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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000446-ME

DEAN VERNOOY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TARA HAGERTY, JUDGE
ACTION NO. 16-D-500448-001

JENNIFER SULLIVAN AND MASON SULLIVAN — APPELLEES

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

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

MAZE, JUDGE: Dean Vernooy appeals from a March 11, 2016 order of the Jefferson Family Court granting a Domestic Violence Order (DVO) to Jennifer Sullivan and Mason Sullivan. He argues that the family court lacked personal jurisdiction over him to issue a DVO, and that the DVO was not supported by substantial admissible evidence. We agree with Vernooy that the family court

erred by finding that it had personal jurisdiction over him. Nevertheless, the court retained the authority to issue a DVO protecting Sullivan within Kentucky. Furthermore, there was substantial evidence to support the family court's finding that Sullivan had fled to Kentucky to escape domestic violence and abuse. Therefore, we affirm the DVO to the extent that it prohibited Vernooy from contacting Sullivan or from engaging in further acts of domestic violence, but we vacate and remand for entry of a new DVO without any affirmative restrictions on Vernooy.

On February 19, 2016, Sullivan filed a petition in the Jefferson Family Court, seeking an Emergency Protective Order (EPO) against Vernooy. In her affidavit, Sullivan alleged that she and Vernooy had lived together in New York state, where he was stationed in the United States Army. Sullivan alleged that she had fled after Vernooy committed several acts of domestic violence, and that he continued to harass and threaten her after she moved back to Kentucky. Sullivan sought a protective order on behalf of herself and her child.[1] The court granted the EPO.

Subsequently, the summons was served on Vernooy in New York state. Vernooy appeared specially, by counsel, to contest personal jurisdiction. At the hearing, Vernooy's counsel noted that Vernooy was a non-resident of

[1] Mason Sullivan is Sullivan's child from another relationship. However, the child had lived with Sullivan and Vernooy during their time in New York state, and had returned with Sullivan to Kentucky.

Kentucky and the alleged acts occurred entirely in New York state. Counsel also argued that recent statutory changes precluded the entry of a DVO over a non-resident defendant over whom the court lacks personal jurisdiction. Sullivan's counsel responded that Kentucky had personal jurisdiction because the parties had lived together in Kentucky and because Vernooy continued to own a house in Radcliff.

After reading the affidavit into the record, the court heard testimony from Sullivan. Sullivan testified that she and Vernooy had moved to New York from Kentucky in December 2014. They lived together in New York until the first week of January 2016 after the alleged acts of domestic violence and after Vernooy told her to leave the house. Sullivan stated that Vernooy had physically assaulted her on several occasions and that he had verbally abused and threatened her on numerous other occasions.

Sullivan further testified that Vernooy had sent her harassing texts since she had returned to Kentucky. The trial court asked Sullivan if she still had these messages, and Sullivan replied that she did. However, neither the court nor Vernooy's counsel asked her to produce them. On cross-examination, Sullivan stated that several of the texts included a picture of Vernooy's current girlfriend, and Vernooy asked Sullivan what she thought about it.

After hearing the evidence, the trial court rejected Vernooy's argument that recent statutory changes preclude the entry of a DVO when the

alleged domestic violence occurs outside of Kentucky. The court further found that it had personal jurisdiction over Vernooy because he owns a home in Kentucky, and he and Sullivan had lived together in Kentucky prior to moving to New York state. Finally, the court found that domestic violence and abuse had occurred and may again occur if a DVO was not entered. Based on these findings, the trial court entered a DVO on behalf of Sullivan and her child, to be effective for a period of three years. Vernooy now appeals.

Vernooy first argues that, based on the current law, Sullivan's flight from New York cannot be a basis for issuing a DVO in Kentucky. Previously, KRS[2] 403.725 authorized the entry of a DVO when a member of an unmarried couple has fled to Kentucky to escape domestic violence and abuse. Even if Kentucky lacked personal jurisdiction over the respondent, Kentucky could enter a limited order of protection for the benefit of the petitioner. *Spencer v. Spencer*, 191 S.W.3d 14, 17 (Ky. App. 2006). However, the General Assembly repealed KRS 403.725 and re-enacted a new version, which became effective on January 1, 2016. Vernooy argues that the current version no longer permits the entry of a protective order for a person who has fled to Kentucky to escape domestic violence committed in another jurisdiction.

We disagree. The current version of KRS 403.725(2) specifically provides that "[t]he petition may be filed in the victim's county of residence or a

[2] Kentucky Revised Statutes.

county where the victim has fled to escape domestic violence and abuse." While Vernooy contends that this language only relates to venue, we find no indication that the General Assembly intended to alter the prior law or to limit the entry of a DVO to only when the acts of domestic violence occurred in Kentucky and involved Kentucky residents. Considering the current language of KRS 403.725(2), and in the absence of a clearer statement from the legislature, we conclude that a Kentucky court retains jurisdiction to enter a DVO for the protection of a person who has fled to this state to escape domestic violence.

Nevertheless, we must also conclude that the trial court erred in finding that Kentucky may exercise personal jurisdiction over Vernooy. As noted above, this Court in *Spencer* held that a Kentucky court has the authority to enter a DVO against a non-resident respondent who lacks minimum contacts with this jurisdiction. *Spencer*, 191 S.W.3d at 18-19. But in such cases, the court is only authorized to enter an order prohibiting contact with or acts of domestic violence against the petitioner. *Id.* On the other hand, the court does not have the authority to issue an order compelling the respondent to affirmative action, such as the surrender of firearms and firearm permits. *Id.* Since the DVO in this case includes such affirmative restrictions, we must next consider whether the trial court properly found personal jurisdiction over Vernooy.

