

RENDERED: May 5, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002580-MR

JAMES A. PONTRICH, JR.

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOSEPH O'REILLY, JUDGE
ACTION NO. 04-D-503851

JOSEPH W. O'REILLY,
JEFFERSON DISTRICT COURT JUDGE
AND
ALICIA PONTRICH

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM,¹ JOHNSON, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: James A. Pontrich, Jr., appeals from a domestic violence order (DVO) entered against him by the Jefferson Family Court pursuant to a domestic violence petition filed by Alicia Pontrich. James contends that Alicia failed to meet the statutory requirement of proving that domestic violence

¹ This opinion was completed and concurred in prior to Judge David C. Buckingham's retirement effective May 1, 2006. Release of the opinion was delayed by administrative handling.

has occurred and may occur again. See KRS² 403.750(1). We affirm.

After more than eight years of marriage, James filed a petition for dissolution of marriage on October 26, 2004. He testified that he did so because it had become apparent to him that Alicia no longer wanted to be married to him. He further testified that he was unaware at the time that Alicia was seeing another man.

James stated that in late November 2004 he received a phone call telling him that Alicia was at a certain residence in Frankfort visiting a male friend. James and his brother drove to the residence and observed the car Alicia was driving in the driveway of the residence.³ James looked in the car and saw two dozen roses, which he removed and threw in the street. Other items in the car were left undisturbed.

After learning of Alicia's apparent infidelity, James then called Alicia's place of work after hours and left a message to her on her voicemail.⁴ There was testimony at the hearing that James advised Alicia that she would be lucky if he

² Kentucky Revised Statutes.

³ James stated that one reason he drove to the Frankfort residence was because Alicia had demanded maintenance in the divorce proceeding and that he knew her infidelity would impact the resolution of that issue.

⁴ James testified that he did so because he had no other way of contacting Alicia.

did not post photographs on the internet or "do something else."⁵ There was also testimony that James sent Alicia an e-mail discussing the divorce proceedings and how "things could get a lot worse." Furthermore, James called Alicia's brother and told him of Alicia's infidelity.

In addition, James packed up Alicia's clothes and dropped them off early one morning at her brother's house.⁶ After doing so, James took a bar of soap and marked on the vehicle Alicia had been driving. Among other things, James wrote "slut," "home wrecker," "I cheat on my husband," and "I was unfaithful." James admitted that he did the things he did because he was angry and hurt.

Alicia filed a domestic violence petition in the Jefferson Family Court. She did not allege that James had physically injured or assaulted her in any manner. Rather, she alleged several facts that she claimed caused her to be afraid of James.

In her petition, Alicia made reference to James's writing on her car while it was parked at her brother's house, James's call to her brother, the aforementioned e-mail, and the

⁵ There was no indication that James had any photographs of Alicia with her male friend. Although the record is not clear, he may have taken photographs of Alicia's car in her friend's driveway.

⁶ Alicia and James had separated, and Alicia had told James that she was staying with her brother and his wife.

fact that James had scratched up a photo of the two of them and had left it on top of her personal belongings that he had delivered to her brother's residence. Finally, Alicia alleged that James has a history of alcohol and drug abuse. She alleged her fear that James would physically harm her or her family.

James and Alicia both testified at a hearing before the Jefferson Family Court on December 8, 2004. Following the hearing, the court entered a domestic violence order finding that James had committed acts of domestic violence or abuse against Alicia and that such acts may occur again. The court ordered that James be restrained from committing further acts of abuse or threats of abuse, restrained from possessing any firearms, and restrained from any contact with Alicia, except for court appearances, depositions, or mediation. Additionally, James was ordered not to dispose of or damage any of the property belonging to him and Alicia and was ordered to participate in counseling services. This appeal followed.

James argues on appeal that the evidence was insufficient to prove domestic violence and abuse and that the court thus erred in entering the DVO. Specifically, James referred to evidence concerning a voicemail he left for Alicia at her workplace and to the incident where he wrote on her car with soap. James contends that his message to Alicia on her voicemail "cannot be considered domestic violence; as such

protected speech is not encompassed in the definition of domestic violence under KRS 403.720." He also contends that Alicia's testimony that she is afraid of him is insufficient because "[a] person's feelings are not good enough." Also, James testified that his acts were in the "heat of passion" and that he was "angry." He maintains that Alicia brought the domestic violence petition against him because he had discovered her involvement in an extramarital affair.

KRS⁷ 403.750(1) allows the court to enter a domestic violence order "if it finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred or may again occur[.]" "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 between family members or members of an unmarried couple[.]" Here, the court based its finding of domestic violence and abuse on "the infliction of fear of imminent physical injury[.]"

In cases tried upon the facts without a jury, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of

⁷ Kentucky Revised Statutes.

the trial court to judge the credibility of the witnesses." CR⁸ 52.01. "The reviewing court should not substitute findings of fact for those of the trial court where they were not clearly erroneous." Reichle v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986).

In relation to the voicemail James left for Alicia, we reject his argument that it was "protected speech." As the U.S. Supreme Court stated in Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498, 69 S.Ct. 684, 93 L.Ed. 834 (1949), "[i]t has rarely been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject that contention now."

We also reject James's argument that "a person's feelings are not good enough" to warrant sanctions for mere words or communications. This court stated in Yates v. Commonwealth, 753 S.W.2d 874 (Ky.App. 1988), as follows:

It is the conduct that is controlled; the manner used which intrudes on an individual's right to be left alone and not the thoughts or ideas conveyed. Freedom of speech does not include freedom to convey messages when, where, and how one chooses. That right must be adjusted to the rights of others.

Id. at 876.

⁸ Kentucky Rules of Civil Procedure.

Having reviewed the record in this case, we cannot say that the trial court was clearly erroneous in its determination that James committed acts of domestic violence and abuse against Alicia by "the infliction of fear of imminent physical injury..." to her. Based on this factual determination, we conclude that the court did not abuse its discretion in entering the DVO.

The order of the Jefferson Family Court is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE, ALICIA
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