RENDERED: AUGUST 1, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001345-ME

JAMES WILLIAMSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOAN BYER, JUDGE
ACTION NO. 07-D-501536-001

JILL BALLARD — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

NICKELL, JUDGE: James Andrew Williamson ("Williamson") appeals a three-year order of protection and a domestic violence treatment order entered against him by the Jefferson Circuit Court on June 4, 2007. Williamson claims he was denied the full hearing required by KRS 403.570 as he was not permitted to cross-

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes ("KRS") 21.580.

examine the petitioner, Jill Ballard ("Ballard"), and the court conducted an investigation outside the record. He also alleges the court refused to allow the parties to voluntarily dismiss the petition. On July 2, 2007, the trial court granted Williamson's motion to stay the domestic violence order (DVO) as well as a substance abuse evaluation order pending a final resolution of this appeal. We now reverse and remand for further proceedings.

On June 4, 2007, a hearing was convened on a domestic violence petition/motion signed by Ballard on May 22, 2007. Neither party was represented by counsel but a victim's advocate accompanied Ballard to the hearing. The court swore the parties and read aloud the allegations stated in the petition:

> PET AND RSP LIVED TOGETHER FOR APPOX (sic) 8 WEEKS IN 2006. PTY'S HAVE DATED ON AND OFF SINCE. PET HAS 1 CHLD (sic) AGE 7 YRS FROM A PREVIOUS RELATIONSHIP. ON MAY 22 RSP SHOWED UP AT PET'S WORK WANTING PET TO CALL RSP LATER. RSP STAYED APPOX (sic) 1 MINUTE THEN LEFT. ON APRIL 07 PET TOOK HER CHILD TO RSP'S FARM. RSP MET PET THERE. RSP WAS DRUNK. PET TOLD RSP SHE WAS LEAVING. RSP BLOCKED THE DOOR FOR APPOX (sic) 5 MINS BEFORE PET WAS ALLOWED TO GO OUTSIDE. PET PUT HER CHILD IN THE CAR, RSP THEN BLOCKED PET FOR APPOX (sic) 5 MINS NOT ALLOWING PET TO [GET] IN HER CAR. PET WAS ABLE TO LEAVE. RSP THEN RACED PAST PET BEFORE PET GOT OFF RSP'S PROPERTY. RSP BLOCKED PET FROM LEAVING. BECAUSE RSP WAS DRIVING IRRATIC (sic) RSP FLIPPED HIS CAR. PET GOT HELP FOR RSP THEN LEFT THE PROPERTY. PET SAYS RSP IS HARASSING HER. PET SAYS RSP CALLS ALL HOURS OF THE DAY AND NIGHT AT HER HOME AND WORK. PET WANTS RSP TO STAY AWAY.

> APPOX (sic) 1 YR AGO RSP WAS DRUNK. RSP GOT MAD. RSP KICKED IN ALL DOORS ON THE PET'S CAR. PET SAYS IN THE PAST RSP HAS CAUSED BRUISES ON PET'S ARMS AND NECK.

In the motion accompanying the petition, Ballard asked the court to "[i]ssue an emergency protective order" to keep Williamson from "committing any further acts of domestic violence and abuse;" contacting or communicating with her; and/or "disposing of, or damaging, any property of the parties." An attachment to the petition indicated Williamson had previously been arrested for "restraining orders, stalking." The court asked Ballard whether the allegations stated in her petition were true. She said they were. The court did not question Ballard further about the alleged incident.

The court then asked Williamson whether he would like to respond. Williamson said he disagreed with Ballard's description, but since the couple was trying to reconcile he would not challenge her written statements.[2] The court told Williamson this was his opportunity to respond before she made judicial findings. He then gave his brief version of the Easter Eve events, saying Ballard asked him to take her daughter inside his home but then changed her mind. According to Williamson, the episode lasted about three minutes. The court thumbed through the court record as Williamson testified and asked him whether his prior charges for stalking, terroristic threatening, and intimidating a witness pertained to Ballard. Williamson said they did not.

