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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001013-ME

CHRISTOPHER ANTOINE HENDERSON

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE REED RHORER, JUDGE
ACTION NO. 05-D-00047

SHAQUANDRA TRANAE TAYLOR

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ABRAMSON AND BARBER, JUDGES; EMBERTON,¹ SENIOR JUDGE.

BARBER, JUDGE: This appeal stems from a Domestic Violence Order (DVO) entered April 13, 2005, by the Franklin Circuit Court.

The DVO was issued to Appellee, Shaquandra Tranae Taylor (Taylor), against Appellant, Christopher Antoine Henderson (Henderson). Taylor and Henderson are both from Florida and moved to Kentucky to attend college in 2004. While in Florida, the parties dated for several years. Following the move, the

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section (110)(5)(b) of the Kentucky Constitution and KRS 21.580.

couple's relationship became sporadic. It is unclear from the record when the couple split, but they were not together at the time of the incident giving rise to the DVO.

On April 5, 2005, Henderson assaulted Taylor. Specifically, Henderson threw Taylor on the ground, pulled her hair, ripped her shirt, and repeatedly punched her on the side of her face. Taylor sought and received an Emergency Protective Order that same day. A trial date was set for April 13, 2005. Henderson admitted to all of Taylor's allegations at the hearing.² As such, the trial court issued a DVO to Taylor.³ Henderson never raised an issue as to Taylor's standing to receive a DVO during the hearing. The trial court also made no inquiry to the parties' current or former living arrangements at the DVO hearing.

Henderson first raised issues pertaining to Taylor's standing in his motion to reconsider filed April 18, 2005. Following a hearing where each party testified, the court found that the parties had lived together. As a result, the trial court overruled Henderson's motion.

Henderson filed a motion to vacate on May 9, 2005, that essentially made the same argument as his motion to reconsider. Taylor was not present for the hearing. Before any

² Henderson was not represented by counsel at this hearing.

³ The DVO was effective until April 13, 2008.

testimony was received, the court summarily overruled Henderson's motion. However, at counsel's request, Henderson was allowed to put additional proof on the record. The additional proof came from Christopher Clark, Henderson's roommate. Following Henderson's second failed attempt at having the DVO against him vacated, he now appeals to our court.

Henderson has one argument on appeal. He argues that Taylor did not have standing to apply for a protective order. Specifically, Henderson argues that he and Taylor failed to meet the definition of "member of an unmarried couple" required by KRS 403.725.⁴

In an action tried without a jury, the factual findings of the trial court shall not be set aside unless they are clearly erroneous. CR 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. Black Motor Company v. Greene, 385 S.W.2d 954, 956 (Ky.App. 1964), (citing Massachusetts Bonding & Insurance Co. v. Huffman, 340 S.W.2d 447 (Ky. 1960)). Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Secretary, Labor Cabinet v. Boston Gear, Inc., a Div.

⁴ KRS 403.275 establishes who may file for a protective order.

of IMO Industries, Inc., 25 S.W.3d 130, 134, (Ky. 2000). We now examine the applicable statutes.

Any member of an unmarried couple who is a resident of this state may file a verified petition for an emergency protective order. KRS 403.725(1). "Member of an unmarried couple" is defined, in pertinent part, by KRS 403.720(3) as "a member of an unmarried couple who are living together or have formerly lived together." The term "living together" is not statutorily defined, but the term has been analyzed by our Supreme Court.

The phrase "living together" implies some sort of cohabitation. Barnett v. Wiley, 103 S.W.3d 17, 19 (Ky. 2003). There are six factors relevant in determining whether two people are "living together" within the meaning of KRS 403.270. Id. at 20. Those six factors are as follows: (1) sexual relations between the parties while sharing the same living quarters; (2) sharing of income or expenses; (3) joint use or ownership of property; (4) whether the parties hold themselves out as husband and wife; (5) the continuity of the relationship; and (6) the length of the relationship. Id., (citing State v. Kellogg, 542 N.W.2d 514, 518 (Iowa 1996)). Under the plain language of the statute, there must be, at a minimum, proof that the petitioner seeking a DVO shares or has shared living quarters with the respondent before a finding can be made that the two are an

"unmarried couple" under KRS 403.725. Id. Using these principles as a guide, we turn to the matter before us.

We must determine whether the trial court's finding that the parties lived together was clearly erroneous. Following a review of the record, we believe its finding was clearly erroneous. This determination is primarily based upon the brief testimony of Taylor herself at the hearing on Henderson's motion to reconsider.

Taylor testified that she and Henderson each lived with their parents while in Florida. Taylor stated she stayed with Henderson in his apartment for brief periods of time during the school semester, but she also testified that she lived in the dorm on campus during that same time. Further, Taylor testified she had no personal property inside Henderson's apartment. Taylor did testify that she received some mail at Henderson's apartment. However, this was done at her request because she did not want her mail to go to the dorm. We believe the testimony received from Taylor was not of sufficient probative value to induce conviction in the mind of a reasonable person that she and Henderson lived together.

At most, a typical (i.e., non-cohabitating) boyfriend/girlfriend relationship was established. The legislature has chosen not to amend the domestic violence statutes to extend protection to members of such a relationship.

Thus, the courts are unable to give these individuals protection under the domestic violence statutes despite violence occurring.

While we acknowledge Henderson's acts were reprehensible, a DVO was not the appropriate avenue for Taylor to seek the protection she deserved. Unfortunately, Taylor lacked standing to seek protection through a DVO against Henderson. Her appropriate remedy was to press criminal charges against Henderson.⁵ Therefore, we reverse and remand to the Franklin Circuit Court to enter an order consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Marie K. Brannon
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Rex L. Hunt
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⁵This case illustrates how essential it is for the deputy clerks in the court clerk offices and domestic violence advocates to be aware of the DVO statutory requirements so that he or she can direct victims to the appropriate office to seek protection.