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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000337-ME

JOHN KESSLER — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE PAULA SHERLOCK, JUDGE
ACTION NO. 05-D-503629

REBECCA SWITZER (FORMERLY KESSLER) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL AND THOMPSON, JUDGES.

THOMPSON, JUDGE: John Kessler appeals an extension of a domestic violence order entered against him. He alleges that: (1) the family court failed to make specific findings of fact; (2) there was insufficient evidence to support the extension of the DVO and it reissued the DVO based solely on events prior to the initial DVO; (3) the time constraints imposed against him at the hearing deprived

him of due process; and (4) that KRS 403.750 is unconstitutional on its face and as applied. We reject Kessler's contentions and affirm.

Kessler and Rebecca Switzer's legal proceedings which are the subject of this appeal began in 2005 when they were having marital difficulties, and Kessler was arrested due to an altercation between them. As a result, on November 28, 2005, a DVO was entered effective for three years. While the DVO was in effect, Switzer initiated criminal charges against Kessler, which were later dismissed after six months of no contact between the parties.

On October 10, 2008, Switzer moved to extend the DVO and attached an affidavit stating that she had filed charges against Kessler and feared for her safety. Following a hearing, the DVO was extended for one year. Kessler appealed to this Court, which affirmed. *Kessler v. Switzer*, 289 S.W.3d 228 (Ky.App. 2009).

In anticipation of the expiration of the DVO, on October 12, 2009, Switzer filed a motion to extend the DVO accompanied by an affidavit that stated the following grounds for relief: (1) Kessler had initiated civil litigation against Switzer as a result of the criminal charges she had pursued against him and that action remained pending; (2) Kessler filed a bar complaint against Switzer's counsel in which Kessler indicated that he was in possession of photographs of the interior of Switzer's residence; (3) Switzer suspected that Kessler had "forked" her yard in a pattern suggestive of a graveyard and left an object in her yard; (4) Kessler continued to obsess over Switzer; and (5) she feared Kessler and that

without the protections afforded by the DVO, future acts of violence remained a reasonable probability under the totality of the circumstances.

A hearing was held at which Switzer testified that Kessler had continued to intervene in her life. She explained that after she filed criminal charges against Kessler, he filed a civil action against her for malicious prosecution, slander and defamation and, subsequently, filed a bar complaint against her attorney as a result of items allegedly taken by Switzer from the marital residence but awarded to Kessler over three years earlier. Although photographs of the interior of the home were introduced by Kessler, Switzer denied that Kessler had access to her home. Regarding the vandalism of her yard on October 3, 2009, photographs accompanying a police report showed that plastic forks were left in her yard and an object was disposed of in her yard. Consistent with her affidavit, Switzer testified that she remained fearful of Kessler and that, although no new acts of physical violence had occurred, if the DVO was lifted, Kessler would commit further acts of domestic violence.

Kessler testified that he obtained photographs of the interior and exterior of Switzer's home, which is currently for sale, from a realtor's website and was interested in the photographs only because they related to the division of the marital property three years ago. He denied any involvement with the forking incident at Switzer's residence and provided articles obtained from the internet indicating "forking" is a prank. He suggested that the forking could have been a high school prank against Switzer's high school son.

After hearing the testimony, the family court extended the DVO for three years finding that by a "preponderance of the evidence the acts of domestic violence and abuse may occur between the parties." Kessler filed a motion to vacate the judgment and, as a result, the family court amended its original findings and clarified its reasoning, which it summarized as follows:

> When drafting the January 5, 2010 Order, the Court concluded that the totality of John's action-constitutionally protected or not-have resulted in Rebecca's prolonged and increased fear of potential violence from John. Considering the obsessive and relentless nature of his actions against her, Rebecca's fear of John in the opinion of the Court, are reasonable.

Kessler alleges that the family court did not specify the facts upon which it relied when it extended the DVO. The alleged error was properly preserved by his post-judgment motion requesting that the family court state its findings with specificity. CR 52.02. *Monin v. Monin*, 156 S.W.3d 309, 317 (Ky.App. 2004).

