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Commonwealth of Kentucky

Court of Appeals

NOS. 2018-CA-000330-MR & 2018-CA-000331-MR

TROY ROBERT CALVERT — APPELLANT

APPEAL FROM DAVIESS CIRCUIT COURT
FAMILY DIVISION
v. HONORABLE JULIA H. GORDON, JUDGE
ACTION NOS. 17-D-00081-001 & 17-CI-00404

TARA DAWN CALVERT — APPELLEE

NOS. 2018-CA-000744-MR & 2018-CA-000813[1]

TROY CALVERT — APPELLANT

APPEAL FROM DAVIESS CIRCUIT COURT
v. HONORABLE JAY A. WETHINGTON, JUDGE[2]
ACTION NOS. 17-D-00081-001 & 17-CI-00404

TARA CALVERT — APPELLEE

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[1] These two appeals were consolidated per this Court's order on January 9, 2019, to track the domestic violence case and the dissolution proceeding, as was done in the two prior appeals, 2018-CA-000330-MR and 2018-CA-000331-MR. The briefs filed in 2018-CA-000744-MR were also to be filed in 2018-CA-000813-MR rather than separate briefs.

[2] Judge Gordon granted Troy's motion to recuse. R. at 252-53 (17-D-00081-001). The case was transferred to Judge Wethington on April 18, 2018.

AND NO. 2018-CA-001714-MR[3]

TROY CALVERT APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JAY A. WETHINGTON, JUDGE
ACTION NO. 17-D-00081-001 & 17-CI-00404

TARA CALVERT APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: COMBS, GOODWINE, AND TAYLOR, JUDGES.

GOODWINE, JUDGE: In these appeals, Troy Robert Calvert ("Troy") seeks review of three orders of the Daviess Circuit Court finding him in contempt of court and imposing jail time [4] for allegedly violating a protective order. We address these appeals in a single opinion for judicial economy.

[3] Troy filed one appeal from the August 24, 2018 order, as amended October 16, 2018, entered in both the domestic violence case and the dissolution proceeding. Tara did not file a responsive brief in this appeal.

[4] Troy did not seek intermediate relief in any of the appeals. *See* Kentucky Rules of Civil Procedure (CR) 76.33 and *Newell Enterprises, Inc. v. Bowling*, 158 S.W.3d 750, 756-57 (Ky. 2005) (holding that the procedure for review in this Court from an order finding a party in contempt of court is to file a notice of appeal and file a motion for intermediate relief in this Court pursuant to CR 76.33 seeking release from custody).

After careful review, we vacate the January 29, 2018 order; affirm the May 2, 2018 order; and vacate, in part, the August 24, 2018 order, as amended by the October 16, 2018 order. We remand for further proceedings.

BACKGROUND

Troy and Tara Dawn Calvert ("Tara") were married on February 28, 2004 and had two minor children. They separated on April 9, 2017. The next day, Tara filed for an emergency protective order ("EPO"). One week later, she filed for divorce and sole custody of the minor children, then ages 10 and 13. The parties agreed on the terms of the EPO. Troy agreed to: (1) stay 500 feet away from Tara; (2) participate in the children's extracurricular activities with supervision from his father, Bob Calvert; and (3) obtain a complete mental health evaluation with an anger management component and follow recommendations. One month after entry of the EPO, Troy was found in contempt for violating the no-contact provision. The family court imposed a 30-day sanction, probated, provided no further violations occur. Troy filed a motion to alter, amend or vacate.

Meanwhile, the family court entered an order in the dissolution action, on June 8, 2017, granting Troy unsupervised visits with his children per the Daviess Circuit Court guidelines provided he: (1) attend weekly counseling/ therapy sessions with a qualified mental health professional; (2) provide proof of

compliance at least once a month; and (3) comply with all terms of the agreed EPO.

Less than a month later, Tara filed an emergency motion to suspend visitation and appoint a guardian *ad litem* ("GAL") alleging Troy harassed the children about divorce issues. Troy filed a motion for immediate relief and noticed it for July 17, 2017. He alleged Tara had unilaterally interfered with his visitation by not showing up at the meeting place on time and discussing visitation and custody issues with the children.

