RENDERED: NOVEMBER 8, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001301-ME

GARRY WILLIAMS APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LAUREN ADAMS OGDEN, JUDGE
ACTION NO. 18-D-502132-001

ABRIA WILLIAMS APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND LAMBERT, JUDGES.

DIXON, JUDGE: The Appellant, Garry Williams, appeals the domestic violence order ("DVO") entered by the Jefferson Family Court on August 7, 2018. After careful review of the record and applicable law, we vacate the judgment of the family court and remand this matter for further proceedings consistent with this opinion.

On July 20, 2018, Abria Williams filed a petition for an order of

protection against her former husband, Garry, wherein she alleged, among other actions, what she deemed to be stalking. She requested emergency protection for herself and the parties' three minor children. The family court entered an emergency protective order ("EPO") on behalf of Abria and the children against Garry and issued a summons for Garry to appear at the hearing on Abria's petition on July 31, 2018.

While the summons was served upon Garry, the July 31, 2018, hearing did not proceed as scheduled because the Jefferson County Courthouse was unexpectedly closed for the day. The hearing was rescheduled for August 14, 2018, and a second summons was issued for Garry. Prior to that date, for reasons unknown to this Court, the hearing was rescheduled a second time for August 7, 2018. Summons was issued on August 2, 2018, for Garry to appear for the August 7, 2018, hearing; however, the record contains no proof that this summons was served upon Garry.

On August 7, 2018, Abria appeared, but Garry did not. The family court stated on the record that Garry was served with the summons on July 25, 2018, and when the hearing was rescheduled, a notice would have been sent to him at his last known address. The record contains no proof of such a notice, other than the unserved summons issued on August 2, 2018. The hearing consisted only of the family court reading the narrative from Abria's petition aloud. At no point

was Abria placed under oath or asked any questions by the family court, nor did Abria present any evidence in support of her petition. The family court then entered a DVO finding that "it was established, by a preponderance of the evidence, that an act(s) of domestic violence and abuse . . . has occurred and may again occur"; protecting Abria and the parties' three minor children; and ordering that Garry's visitation with the children be supervised.

Subsequently, Garry timely filed a motion pursuant to CR[1] 59.05 to alter, amend, or vacate the DVO on the basis that he was not served with the summons to appear at the August 7, 2018, hearing and had no opportunity to be heard. The family court denied the motion, finding Garry "was properly before the court" for the August 7, 2018, hearing.[2] This appeal followed.

Preliminarily, we note that Abria filed a brief that is noncompliant with CR 76.12, as it does not contain "ample references" to the record and only sparse citations to pertinent authority. "Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only[.]" *Hallis v. Hallis*,

[1] Kentucky Rules of Civil Procedure.

[2] The family court's denial of Garry's CR 59.05 motion was also based upon his failure to file an affidavit in support of the motion. However, "affidavits are not required in support of a CR 59.05 motion to alter, amend or vacate." *Gullion v. Gullion,* 163 S.W.3d 888, 890 (Ky. 2005).

328 S.W.3d 694, 696 (Ky. App. 2010). Garry alleges that these are sufficient grounds for striking Abria's brief. Although Abria's brief is certainly lacking in citations to the record and relevant authority, we elect to ignore the deficiencies and proceed with our review, but strongly suggest that the best practice is to file a brief that is fully compliant with the requirements of CR 76.12.

On appeal, Garry raises the following arguments: (1) the family court lacked personal jurisdiction to consider the DVO and, without service of the summons for the August 7, 2018, hearing, entry of the DVO violated his right to due process; and (2) evidence did not support entry of the DVO against him.

"Because the determination of whether a court possesses jurisdiction over a party is a legal question, we will review the issue *de novo*." *Auto Owners Ins. Co. v. Consumers Ins. USA, Inc.*, 323 S.W.3d 781, 783 (Ky. App. 2010). We review factual determinations for clear error. *Dunn v. Thacker*, 546 S.W.3d 576, 578 (Ky. App. 2018).

First, Garry argues that, because he was not properly served with a summons for the August 7, 2018, hearing, the family court lacked personal jurisdiction over him and violated his due process rights by entering the DVO. Abria contends that the family court was not required to have proof Garry was served with the summons prior to proceeding with the hearing on August 7, 2018. She argues that because Garry was served with the summons to appear on July 31,

2018, thereafter it was his responsibility to "monitor court activity and the scheduling of hearings[.]" Abria cites no relevant authority in support of this position, and it is without basis in law.

For the family court to obtain personal jurisdiction over a party, proper service of process is necessary. *Thurman v. Thurman*, 560 S.W.3d 884, 886 (Ky. App. 2018). KRS[3] 403.730 sets out the procedure for service of summons in domestic violence actions. In relevant part, the statute requires the following:

> Service of the summons and hearing order under this subsection shall be made upon the adverse party personally and may be made in the manner and by the persons authorized to serve subpoenas under Rule 45.03 of the Rules of Civil Procedure. A summons may be reissued if service has not been made on the adverse party by the fixed court date and time.

KRS 403.730(1)(b). Once the parties are both properly before the family court, the court is authorized by statute to grant a continuance of the hearing on the petition. *Guenther v. Guenther*, 379 S.W.3d 796, 798, n.2 (Ky. App. 2012).

In the case at hand, the family court had personal jurisdiction over the parties. Review of the record on appeal indicates that Garry was properly served with a summons to appear at the July 31, 2018, hearing. Upon proper service of this summons, the family court obtained personal jurisdiction over Garry.

[3] Kentucky Revised Statutes.

Although the family court had personal jurisdiction over the parties, Garry was not given notice of the August 7, 2018, hearing. "[N]otice and an opportunity to be heard are the basic requirements of due process." *Storm v. Mullins*, 199 S.W.3d 156, 162 (Ky. 2006) (citation omitted). Due process further requires that a DVO not be entered without a full hearing on the allegations contained in the petition. *Hawkins v. Jones*, 555 S.W.3d 459, 462 (Ky. App. 2018) (citation omitted). This requires the family court to allow "each party to present evidence and give sworn testimony before making a decision." *Id.* (quoting *Holt v. Holt*, 458 S.W.3d 806, 813 (Ky. App. 2015)). Furthermore, if a party is given notice of a proceeding but fails to appear or object, he waives any due process claim. *Storm*, 199 S.W.3d at 162.

Garry did not receive notice of the hearing when it was continued to August 7, 2018. The record shows that summons was issued for him to appear at the August 7, 2018, hearing; however, the record contains no proof that Garry was served with the summons, nor proof that he was notified by the family court of the rescheduled hearing in any other manner. Because Garry did not receive notice, nor did he appear at the hearing, we conclude that the family court was unable to "make a finding of domestic violence based upon a preponderance of the evidence." *Hawkins*, 555 S.W.3d at 462 (citation omitted). For this reason, the DVO must be vacated. After giving proper notice to the parties of a new hearing

date, the family court must conduct a full evidentiary hearing upon the allegations in Abria's petition.

Furthermore, although we express no opinion as to the sufficiency of the evidence upon which the family court based the DVO, we note "a DVO 'cannot be granted solely on the basis of the contents of the petition.'" *Id.* at 461-62 (quoting *Rankin v. Criswell*, 277 S.W.3d 621, 625 (Ky. App. 2008)). Where "absolutely no testimony or other evidence in support of the petition" is presented by the petitioner or solicited by the family court, this Court has deemed such a hearing to be "woefully inadequate" to support entry of a DVO. *Rankin*, 277 S.W.3d at 625-26.

For the foregoing reasons, we vacate the DVO and remand this matter to the Jefferson Family Court for a full evidentiary hearing consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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