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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000416-ME

JOHN JAMES BOYLE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY PHILPOT, JUDGE
ACTION NO. 12-D-00694

KRISTIE BOYLE (NOW SMITH) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND MAZE, JUDGES.

MAZE, JUDGE: Appellant, John James Boyle, appeals from an order of the Fayette Circuit Court regarding the conditions of a Domestic Violence Order (DVO). For the reasons stated herein, we conclude that the trial court did not err and did not abuse its discretion. Hence, we affirm.

Background

As a preliminary matter, we note that Appellee, Kristie Smith, did not file a brief in this case. Under Kentucky Rules of Civil Procedure (CR) 76.12(8), this fact entitles us to adopt John's portrayal of the facts and issues as true, to reverse the trial court if John's brief supports such a result, or to interpret Kristie's silence as a confession of the trial court's error. We elect to adopt as true John's portrayal of the facts and issues on appeal. Those facts are as follows.

The parties married on October 29, 2011, while both were employees of the Lexington-Fayette Urban County Police Department. The following July, Kristie petitioned the trial court for an Emergency Order of Protection (EPO) against John following a verbal and physical altercation between them. In her petition, Kristie alleged that during the altercation, John took a pistol from on top of their refrigerator and locked himself inside a bathroom in their home. From outside the bathroom, Kristie stated that she heard "the slide on the gun and what sounded like a round chamber." According to Kristie, John then called a friend to come to the home, and when the friend arrived, John admitted to being "extremely upset" and that he had placed the pistol in his own mouth. The petition further stated that "since this incident, John has made several comments . . . that he should have killed himself. . . ."

Following a hearing regarding these allegations, the trial court entered a DVO against John. The conditions of the order included a prohibition on John's

possession, purchase, or attempt to possess, purchase or obtain a firearm for the duration of the DVO.[1]

As a result of the domestic violence incident, and in light of the resulting possibility of discipline or termination, John resigned his position as a police officer in Lexington. John subsequently moved to Magoffin County where he accepted a position with that county's Sheriff's office. In that position, John's employer required him to carry an employer-issued firearm. After learning of this, Kristie filed a motion to hold John in civil contempt of the DVO's prohibition of John's possession of a firearm. John responded to Kristie's motion and filed a countermotion asking the court to amend the DVO to permit him to carry a firearm during work hours pursuant to a federal law which he argued exempted law enforcement officers from state DVO firearm prohibitions.

Following a hearing, the trial court overruled John's motion to amend and held John in contempt of the DVO's firearm prohibition. The trial court held that the federal law John cited was "irrelevant" and did not supersede the court's authority to institute a prohibition on the possession of a firearm. John filed a timely appeal from the denial of his motion to amend the DVO.[2]

Standard of Review

[1] At the bottom of the DVO, as a permanent part of the order form completed by the court, it read: "Federal law provides penalties for possessing, transporting, shipping, or receiving any firearm or ammunition (18 U.S.C. Section 922(g)(8))."

[2] John also appealed various orders stemming from the parties' concurrent divorce case. We consolidated all of John's appeals into the present one; however, during the pendency of this case, the parties settled all issues related to the divorce case and we dismissed those appeals on August 28, 2014. Hence, only John's appeal from the DVO remains before us.

John's sole argument on appeal concerns the trial court's denial of his motion to amend the DVO to permit him to carry a firearm during his work as a law enforcement officer. Our initial review of the trial court's finding regarding the federal statute's application is *de novo*, as it is a question of statutory interpretation and therefore, of law. *Jefferson County Bd. of Educ. v. Fell*, 391 S.W.3d 713, 718-719 (Ky. 2012). Upon a finding that the federal statute does not affect the trial court's discretion in considering a motion to amend the DVO, the test for this Court becomes not whether we would have come to a different decision, but whether the trial court's findings of fact were clearly erroneous or, overall, whether the court abused its discretion. *See* CR 52.01; *see also Caudill v. Caudill*, 318 S.W.3d 112, 114 (Ky. App. 2010) (*citing to Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986)); *Pasley v. Pasley*, 333 S.W.3d 446 (Ky. App. 2010).

Analysis

In arguing that the trial court misapplied the law and wrongfully held him in contempt of the DVO, John points to a pair of federal provisions, 18 U.S.C. § 922(g)(8) and 18 U.S.C. § 925(a)(1), both of which he argues exempt him from the firearm prohibition of the DVO while on-duty as a Magoffin County Deputy Sheriff. Section 922(g)(8) reads, in pertinent part:

> (g) It shall be unlawful for any person
>
> …
>
> (8) who is subject to a court order that--

> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
> (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury[,]
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce

18 U.S.C. § 922(g)(8). Section 925(a)(1), also known as the "official use exception," states:

> The provisions of this chapter . . . shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearms or ammunition imported for, sold or shipped to, or issued for use of, the United States or any department or agency thereof *or any State or any department, agency, or political subdivision thereof*.

