February 6, 2001, Crowley filed a "Motion to Vacate and Set Aside Judgment or in the Alternative to Make Additional Findings of Fact." The motion requested that the order be set aside on two grounds: 1) the order violated the mandates of KRS 403.720, in that the evidence did not support a finding of "physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault." KRS 403.720

(1); 2) the domestic violence statutes violated the Kentucky and U.S. Constitutions, both as written and as applied to Crowley. The motion requested, in the alternative, that the trial court make additional findings of fact as to what facts gave rise to 1) acts of domestic violence, or 2) the fear of imminent physical injury, including date, place, and location of each act; and 3) facts upon which the court relied to find that domestic violence may occur in the future.

The motion was to be heard on February 16, 2001. On that date, Crowley filed a "Memorandum in Support of the Motion" and filed a "Notice to Attorney General of Constitutional Challenge."[1] The record shows that the hearing on the motion was continued to March 2, 2001.[2] The District Court denied the motion on March 2, 2001. However, the court docket sheet shows that this order was either lost or misfiled and on March 28, 2001, the court again denied the motion. The trial court did not enter specific findings of fact as requested by Crowley.

Crowley appealed to the Henderson Circuit Court. In the appeal he argued that there were "no facts supporting domestic violence" and that the domestic violence statutes were

[1] The Certificate of Service noticing the Attorney General states that it was served by mail. The Certificate of Service is dated February 5, 2001, with what appears to be a hand-altered date of February 15, 2001. Entry of the motion and notice in the record was February 16, 2001.

[2] Crowley contends that the continuance was to allow the Attorney General's office time to intervene. However, there is nothing in the record to support.

unconstitutional both facially and as applied. The Circuit Court entered a Memorandum Opinion affirming on October 3, 2001, which determined that the Act was not overbroad, that it was not vague, and that it did not violate due process.

This Court granted Crowley's motion for discretionary review on February 25, 2002. On August 7, 2002, Lilly filed a Motion to Dismiss Appeal, arguing that: 1) Crowley's constitutional challenge was untimely filed in that the constitutional challenge was first raised in a post-judgment motion; and 2) the Attorney General was never given the proper opportunity to respond to the challenge as a result of the untimely challenge. On September 26, 2000, this Court entered an order passing the Motion to Dismiss to a three-judge panel. On the same date, this Court entered an order denying a motion for attorney fees and costs and granting a motion for additional time to file briefs. The Governor's Office of Child Abuse and the Kentucky Domestic Violence Association were also granted leave to file amicus briefs. On March 26, 2003, we entered an order denying Lilly's motion to dismiss.

The first issue to be addressed on appeal is whether Crowley complied with the mandatory requirements of Kentucky Revised Statutes (KRS) 418.075(1), which states:

> 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.

Lilly relies on the cases of Maney v. Mary Chiles Hosp., Ky., 785 S.W.2d 480 (1990), and Allard v. Kentucky Real Estate Comm'n, Ky. App., 824 S.W.2d 884 (1992), in support of her argument that Crowley failed to comply with the notice requirements of the statute. In Maney, the Kentucky Supreme Court held that KRS 418.075 is mandatory and that strict enforcement of the statute is necessary to eliminate procedural uncertainty. Maney, 785 S.W.2d at 482. In Allard, this Court applied Maney and determined that a constitutional challenge was untimely when it was raised for the first time in a motion to alter, amend or vacate. Allard, 824 S.W.2d at 886.

Crowley attempts to distinguish Allard on its facts. He emphasizes the following language from Allard: "Appellant's initiating document before the circuit court (designated 'Appeal Pursuant to KRS 324.210') makes no reference to the constitutionality of the statutes." Id. at 887. Crowley argues that the first document he filed was the motion to vacate and set aside the judgment and that when he filed the motion the document was accompanied by a written notice to the Attorney General. Crowley argues that the rationale behind this court's

opinion that Allard's constitutional challenge was untimely was that Allard had a lengthy trial and the case had been before the circuit court for months before the issue was raised. However, this interpretation fails to consider the language that follows the Allard cite Crowley offers to support his argument. This Court stated, "The proceedings before the commission, copies of which were filed with the trial court, reflect no issue being raised regarding the constitutionality of the statutes." Id. Clearly, the length of time the case was before the circuit court was not the determining factor.