At the July 17, 2017 hearing, the family court heard: (1) Troy's motion to alter, amend, or vacate the family court's May 17, 2017 order; (2) Troy's motion to hold Tara in contempt for interfering with visitation; and (3) Tara's motion to appoint a GAL and to suspend Troy's visitation. To support his motion to alter, amend or vacate, Troy called Scott Morgan ("Scott") to testify, but the family court stopped the hearing after Scott revealed Troy threatened him to get him to come to court and testify. Troy withdrew his motion to alter, amend or vacate. However, the family court suspended Troy's visitation and contact with the children until further orders of the court stating it had "grave concerns" about Troy's mental stability. *See* Opinion and Order entered January 29, 2018. R. at 99. The family court appointed a GAL and friend of the court and ordered the children to meet with both before July 21, 2017.

On July 21, 2017, the family court entered an order in the domestic violence case ordering Troy to complete a full psychological evaluation with a provider other than the Department of Veterans' Affairs ("VA")[5] and to sign releases. A visitation schedule was set with the children. On August 7, 2017, Troy filed a report dated August 1, 2017 from Kendra Keith Counseling ("Keith"), a mental health professional, who assessed Troy for post-traumatic stress disorder.[6] Troy did not suffer from the disorder. The family court extended the EPO to August 30, 2017.

On August 30, 2017, the parties entered into a partial separation agreement and the family court entered a divorce decree. The family court also heard testimony on the EPO. Troy disputed Tara's claims, but family court found evidence supported domestic violence and granted a Domestic Violence Order (DVO) for one year, which replaced the provisions of the EPO.

Under the August 30, 2017 DVO, Troy was prohibited from (1) any contact or communication with Tara; and (2) being within 500 feet of Tara, including her residence. He was to have a full psychological evaluation from a provider other than the VA and continue seeing a therapist. He could attend church at Masonville Baptist Church at designated times, which required reducing

[5] Troy served in the National Guard approximately twenty years prior to the parties' dissolution.

[6] The VA referred Troy to Keith.

the 500-foot restriction to 50 feet for said purpose. The DVO was in effect for one year and did not list the parties' two minor children as protected parties.

The family court also heard whether Troy should be held in contempt for violating the EPO based on Troy's threat to Scott Morgan to get him to testify. No prior notice was given that this would be a show cause hearing. The family court revoked a weekend of the 30 days previously probated and ordered Troy to pay a fine of $500. He had to spend a weekend in the Henderson County Detention Center and pay the fine within 60 days. R. at 99. However, the family court failed to issue a commitment order.

On September 27, 2017, GAL filed a motion for individual assessments of the children, and the family court entered an order that the children were to continue therapy at Sunrise Children's Services. Troy and Tara were ordered not to discuss counseling with the children nor interfere with it.

Following an incident on December 21, 2017 at Troy's home where his daughter took a video of him screaming at his mother in front of the children, resulting in a welfare check by the police and the police removing the children from his home following a two-hour standoff, the GAL filed a motion to suspend Troy's visitation. On December 22, 2017, the family court signed an emergency *ex parte* order suspending Troy's visitation pending a hearing on January 4, 2018. Troy's counsel withdrew on December 27, 2017.

On January 4, 2018, the family court held a hearing on the GAL's motion to suspend visitation and review the DVO, even though no notice was filed that the DVO had been violated. The DVO did not include the children. Troy was unrepresented at the hearing. The family court heard testimony from Troy and a deputy sheriff. It appointed a public advocate to represent Troy and scheduled another hearing for January 18, 2018. The family court told Troy the hearing would be a show cause hearing, and he had to serve his weekend in jail by then or face contempt. On January 9, 2018, Troy's counsel filed an *ex parte* motion to suspend execution of the sentence previously imposed.

On January 17, 2018, the family court interviewed the minor children in chambers. The GAL was present. Each child was interviewed separately. "Both children described [Troy's] fixation with [Tara], threats [Troy] made against [Tara's] life and that they believe [Troy] has broken into [Tara's] home." R. at 101.

On January 18, 2018, the family court called both the domestic violence case and the dissolution proceeding, stating they were both on for review. The family court told Troy he had the burden of proving by clear and convincing evidence some reason he had not complied with the court's order. Troy's counsel argued his attempts to comply and noted a previously filed verified notice detailing Troy's attempts to comply with the family court's order. R. at 87. Despite this,

the family court found Troy had not completed a full psychological evaluation as previously ordered on July 21, 2017, August 30, 2017, and January 5, 2018. Troy testified he had no insurance and the VA was free. He was now unemployed.[7] The VA referred Troy to Keith, who determined that Troy did not suffer from post-traumatic stress disorder. Additionally, his counsel explained that Troy tried to turn himself in to the Henderson County Detention Center the weekend before the hearing, but the jail would not take him because the family court had failed to issue a commitment order.

