

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000789-MR

RICHARD D. MURPHY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 01-XX-00061

RUTH E. MURPHY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, KNOFF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from an order of the Fayette Circuit Court affirming an extension of a domestic violence order obtained by a mother against her son in district court. The son argues that KRS 403.750 is unconstitutional, that the original domestic violence order was entered without affording him an evidentiary hearing, and that the original domestic violence order was improperly extended beyond the maximum period of three years. The constitutional challenge to KRS 403.750 was

not properly preserved because it was not raised in the lower courts, nor in the motion for discretionary review before this Court. The second issue is likewise not properly before this Court because the original domestic violence order was never appealed. Finally, we adjudge that the three-year extension of the domestic violence order was clearly permitted under KRS 403.750(2). Hence, we affirm.

In August of 2001, Richard Murphy, age 51, and his wife and daughter were living in a house with his mother, Ruth Murphy, age 78. Apparently, Ruth had some years prior placed the property on which they were living in hers and Richard's names pursuant to a joint survivorship trustee deed. On August 10, 2001, Ruth filed a domestic violence petition against Richard which alleged as follows:

People were moving furniture out of house,
my furniture. He got upset and said, you
will be sorry for this. I am scared that he
might do something to hurt me.

On August 22, 2001, the Fayette District Court held a hearing on the petition. At the hearing, Ruth stated that she had hired people to move furniture from her house that Richard's family used for sleeping. She stated that Richard told her that she would be sorry for moving the furniture. Ruth maintained that she was afraid of Richard. Ruth also told the court that

Richard and his family had destroyed items in her house, including a mattress.

Richard admitted that Ruth had asked him to move out of the house and that he had refused. However, Richard denied telling Ruth that she would be sorry for moving the furniture. He contended that such statements were addressed to the movers.

Also present at the hearing was a representative from Adult Protective Services who informed the court that they had opened a case on the possible exploitation of Ruth by her son. Further, a series of photographs of Ruth dated August 22, 2001, taken by the Fayette County Sheriff's Office were at some point placed in the record. These photographs show a large bruise on Ruth's arm and a black eye. However, there was no indication whether these photographs were taken prior to the hearing and, if so, whether the court considered these photographs in making its decision.

The court apparently reviewed the trustee deed and then asked questions of the parties/attorneys regarding ownership of the property at issue. The court ultimately found that even if Ruth and Richard were joint owners of the property, the court had the right to remove one of the parties pursuant to a domestic violence order. The court recognized that it was Ruth who had paid for the house and that it would be more difficult for her to move. The court then ruled that Richard

and his family must vacate the residence because it was entering the domestic violence order which additionally prohibited Richard from committing any further acts of domestic violence, having any contact with Ruth and disposing of Ruth's property. The order, entered in August 22, 2001, was for a 90-day period. The court stated that it was issuing a short duration order because there were other legal issues to be addressed. The court explicitly stated that if the parties did not resolve these issues within the 90-day period, Ruth could request that the order be extended for the full three-year period. Richard did not appeal the original domestic violence order entered on August 22, 2001.

On September 17, 2001, Ruth filed a motion to amend the order by extending it for three years. On October 3, 2001, the court held a hearing on the motion. At the hearing, Ruth did not allege any further claims of domestic violence or threats of domestic violence. The court asked Richard why the order should not be extended and Richard's attorney responded that no additional domestic violence was alleged in Ruth's motion. The court ruled that pursuant to KRS 403.750(2), it could extend the original domestic violence order even if additional acts of domestic violence were not alleged. The court went on to state that it had granted the original order for a short duration only because there were other legal issues

which needed to be resolved. The court then ordered that the original order be extended until October 3, 2004, three years from the date of the hearing on the motion to extend the original order. At that time, there was no objection by Richard to the computation of the three-year term.

On November 2, 2001, Richard filed his notice of appeal to the Fayette Circuit Court from the October 3, 2001, order "and all rulings made thereto including the Court's Order of August 22, 2001." The appellant made the following arguments in said appeal: 1.) It was palpable error to enter the original domestic violence order without a hearing; 2.) extending the original domestic violence order until October 3, 2004 violated KRS 403.750(2) because it resulted in a domestic violence order for more than three years; 3.) it was palpable error to extend the original domestic violence order when there were no further allegations of domestic violence; and 4.) it was error to extend the original domestic violence order because Richard was denied a hearing in the original proceedings and there was no evidence of domestic violence to support the original order. On March 21, 2002, the Fayette Circuit Court affirmed the original domestic violence order and the three-year extension thereof. This Court then granted Richard's motion for discretionary review.