In *Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 57 (Ky. 2011), the Kentucky Supreme Court set out a two-step process for the analysis of

long-arm jurisdiction over a non-resident defendant. First, the court must proceed under KRS 454.210 to determine if the cause of action arises from conduct or activity of the defendant that fits into one of the statute's enumerated categories. If not, then *in personam* jurisdiction may not be exercised. *Id.* When that initial step results in a determination that the statute is applicable, a second step of analysis must be taken to determine if exercising personal jurisdiction over the non-resident defendant offends his federal due process rights. *Id.* In so holding, the Supreme Court expressly overruled the three-step test first set out in *Wilson v. Case*, 85 S.W.3d 589, 593 (Ky. 2002), and later applied in *Spencer*.

In pertinent part, KRS 454.210(4) permits a Kentucky court to exercise personal jurisdiction over a non-resident who causes tortious injury outside this Commonwealth,

> if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth;

Here, the alleged acts of domestic violence and abuse occurred entirely in New York state. The text messages were directed to Sullivan after she returned to Kentucky, and arguably were intended to harass and intimidate Sullivan in Kentucky. But in finding personal jurisdiction, the trial court relied

only on the facts that Vernooy had previously resided in Kentucky, and that he currently owns a home in Kentucky. And, as Vernooy notes, these facts were only introduced through statements of counsel, and not through testimony or documentary evidence.[3] Moreover, Sullivan does not allege that her claims arise out of Vernooy's connections to Kentucky. Under these circumstances, the trial court clearly erred in finding that it had personal jurisdiction over Vernooy. Therefore, the trial court could not impose affirmative restrictions prohibiting Vernooy from possessing firearms.

Finally, Vernooy argues that the DVO was not supported by substantial evidence. KRS 403.740(1) provides that "if a court finds by a preponderance of the evidence that domestic violence and abuse has occurred and may again occur, the court may issue a domestic violence order . . . ." The preponderance of the evidence standard is met when sufficient evidence establishes that the alleged victim was "more likely than not to have been a victim of domestic violence." *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). KRS 403.720(1) defines "domestic violence and abuse" as "physical injury, serious

[3] In a separate motion, Sullivan asks this Court to take judicial notice of copies of the deed showing Vernooy's ownership of a home in Radcliff, as well as his vehicle registrations in Kentucky. As an appellate court, we have the authority to take judicial notice of matters in the public record. *See Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 264-65 (Ky. App. 2005). However, the exercise of that authority is not appropriate where the matter on appeal concerns the sufficiency of the evidence supporting the trial court's factual findings. Furthermore, as discussed above, these facts alone would not support a finding of personal jurisdiction over Vernooy. Therefore, we shall deny the motion to take judicial notice of these records in a separate order.

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[.]" As an appellate court, we review the trial court's issuance of a DVO to determine "whether the court's findings were clearly erroneous or . . . it abused its discretion." *Holt v. Holt*, 458 S.W.3d 806, 812 (Ky. App. 2015). In making this determination, we must be mindful of the trial court's opportunity to assess the credibility of the witnesses. CR[4] 52.01. However, this Court will engage in a *de novo* review with regard to the trial court's application of law to those facts. *Buddenberg v. Buddenberg*, 304 S.W.3d 717, 720 (Ky. App. 2010).

As an initial matter, Vernooy notes that the trial court never expressly found that Sullivan had fled to Kentucky to escape domestic violence and abuse. However, Sullivan alleged in her affidavit that she had fled, and she so testified again at the hearing. In addition, the trial court found that Sullivan "moved to get away from [Vernooy]." We recognize that a trial court has a duty to make written findings required for entry of a DVO. *See Boone v. Boone*, 463 S.W.3d 767 (Ky. App. 2015). Nevertheless, we conclude that the trial court's written findings are sufficient to afford meaningful appellate review. Since there was substantial evidence in the record to support the finding that Sullivan fled New York state, we find no basis to disturb that conclusion.

[4] Kentucky Rules of Civil Procedure.

Vernooy primarily argues that there was insufficient admissible evidence to support a finding that there was domestic violence or abuse. Vernooy takes issue with the trial court's reliance on Sullivan's statements in her affidavit, contending that those statements were inadmissible hearsay. However, Sullivan testified under oath and expressly adopted the statements in her affidavit. Vernooy's counsel had a full opportunity to cross-examine Sullivan about the allegation. And as the trial court noted, Sullivan's testimony was more than sufficient to establish that an act of domestic violence had occurred and may again occur within the meaning of KRS 403.720(1). Consequently, there was substantial evidence to support the entry of the DVO in this case.

Accordingly, we affirm the DVO entered by the Jefferson Family Court to the extent that it prohibited Vernooy from contacting or communicating with Sullivan and her child, and from engaging in further acts of domestic violence. However, we vacate the DVO to the extent that it imposed affirmative restrictions on Vernooy, including prohibiting Vernooy from owning or possessing firearms, and from disposing of any property owned by the parties outside of this Commonwealth. We remand this matter for entry of a new DVO consistent with this opinion.

ALL CONCUR.

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