

RENDERED: AUGUST 26, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001693-ME

THOMAS CATHERSON

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 15-CI-00057

JAMIE MATAISZ DOLL

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: JONES, D. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Thomas Catherson (Catherson) brings this appeal of an order entered in the Oldham Circuit Court denying him visitation with his children.

Below, the motion was opposed by the children's mother, Jamie Mataisz Doll (Doll). We conclude that the trial court did not improperly deny Catherson a

visitation hearing because the uncontested evidence supported a finding that visitation would not be in the best interests of the children. Hence, we affirm.

Analysis

Catherson is currently incarcerated as a result of his guilty plea to three counts of rape in the second degree and one count of rape in the third degree. On February 2, 2015, he filed a motion requesting visitation with his minor children while in prison. On September 22, 2015, Doll filed a response, requesting the trial court deny Catherson's motion. On October 1, 2015, the trial court denied Catherson's motion without a hearing, noting that Catherson is currently incarcerated for rape. This appeal follows.

As a preliminary matter, we note that Doll failed to file an appellee brief in this case. Kentucky Rules of Civil Procedure (CR) 76.12(8)(c) "provides the range of penalties that may be levied against an appellee for failing to file a timely brief." *St. Joseph Catholic Orphan Soc'y v. Edwards*, 449 S.W.3d 727, 732 (Ky. 2014). At our discretion, we may "(i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." CR 76.12(8)(c). While a party's failure to file a brief may be taken as a confession of error, such a sanction is usually inappropriate in appeals involving child custody, support or visitation. *Ellis v. Ellis*, 420 S.W.3d 528, 529 (Ky. App. 2014).

Furthermore, we conclude that neither Catherson's brief nor the trial court's findings justify an automatic reversal.

Kentucky Revised Statutes (KRS) 403.320(1) provides, in part, that: "A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, *after a hearing*, that visitation would endanger seriously the child's physical, mental, moral, or emotional health." (Emphasis added). As a general rule, an inmate's incarceration, standing alone, will not justify denial of a parent's right to visitation. *Smith v. Smith*, 869 S.W.2d 55, 57 (Ky. App. 1994). Rather, the burden of proving that visitation would harm the child is on the party who would deny visitation. *Id.* A finding that visitation would seriously endanger the child may not be presumed based merely upon a conviction involving moral turpitude, but unrelated to the children. *Id.* To make this determination, the court usually must hold an evidentiary hearing to determine whether visitation would seriously endanger the child. *Alexander v. Alexander*, 900 S.W.2d 615, 616 (Ky. App. 1995).

In this case, however, the trial court noted that Catherson pleaded guilty to five counts of felony rape. In addition, he admits that one of those counts stemmed from a victim who is the daughter of his estranged wife, but not his biological child. Moreover, the trial court pointed out that Catherson's plea agreement provided, "Upon release from the Department of Corrections the defendant would have no contact with the victim or the families of the victim and will pay all counseling costs for the victim."

Given the existence of a no-contact provision in Catherson's plea agreement, we conclude that Catherson was not entitled to a hearing on his motion for visitation. Although the no-contact provision does not expressly take effect until his release, the plea agreement clearly anticipated that Catherson would not be entitled to have contact with any member of Doll's family following his conviction. Furthermore, the crimes to which he pleaded guilty directly involved one of those family members. These circumstances clearly made visitation between Catherson and his children inappropriate. Therefore, the trial court did not err by denying his motion for visitation without an evidentiary hearing.

Conclusion

Accordingly, the order of the Oldham Circuit Court denying Catherson's motion for visitation is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Thomas Catherson
LaGrange, Kentucky