Richard's first argument is that KRS 403.750(2) is unconstitutional in that it fails to afford individuals due process of law prior to limiting certain liberty and property rights. This issue was raised for the first time in Richard's appellate brief before this Court. It was not raised in the district court, the circuit court or even in Richard's motion for discretionary review. Where the lower court was not given an opportunity to pass on appellant's assignment of error, there can be no appellate review of the alleged error. Payne v. Hall, Ky., 423 S.W.2d 530 (1968). Also, CR 76.20(3)(d)(ii) requires that the questions of law raised be included in the movant's motion for discretionary review. Finally, we also note that although a copy of appellant's brief was sent to the Kentucky Attorney General, this was not sufficient notice of the constitutional challenge to allow the Attorney General to exercise his right to intervene. See KRS 418.075; CR 24.03; and Blake v. Woodford Bank & Trust Co., Ky. App., 555 S.W.2d 589 (1977). Accordingly, this issue is precluded from our review.

Richard next argues that the trial court entered the original domestic violence order without affording him a full evidentiary hearing. As stated earlier, Richard did not file an appeal from the original domestic violence order within the 30-day time period allotted in CR 73.02(1)(a) which is applicable through CR 72.02(3) to district court appeals. Thus the present

argument would constitute an untimely appeal which, under CR 73.02(2), must be dismissed.

Richard urges us to nevertheless consider this argument as palpable error pursuant to CR 61.02. However, the failure to timely file a notice of appeal under CR 73.02 results in a lack of jurisdiction on the part of the appellate court. Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990). Hence, this is not an argument that was simply insufficiently raised or preserved for review for CR 61.02 purposes.

Even if we consider the argument as properly part of the appeal of the order extending the original domestic violence order, we deem it without merit. Pursuant to KRS 403.740 and KRS 403.745, a hearing is required before entry of a domestic violence order. KRS 403.740(4) provides that it be a "full hearing." In the case at bar, this Court listened to the full audiotape of the hearing before the district court on the original domestic violence order and believes that Richard was afforded sufficient due process. Richard was present at the hearing with counsel and was given the opportunity to be heard on the matter. The court asked questions of both parties regarding the allegations of domestic violence and ownership of the home and allowed both parties to respond. Richard's complaint that the parties were not sworn before giving their testimony was waived by his failure to object thereto at the

hearing. CR 46; Spigarolo v. Meachum, 934 F.2d 19 (2nd Cir. 1991). In fact, Richard voiced no objection to the form or adequacy of the hearing at that time.

Richard's claim that there was insufficient evidence to enter the original domestic violence order must also fail. The standard for entry of a domestic violence order is if the court finds "from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur." KRS 403.750(1). This preponderance of the evidence standard merely requires that the evidence believed by the factfinder be sufficient that the petitioner was more likely than not to have been a victim of domestic violence. Commonwealth v. Anderson, Ky., 934 S.W.2d 276 (1996). "Domestic violence and abuse" is defined in 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. . . ."

In the present case, Ruth stated that Richard told her that she would be sorry for moving her furniture and that she was, therefore, afraid that he might harm her. In our view, this was sufficient evidence that Richard inflicted fear of imminent or serious physical injury to support the domestic violence order.

Richard's final argument is that the trial court erred in extending the original domestic violence order until October 3, 2004. Richard maintains that extending the order beyond August 22, 2004, (three years from the date of the original order) exceeded the maximum three-year period for a domestic violence order. KRS 403.750(2) provides as follows:

Any order 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.

Clearly, from the above language, the court is not limited to entering domestic violence orders for a total period of three years including the period of the original order. The plain meaning of the above statute would allow for indefinite three-year extensions at the expiration of the prior order/extension. Accordingly, the extension of the order in the instant case to October 3, 2004, was not in violation of KRS 403.750(2).

For the reasons stated above, the order of the Fayette Circuit Court is affirmed.

GUIDUGLI AND KNOPF, JUDGES, CONCUR IN RESULT ONLY.

BRIEF AND ORAL ARGUMENT FOR
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BRIEF AND ORAL ARGUMENT FOR
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