The family court orally revoked 90 days probation. The parties immediately pointed out it had only imposed 30 days, probated. The family court then changed Troy's sanction to a revocation of 30 days but added an additional 60 days for failing to comply with the court's orders. The family court entered a commitment order on January 18, 2018 for Troy to serve 90 days and he was taken into custody. The family court entered written findings of fact and conclusions of law on January 29, 2018. [8] These appeals followed.

[7] Troy was a deputy sheriff with the Daviess County Sheriff's Department for seventeen years. He lost his job on May 18, 2017, after the family court's original finding of contempt.

[8] Troy's counsel did not appeal the original finding of contempt when the family court imposed 30 days for Troy's contact with Tara at their daughter's school graduation nor the imposition of a weekend in jail and the $500 fine.

ANALYSIS

1. 2018-CA-000330-MR and 2018-CA-000331-MR.[9]

Troy contends the family court denied him due process in finding him guilty of indirect criminal contempt for failing to do an impossible act. After careful review, we vacate and remand. We are mindful that a trial court has broad authority when exercising its contempt powers; consequently, our review is limited to a determination of whether the court abused its discretion. *Kentucky River Community Care, Inc., v. Stallard*, 294 S.W.3d 29, 31 (Ky. App. 2008); *see also Lewis v. Lewis*, 875 S.W.2d 862, 864 (Ky. 1993). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000); *see also Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). The trial court's underlying findings of fact are reviewed for clear error. *Commonwealth, Cabinet for Health and Family Servs. v. Ivy*, 353 S.W.3d 324, 332 (Ky. 2011).

[9] The same order was entered in both the domestic violence case (17-D-00081-001) and the dissolution proceeding (17-CI-00404).

Under KRS[10] 403.763(1), "[v]iolation of the terms or conditions of an order of protection after the person has been served or given notice of the order shall constitute contempt of court and a criminal offense under this section."

The Kentucky Supreme Court has defined contempt as the willful disobedience of or the open disrespect for the court's orders or its rules. *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996). The purpose of contempt authority is to provide courts with a means for enforcing their judgments and orders. *Smith v. City of Lovall*, 702 S.W.2d 838, 838-39 (Ky. App. 1986). "Contempt may be either civil or criminal, depending upon the reason for the contempt citation." *Crowder v. Rearden*, 296 S.W.3d 445, 450 (Ky. App. 2009).

"A civil contempt occurs when a party fails to comply with a court order for the benefit of the opposing party, while criminal contempt is committed by conduct against the dignity and authority of the court." *Smith*, 702 S.W.2d at 839. "It is not the fact of punishment but rather its character and purpose, that often serve to distinguish civil from criminal contempt." *Burge*, 947 S.W.2d at 808 (internal quotation marks and citation omitted).

Criminal contempt is divided into two categories: direct and indirect. *Id.* Direct contempt is committed in the presence of the court and may be punished summarily without a fact-finding function because all the elements of the offense

[10] Kentucky Revised Statutes.

are within the personal knowledge of the court. *Id.* Indirect contempt is committed outside the presence of the court and may be punished only after a hearing that satisfies due process. *Id.* A finding of indirect contempt requires the presentation of evidence "to establish a violation of the court's order." *Id.* The violation of a court order is not an exhaustive example of indirect criminal contempt. *See Mitchell v. Commonwealth*, 206 Ky. 634, 268 S.W. 313 (1925); *Brannon v. Commonwealth*, 162 Ky. 350, 172 S.W. 703 (1916).

Commonwealth v. Pace, 15 S.W.3d 393, 395 (Ky. App. 2000), holds that indirect contempt may be punished only in proceedings that comport with due process. Courts must assess due process by determining whether "notice [is] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mulane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired . . . ." *Cole v. State of Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 96 L.Ed. 644 (1948). "Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." *Lankford v. Idaho*, 500 U.S. 110, 126, 111 S.Ct. 1723, 1732, 114 L.Ed.2d 173 (1991).

