

RENDERED: OCTOBER 12, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002326-ME

MICHAEL DEAN RUSH

APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 08-CI-00119

MICHELLE MOLENE RUSH

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, MAZE AND TAYLOR, JUDGES.

MAZE, JUDGE: Appellant, Michael Rush, appeals the finding of the Monroe Circuit Court placing sole permanent custody of his children with his former wife, Michelle Rush (now Vickery). Rush contends he was denied due process when he was arrested for violation of an Emergency Protective Order (EPO) as he entered the courthouse on the day of his divorce and custody hearing, thereby preventing him from attending, calling witnesses or being otherwise represented at that

hearing. We conclude that Rush fails to present an issue properly preserved for appeal. Hence, we affirm the trial court's order regarding custody.

Rush and Vickery married on May 31, 2003. During the course of the marriage, two children were born to the parties. Vickery sued for divorce on March 28, 2008, requesting that issues regarding custody and visitation of her children be handled pursuant to the Protection and Permanency case regarding her children then pending in Monroe District Court. Rush's Answer and Response requested that custody and visitation of their children be within the sole discretion of the Circuit Court. Eventually, the trial court scheduled the case for an August 31, 2010 hearing before a Domestic Relations Commissioner (DRC) regarding several issues, including custody of their children.

Days prior to the hearing date, a warrant for Rush's arrest was issued for his alleged violation of an EPO. More specifically, the Criminal Complaint alleged that Rush was seen in the possession of a firearm in violation of the EPO's conditions. Upon arriving at the courthouse on the day of his divorce and custody hearing, Rush was served with the warrant, arrested and booked into the Monroe County Correctional Center. He was released the next morning. Because he did not have counsel, Rush's arrest prevented him from being represented at the hearing, which the DRC proceeded to hold in his absence. It is unclear from the record whether the DRC knew of Rush's arrest and its cause of his absence at trial.¹

¹ The docket sheet for that day's hearing reads simply, "No appearance by Respondent."

As a result of the hearing on August 31, a report of the children's Guardian Ad Litem, and the results of court-ordered psychological testing on Rush and Vickery, the trial court adopted the recommendations of the DRC and issued its Findings of Fact and Conclusions of Law and the Decree of Dissolution on December 8, 2010. It concluded that Vickery was to be the sole permanent custodian of the children and that Rush was to have no visitation with his children. Nine days following the issuance of the trial court's order, Rush filed a handwritten document titled "Motion to Appeal Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage." However, he filed no written objection to the DRC's report prior to the trial court's adoption of its recommendations. Rush now appeals the findings of the trial court, but limits his appeal to issues regarding the custody of his children. (Appellant's Brief, p. 2.)

Rush again argues that the DRC's decision to proceed with the custody hearing in his absence deprived him of his due process right in that he was prevented from calling witnesses and making arguments he believes would have cast doubt on Vickery's ability to parent their children and on the truth of certain allegations made against him. (R. at 91.) In sum, Rush contends that his presence at the hearing would have altered court's ultimate decision.

Rush's failure to preserve his due process argument for appeal, as required by the Kentucky Rules of Civil Procedure, is fatal to his claim.

CR 53.06(2), which deals directly with DRCs' reports, states:

Within 10 days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in CR 6.04.

Ky. R. Civ. P. 53.06(2). In general, a party who desires to object to the report of a DRC must do so as provided by the provisions of CR 53.06, or that party will be precluded from questioning on appeal the action of the Circuit Court in confirming the DRC's report. *Eiland v. Ferrell*, 937 S.W.2d 713 (Ky. 1997); *see also United States v. Central Bank & Trust Co., Ky.*, 511 S.W.2d 212 (1974). When the only issue on appeal is whether the evidence at hearing was sufficient to support the findings, there is no need to object or make additional motions. *Id.* at 715. Other circumstances, however, require motions or objections subsequent to the findings. *Id.* at 716. If the findings are objectionable on grounds other than insufficiency of evidence, an objection or appropriate motion should be made to identify the defect. *Id.* Further, CR 46 requires a party to make "known to the court the action which he desires the court to take or his objection to the action of the court."

Rush filed no objections to the DRC's report and he filed no other pleadings or motions requesting relief allowed under the Civil Rules. Rush filed only what amounted to a Notice of Appeal on December 17, 2010. Furthermore, Rush's appeal of the trial court's decision on the basis of due process touches on much more than the sufficiency of the evidence. According to CR 53.06(2) it was Rush's responsibility to make the DRC or the court aware of his objections to their respective decisions. Rush failed to do so, instead choosing to file a Notice of

Appeal with this Court. Accordingly, Rush's claim of error was not properly preserved.

