RENDERED: NOVEMBER 6, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2008-CA-002405-ME

JEFF DOUGLAS APPELLANT

v.

APPEAL FROM HENDERSON FAMILY COURT
HONORABLE SHEILA N. FARRIS, JUDGE
ACTION NO. 08-D-00193

MELISSA DOUGLAS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND CLAYTON, JUDGES; HARRIS,[1] SENIOR JUDGE.

ACREE, JUDGE: Jeffrey Douglas appeals the December 11, 2008 Domestic Violence Order (DVO) of the Henderson Family Court prohibiting contact with his wife, Melissa Douglas, for a period of three years. Having reviewed the record and considered the parties' arguments, we affirm.

---

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

Following a physical altercation with Jeffrey on November 9, 2008, Melissa filed a domestic violence petition and was granted an Emergency Protective Order (EPO). The petition alleged Jeffrey had physically assaulted Melissa, threatened her, and prevented her from eating on several occasions. The EPO remained in effect until December 11, 2008, when a hearing mandated by Kentucky Revised Statutes (KRS) 403.740 was conducted to determine whether to grant Melissa's petition for a three-year DVO.

At the December 11, 2008 hearing, both parties testified; both were allowed to call witnesses and cross-examine the opposing party; and both were provided the opportunity to present their own evidence and make arguments before the court. Only Melissa and Jeffrey testified. They gave significantly different accounts of the events which led Melissa to seek the EPO. The family court granted Melissa's petition, expressing doubt whether Jeffrey's testimony had been entirely truthful.

On appeal, Jeffrey first claims the family court failed to properly apply the burden of proof and, second, disputes the constitutionality of Kentucky's domestic violence statutes. Specifically, he claims those statutes do not adequately protect his right to due process.[2] We will address each of the Appellant's arguments in turn. First, however, we address Jeffrey's expression of our standard of review.

---

[2] Jeffrey's brief does not refer us to the portions of the record at which he preserved his arguments as required by CR 76.12(4)(c)(v), and our review of the record did not reveal that he preserved the due process argument at trial. However, we are required to review the matter for manifest injustice. *Elwell v. Stone,* 799 S.W.2d 46, 48 (Ky.App. 1990).

Jeffrey notes that KRS 403.750 requires the family court to find by "a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur" before issuing a DVO. He then argues that the evidence in his case did not support the family court's findings. Although he does not use the operative language, "clearly erroneous," in his brief, we are required to review a trial court's findings of fact by that standard. Kentucky Rules of Civil Procedure (CR) 52.01; *Gomez v. Gomez*, 254 S.W.3d 838, 842 (Ky.App. 2008). A finding supported by substantial evidence is not clearly erroneous. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 955 (Ky. 1965). Substantial evidence is "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." *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409 (Ky.App. 1994). In assessing whether the findings of fact are supported by substantial evidence, we will not substitute our judgment for that of the trial court. *Bickel v. Bickel*, 95 S.W.3d 925, 928 (Ky.App. 2002).

Jeffrey's first argument appears to be that the "he said/she said" type of evidence presented before the family court cannot constitute substantial evidence. Of course, that premise is valid only if the evidence presented as grounds for the order is not substantial evidence.

As noted, the only evidence presented to the circuit court was the parties' testimony. The evidence, therefore, is easily summarized.

Melissa testified that, on November 9, 2008, Jeffrey physically prevented her from leaving their home by shoving her and bending her fingers backward to keep her from opening the door. She also testified that she was afraid and that Jeffrey had hit her, spit in her face, and prevented her from eating in the past, in addition to threatening her. Some of these allegations were noted in the petition for the protective order, while others were not.

Jeffrey's testimony described the events of November 9, 2008, in a different light. In essence, he denied Melissa's allegations, with the concession that he may have accidentally spit on her during an argument in the past.

Melissa, as the alleged victim before the family court, presented credible eyewitness testimony to facts that supported the allegations in her petition for the DVO. Credible eyewitness testimony is substantial evidence. *See Higgs v. Commonwealth*, 255 Ky. 547, 75 S.W.2d 21, 24 (1934) (eyewitness testimony alone is substantial evidence to allow jury to decide case; issues of credibility being the purview of jury). Even presuming, for the same reasons, that Jeffrey's testimony is also substantial evidence, we cannot ignore the rule of law that "when the testimony is conflicting we may not substitute our decision for the judgment of the trial court." *R.C.R. v. Commonwealth Cabinet for Human Resources*, 988 S.W.2d 36, 39 (Ky.App. 1998), *citing Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967).

Deciding which witness to believe is within the sound discretion of the family court as fact-finder; we will not second-guess the family court, which

had the opportunity to observe the parties and assess their credibility. CR 52.01. Jeffrey's argument before us, "[s]tated simply, . . . ignored [his] obligation to show that the [order] was not based on substantial evidence and instead endeavored to prove to this Court that [he] had the 'better' case." *Bayless v. Boyer*, 180 S.W.3d 439, 452 (Ky. 2005). However, the family court was the proper arbiter to decide who had the better case, not this appellate court. The family court's factual determination was based upon substantial evidence.

Jeffrey's first argument is without merit.

His second argument, in effect, is this: the hearing required by KRS 403.745 lacked sufficient due process to authorize the otherwise unconstitutional curtailment of his liberty interest in carrying a concealed deadly weapon and protecting his home and hearth. Like his first, we are not persuaded by this argument.

