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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-000376-ME

JAVIER ARCE

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOAN L. BYER, JUDGE
ACTION NO. 06-D-500189-001

MARIA C. ARCE

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: JOHNSON AND WINE, JUDGES; MILLER,¹ SPECIAL JUDGE.

WINE, JUDGE: Javier Arce appeals from a domestic violence order (DVO) entered by the Jefferson Family Court restraining him from contact with or acts of domestic violence against his wife, Maria Arce. He argues that Maria failed to establish either that her usual or her current residence was located in Jefferson County, and therefore venue was improper. We agree with Javier that the evidence did not support a finding of venue. Hence, we vacate the DVO. We further remand this matter for additional

¹ Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

findings to determine whether this action should be transferred to Hardin County.

For purposes of this appeal, the underlying facts of this action are not in dispute. At the time of the filing of the petition, Maria and Javier Arce had been married for approximately twenty-seven years. They had three children. Two of the children were over the age of majority and lived in Jefferson County. The youngest child, then age ten, resided with the parties at their marital residence in Elizabethtown, Hardin County, Kentucky.

Maria alleges that Javier was physically abusive to her on the evening of January 16, 2006. Maria testified that she drove to Louisville each day after the incident to avoid Javier. However, she returned to Elizabethtown each night to pick up the child from school and to stay at the marital residence.

During the afternoon of January 20, Maria filed a domestic violence petition with the Jefferson Family Court, seeking an emergency protective order (EPO) against Javier. In the petition, Maria detailed the January 16 incident and she also alleged that Javier had been violent toward her in the past. She listed a Louisville address as her current residence. The family court granted the EPO, restraining Javier from further acts of domestic violence and abuse, from any contact

with Maria, and from damaging or disposing of any property. The order further ordered Javier to vacate the marital residence and granted Maria temporary custody of their child.

Maria returned to the marital residence in Elizabethtown that evening. Javier stayed at the house that night and left on a trip to Florida the next day. Javier returned to the marital residence on January 23 and he was served with the EPO on January 24. Pursuant to the EPO, he vacated the marital residence, but he apparently returned to the house for a short period on January 25. Maria remained in the marital residence until January 29, when she left to stay at a hotel in Louisville.

On the morning of January 30, both parties appeared for the scheduled domestic violence hearing. Javier filed a motion to dismiss based on lack of subject-matter jurisdiction and improper venue. After hearing evidence, the trial court determined that jurisdiction and venue was proper in Jefferson County. Turning to the merits of the petition, the trial court granted the DVO, extending the terms of the EPO for three years. KRS 403.750(2).

On appeal, Javier concedes that the Jefferson Family Court had subject-matter jurisdiction, but he again argues that venue was improper in Jefferson County. He points to KRS 403.725(1), which provides that "[a]ny family member or member

of an unmarried couple who is a resident of this state or has fled to this state to escape domestic violence and abuse may file a verified petition in the District Court of the county in which he resides." That section further provides that "[i]f the petitioner has left his usual place of residence within this state in order to avoid domestic violence and abuse, the petition may be filed and proceedings held in the District Court in the county of his usual residence or in the District Court in the county of current residence."

The trial court found that Maria had fled to Jefferson County to escape domestic violence, and therefore venue was proper there. Javier contends that this finding was clearly erroneous. We agree.

KRS 403.725(1) does not set out any minimum residency requirement necessary to invoke venue in a particular county. Rather, the statute is intended to provide a "safe harbor" for victims who have fled acts of domestic violence. Spencer v. Spencer, 191 S.W.3d 14, 17 (Ky. App. 2006), *citing* L. Graham and J. Keller, 15 Kentucky Practice Series, Domestic Relations Law, § 5.2 (1997 & 2006 Supp.). But while KRS 403.725(1) envisions relaxed standards for venue, the statute still requires the petitioner to file either in the county of her usual residence or in the county of her current residence. To determine residency, the court must evaluate Maria's actions and intent.