We now turn to Rush's due process claim with the understanding that it was unpreserved on appeal, and thus we will substantively review the trial court's decision to adopt the recommendations of the DRC only if that decision constituted palpable error. Ky. R. Civ. P. 61.02. Palpable error, which may be considered by a reviewing court even if it is not properly preserved, must be so serious that it would seriously affect the fairness to a party if left uncorrected. *Hibdon v. Hibdon*, 247 S.W.3d 915 (Ky. App. 2007)(citing *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006)). "An error is palpable . . . only when it is easily perceptible, plain, obvious and readily noticeable." *Hibdon v. Hibdon*, 247 S.W.3d 915 (Ky. App. 2007). Fundamentally, a palpable error determination turns on whether the appellate court believes there is a "substantial possibility" that the result would have been different without the error. *Id.* For this reason, we review the trial court's decision for palpable error only, pursuant to CR 61.02.² We respectfully disagree with the dissent's implicit assertion that our decision should be informed by the "best interests of the two Rush children," as it is not our place to subvert the trial court's consideration of the same.

Rush presents this Court with the very broad argument that the trial court's order denied him due process. " '[D]ue process,' . . . is not a technical

² CR 61.02 reads as follows: A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error. Ky. R. Civ. P. 61.02.

conception with a fixed content unrelated to time, place and circumstances” but “is flexible and calls for such procedural protections as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976)(internal quotations and citations omitted). The fundamental requirement of procedural due process is simply that all affected parties be given “the opportunity to be ‘heard at a meaningful time and in a meaningful manner’.” *Id.* at 333, 96 S.Ct. at 902 (citation omitted). All that is necessary is that the procedures be tailored, in light of the decision to be made, to “the capacities and circumstances of those who are to be heard,” to insure that they are given a meaningful opportunity to present their case. *Mathews* at 319 (citing to *Goldberg v. Kelly*, 397 U.S., at 268-269, 90 S.Ct., at 1021 (footnote omitted)).

The record reflects Rush was afforded due process. He was properly noticed of the case against him and was aware of the hearing on August 31, 2010. He filed several pleadings during the pendency of the divorce action, clearly stating his position on issues including the custody of his children. Furthermore, Rush fails to convince this Court that the DRC, before deciding to proceed, had any reason to doubt that Rush had simply chosen not to come to the hearing. The dissent finds “serious doubt” in notion that the DRC did not know Rush had been detained prior to the hearing. However, it is not the purview of this Court to rule based on mere suspicion of things unseen. As easy as it might be to presume some knowledge on behalf of the DRC on the day of the hearing, such a presumption is

not ours to make when there simply is no indication in the record on appeal of what the DRC did or did not know regarding Rush's detention.

Furthermore, after his arrest and subsequent release, Rush had ample time prior to the trial court's order adopting the DRC's recommendations to object to those recommendations under CR 56.06. He did not. Rush was afforded the opportunity under CR 59.05 to move the trial court to set aside, vacate or amend its order. He did not. And within a reasonable time following entry of the trial court's order, Rush was entitled to move the court for relief under CR 60.02 on the grounds that the issue of his absence was "of an extraordinary nature justifying relief." Ky. R. Civ. P. 60.02. He did not. It remains the case that Rush can, under Kentucky law, petition the Circuit Court for modification of the custody order at any time. He has not. As a result, Rush, though absent from the August 31 hearing, was afforded ample due process, having had multiple opportunities to present his case and to inform the trial court of the reason for his absence. That Rush failed to take up the proper procedural remedies afforded to him does not constitute a deprivation of his due process rights, nor does it constitute error on the part of the trial court.

It cannot be said that the trial court's adoption of the DRC's recommendations, which were developed following a hearing which Rush did not attend, meets the definition of "palpable error" under CR 61.02 or under the standard in *Hibdon*. The record does not reflect, and Rush certainly does not establish, any error by the trial court which is "easily perceptible, plain, obvious

and readily noticeable.” *Hibdon* at 918 (citing *Burns v. Level*, 957 S.W.2d 218, (Ky. 1997)). Considering the weight of evidence before the trial court other than that which was obtained at the August 31 hearing, no “substantial possibility” exists that, had Rush been present at the hearing, the decision of the trial court would have been different. *Id.* Thus, palpable error does not exist within the trial court’s order, and we are therefore precluded from reviewing Rush’s unpreserved claim of error.

There being no error properly preserved issue for appeal, we affirm the Monroe Circuit Court’s final order.