"When the contempt is criminal in nature, . . . all the elements must be proven beyond a reasonable doubt." *Brockman v. Commonwealth*, 185 S.W.3d 205, 208 (Ky. App. 2005). A party is entitled to a jury trial on the disputed facts related to whether he is guilty to contemptuous conduct if the fine is "serious" rather than "petty", and that determination will be made "within the context of the risk and possible deprivation faced by a particular contemnor." *Id.* (quoting *Int'l Assoc. of Firefighters, Local 526, AFL-CIO v. Lexington-Fayette Urban Cty. Gov't*, 555 S.W.2d 258, 260 (Ky. 1977))

"Whether civil or criminal, a party cannot be punished for contempt for [his] failure to perform an act which is impossible. *Blakeman* [*v. Schneider*, 864 S.W.2d 903, 906 (Ky. 1993)]. The inability to comply must be shown clearly and categorically by the defendant, and the defendant must prove he took all reasonable steps within [his] power to insure compliance with the court's order." *Crowder*, 296 S.W.3d at 450-51.

The family court concluded Troy had a long history of not following the court orders. Troy did not appeal the first two findings of contempt.

At the January 4, 2018, hearing on the GAL's motion to suspend visitation, the family court also called the domestic violence case for review even though no notice was filed that the DVO had been violated. The children were not protected parties under the DVO. Troy was unrepresented at the hearing, but the

family court heard testimony from Troy and a deputy sheriff. It appointed a public advocate to represent Troy and scheduled another hearing for January 18, 2018. At that time, the family court told Troy the hearing would be a show cause hearing, and he had to serve his weekend in jail by then or face contempt. On January 9, 2018, Troy's counsel filed an *ex parte* motion to suspend execution of the sentence previously imposed.

At the January 18, 2018 hearing, Troy's counsel argued his attempts to comply and had previously filed a verified notice detailing Troy's attempts to comply with the family court's order. R. at 87. Despite this, the family court found Troy had not completed a full psychological evaluation as previously ordered on July 21, 2017, August 30, 2017, and January 5, 2018. As previously noted, Troy testified he had no insurance and the VA was free. He lost his job as a Daviess County deputy sheriff on May 18, 2017, following the first finding of contempt. The VA referred him to Keith. Troy's counsel subsequently requested KRS Chapter 31 funds for an expert, but the family court did not sign said order.

Additionally, Troy's counsel explained that he tried to turn himself in to the Henderson County Detention Center the weekend before the hearing, but the jail would not take him because the family court had failed to issue a commitment order. The family court noted it had allowed Troy months to comply and had he made a sincere effort, he could have complied. Troy could not have complied with

the request to turn himself in without a commitment order. The family court signed a commitment order on January 18, 2018, for Troy to serve 90 days and he was taken into custody.

At the time of the show cause hearing, the family court noted it had given Troy approximately six months to comply with its orders. However, at that time, the family court had neither signed a commitment order nor signed the tendered order for KRS Chapter 31 funds for the expert to complete the full psychological evaluation even after declaring Troy in need of a public advocate. Thus, we agree with Troy that it was impossible for him to have complied with either of the family court's directives and to hold him in contempt on January 18, 2018, and remand him to custody was an abuse of discretion. *Blakeman*, 864 S.W.2d at 906.

Contempt proceedings address whether the contemnor violated a court order, whether the contemnor is vested with a valid defense, and fashioning a remedy. *Ivy*, 353 S.W.3d at 332. CR 52.01 states in pertinent part, "Findings 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." Furthermore, findings of fact are clearly erroneous only if they are manifestly against the weight of the evidence.

The family court's findings of fact state:

> At a review on January 4th, 2018, the Court ordered [Troy's] visits with his children to remain suspended. [Troy] was again ordered to serve the weekend of incarceration that was previously imposed by the Courts [sic] revocation of his
> probation and for the third time ordered to provide a full psychological evaluation to this court.
>
> On January 17th, 2018 the minor children were interviewed by the Court and the Guardian Ad Litem in chambers. Each child was interviewed separately. Both children described [Troy's] fixation with [Tara], threats [Troy] has made against [Tara's] life, and that they believe [Troy] has broken into [Tara's] home.
>
> At a show cause hearing on January 18th, 2018 [Troy] did not present the Court with a full psychological evaluation. Instead, [Troy] had a copy of a mental health assessment from Kendra Keith Counseling that he had previously filed with the Court in August 2017. [Troy] also testified as to why he was not able to serve the weekend at Henderson County Detention Center. According to [Troy], on Friday, January 12th, when he attempted to turn himself in, the jail would not accept him. There is a hand-written note from Deputy Herron, which states that the jail would not accept [Troy] without a warrant. The Court ordered that [Troy's] original 30-day sentence was imposed, and he was sentenced to an additional 60-days of incarceration. [Troy] was immediately taken into custody by Daviess County Sheriff's Deputies.