Crowley also argues that, because he only knew of the charges against him for nineteen days before he raised the challenge, Allard should not apply. The record establishes that the first time Crowley considered raising the issue of constitutionality was in a letter written to the Commonwealth Attorney on February 2, 2001, after the DVO was entered. As excuse for this procedural failure, Crowley states that he expected the charge to be dismissed at the hearing and that the motion to vacate was the first document he filed. While it is true that Crowley's motion to vacate was the first document he filed, we do not see how this relieved him from the procedural mandates of the notice requirement. The reason for the rule requiring notice to the Attorney General prior to judgment is to prevent procedural uncertainty. Crowley's failure to follow the

procedural mandate is fatal to his attack on the facial constitutionality of the statute. However, this does not preclude our review of whether the statute was unconstitutionally applied to Crowley. See Sherfey v. Sherfey, Ky. App., 74 S.W.3d 777, 782 (2002).

Crowley's "as applied" arguments are that his due process rights were violated by: 1) the summary procedures without trial by jury and proof beyond a reasonable doubt; 2) the trial court considering evidence outside the scope of the complaint; 3) the trial court's failure to make specific findings of fact that domestic violence occurred -- including the date, place, and location of the acts that gave rise to a finding of domestic violence -- and that domestic violence was likely to occur again in the future.

Crowley's argument regarding a trial by jury and the standard of proof, while styled "unconstitutional as applied," in fact goes to the facial constitutionality of the statute. The statute specifically allows for the court, without a jury, to make its findings from a preponderance of the evidence. KRS 403.750(1). As previously stated, Crowley is precluded from making this argument for failure to timely notice the Attorney General.

Crowley's argument regarding the trial court considering evidence outside of the complaint is unpreserved.

Our review of the record establishes that Crowley made no objection to this evidence at the hearing. KRE 103(1).

Crowley's final argument is that his due process rights were violated when the trial court failed to make specific findings of fact. The process for obtaining a domestic violence protective order is outlined in KRS 403.700 et. seq. KRS 403.750(1) allows the trial court to enter a Domestic Violence Order following a hearing, "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[.]"

KRS 403.720(1) defines domestic violence and abuse as follows:

> "Domestic violence and abuse" means 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.

"Imminent physical injury," as it applies to the domestic violence statutes is defined as follows:

> "Imminent" means impending danger, and, in the context of domestic violence and abuse as defined by KRS 403.720, belief that danger is imminent can be inferred from a past pattern of repeated serious abuse.

KRS 503.010(3).

We have thoroughly reviewed the Domestic Violence Order and the transcript of the hearing held on January 26, 2001, in the Henderson District Court and must vacate and remand for further findings of fact.[3] Based on the record before us, the trial court failed to make findings of fact sufficient to allow for meaningful appellate review.

In her petition, Lilly stated that on January 16, 2001,

> . . . he [Crowley] is threatening violence against my spouse and me (to beat us up). His wife is also making threats against me. Both are using abusive obscene language. On numerous occassions [sic] he has used this language and screamed and yelled at me in front of the children. "He has threatened "to whip your ass until you wouldn't know which end is up." (to Cooper) His wife has said "Your ass is going to burn." (to me), etc.

At the hearing, the trial court questioned Lilly about what threat Crowley had made specifically to her. Lilly proceeded to testify as to previous encounters with Crowley as opposed to the phone call upon which the petition was based. She testified about previous encounters where Crowley had yelled at her and pointed his finger at her. Lilly also testified that Crowley had pushed her once, seven years earlier while they were getting divorced. She also testified that on a previous

[3] While the record establishes that the DVO was to expire on January 25, 2003, which could render this issue moot, KRS 403.750(2) provides that an order may be reissued upon expiration and the number of times it may be reissued is unlimited.

occasion he had pulled his car in behind her at the daycare center where they exchanged the children for visitation. She testified that when Crowley was informed that his son had forgotten his coat Crowley was thrown "into a fit of rage" and in response she "just walked off in the Busy Bee."

