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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000617-ME

MATTHEW C. SEXTON APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE BRUCE PETRIE, JUDGE
ACTION NO. 17-D-00024-001

KRISTIN WILSON-TILTON APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT AND NICKELL, JUDGES.

COMBS, JUDGE: Appellant, Matthew Sexton (Matthew), appeals from a Domestic Violence Order (DVO). Following our review, we vacate and remand.

On March 27, 2016, Appellee, Kristin Wilson-Tilton (Kristin), filed a Petition/Motion for Order of Protection in Boyle Family Court against Matthew, which reflects that they were "currently or previously in a dating relationship."

Kristin alleged that on March 27, 2016, Matthew had engaged in acts of domestic violence & abuse/dating violence, specifically charging that Matthew was:

> drinking at my house; he got angry over the the fact I had a male friend at my work place. After multiple beers he became more irate, I threatened to call his father to remove him from my home. This upset him to the point that he slapped me across my face on my right side of my face below my glasses. With the force of the hit, my glasses came off. He then picked them up & broke them. I then started calling 911 as I threw his property outside my door, Matthew made multiple attempts to break down my door leaving blood & missing paint.

After conducting a hearing on April 6, 2017, the Boyle Family Court entered an Order of Protection on a Form AOC-275.3 restraining Matthew from committing further acts of abuse or threats of abuse, stalking, or sexual assault and from any unauthorized contact with Petitioner. The Order remains in effect until April 6, 2020. Under the heading, "**ADDITIONAL FINDINGS"** (emphasis original), at the top of page two, the court found:

> ☑ For the Petitioner against the Respondent in that it was established, by a preponderance of the evidence, that an act(s) of □ domestic violence and abuse, □ dating violence and abuse, □ stalking, □ sexual assault has occurred and may again occur;

Only the first box was checked; the rest were left blank.

Handwritten notations on the docket sheet order entered April 6, 2017, are difficult to decipher, but they appear to state the following:

1. Proof heard. Court finds statutory standard for the entry of a DVO has been met. Grounds [illegible, but appears to state "dictated" or "are cited"] on the record & incorp. by reference
2. "No Contact" DVO entered @ Petr's. request.
3. Review set for May 4, 2017 @ 9:00 A.M. for Resp. to show compliance w/ counseling eval. order. Proof of compliance in file [illegible] until further review, if necessary."

On April 12, 2017, Matthew filed a Notice of Appeal to this Court.[1] He raises two issues on appeal: 1) that the DVO was entered without a sufficient factual basis to establish that an act of domestic violence or abuse might occur again; and 2) that he was not afforded a full hearing in violation of Kentucky statutes and due process. Thus, he contends that it should be vacated.

Domestic violence and abuse is defined as "physical injury, serious physical injury, stalking, 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[.]" KRS[2] 403.720(1). A court may

[1] After this appeal was filed, Kristin filed a motion in the Boyle Family Court to amend the DVO to a no-violent-contact DVO. By Order entered October 2, 2017, the family court passed Kristin's motion "to the Court of Appeals as part of the appeal that has been taken." This Court does not have jurisdiction to consider Kristin's motion. KRS 403.725(6)(a) provides that jurisdiction over petitions for orders of protection filed under that chapter "shall be concurrent between the District Court and Circuit Court and a petition may be filed by a petitioner in either court, except that a petition shall be filed in a family court if one has been established in the county where the petition is filed."

[2] Kentucky Revised Statutes.

issue a DVO following an evidentiary hearing if it "finds by a preponderance of the evidence that domestic violence and abuse has occurred and may again occur…." KRS 403.740(1). "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." *Gomez v. Gomez*, 254 S.W.3d 838, 842 (Ky. App. 2008) (internal quotation marks and citation omitted). "The predictive nature of the standard requires the family court to consider the totality of the circumstances and weigh the risk of future violence against issuing a protective order." *Pettingill v. Pettingill*, 480 S.W.3d 920, 925 (Ky. 2015). When we review a DVO, "the test is not whether we would have decided it differently, but whether the court's findings were clearly erroneous or that it abused its discretion." *Gomez* at 842.