R. at 100-101. The family court reasoned that Troy had five months to serve his weekend in jail. On the one hand, the family court said that Troy's only evidence was a hand-written note from Deputy Herron, which stated that the jail would not accept him without a warrant yet intimated that Troy should have subpoenaed the

deputy to corroborate his story. The family court further found that had Troy bothered to follow the court's order anytime in the previous five months, he would have realized that he couldn't serve his time in Henderson without additional paperwork—apparently acknowledging the court had not signed a commitment order. No matter when Troy presented himself to the jail, they would not have taken him. Moreover, following the January 18, 2018 show cause hearing, Troy was remanded to custody to serve the 90 days imposed after the family court signed a commitment order.

"The Court finds that there was no sincere effort made by [Troy] to follow its orders and therefore orders [Troy] to an additional 60 days of incarceration, which may encourage him to take seriously the orders of this court and complete a full psychological evaluation." R. at 103. We note the family court found Troy to be indigent and in need of a public advocate, yet the family court denied or refused to sign an order wherein he requested KRS Chapter 31 funds to retain the very expert that could have conducted the full psychological evaluation. "As the Court noted during the hearing . . . [Troy] has consistently played mental games with the court and tried to get around following orders." R. at 103. At no time did the family court address funding for an expert to conduct the full psychological evaluation.

Moreover, nowhere in its findings of fact and conclusions of law does the family court explain why it imposed an additional 60-day sanction for contempt. When it orally announced it was revoking 90 days, the parties immediately informed the court that its prior order only imposed a sanction of 30 days. It stated at that time that it was revoking the 30 days and imposing an additional 60, without an explanation of why the additional days were warranted. The punishment for the Scott Morgan threat was a suspension of Troy's visitation "out of grave concerns" for his mental state. R. at 99.

The family court's findings were not supported by substantial evidence and, thus, clearly erroneous. The imposition of 90 days for contempt, without an explanation for imposing the additional 60 days, was an abuse of discretion. Thus, we vacate the January 29, 2018, order and remand with instructions to dismiss the contempt.

2. 2018-CA-000744-MR & 2018-CA-000813-MR.

Approximately one month after Troy filed his notice of appeal in 2018-CA-000330-MR and 2018-CA-000331-MR, Tara filed a motion to amend her prior DVO using AOC[11] Form 276. She stated "Petitioner wants to add their two children back on to the DVO and extend DVO 3 years. Drop church." That same day, Tara completed, in part, AOC Show Cause Order, Form 275.5. Therein,

[11] Administrative Office of the Courts.

she stated "Troy followed son and therapist to counseling office. Son does not want to go to school." Tara signed the back of the order and her signature was notarized by a deputy clerk. The family court signed the order and set the matter for a contempt hearing on April 18, 2018 at 2:00 p.m.

At the hearing, Troy asked Judge Gordon to recuse, citing bias. She recused herself and the case was transferred to Judge Jay A. Wethington, Division 1, Daviess Circuit Court. The case was rescheduled for a hearing on April 19, 2018, at 3:30 p.m. Prior to the scheduled hearing, Troy filed a motion to strike Tara's motion to amend, arguing it did not afford him proper notice or opportunity to be heard. Troy also filed a motion to reconsider and set aside the April 10, 2018 show cause order, arguing they failed to afford him notice and an opportunity to be heard.

At the hearing, prior to taking testimony, the circuit court denied Troy's motions to strike and to reconsider. Two witnesses were called: Tara and the children's therapist, Audra Harley, of Sunrise Children's Services. The testimony of both parties established independent violations of the August 30, 2017 DVO. Tara testified that she observed Troy driving past her home on April 8, 2018. She testified concerning the children's fear of Troy, noting that her daughter has made her barricade the doors, and her son sleeps so that his bed points across the hallway toward her so that he can check on her. Additionally, Tara noted Troy

was released from custody on the prior contempt violation on April 4, 2018—a few days before the current violation.