(emphasis added).

The Courts of this Commonwealth and the federal circuit in which it sits have remained relatively silent regarding what, if any, duty Sections 922 and 925 place on state courts. In *Cottrell v. City of Hillview*, 2005 WL 1993032, 2004-CA-000327-MR (Ky. App. 2005), a panel of this Court seemed to imply that the

federal statutes were at least to be considered when a timely motion to amend a DVO was filed. In *Cissell v. Cissell*, 2009 WL 3672835, 2009-CA-000610 (Ky. App. 2009), another panel of this Court declined to follow *Cottrell* and upheld a trial court's refusal to amend a DVO to permit a member of the armed forces to carry a firearm pursuant to his duties as such. The analysis in these cases is of some help. However, for further guidance, and in the interest of a more developed analysis, we look to our sister states and judicial circuits.

In *United States v. Jones*, 231 F.3d 508 (9th Cir. 2000) and *United States v. Wilson*, 159 F.3d 280 (7th Cir. 1998), the Ninth and Seventh Circuits, respectively, rejected a constitutional challenge to Section 922, *et seq*. alleging that it violated the Tenth Amendment's proscription of federal intrusion into the residual powers of the states. The *Jones* Court concluded,

> [Section 922(g)(8)] is a federal criminal statute to be implemented by federal authorities; it does not attempt to force the states or state officers to enact or enforce any federal regulation. . . . Section 922(g)(8) does not attempt to regulate domestic relations; it simply accepts the validity of domestic abuse restraining orders that have been issued under state law."

Jones, 231 F.3d at 515. The *Wilson* Court agreed that Section 922(g)(8) does not press state governments "into the service of federal regulatory purposes. . . ." 159 F.3d at 287. Though John's is not a constitutional challenge, *Jones* and *Wilson* provide us with the persuasive, albeit non-binding, proposition that the federal statute to which John cites did not compel the trial court to amend the DVO.

John's sole argument on appeal is built upon the premise that a conflict exists between the federal he cites and a state court's ability to enter orders in a domestic violence case. This premise is false.

Contrary to John's ardent assertion, the persuasive, but non-binding, guidance provided by the Ninth and Seventh Circuits demonstrate that the supremacy of federal law over state law is not an issue and that the alleged conflict between the federal criminal statute and the state civil court's ability to enter orders is, in fact, no conflict at all. Section 922(g)(8) merely forms the basis for federal criminal prosecution of an individual alleged to be in violation of its prohibition; and Section 925(a)(1) creates an exemption or defense to that prosecution. The present case is a state civil matter involving domestic relations. Section 925(a)(1) does not immunize John from civil orders governing domestic relations entered by a state court; it merely protects him from federal criminal prosecution.

Furthermore, while Kentucky's domestic violence laws are silent on the specific issue of a DVO respondent's ability to carry a firearm, KRS 403.750(1)(j) permits a state court to "enter other orders the court believes will be of assistance in eliminating future acts of domestic violence and abuse." As other states' courts have found, the general authorization of the court to make orders it deems necessary to protect a domestic violence plaintiff, and her child, is sufficiently broad to allow the court to prohibit defendant from possessing firearms. *Benson v. Muscari*, 769 A.2d 1291, 1298 (Vt. 2001) (citing to *Woolum v. Woolum,* 723 N.E.2d 1135, 1139 (Ohio App. 1999) (holding that an order to

surrender firearms lies within the court's discretion)). Although we are not bound by this authority, we agree with the principle it conveys, as it complements well the above statutory authority to which we are bound.

Having found that Sections 922(g)(8) and 925(a)(1) do not limit a state court's ability to do so, we conclude that the trial court properly exercised its discretion in denying John's motion to amend the DVO. At the March 26, 2012 hearing, the trial court heard evidence that, despite the DVO's clear and unqualified prohibition against John's possession of a firearm, John became employed with the Magoffin County Sheriff and regularly possessed a firearm while on duty. This was the basis both for the trial court's finding of civil contempt against John, as well as its finding that amendment of the DVO was improper. In addition, the incident which formed the basis of the original DVO involved John's possession of a firearm. Given these facts, we are satisfied that the trial court did not abuse its discretion in refusing to amend the DVO.

Conclusion

For the above reasons, we affirm the order of the Fayette Circuit Court holding John in contempt and denying his motion to amend the DVO.

ALL CONCUR.

BRIEF FOR APPELLANT:

James L. Deckard
Lexington, Kentucky

Bryce Caldwell
Brent Caldwell
Frankfort, Kentucky

BRIEF FOR APPELLEE:

No brief for Appellee