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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000226-ME

DION S. RUDOLPH — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 08-D-500537-002

SARA MORGAN — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

CLAYTON, CHIEF JUDGE: Dion Rudolph appeals from an amended order of protection entered by the Jefferson Family Court extending a domestic violence order (DVO) against him for an additional three years. For the foregoing reasons, we reverse and remand for entry of an order consistent with this opinion.

BACKGROUND

Dion Rudolph and Sara Morgan were in a long-term relationship when Sara filed a petition seeking a DVO against Dion. In the January 31, 2012, petition, Sara alleged a sustained assault by Dion in which he entered her residence while she was asleep, held her down with his knees on her chest, choked her, masturbated in front of her, and inserted his finger in her rectum. Sara also stated in the petition that Dion had a history of being violent with her, and that a DVO had previously been issued against him for her protection in 2008.

The trial court issued an emergency protection order (EPO) the same day Sara filed the petition seeking the DVO, and a DVO was subsequently issued on February 9, 2012. In conjunction with the DVO, Dion was ordered to complete Domestic Violence Offender Treatment, which he successfully completed. By its own terms, the DVO was to remain in effect through February 8, 2015. During the three-year term of the original DVO, Dion did not, nor was he ever alleged to have, violated the DVO or communicated with Sara in any way.

On January 12, 2015, Sara filed a *pro se* motion to extend the 2012 DVO against Dion, stating in her motion that she was still fearful of him and did not wish to see him. Sara's motion to extend the DVO for a further three years was granted on February 5, 2015. Again, Dion did not, nor was he ever alleged to have, violated the DVO as extended for the additional three years.

In January 2018, Sara filed another *pro se* motion to extend the 2012 DVO against Dion for a further three years, stating in the petition that she remained fearful of Dion and did not want him near her house, street, or place of business. The hearing on this extension of the DVO was scheduled for January 18, 2018, and Sara appeared *pro se*. Dion did not appear. The trial court heard brief testimony from Sara that she was in a relationship with Dion for eleven years and that Dion was vengeful and spiteful. The trial court asked if the order kept Sara safe, and she testified that it did. The trial court then granted another three-year extension of the DVO.

Dion filed a motion to alter, amend or vacate the trial court's extension order, claiming that he did not receive adequate notice of the prior hearing or he would have been in attendance. The trial court held another hearing to give Dion the opportunity to be heard and Dion testified that the DVO should not have been extended because he had not violated the DVO for the six years that it had been active against him. Dion further testified that, although the parties had lived within one mile of each other for the previous six years, Dion had never attempted to communicate with or contact Sara in any way. Additionally, he testified that he was now the father of two small children and had full custody of a special needs child, and that he wished to move to southern Indiana with his family, but his employment opportunities were limited because of the active DVO

against him. Moreover, he testified that, upon motion of the Commonwealth, the criminal charges associated with the DVO issued in 2012 had been dismissed, that he had matured over the years since 2012, and that no other girlfriend had accused him of domestic violence. Sara also testified at the subsequent hearing, restating her fear and reaffirming that the DVO made her feel safe and gave her peace of mind. She acknowledged that the parties were never married and had no children in common, and that Dion had not violated the DVO in any way since it had been ordered in 2012.

At the hearing, the trial court found the existence of good cause to extend the DVO. In its subsequent written order, the trial court indicated that it considered the history of Sara's prior DVO against Dion in 2008, the seriousness of the alleged incident precipitating the DVO, which included strangulation and sexual assault, and Sara's level of fear of Dion in its decision to extend the DVO. Further, the trial court noted that the DVO had obviously worked to keep Sara safe thus far, as Dion had initiated no contact with her since its issuance. This appeal followed.

ANALYSIS

When a trial court is the factfinder, "[f]indings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil

Procedure (CR) 52.01; *see also Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). A finding is not clearly erroneous if it is "supported by substantial evidence or, in other words, evidence that when taken alone or in light of all the evidence has sufficient probative value to support the trial court's conclusion." *Rupp v. Rupp*, 357 S.W.3d 207, 208 (Ky. App. 2011).

Dion argues that, because he did not violate any DVO issued against him in favor of Sara, the trial court erred in extending the DVO for a further three years. The statutory provision for extensions of a DVO, KRS 403.740(4), provides as follows:

> A [DVO] shall be effective for a period of time fixed by the court, not to exceed three (3) years, and may be reissued upon expiration for subsequent periods of up to three (3) years each. The fact than an order has not been violated since its issuance may be considered by a court in hearing a request for a reissuance of the [DVO].

In *Rupp*, a panel of this Court explained the standard by which the extension of a DVO should be analyzed. *Rupp*, 357 S.W.3d at 209. The ex-wife in *Rupp* had obtained two DVOs against her ex-husband. *Id*. The first was in 1995, while they were still married, because the ex-husband had yelled, cursed, and been violent toward the ex-wife while she was pregnant. *Id*. at 209-10. The second was in 2004, after a contentious divorce proceeding, based on the ex-wife's testimony that the ex-husband was screaming outside of her home and displaying other threatening and harassing behavior. *Id*. at 210.

After several amendments of the second DVO and two extensions, the family court reissued the DVO against the ex-husband for a third time, to be effective through December of 2013. *Id*. On appeal, the ex-husband argued that the evidence was inadequate to reissue the DVO. *Id*. At the evidentiary hearing, the ex-wife testified that her ex-husband had violated the DVO multiple times in the past, including in 2010 when he sent her an angry email, and had persisted in threatening behavior towards her. *Id.* at 209. Moreover, the ex-wife testified that she believed a pending custody action initiated by the ex-husband would heighten his stress level and the chance that he would perpetrate violence against her. *Id*. The trial court found that domestic violence had occurred and was likely to occur again and that "[i]n light of the parties' history and the high emotion exhibited throughout the proceedings," the ex-wife had a "reasonable basis for her fear." *Id*. at 210. Based on those factors, the trial court found that there was a continued need for the DVO. *Id*. at 211.

The *Rupp* Court began by acknowledging that KRS 403.740(4) grants courts the "authority to reissue DVOs even in the absence of additional acts of domestic violence and abuse during the prior period." *Id*. at 208 (quoting *Kingrey v. Whitlow*, 150 S.W.3d 67, 70 (Ky. App. 2004)). However, the Court further discussed the "great responsibility in determining whether reissuance is warranted due to the significant consequences facing the parties upon the reissuance of a

DVO." *Id*. at 209. Therefore, the Court understood "the law to require some showing of a continued need for the DVO to be presented to the court, although additional acts of domestic violence need not be proven." *Id*. (citing *Baird v. Baird*, 234 S.W.3d 385, 388 (Ky. App. 2007)).

In this case, Sara has not made a sufficient showing of a continued need for the DVO. Unlike in the *Rupp* case, Dion did not violate any DVO issued against him with regard to Sara or contact Sara in any way after the issuance of the DVO at issue in this case. There is a complete and total absence of any violence or threatening behavior on Dion's part for six years. Moreover, unlike in *Rupp*, the parties do not share children together and therefore have no reason to be in contact with each other. Finally, the evidence shows that Dion wishes to move further away from Sara, limiting the contact between the parties to an even greater extent. Overall, the evidence shows that Dion wants to move on with his life without continually facing the significant burdens placed on him due to the DVO. In this case, the trial court's finding of good cause to support the extension of the DVO was not supported by substantial evidence.

CONCLUSION

For the foregoing reasons, we reverse the Jefferson Family Court's order extending the DVO and remand with instructions to enter an order denying the motion for an extension of the DVO.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Bart McMahon
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