[2] Ballard was not asked to orally describe the incident during the hearing. The trial court's only inquiry of her about the incident was whether the facts alleged in the petition were true to which Ballard responded, "Yes."

The court then asked Ballard whether she was requesting a no contact order. Ballard responded, "No." When asked what protection she was seeking from the court, Ballard stated, "None." The court then advised Ballard she was required to contact Child Protective Services (CPS) and report that Ballard's daughter had witnessed an act of domestic violence which could result in removal of the child from Ballard's home since Ballard was not protecting herself and her child. Ballard stated she was unaware of the court's reporting obligation. Williamson attempted to interrupt while the court was speaking to Ballard, but the court cut him off saying, "I am not speaking with you at this point, thank you." The court returned her attention to Ballard and asked whether she was seeking particular types of protection such as prohibiting Williamson from harassing her, calling her in the middle of the night, and/or threatening her. Ballard responded, "Yes."

Williamson interrupted again saying he and Ballard had resolved everything before coming to court. He said he and Ballard had argued in front of Ballard's daughter and all he did was ask Jill to stay and she said no. The court said she understood. Williamson asked the court whether he would have an opportunity to tell his version of the incident to CPS and whether he and Ballard could talk about it. The court stated, "This is a hearing today, sir. I'm the ultimate decision maker. You don't get to quote 'work it out' before you come in here. Okay. The court makes the decision regarding the facts in this case." The court then found an act of domestic violence had occurred and could occur in the future.

In tailoring the three-year DVO, the court required Williamson to surrender his shotgun to the Jefferson County Sheriff within 24 hours. Rather than focusing on the trial court's questions about firearms, Williamson attempted to show papers to the court. While the court explained the terms of the gun surrender, something occurred off camera that prompted the court to say "Sir," and Williamson to respond, "Yes ma'am, I'm listening."

The court asked Ballard whether she was requesting that Williamson not call her at work or during the night. Ballard said, "Yes." Ballard asked that a "no unlawful contact order" be issued and the court said that was what was being issued. When Ballard asked whether Williamson was still required to surrender his shotgun with a no unlawful contact order, the court said he was and further stated that it was non-negotiable under both state and federal law. The court then said, "This is a domestic violence order. The court takes these behaviors very seriously. And with no disrespect, if Mr. Williamson's insistent behavior is any indication of what he's like around you, in this court, where most people can contain themselves, I imagine he becomes quite overwhelming."

Because Ballard said Williamson was drunk at the time of the incident, the court ordered him to undergo a substance abuse evaluation as well as domestic violence offender treatment. Williamson asked whether he could say something. The court said, "Yes, sir." He then asked to approach the bench but the court said, "No sir. What is it that you need to show me, sir?" Williamson asked her to look at some papers and then said he and Ballard had spent the night

together a few days ago and Ballard was not afraid of him. The court responded that she had made her decision. Williamson said he was an avid hunter. The court said she understood, but surrender of his shotgun was mandated by federal law. Williamson asked whether it was possible to shorten the three-year order. The court said, "No, sir." He then asked whether he could appeal her decision and she said, "Yes, sir, you may." When Williamson repeated his request to add evidence to the record the court said, "I've made a judicial determination about the incidents that occurred." Williamson persisted, at which point the court stated, "You need to stop talking, thank you." A few moments passed and Williamson said, "Anyway ma'am you'd take a look at this," to which the court responded, "Which part of stop talking was unclear to you? I'm going to try not to put you in custody right now but you're right on the edge."