Mobley v. Armstrong, 978 S.W.2d 307, 310 (Ky. 1998). Maria's actions and her testimony at the DVO hearing do not support the trial court's conclusion that Maria had come to Jefferson County to escape from acts of domestic violence in Hardin County.

Maria's four-day delay in leaving the marital residence to obtain the EPO is not controlling. We recognize that a victim of domestic violence cannot always leave an abusive relationship immediately to seek help. However, her conduct during this period does not demonstrate any intent to flee acts of domestic violence in Hardin County. On each of these days, Maria left the marital residence, dropped the child off at school, and drove to Louisville. Later in the day, she would return to Elizabethtown, pick up the child, and take her to after-school activities. Maria and the child would then return to the marital residence to spend the night.

Maria followed this pattern on January 20 when she obtained the EPO. And after the EPO had been entered, Maria again returned to the marital residence in Elizabethtown, even though Javier had not been served with the order. Javier stayed at the marital residence with Maria on the night of January 20 and when he returned on January 23. There is no evidence that Javier was even aware of the EPO until he was served with it on January 24.

Of course, this Court must defer to the trial court's factual findings, giving due regard to the trial court's superior position to judge the credibility of witnesses. CR 52.01. In this case, however, there is no substantial evidence to support venue in Jefferson County. Maria never stated any intent to establish a residence in Jefferson County even for the temporary purpose of obtaining an EPO. And her conduct during her short daily visits to Louisville did not demonstrate any intent to flee acts of domestic violence in Hardin County. Indeed, she did not testify even that she spent any time at the Louisville address listed on her EPO petition. We conclude, therefore, that the trial court clearly erred in finding that venue was appropriate in Jefferson County.

Improper venue is grounds for the trial court to dismiss under CR 12.02(c), and the required observance of proper venue is deeply imbedded in Kentucky law. Fritsch v. Caudill, 146 S.W.3d 926, 927 (Ky. 2004). But, the concept of venue does not reach the fundamental level of jurisdiction, a concept whereby the authority of the court to act is at issue. Id. Furthermore, KRS 452.105 permits a trial court to transfer venue from one court to another when it determines that the venue of the selected forum is improper. Since a DVO proceeding is a civil action, see Gutierrez v. Commonwealth, 163 S.W.3d 439, 442 (Ky. 2005), the transfer provision of KRS 452.105 is applicable.

Therefore, we remand this matter back to the Jefferson Family Court to determine whether transfer would be appropriate.

Finally, we will briefly address the remaining issue raised in Javier's brief. During the DVO hearing, Maria testified that Javier had returned to the marital residence on January 25 after he had been served with the EPO. The trial court asked Javier if this was true. Initially, Javier declined to answer, citing his Fifth Amendment privilege against self-incrimination. However, the trial court required Javier to testify, and Javier answered that he did return to the marital residence on January 25.

We agree with Javier that the trial court erred when it required him to testify after he had invoked his right against self-incrimination. The right to remain silent applies not only to criminal proceedings, but also in civil proceedings and where one is merely a witness. Akers v. Fuller, 228 S.W.2d 29, 31 (1950); Kindt v. Murphy, 227 S.W.2d 895, 898 (1950). A witness may invoke the privilege when answering the question could subject him to criminal prosecution. Akers, 228 S.W.2d at 31. In this case, there is no indication that Javier had waived the privilege. Consequently, the trial court should not have compelled Javier to answer the question.

Because we are vacating the DVO, the admissibility of Javier's statements does not directly affect the outcome of this

appeal. Nevertheless, we would note that Javier's testimony may be inadmissible at any subsequent proceedings to the extent that the statements were involuntary. Canler v. Commonwealth, 870 S.W.2d 219, 221 (Ky. 1994). However, the admissibility of the statements in any future proceedings is not yet ripe for adjudication.

Accordingly, the domestic violence order entered by the Jefferson Family Court on January 30, 2006, is vacated, and this matter is remanded for additional proceedings as set forth in this opinion.

ALL CONCUR.

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