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# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-001844-ME

KEEGAN C. WECKMAN — APPELLANT

v. — APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JO ANN WISE, JUDGE
ACTION NO. 09-D-00675-001

KIRA A. WECKMAN — APPELLEE

## OPINION
## VACATING AND REMANDING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; WHITE,[1] SENIOR JUDGE.

WHITE, SENIOR JUDGE: Keegan Weckman, a United States Marine stationed at Camp Lejeune, North Carolina, appeals from a domestic violence order (DVO) issued against him by the Fayette Family Court. Keegan claims that the court erred by refusing to allow him to call a relevant witness to testify on his behalf. Keegan

[1] Senior Judge Edwin M. White 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.

also claims that no evidence was presented at the hearing to prove "injury or threat of imminent injury." After carefully reviewing the hearing, we conclude that Keegan was denied fundamental due process rights and a fair hearing. Therefore, we vacate the Fayette Family Court's DVO.

## I. Factual Background

On August 25, 2009, Kira filed a petition in the Fayette Family Court for an EPO to be issued against Keegan, her husband of less than one year. The petition stated that on August 2, 2009:

> An argument lead [sic] to out lashes of anger. Keegan tried to confine me into a corner in our apartment where I asked him to step out of my way when he did not move I tried to push my out of the corner in our kitchen. He then slammed me into the stove. I was still trying to push past him so I could leave the environment. Once I broke away from him he still had a hold of my shirt and thats [sic] when he swung his fist in an attempt to hit my face and he missed by 4 inches. I was very shocked and knew I needed to leave. I began to gather a few belongings. He then went into our bedroom and pulled the shotgun out and held it to his head and said, "I'll kill myself if you leave me." Concerned I took the fire arm and said I won't let him and he reached for a knife in the kitchen and stated, "I can still slit my wrists."

The family court granted Kira's petition and scheduled a DVO hearing. The court heard Kira's petition on September 24, 2009. Consistent with the petition, Kira testified that on August 2, 2009, in Onslow County, North Carolina, Keegan confronted her and prevented her from moving out of a corner. She testified that Keegan shoved her against a stove when she tried to move past

him. He swung his fist but missed her by four inches. Then she alleged that Keegan retrieved a gun and threatened to kill himself if she left him.

Kira continued to live with Keegan until she moved into her parent's Lexington home on August 17, 2009. She never called the police to report the incident. At the hearing, Kira admitted that she made the first physical contact by shoving Keegan.

In his testimony, Keegan disputed almost all of Kira's testimony. He denied swinging at Kira, confining her to a corner, and threatening to kill himself. In fact, Keegan brought a statement from a North Carolina neighbor who claimed that Keegan's gun had been at his house since July 7, 2009. Keegan also testified that Kira suffers from bipolar disorder and does not take medication. The trial court interrupted Keegan and chastised him for discussing Kira's mental health problems. The court claimed that bipolar disorder has only a very limited relevance in a DVO proceeding and demanded that he get to the point.

Keegan testified that he went to the home of Kira's parents on August 20, 2009, at 11:30 PM. He testified that he had learned of Kira's premarital infidelities and went to tell her that he wanted a divorce. The next day he returned to the home with his father to pick up the couple's dog. Keegan testified that Kira acted erratically by throwing the dog's kennel and screaming. Further, he testified that Kira's mother threatened to call his commanding officer and "ruin his career." No allegations of domestic violence arise from either interaction.

After defense counsel ended his direct examination of Keegan, the court asked Keegan several questions including why he found it appropriate to go to the home of Kira's parents at 11:30 PM. Then the court questioned Keegan about Kira's motive to lie in the petition.

> Court: All four of those things that she said happened that night, she sat here and just completely and totally made all of that stuff up? Every bit of it is a lie, is that what you are saying? Is that not right?
>
> Keegan: Yes.
>
> Court: Why would she make all of that up? What motivation? You've been married since Valentine's Day of this year. You have no children. I dare say you probably have no property. Why do you think that she made all of those lies up?
>
> Keegan: To ruin my career, ma'am.

The court then stated that it made a decision to enter the DVO for a period of three years because it did not believe Keegan. When defense counsel stated that an intention to call Keegan's father as a witness, the court refused and said that his testimony was irrelevant. Defense counsel was not given an opportunity to make any arguments. On appeal, Keegan claims that the family court erred by refusing to allow him to call his father as a witness. We agree. The errors in this case necessitate a review of the procedural aspects of DVO hearings, petitions, and the due process rights of which those subject to a DVO are entitled.

## II. Domestic Violence Orders

In 1992, the Kentucky General Assembly enacted KRS 403.715 to 403.785 as a way, "[t]o allow persons who are victims of domestic violence[2] and abuse to obtain effective, short-term protection against further violence and abuse in order that their lives will be as secure and as uninterrupted as possible[.]" KRS 403.715(1); *see also Rankin v. Criswell*, 277 S.W.3d 621, 625 (Ky. App. 2008).

Pursuant to the enactment, "[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" may petition the court in the county in which he resides to issue a protective order to protect against acts of domestic violence. KRS 403.725(1).