CLAYTON, JUDGE, CONCURS

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING. Respectfully, I dissent. First, I have serious doubt that Rush actually filed a notice of appeal with our Court in compliance with CR 73.03. The pleading triggering this appeal was styled a “Motion” filed in the Monroe Circuit Clerk’s Office, nine days after the decree and final judgment were entered. Rush’s “Motion” specifically requests the circuit court to grant him a hearing on the child custody issue which he was denied in the DRC proceeding by his untimely arrest on August 31, 2010, the day of the hearing. The “Motion,” which does not comply with CR 73.03, could easily be construed as a CR 59 motion which would preclude the jurisdiction of this Court until resolved by the circuit court. *Gullion v. Gullion*, 163 S.W.3d 888 (Ky. 2005). Of course, since Rush is *pro se* in this appeal, as well in the proceedings below, he would not

have had the knowledge or ability to understand the distinction between a CR 59 motion and a notice of appeal. Given the circumstances that precluded his attendance at the DRC hearing, I believe Rush raised sufficient grounds for the circuit judge to grant him a hearing in conjunction with CR 59 relief.

Second, assuming this Court has jurisdiction in this appeal, I would reverse and remand this case to the circuit court for a hearing on the child custody issue. Rush's arrest at the Monroe County Courthouse on the day of his DRC hearing is inherently suspect, at minimum. There was no EPO or DVO entered in Rush's divorce case at the time of his arrest. However, an EPO was entered against Rush on July 20, 2010, by the Monroe District Court in a totally unrelated case (Case No. 10-M-00192). A sheriff's deputy later observed a violation of this EPO in Monroe County on August 22, 2010.³ Rather than arrest Rush at the time of the violation, as would have been permitted under KRS 431.005, the deputy filed a verified complaint for an arrest warrant in the district court. In the new proceeding, the deputy alleged that Rush had a handgun, again in violation of the EPO entered July 20, 2010. The arrest warrant was issued by the district court on August 24, 2010, but conveniently, was not served on Rush until he appeared at the Monroe County Courthouse on August 31, 2010, for his DRC hearing, where he was arrested and taken into custody.⁴ I have serious doubt that the DRC and other court personnel or parties were unaware of Rush's arrest on August 31 in the

³ Court records reflect the deputy was the only witness against Michael Dean Rush.

⁴ Rush was arrested by a different deputy of the Monroe County Sheriff's Office than who swore out the complaint for the arrest warrant.

courthouse where the hearing was to be conducted. Monroe County is one of Kentucky's smaller counties and the courthouse where this hearing was to be conducted is one of Kentucky's smallest courthouses.⁵ Yet the DRC hearing was conducted without Rush and the proposed recommendations to the circuit court judge makes no mention of his absence. Interestingly, the civil docket sheet prepared by the circuit clerk reflected that Rush had "no appearance." Thus, Rush was denied the opportunity to present evidence pertaining to the custody of his children and was further denied visitation with his children.

Finally, and perhaps most importantly, what is lost in the fog of this case is the best interests of the two Rush children. Our courts should strive to address the merits of child custody disputes after hearing evidence presented by **both** sides to a case. Effectively, a default was entered against Rush for failing to appear due to circumstances out of his control and which were suspect at minimum. Child custody and visitation were determined without any evidence or testimony from Rush. Had Rush willfully or intentionally failed to appear at the DRC hearing, there arguably would be no issues to contest. Here, Rush made it to the courthouse but yet, was deprived of his right to present evidence regarding the best interests of his children. In child custody proceedings, there is no greater injustice than courts failing to comply with applicable statutes and civil rules. *Pursley v. Pursley*, 242 S.W.3d 346 (Ky. App. 2007). Our court system has failed both Rush and his children in this case.

⁵ The hearing was conducted in the Monroe County Courthouse. A new judicial center opened in Monroe County in 2011.

I believe this is a classic CR 61.02 situation where a manifest injustice has occurred and Rush has been denied a fundamental right to a hearing on the custody of his children in his divorce proceeding as well as his visitation rights. What is even more specious about the proceedings below is that the EPO complaint/violation against Rush which resulted in his arrest on August 31, 2010, was dismissed by the Monroe District Court when the hearing on the complaint was conducted September 21, 2010. In my twenty-one years as a practicing attorney and almost nine years experience as an appellate judge, this is the first dismissal of an EPO/DVO violation where a gun was involved, that I have encountered.

Accordingly, I would reverse and remand this case for an evidentiary hearing on the child custody issue in the circuit court.

BRIEFS FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE.

Michael D. Rush, Pro Se
Gamaliel, Kentucky