When questioned by counsel for Crowley, Lilly testified that she had never had to call the police for protection from Crowley. Lilly also testified as follows:

> "When he started the yelling, the screaming, the calling me names, and the cussing, I refused to talk, and I would have – warned him numerous times that when he begins to talk to me that way, I will hang up, because I am not – I just cannot keep living like this, and if we – you know, the conversations aren't about what's best for the boys, they're about how horrible I am, and he makes many mentions of that, and it's over and over, it's screaming and yelling. It's not a civil conversation of how to work things out, it's a conversation of, "You're going to pay," you know, and, "your life's going to fall down around you when you least expect it."

Lilly testified that most of conversations to which she was referring took place over the phone.

After Lilly testified, counsel for Crowley moved to dismiss the petition.[4] The trial court overruled the motion as follows:

[4] The transcript of the hearing indicates that the tape was inaudible when counsel stated the basis for the motion to dismiss. However, based on the ruling of the court, we believe the basis was lack of evidence to support the petition.

> Pointing fingers, elevating voices, "Going to get you; going to make you pay," keeping a person from leaving when they choose to are all situations which somebody, I believe, could objectively and reasonably be placed in eminent [sic] fear of misthought. Those are acts of domestic violence.

After denying the Motion to Dismiss the trial court requested the parties come to bench. The following exchange then took place:

> THE COURT: I want to bring you all up here. I'm not – number one, I don't want you to leave today feeling like I've lectured at you. But inevitably that's probably what I'm going to do anyway.
>
> The – the very least I can say, I know nothing about your particular situation. I've not been there the last seven years. I have no idea what transpires between you. I can tell you based on what I've heard and the interaction and the evidence that I've seen that you, all four of you, and I bring the two – other two of you up because you play an important dynamic in the relationship, that this is a highly unhealthy situation, and if not for the two – not for the four of you, these two kids, because the statistics show that kids who see people yelling, and screaming, and doing irrational type things, and I'm not suggesting that all of this necessarily happened, but that the kids are going to learn from this, and they're much more likely to perpetuate this kind of behavior.
>
> MR MCCOLLOM[5]: Your Honor, if I could interject, these dynamics have been terrible and I've talked to them. They were going to counseling [sic], and Mr. Crowley has ordered the children to call his current

[5] County Attorney.

> wife mom, and that was causing the children concern, and the counselor called Mr. Crowley to try to talk to him about how the problems could affect the children –
>
> THE COURT: I'm not –
>
> MR. MCCOLLOM: The mother then told –
>
> MS. ZACHARY[6]: Did you talk to the counselor?
>
> THE COURT: Hold on; hold on. I'm not going – I'm not going to point fingers today, and I'm not going to blame anybody. I'm just asking you please to start to heal. And today's not the day to do it. You've come in, [sic] you've had an emotional hearing. You know, you're not going to heal today. But you can't afford for these kids to continue to see this kind of conduct, if it occurred, if it happened, okay? Please try – I mean, I'm not worried about the four of you. I mean, I just don't want these kids to show up down here in front of me in ten years because they're not getting along with their sixteen-year old girlfriend in high school and they take a swipe at her. Okay?

(Emphases ours.)

The trial court then discussed pending criminal charges with Mr. McCollom. These criminal charges related specifically to the phone call made by Crowley to Lilly's home on January 16, 2001, which was the basis of the complaint and request for a DVO. The County Attorney made the following statement:

> We've talked and the criminal cases have been filed, and I think from the evidence that I've heard, probably the criminal

[6] Counsel for Crowley.

> terroristic threatening is probably – wasn't just, "I'm going to do something if you don't" – make threats. It's not, "I'm going to come over and do it." So probably that's not a good charge.

Based on the record we cannot tell, for purposes of appellate review, whether the trial court found that the act alleged in the complaint was an act of domestic violence, whether it put Lilly in fear of imminent physical injury, and whether it was likely to occur again in the future – all findings required by the statutes. Therefore, we must vacate the order of the Henderson District Court and remand for additional findings of fact consistent with this opinion.

ALL CONCUR.

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