The court shall issue an emergency protective order (EPO) if the court determines that the allegations in the petition, ". . . indicate the presence of an immediate and present danger of domestic violence and abuse[.]" KRS 403.740(1). Following an *ex parte* proceeding, the trial court shall enter the EPO "[r]estraining the adverse party from any contact or communication with the petitioner as directed by the court[.]" KRS 403.740(1)(a).

An emergency protective order shall remain in effect no longer than fourteen days, at which time a full hearing shall be scheduled. KRS 403.740(4). At the hearing, the court may enter a DVO for a period of time not to exceed three years. KRS 403.750(2).

[2] KRS 403.720(1) defines "domestic violence and abuse" 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[.]"

A. Standard of Review

A court may only enter a DVO if the petitioner shows that by "a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur[.]" KRS 403.750(1); *Bissell v. Baumgardner*, 236 S.W.3d 24, 29 (Ky. App. 2007). The preponderance of the evidence standard is met when the evidence establishes that the petitioner "was more likely than not to have been a victim of domestic violence." *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996).

DVO hearings must grant both parties equal footing from which to state their case. There is no presumption that the petition is true or that the petitioner is truthful. The family court appeared to disregard the above standard when repeatedly questioning Keegan about Kira's motivation to lie.

Further, we conclude that both the court's tone and line of questioning were improper. "A witness should not be required to characterize the testimony of another witness . . . as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony." *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997).

Individually, the trial court's line of questioning and apparent presumption that the petitioner was truthful may not require reversal. Those errors combined with the additional errors discussed herein, however, require us to vacate the DVO.

B. Due Process Rights

Those subject to a DVO are placed under significant restrictions. *Kingrey v. Whitlow*, 150 S.W.3d 67, 70 (Ky. App. 2004) (Knopf, J., concurring). They may face employment consequences, the loss or decrease of child custody, the loss of the right to bear arms, increased difficulty in traveling abroad, and an overall restraint on liberty. Further, a person subject to a DVO faces immediate arrest and incarceration for a period up to one year for violation of the court order. *Rankin,* 277 S.W.3d at 625.

Although DVO hearings are civil proceedings, the significant consequences trigger procedural protections.

> Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplations of the 'liberty or property' language of the Fourteenth Amendment.

*Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972) (internal citations omitted). Therefore, those subject to a DVO are entitled to due process rights, such as the right to call witnesses and a full evidentiary hearing. *Wright v. Wright*, 181 S.W.3d 49, 52 (Ky. App. 2005).

1. The Right to a Full Evidentiary Hearing

Family courts are given broad discretion in weighing the evidence and witness credibility.

> [T]he trier of fact has the right to believe the evidence presented by one litigant in preference to another. The trier of fact may believe any witness in whole or in part.

> The trier of fact may take into consideration all of the circumstances of the case, including the credibility of the witness.

*Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996) (internal citations omitted). Credibility may only be determined once the trier of fact has heard all relevant evidence. Only after conducting the evidentiary hearing may the court decide whether, under a preponderance of the evidence, domestic violence occurred and may occur again. *Rankin,* 277 S.W.3d at 626. Keegan was not allowed to summarize the evidence or argue possible defenses in a closing statement. The court deprived Keegan of his right to a full evidentiary hearing by interrupting the proceeding and making a premature judgment.

2. The Right to Call Witnesses

Although the court stated that Keegan's father's testimony was irrelevant, the testimony could be relevant to the question of imminent harm. As used in KRS 403.270, the term "imminent" harm means "impending danger and, in the context of domestic violence and abuse . . . [,] belief that danger is imminent can be inferred from a past pattern of repeated serious abuse." KRS 503.010(3). The fact that he witnessed Keegan and Kira's last interaction makes his testimony relevant to the imminent harm inquiry. Further, the father's testimony could have been used to advance the defense theory that Kira sought a DVO in an attempt to ruin Keegan's career, which clearly relates to credibility.

3. The Right to Present Evidence

We are also concerned that the trial court unnecessarily limited Keegan's testimony concerning Kira's mental bipolar disorder. The trial court claimed that Keegan used Kira's bipolar disorder as a way to attack her. The record does not support this contention. As long as the testimony is admissible under the rules of evidence, mental health disorders and medication schedules can be highly relevant to credibility.

Keegan's counsel did not object to the trial court's limitation of testimony. Nonetheless, we conclude that palpable error exists as the limitation deprived Keegan of the ability to formulate certain defenses.

As Keegan was denied fundamental due process rights and all relevant evidence was not presented, we are unable to address his claim that the evidence did not reflect injury or threat of imminent injury.

## III. Conclusion

We recognize that "domestic violence statutes should be construed liberally in favor of protecting victims from domestic violence[.]" *Barnett v. Wiley*, 103 S.W.3d 17, 19 (Ky. 2003). Nonetheless, the issuance of a DVO must not be taken lightly. While the orders provide protection to victims, they often have devastating effects on those to whom they are issued against. It is essential that courts embrace the gravity of this decision.

Based upon the foregoing reasons, we vacate the Fayette Family Court DVO issued against Keegan Weckman and remand the order for a hearing in conformance with this opinion.

ALL CONCUR.

| BRIEF FOR APPELLANT: | No appellee brief filed. |
| --- | --- |
| C. Ed Massey<br>Erlanger, Kentucky | |