KRS 403.750(2) provides:

> Any order entered pursuant to this section shall be effective for a period of time, fixed by the court, not to exceed three (3) years and may be reissued upon expiration for an additional period of up to three (3) years. The number of times an order may be reissued shall not be limited. With respect to whether an order should be reissued, any party may present to the court testimony relating to the importance of the fact that acts of domestic violence or abuse have not occurred during the pendency of the order.

The statute is silent regarding the facts necessary to reissue a DVO. Absent is an explicit directive when the party against whom the DVO was entered has not committed additional acts of domestic violence or abuse during the pendency of the DVO. However, our Courts have interpreted the statute to permit the reissuance of a DVO even where no additional violence or abuse has occurred.

In *Kingery v. Whitlow*, 150 S.W.3d 67 (Ky.App. 2004), the Court clarified the requisite findings that a trial court must make in order to reissue a DVO and addressed the question regarding proof as to whether evidence of additional violence or abuse is necessary. Holding that no such evidence is required, the Court stated:

> The statute does not state the conditions under which a DVO may be reissued. However, it does state that any party may present testimony concerning the importance of the fact that domestic violence or abuse may not have occurred during the pendency of the previous order. KRS 403.750(2). Contrary to the circuit court's interpretation, we do not read the statute as requiring proof of additional acts of domestic violence or abuse during the prior period before a DVO may be reissued. Rather, the statute makes it clear that testimony that such acts did not occur may be presented for the court's consideration in determining whether or not to reissue the order.

Id. at 69. Judge Knopf's concurring opinion further discussed the requirements for reissuing a DVO:

> I write separately to clarify the grounds necessary to support renewal of a DVO. It is important to remember that a person subject to a DVO is placed under significant restrictions. Consequently, a DVO should not be renewed merely at the request of the petitioning party. Rather,

> there must be some showing of a continuing need for the DVO.
>
> In making a decision to renew a DVO, "the fact that acts of domestic violence or abuse have not occurred during the pendency of the order," KRS 403.750(2), is a relevant, but not controlling factor in making such a determination. The critical issue is whether the court finds that future acts of domestic violence remain a reasonable probability. There may be other conduct or circumstances, not amounting to a violation of the prior DVO, which may nonetheless be relevant to considering the continuing need for the DVO. The trial court may also consider the nature, extent and severity of the original acts of domestic violence. In short, a court considering a motion to renew a DVO may consider the totality of the facts and circumstances in finding that acts of domestic violence and abuse may again occur if the DVO is allowed to expire.

Id. at 70-71.

A review of the family court's order in Kessler's case reveals that the family court made detailed findings of fact and conclusions of law and specifically found that "acts of domestic violence and abuse may occur between the parties." The family court found Switzer's testimony to be more credible than Kessler's. Further, it found that Kessler's continued interest in Switzer and her affairs and the circumstances giving rise to the original issuance and extension of the DVO required that the DVO be reissued. Having concluded that the family court's findings were sufficient, we turn to Kessler's remaining contentions.

Kessler argues that there was insufficient evidence to support the family court's finding that acts of domestic violence and abuse may occur between him and Switzer and the court only considered his conduct prior to the DVO.

The standard of review applicable to the reissuance of a DVO is as follows:

> The standard of review for factual determinations is whether the family court's finding of domestic violence was clearly erroneous. Findings are not clearly erroneous if they are supported by substantial evidence. [I]n reviewing the decision of a trial court the test is not whether we would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion. Abuse of discretion occurs when a court's decision is unreasonable, unfair, arbitrary or capricious.

Caudill v. Caudill, 318 S.W.3d 112, 114-115 (Ky.App. 2010)(internal quotations and citations omitted).

The basis for the reissuance of the DVO was the family court's finding that Kessler is unable to disassociate from Switzer as evidenced by his pursuit of a legal action against her, possession of pictures of the interior of her residence, and recent vandalism of Switzer's yard.