The lack of written findings precludes us from addressing the first issue that Matthew has raised. CR[3] 52.01 provides in relevant part that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon …." In *Anderson v. Johnson*, 350 S.W.3d 453, 458 (Ky. 2011), our Supreme Court further explained that civil rule:

[3] Kentucky Rules of Civil Procedure.

> CR 52.01 requires that the judge engage in at least a good faith effort at fact-finding and that the found facts be included in a written order. Failure to do so allows an appellate court to remand the case for findings, even where the complaining party failed to bring the lack of specific findings to the trial court's attention.

In *Keifer v. Keifer*, 354 S.W.3d 123, 124 (Ky. 2011), the Supreme Court emphasized that "[e]ven if the trial court's rationale is readily determinable from the record, … compliance with CR 52.01 … requires *written* findings." (Emphasis original). In *Boone v. Boone*, 463 S.W.3d 767, 768 (Ky. App. 2015), this Court held that "[w]hile *Anderson* and *Keifer* pertain specifically to … child custody, we believe that the Supreme Court's mandate of written findings also applies to DVO cases." We recognize that the handwritten notation on the court's docket sheet refers to "grounds" incorporated by reference; however, as we explained in *Boone*, "[n]otations on the docket or papers in the record are not judgments." *Id.* (Internal quotation marks and citation omitted). Thus, we are compelled to vacate the Order of Protection and remand for entry of a new order with written findings as mandated by *Keifer*.

Matthew also contends that the DVO was entered without a full hearing in violation of Kentucky statutes and his due process rights. Courts are required to provide a full hearing to each party "[b]ecause of the immense impact EPOs and DVOs have on individuals and family life . . . ." *Wright v. Wright*, 181 S.W.3d 49, 53 (Ky. App. 2005). *Wright* was a consolidated action. In one case,

testimony was not allowed. In the other, counsel was not permitted to complete direct examination before the court rendered its decision. "As such, neither court could have made a finding based upon a preponderance of the evidence." *Id.* at 53. This Court vacated the rulings and remanded for a "'full hearing' as contemplated by the statute, comprised of the full testimony of any appropriate witnesses sought to be presented." *Id.*

We have reviewed the video recording of the hearing in the case before us. It bears no resemblance to the abbreviated proceedings described in *Wright.* Kristin, acting *pro se*, was present. Michael was present and was represented by counsel. After the court read the allegations of the Petition into the record and questioned Kristin in detail, Matthew's counsel cross-examined her and then called Matthew on direct. The court granted counsel's request to reserve "a few questions" in the event that the court would find that an act of domestic violence had occurred. After Kristin offered some additional proof (photographs she had taken on her cell phone), the court inquired if Matthew's counsel wanted to ask her anything else or offer any additional rebuttal in terms of testimony. Matthew's counsel declined and proceeded to make a brief oral argument. The court explained that it was going to make a finding that domestic violence had occurred. It found Kristin more credible because – unlike Matthew – she had not been drinking. Matthew's counsel again addressed the court to the effect that

caselaw on DVOs requires a finding that domestic violence is likely to occur again. The court responded that it made such a finding and inquired if there was anything else. Counsel responded, "Nothing more." The court asked if he had "some kind of question" he wanted to take up. Counsel declined additional comment or argument.

We are wholly satisfied that Matthew was afforded a full evidentiary hearing. If indeed he intended to ask any additional questions at the hearing, he waived the opportunity to do so.

We vacate the Order of Protection and remand to the Boyle Family Court for entry of a new order which shall properly reflect "in writing that court's findings of fact and conclusions of law based upon the evidence that was presented at the hearing previously held." *Keifer*, at 127.

ALL CONCUR.

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