Ballard asked for clarification of the judge's prior statement that she was required to report the incident to CPS. The court explained that exposing a child to domestic violence constitutes abuse and continued exposure may result in removal of the child from the parent and placement in either relative care or foster care. When Ballard asked whether her daughter could still be removed from her home since she had now requested protection for herself and her child, the court stated she could not guarantee that because the parties had decided to continue having contact with one another. The court went on to explain that as a mandatory reporter she was obligated to report the incident to CPS which would trigger an investigation and CPS would determine whether removal of the child was

appropriate. The court also ordered Ballard and her daughter to participate in counseling.

Williamson continued exploring options. He asked whether marrying Ballard would resolve the matter. The court said it would not. Shortly thereafter, the hearing concluded. On June 22, 2007, Williamson moved the trial court to stay the DVO and substance abuse treatment orders. The court granted that motion on July 7, 2007, the same day Williamson filed his notice of appeal to this Court. For the reasons that follow, we reverse and remand to the trial court for further proceedings.

Williamson alleges two errors.[3] First, he claims he was denied the full evidentiary hearing required by KRS 403.750(1) because the trial court (a) refused to let him cross-examine Ballard and (b) ran a criminal history check on him. Second, he complains the trial court refused to let the parties voluntarily dismiss the petition. Since no brief was filed on behalf of Ballard, we are without the benefit of her description of the hearing or her legal analysis. When a party chooses not to file a brief, we may "(i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." CR

[3] Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v) requires an appellate brief to "contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Williamson's brief merely states in a footnote, "Appellant certifies that the arguments were preserved at the June 4, 2007 hearing." Such a general statement does not satisfy CR 76.12 and we would be well within our authority to deny review due to noncompliance with the above-quoted rule. CR 76.12(8)(a).

76.12(8)(c). Due to the nature and circumstances of this case we have decided to reverse and remand the matter to the trial court for further proceedings. We do this on the strength of Williamson's claim that the trial court refused to let the parties voluntarily dismiss the action.

The filing of a domestic violence petition is a civil matter. *See* 16 Louise E. Graham & James E. Keller, Kentucky Practice-Domestic Relations Law § 5.13 (2d. ed. West Group 2003 Pocket Part) ("domestic violence proceeding is not a criminal action."). Therefore, CR 41, pertaining to dismissal of actions, applies. Pursuant to CR 41.01(1), Ballard and Williamson could have signed and filed "a stipulation of dismissal" and the matter could have been voluntarily dismissed. Or, under CR 41.01(2), the parties could have asked the court to dismiss the action under any terms it deemed appropriate. Finally, under CR 41.02(1), if Ballard chose not to prosecute the petition, Williamson could have moved for dismissal of the action and it would have been involuntarily dismissed. While CR 41 could have been invoked, it was not.

Williamson never asked the court to "dismiss" the petition. However, he did tell the court the parties had resolved their differences before entering the courtroom. Rather than asking Ballard if the parties had reconciled, or confirming she wanted to go forward with the allegations, the court instead said, "This is a hearing today, sir. I'm the ultimate decision maker. You don't get to quote 'work it out' before you come in here. Okay. The court makes the decision regarding the facts in this case." From our reading of the cases, this was an incorrect statement

of the law. In *Sherfey v. Sherfey,* 74 S.W.3d 777, 780 (Ky.App. 2002), the grandparents of a fourteen-year-old boy filed a domestic violence petition against the boy's father. Ultimately the parties agreed to voluntarily dismiss the domestic violence petition and continue with a custody proceeding. In light of *Sherfey*, the trial court's statement that the parties could not work out their differences was inaccurate.

While Williamson never uttered the word "dismiss," he did tell the court multiple times he and Ballard were reconciling, had worked things out, and had resolved the matter before entering the courtroom. Ballard, on the other hand, never commented on whether the couple had reconciled and the court never inquired. We note with interest that Ballard said "No," the first time the court asked her whether she wanted a no contact order and "None," when the court asked what protection she was seeking.