It is noteworthy that the family court judge had a lengthy history with the parties. In *Kessler*, the Court noted that the judge was extremely familiar with the details of the case as she had followed it through district and circuit court. *Kessler*, 289 S.W.3d at 228. We make the same observation and point out that the same family court judge presided over the most recent proceeding. Thus, she was familiar with the parties' history and had the authority to weigh the testimony and determine the credibility of the witnesses. *Baird v. Baird*, 234 S.W.3d 385, 388

(Ky.App. 2007). There was substantial evidence to support the family court's order reissuing the DVO and, therefore, we conclude it was not clearly erroneous.

Kessler's remaining issues implicate the due process clause of the Kentucky and United States Constitutions. He alleges that the family court denied him due process when it limited his time to present his evidence. Kessler's contention is without merit. The family court did not impose any specific time limitation on Kessler's presentation of his case. His counsel cross-examined Switzer and volunteered to be brief stating that he would "call Mr. Kessler very quickly." It was not until the family court found Kessler to be uncooperative and evasive in responding to counsel's and the court's questions that it stopped the hearing and reissued the DVO.

A trial judge is given wide latitude in controlling the length of a trial and, absent a showing of prejudice, no abuse of discretion will be found. *Lewis v. Commonwealth,* 42 S.W.3d 605 (Ky. 2001). Kessler fails to allege any further testimony he could have elicited from Switzer or any witness that would have warranted a different result. Moreover, in *Kessler*, the Court reaffirmed the holding in *Kingrey* that KRS 403.750(2) does not require a hearing before a DVO can be reissued :

> We agree with the *Kingrey* Court that KRS 403.750(2) does not require proof of additional acts of violence and that a hearing is therefore not required before an extension of a DVO is ordered. The statute clearly does not require a hearing. Further, if a hearing was required, the process articulated in KRS 403.750(2) for extending a DVO would be rendered useless, as the process would be

> the same as the process for originally granting a DVO. Clearly the legislature did not intend this result or the statute would not have a procedure for extending the DVO.

Id. at 232.

Kessler contends that KRS 403.750(2) is unconstitutional because it failed to provide a standard for extending a DVO. The initial issue we address is whether Kessler properly preserved his facial constitutional attack on the statute.

Kessler points out that he notified the Attorney General of his constitutional challenge to the statute and, therefore, complied with KRS 418.075(1). We conclude that mere notification to the Attorney General of an intent to challenge a statute is insufficient: The issue must be timely presented to the trial court.

Our Supreme Court has succinctly stated the rule: "A party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment." *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky.App. 2005)(quoting from *Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky.App. 1997)). The rule applies equally to factual constitutional challenges. In *Allard v. Kentucky Real Estate Commission*, 824 S.W.2d 884 (Ky.App. 1992), this Court held that a constitutional challenge not argued until a motion to alter, amend or vacate the final opinion and order of the circuit court was not properly preserved for review. Although Kessler notified the Attorney General, he did not timely present the issue regarding the facial

constitutionality of KRS 703.750(2) to the family court and, therefore, the issue is not properly before this Court. However, this does not preclude us from reviewing whether the statute was unconstitutionally applied to Kessler.

Kessler argued to the family court that the litigation filed against Switzer and the bar complaint filed against her attorney is constitutionally protected activity and could not be considered as factors when determining whether to reissue the DVO. The family court rejected his argument and stressed that it was not restricting Kessler's right to pursue litigation but considered his actions constitutionally protected or not as indicative of his inability to disassociate with Switzer and to Switzer's perception that Kessler continues to victimize her. We agree with the family court's logic.

We have consistently recognized that a DVO has a significant impact on the perpetrator's constitutional freedoms, including the immediate loss of one's children, home, financial resources, employment, and dignity. Further, one becomes subject to immediate arrest, imprisonment, and incarceration for up to one year for the violation of a court order, no matter what the situation or circumstances might be. *Rankin v. Criswell,* 277 S.W.3d 621, 625 (Ky.App. 2008). However, it restricts those freedoms only to the extent necessary to protect the victim. The family court stressed that it was not commenting on the merits of Kessler's claims nor was it reissuing the DVO to deter Kessler's litigation against Switzer or complaints against her attorney.

Based on the foregoing the DVO is affirmed.

ALL CONCUR.

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