Audra Harley testified that on April 9, 2018, she was picking up the parties' son from a counseling appointment and saw Troy's vehicle on Garden Drive. Harley stated that after she picked the child up, she started driving toward the stop sign and recognized Troy's silver Ford Focus and saw his face. She stated that she again noticed him behind her as she was driving and saw his face on Highway 231 in front of Owensboro Christian Church. After arriving with the child at Sunrise Children's Services, she again observed Troy's silver Ford Focus driving through the parking lot. She noted that the child was aware of Troy's presence. Following Tara's case, the circuit court asked Troy's counsel, "Do you want to present any testimony or further argument today?" Troy's counsel responded: "Your honor, we're not prepared to do that." However, at no time during the hearing did Troy object to Tara's proof or request a continuance at the end of the testimony.

Based upon the testimony, the circuit court found Troy violated the DVO by being within 500 feet of Tara's residence on April 8 and April 9, 2018. The circuit court sentenced Troy to 120 days incarceration with 30 days to serve. The remaining 90 days were suspended. The May 2, 2018 order of contempt was entered in both cases. The circuit court granted Tara's motion to amend the DVO

in part, adding the two minor children as protected parties. The circuit court dropped the church as an exception to the 500-foot prohibition. The circuit court denied Tara's motion to extend the DVO three years. The amended DVO was entered April 20, 2018.

Troy argues the circuit court erred when it amended the parties' DVO and held him in contempt under the show cause order without giving him notice and a meaningful opportunity to be heard. Tara's motion to amend sought to: (1) add the parties' two children as protected parties on the DVO; (2) extend the DVO for three years; and (3) drop the church as an exception to the 500-foot restriction around her residence. Troy's arguments were properly preserved. The appeals in 2018-CA-000744-MR and 2018-CA-000813-MR followed.

Although listed in his notice of appeal and in the designation of record attached to his brief, Troy fails to attach the April 20, 2018 amended domestic violence order and the May 2, 2018 order of contempt in violation of CR 76.12. *See Koester v. Koester*, 569 S.W.3d 412, 413 (Ky. App. 2019) (citing CR 76.12). First, Troy's brief does not comply with CR 76.12(4)(c)(vii). Troy failed to "place the judgment, opinion, or order under review immediately after the appendix list so that it is most readily available to the court." Troy was clearly aware of this fact as his notice of appeal lists both orders, yet he failed to include the orders in his brief.

Additionally, Troy failed to "set forth where the documents may be found in the record." *Id.* The May 2, 2018 order of contempt was included in Tara's appendix.

In his motion to strike and on appeal, Troy argues that Tara's motion to amend prior domestic violence order was insufficient under CR 7.02 to place him on notice of the allegations and to allow him to present a defense at the April 19, 2018 hearing. He argues that the circuit court erred in proceeding with the hearing. The circuit court noted at that beginning of the hearing that it would proceed with testimony but that if after hearing same Troy and his counsel wished additional time to respond or present evidence, it would consider a continuance. Troy failed to request a continuance after hearing the testimony.

When reviewing the trial court for proper application of the law to the facts at hand, review is *de novo*. *Drake v. Commonwealth*, 222 S.W.3d 254, 256 (Ky. App. 2007). Otherwise, the trial court's findings of fact should be reviewed for abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945 (citation omitted).

Under Kentucky law, the "civil rules [of procedure] . . . apply to domestic violence proceedings." *Wolfe v. Wolfe*, 393 S.W.3d 42, 45 (Ky. 2013). Under CR 7.02(1), "[a]n application to the court for an order shall be by motion

which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Domestic violence cases are no exception to this civil pleading requirement. *See e.g. Rankin v. Criswell*, 277 S.W.3d 621, 626 (Ky. App. 2008).

The evidentiary and due process requirements for amending a DVO are much more relaxed. *See Kingrey v. Whitlow*, 150 S.W.3d 67 (Ky. App. 2004) (finding that evidentiary requirement to amend/extend DVO under KRS 403.750(2) is less rigorous than KRS 403.750(1) preponderance of evidence standard).

However, the circuit court found by a preponderance of the evidence that Troy willfully violated the 500-foot restriction of the DVO and ordered him to serve 30 days of the 120-day sentence, with the remaining 90 days suspended. R. at 271. The circuit court granted Tara's motion to amend the DVO to add the parties' two minor children but denied her request to extend the DVO for three years. Based on a review of the testimony, we cannot find that the circuit court abused its discretion. Thus, we affirm the circuit court's April 20, 2018 amended DVO and its May 20, 2018 order of contempt.