We staunchly confirm a trial court has no duty to practice a case for the litigants, but in light of Williamson's statements, the trial court should have at least asked Ballard whether she wanted to move forward with the petition. Instead, the court told Ballard she could lose custody of her child and then immediately asked whether she was seeking specific types of protection such as ordering Williamson not to harass her, call her at work or in the middle of the night, or threaten her. It was only then that Ballard asked for protection. In his brief, Williamson suggests the court "threatened" and coerced Ballard into going forward. We will not characterize the court's conduct so harshly, but we do

question whether Williamson received the full hearing envisioned by KRS 403.750(1). *Baird v. Baird,* 234 S.W.3d 385, 387 (Ky.App. 2007).

We defer to the trial court when it comes to judging witness credibility. CR 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). While the videotaped record captured what was *said* in the courtroom, it did not capture everything that happened in the courtroom as some activity occurred off camera. Furthermore, it could not capture and convey whether there was any tension between the parties. While we do not substitute our judgment for that of the trial court, under these facts, we do not believe the trial court inquired sufficiently so as to be able to determine whether the parties had indeed reconciled and wanted to dismiss the petition or whether Williamson was pressuring Ballard into telling the court she no longer wanted or needed the protection she had previously requested. Thus, not only did the court lack critical factual information, it erroneously told the parties that once they came to court they no longer had an option of working things out and voluntarily dismissing the domestic violence petition/motion. Under CR 52.01, the trial court committed clear error requiring reversal. Therefore, we remand the matter to the trial court for further proceedings consistent with this opinion.

Because we are reversing for other reasons, we will comment only briefly upon Williamson's other allegations which are unlikely to recur on remand. Neither complaint is preserved for our review and normally would not be

considered. *Kennedy v. Commonwealth,* 554 S.W.2d 219, 222 (Ky. 1976). However, we comment because both illustrate the perils of self-representation.

First, Williamson claims he was prevented from cross-examining Ballard during the hearing. Our review of the thirteen-minute hearing shows Williamson never asked to cross-examine Ballard. Second, Williamson alleges the court took it upon itself to conduct a criminal history check on him and thereby learned he had prior criminal charges that were unrelated to Ballard. Again, our review of the record shows the court was looking through the case file when she inquired of Williamson about his prior charges. An attachment to the petition, states:

> Has person been arrested before YES
> If so, list charges RESTRAINING ORDERS, STALKING

Thus, contrary to Williamson's claim in his brief, part of the information he challenges now was in fact in the record. The court also asked about charges of terroristic threatening and intimidating a witness. It is unclear how the court learned of those charges since they do not appear in the record before us. Even so, as soon as Williamson said the prior charges pertained to someone else, the court moved on to another topic. Since neither error was alleged during the hearing, they are not preserved for our review. *Kennedy, supra.*

We cannot help but think this hearing may have turned out differently had Williamson been represented by counsel. However, he chose to appear without an attorney and either did not recognize the seriousness of the allegations

or believed he was capable of representing himself. Either way, the record shows he was ill-prepared to present an organized defense or to protect the record for appellate review. He did not move the court to dismiss the petition and he did not provide legal authority in support of dismissal. He asked the court to look at documents that might have proved Ballard had recanted the allegations in the petition, but he did not make the request until the court had already found domestic violence had occurred and might occur in the future. Williamson did ask that he be allowed to place documents into the record. However, when the court denied his request to approach the bench with these documents, he did not ask that the bailiff hand the papers to the court. As a result, those documents are not part of the record for our review. Had Williamson offered that evidence at the beginning of the hearing when the court asked for his response to the allegations, he may have been able to impeach Ballard's veracity by showing she had told another version of the incident.

For the foregoing reasons, the orders of the Jefferson Circuit Court are reversed and remanded for further proceedings consistent with this opinion.

KNOPF, SENIOR JUDGE, CONCURS IN RESULT ONLY.

DIXON, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

BRIEF FOR APPELLANT:

Troy DeMuth
John Helmers, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEE:

No brief for Appellee.