Jeffrey begins by claiming that what was really at stake in the DVO hearing was his "liberty interest in maintaining a home and family." (Appellant's brief, p. 11). This liberty interest was recognized in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572, 92 S.Ct. 2701, 2707 (1972). He then piggy-backed upon that liberty interest, citing KRS 237.110[3] and KRS 503.050[4] as creating "the right to protect and defend the home and family." (Appellant's brief,

[3] KRS 237.110 is captioned: "License to carry concealed deadly weapon; criteria; training; application; issuance and denial of licenses; automated listing of license holders; suspension or revocation; renewal; prohibitions; reciprocity; reports; requirements for training classes".

[4] KRS 503.050 is captioned: "Use of physical force in self-protection; admissibility of evidence of prior acts of domestic violence and abuse".

p. 11). Subtly melding a right-to-bear-arms argument, he asserts that his "legal entitlement to use a weapon and protect his family is removed by a DVO [and, thereby, his] protected interests are compromised." (*Id.*)

This argument fails for a variety of reasons unrelated to its merits.

Initially, we note that, despite its lack of directness, Jeffrey's challenge is clearly constitutional in nature. He specifically states, "Kentucky's current domestic violence statutes pose a considerable threat to [his] protected constitutional interests." (Appellant's brief, p. 16). Furthermore, it is unavoidable that the underlying constitutional interest he believes is threatened is his right to bear arms, for he states "that his license to own a gun and carry a concealed deadly weapon is an entitlement" which he asserts is the liberty interest at stake.[5]

The first reason Jeffrey's constitutional argument fails is that he never afforded the family court the opportunity to consider it. The record before us is devoid of any mention of the Second Amendment to the Federal Constitution, or the Seventh provision of Ky. Const. § 1, or even KRS 237.110(13)(k).[6] As a general rule, an issue not raised in the trial court may not be presented for the first time on appeal. *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky.App. 1998).

[5] In his brief, Jeffrey does not specifically cite either the Second Amendment of the United States Constitution or the Seventh provision of Ky. Const. § 1, which states: "All men . . . have certain inherent and inalienable rights, among which may be reckoned . . . The right to bear arms in defense of themselves and of the State, *subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons*" (emphasis supplied). However, he does cite Ky. Const. § 2, captioned "Absolute and arbitrary power denied".

[6] In pertinent part, KRS 237.110(13)(k) states: "When a domestic violence order or emergency protective order is issued pursuant to the provisions of KRS Chapter 403 against a person holding a license issued under this section, the holder of the permit shall surrender the license to the court or to the officer serving the order."

It is true that, on occasion, Kentucky appellate courts have considered constitutional issues which were not raised before the trial court. *See Brown v. Commonwealth*, 975 S.W.2d 922, 923 (Ky. 1998). However, we take that course "rarely" and only under circumstances not present here. *Owens v. Commonwealth*, 2008 WL 466132, No. 2006-SC-000713-MR, at *1 (Ky. Feb. 21, 2008). Having failed to present this argument to the family court, we will not address it.

The second reason Jeffrey's constitutional argument fails is that he did not comply with KRS 418.075(2) which states,

> In any appeal to the Kentucky Court of Appeals . . . which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum. This notice shall specify the challenged statute and the nature of the alleged constitutional defect.

KRS 418.075(2). The actual statute Jeffrey must consider constitutionally offensive is KRS 237.110(13)(k) because its effect is to require the surrender of one's license to carry a concealed deadly weapon upon entry of an EPO or DVO, either of which may be entered without providing the *full* panoply of due process protections.[7] Ignoring the requirement of KRS 418.075(1), Jeffrey never notified the Kentucky Attorney General of his constitutional challenge. For this reason, too, we will not address his argument.

---

[7] Jeffrey never specifically identifies the due process he believes was lacking. At the DVO hearing, Jeffrey was present and represented by counsel; he was allowed to present evidence, testify on his own behalf, and cross-examine witnesses. Because the hearing was not a "prosecution[] by indictment or information," Jeffrey was not entitled under Ky. Const. § 11 to a trial by a "jury of the vicinage" and KRS 403.735(1) specifically states that the decision to issue the EPO or DVO is to be undertaken by the court, "without a jury[.]"

Finally, there is an utter dearth of evidence that Jeffrey either owned a gun or held a license to carry a concealed deadly weapon. In fact, there is a block on the DVO that should be checked if the family court required that his "Kentucky license to carry [be] surrendered to the Court." (Family Court's Order of Protection, p. 2). That block is not checked. Consequently, Jeffrey has no liberty interest at stake because nothing in the DVO affects his right to bear arms – in defense of home and family or otherwise. If, contrary to the record, he actually holds a license to carry a concealed deadly weapon, the family court did not require him to surrender it despite the mandatory language of KRS 237.110(13)(k). Jeffrey's argument, therefore, presents a purely hypothetical question. "Questions that . . . are purely advisory or hypothetical do not establish a justiciable controversy." *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky.App. 2005). This means that even if Jeffrey had raised this issue before the family court, that court would not have had subject matter jurisdiction to entertain it. *Id.* Since "the issue of subject matter may be raised at any time, even *sua sponte*," we here raise the lack of subject matter jurisdiction as a third reason we will not consider Jeffrey's argument.

For the foregoing reasons, we affirm the decision of the Henderson Family Court.

ALL CONCUR.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
| Dax R. Womack<br>Henderson, Kentucky | Susie H. Moore<br>Henderson, Kentucky |