3. 2018-CA-001714-MR

In this final matter, on June 12, 2018, while the other appeals were pending, Troy agreed to wear an ankle monitoring device to assure Tara he was

remaining 500 feet away and to protect himself from false allegations. On August 15, 2018, as the DVO was about to expire, Tara filed another motion to amend the parties' DVO, alleging Troy had been incarcerated on two prior occasions for violating the terms of the court's orders. Tara alleged Troy was monitoring her whereabouts. She believed he was in Walmart on July 29, 2018 at about 2:00 p.m. while she was there. She requested that the court extend the DVO to its maximum duration. She did not file a motion for or affidavit in support of a show cause hearing.

The circuit court heard the motion to extend the DVO on August 22, 2018. At said hearing, Jason Pagan, owner and operator of the Catch N' Release Program that managed Troy's voluntary ankle monitor, testified he monitored Troy for 32 days and, in that time frame, his records indicated that Troy **never** came within 500 feet of Tara's residence. He further testified Troy had been on nearby Harmony Road on eighty occasions during the timeframe. However, Harmony Road is not a restricted location.

Tara testified that she did not see Troy at Walmart, but only had reason to believe he was there after she received an email from Redbox DVD rental service that contained a receipt for a DVD which she had not rented. The electronic receipt was from a rental that Troy had made on a marital Redbox account that was apparently still linked to Tara's email.

At the close of the testimony, the circuit court granted Tara's motion to extend the DVO for two years. However, the court went further and found Troy in contempt of the court's DVO. It imposed a 180-day jail sentence on Troy, finding that he had willfully committed unauthorized communication and stalking, in violation of the DVO. Troy objected on the basis that testimony taken was insufficient to meet the criminal definition of stalking, but the objection was overruled. Troy was taken into custody immediately after the hearing.

In its August 24, 2018 order, the circuit court clarified that its ruling was based on a finding of unauthorized communication and "stalking" under the KRS 508.130 definition of "stalking" which the court's order defined as "an intentional course of conduct directed at a specific person or persons which serves no legitimate purpose other than to seriously harm, annoy, intimidate or harass." R. at 359-61 (DVO) and R. at 362-65 (dissolution). Contrary to the testimony that was taken at the hearing, the circuit court's order stated that "[Tara] testified that she thought she saw [Troy] in the parking lot of Walmart . . . ." R. at 364.

On August 31, 2018, Troy filed a motion to alter, amend or vacate the court's order, requesting various relief: (1) to remove the finding of unauthorized communication that was made in relation to the Walmart incident; and (2) clarify whether it had exercised criminal or civil contempt. The circuit court sustained

Troy's request by order dated October 16, 2018. It withdrew its factual finding regarding Walmart. R. at 427-28.

Troy asked the court to clarify whether it had exercised criminal or civil contempt; and, to the extent the court had exercised civil contempt, Troy asked the court to specify the manner he could purge himself of contempt, citing *Ivy*, 353 S.W.3d at 334. To the extent that the court had exercised criminal contempt, Troy asked the court to vacate the contempt order because due process in the form of notice and an opportunity to be heard had not been provided in contravention of *Cooke v. United States*, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925).

Troy argued Tara had only filed a motion to amend their DVO, not a motion to show cause or similar contempt-based motion. Accordingly, Troy argues there was no notice that he would be defending against contempt. Rather, notice was only provided to Troy that he would be defending against the amendment/extension of the DVO.

On October 16, 2018, the circuit court clarified its August 24, 2018 order finding Troy in indirect criminal contempt. It stated he was given sufficient notice of the allegations against him and an opportunity to be heard in relation to those allegations, based upon the details contained in Tara's motion to amend. The circuit court found that its exercise of its contempt powers over Troy, *sua sponte*,

was within the scope of its authority at the hearing, even absent a motion to hold him in contempt. Appeal 2018-CA-001714-MR followed.[12]

As noted above, the evidentiary and due process requirements for amending a DVO are much more relaxed. *See Kingrey*, 150 S.W.3d at 67 (finding that evidentiary requirement to amend/extend DVO under KRS 403.750(2) is less rigorous than KRS 403.750(1) preponderance of evidence standard). However, that is not the case in contempt proceedings.

Indirect contempt is committed outside the presence of the court and may be punished only after a hearing that satisfies due process. *Burge*, 947 S.W.2d at 808. A finding of indirect contempt requires the presentation of evidence "to establish a violation of the court's order." *Id.* The violation of a court order is not an exhaustive example of indirect criminal contempt. *See Mitchell*, 268 S.W. at 313; *Brannon*, 172 S.W. at 703.

Indirect criminal contempt may be punished only in proceedings that comport with due process. *Pace*, 15 S.W.3d at 395. Courts must assess due process by determining whether "notice [is] reasonably calculated, under all the

[12] Troy has served the entirety of his 180-day sentence on the court's August 24, 2018 order of contempt. Nevertheless, Troy believes this appeal is necessary not only to correct the record in the underlying divorce proceedings, which are still ongoing, but also to preserve the integrity of contempt proceedings throughout the Commonwealth and affirm basic principles of due process and fair proceedings. We agree. "Testing the sufficiency of the evidence on which a DVO has been granted is never moot because entry of a DVO follows the alleged perpetrator." *Calhoun v. Wood*, 516 S.W.3d 357, 360 (Ky. App. 2017) (quoting *Caudill v. Caudill*, 318 S.W.3d 112, 114 (Ky. App. 2010). Tara did not file a responsive brief.

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mulane*, 339 U.S. at 314, 70 S.Ct. at 657. "No principle of procedural due process is more clearly established than that of notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired . . . ." *Cole*, 333 U.S. at 201, 68 S.Ct. at 517. "Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." *Lankford*, 500 U.S. at 126, 111 S.Ct. at 1732.

In granting Tara's amended DVO and finding Troy in contempt, the circuit court reasoned that Troy had stalked Tara. Troy contends he was denied due process and the finding was not supported by the evidence. We agree. Pagan testified that Troy did not violate the 500-foot restriction in the DVO during the time he voluntarily wore an ankle monitor. Yet, the circuit court found that his being on a nearby street not restricted by the DVO 80 times in 32 days constituted stalking.

KRS 508.140(1)(b) states:

A person is guilty of stalking in the first degree,

(a) When he intentionally:

1. Stalks another person; and
2. Makes an explicit or implicit threat with the intent to place that person in reasonable fear of:

a. Sexual contact as defined in KRS 510.010;
b. Serious physical injury; or
c. Death; and

(b) 1. A protective order has been issued by the court to protect the same victim or victims and the defendant has been served with the summons or order or has been given actual notice[.]

The term "stalk" as used in KRS 508.140(1) is defined as follows:

(1)(a) To "stalk" means to engage in an intentional course of conduct:

1. Directed at a specific person or persons;
2. Which seriously alarms, annoys, intimidates, or harasses the person or person; and
3. Which serves no legitimate purpose.

(b) The course of conduct shall be that which would cause a reasonable person to suffer substantial mental distress.

(2) "Course of conduct" means a pattern of conduct composed of two (2) or more acts, evidencing a continuity of purpose.

KRS 508.130.

At issue here is whether Troy met the definition of "stalk" as defined in KRS 508.130. We cannot agree that Troy's actions constituted stalking simply by being on a nearby street outside the 500-foot restricted perimeter. There was absolutely no evidence that subsection (2) of first-degree stalking was met. There was no testimony that Troy made an explicit or implicit threat, even it if could be

argued that he had no legitimate purpose for being on a nearby street 80 times in 32 days, and that these multiple times satisfied the "course of conduct" prong.

Contempt proceedings address whether the contemnor violated a court order, whether the contemnor is vested with a valid defense and fashioning an appropriate remedy. *Ivy*, 353 S.W.3d at 332. We agree with Troy on both issues raised in this appeal. First, he was denied due process by lack of proper notice to show cause on the charge of contempt and a meaningful opportunity to be heard. Even if proper notice was given, the family court's finding of stalking was not supported by substantial evidence, and the imposition of a 180-day sanction was an abuse of discretion. *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007).

In deciding as we do, we further rely on CR 76.12(8)(c), which permits us three courses of action upon the failure of an appellee to file a brief (as Tara failed to do in this case):

> If the appellee's brief has not been filed within the time allowed, the court 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).

We believe Troy's brief reasonably appears to sustain such an action and, therefore, we vacate the portion of the circuit court's order entered August 25,

2018, and amended October 16, 2018, entitled "Order of Contempt" insofar as its finding Troy in contempt and sentencing him to serve 180 days. The portion of the order extending the DVO two years is affirmed.

ALL CONCUR.

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