

RENDERED: APRIL 12, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001597-ME

JOSEPH MICHAEL GRAPNER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KATHY STEIN, JUDGE
ACTION NO. 18-D-01199-001

DENAISA UNIQUIC GAIL DENNY HARRIS

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, NICKELL, AND K. THOMPSON, JUDGES.

COMBS, JUDGE: Appellant, Joseph Michael Grapner (Joseph), appeals from an Interpersonal Protective Order (IPO) entered against him by the Fayette Circuit Court. For the reasons set forth below, we reverse and remand with instruction to vacate the IPO.

Joseph and the Appellee, Denasia Uniquic Gail Denny Harris

(Denasia),¹ were involved in a dating relationship. On October 14, 2018, Denasia filed a petition for an order of protection, alleging as follows:

On August I broke up with Michael Grapner, but agreed to be friends with him. At first he was okay with it, but he started to act aggressive toward the situation. He would text me continuously, even when I asked him to stop. He then started to show up at my house (unannounced). He payed [*sic*] my cell phone bill and then said that he was doing it because he knew we'd get back together. When I offered to pay him back he said no. He showed up at my job one day and gave me a bag of pictures and a gift card. Once I asked him to leave me alone he messaged my friends and began to blow up on me. He left me alone for a while then he once again got mad and threatened to post unsolicited nude photos and videos of myself on social media.

He stopped blowing up for a while but he then began to blow up on me and calling me nonstop until I answered his phone calls. Here recently (week of Oct. 13th) he has been messaging and calling me off of "text now" numbers and harassing me/threatening on Thursday October 11, 2018 he had other family members message me and implying that he was going to hurt himself physically and that it would be my fault.

At first, I wasn't afraid of his outburst, but on October 13th/14th I started receiving messages off of the unknown numbers that asked if I was "having fun" and that I didn't "look busy" while I was home alone. I then received messages stating that I was going to get hurt and needed to watch my back. He then sent me a text message of my current address and threatened to harm me, my three roommates and 3 of my family members.

¹ Appellee's name is spelled various ways in the record. We use "Denasia", which is the spelling in the petition for order of protection.

My new address has not ever been disclosed with the respondent.

On October 18, 2018, the court conducted a hearing on the petition.

Both parties appeared, *pro se*. We have reviewed the video recording of that proceeding. Denasia testified along the lines of the allegations in her petition. In October 2018, she began getting text messages from anonymous numbers. At first, she did not think anything of it. She asked Joseph if he had given her number out to anyone, and he said, “No.”

The messages continued but started to become more threatening and harassing. Denasia testified she was led to believe it was Joseph because of the content of the messages (“he says stuff that he has mentioned to [her] prior in [the] relationship . . .”) and because of the punctuation. Joseph testified that he was asleep at the times she received the messages as shown on his Fitbit. Joseph “absolutely” denied sending the messages and had offered to let her go through his phone -- as he also offered to the court.

The court asked Denasia if she had her phone with her; she responded that she did and that she also had screenshots of the messages. The video recording reflects that Denasia handed what presumably are photocopies of the screenshots to the bailiff and that the court reviewed them for the next few minutes. However, the photocopies are not of record. The court then questioned the parties about some of the messages. Near the end of the hearing, after the court

announced that it was issuing an IPO, the court stated: “Sir, you have admitted to certain statements that she has provided to me to read and ... well, what I read there and there are other things that I did not read out loud”

On October 18, 2018, the court entered an IPO on a Form AOC 275-3, finding that “it was established by a preponderance of the evidence, that an act(s) of . . . stalking . . . has occurred and may again occur[.]” The court ordered that Joseph be restrained from committing additional such acts; that he refrain from any contact or communication with Denasia; that he remain at least 500 feet away from her and from the locations identified in the order; that he be restrained from disposing of or damaging any property of the parties; and that he not possess, purchase or attempt to possess or obtain a firearm during the duration of the IPO, which remains in effect until October 18, 2021.

On October 28, 2018, Joseph, by counsel, filed a notice of appeal to this Court. On appeal, he contends: (1) that the trial court did not conduct a full and proper evidentiary hearing, thus violating his due process rights; and (2) that no IPO should have been issued based upon the insufficient evidence presented. In particular, Joseph contends that Denasia failed to provide specific details to support her testimony. Joseph explains that Denasia claimed to have received texts from anonymous numbers, but she provided no proof that Joseph had sent them. Only Denasia’s unsubstantiated assumption served as the basis for her assertion.

Joseph denied having given Denasia's number to anyone. He had offered to send Denasia screen shots of his texts/emails and to provide passwords to his accounts to show that he had not done so. Joseph further contends that he was permitted to testify only on a limited basis. When he was asked by the court if he sent the anonymous text messages, he "absolutely" denied having done so and offered his phone for the court to search -- just as he had offered it to Denasia. Joseph states that the only proof of a text he actually sent "was one containing a statement about self-harm, never any about threats of harm to [Denasia]."

Joseph notes that the court never asked to see his phone, Fitbit log, or any other proof that he had with him. Instead, the court asked for Denasia's phone, which she provided with screenshots of the messages. Joseph maintains that although he was never permitted to review them, the "court spent a good deal of time reviewing these and never stated what it was reviewing and never entered these into the record." Joseph cites *Heaston v. Smith*, No. 2013-CA-000113-ME, 2013 WL 5522825 (Ky. App. Oct. 4, 2013), in which the circuit court considered extrajudicial evidence from the respondent's divorce case without any explanation of what it considered. This Court reversed.

[B]ecause the circuit court failed to fully articulate its decisional basis, it has prevented us from conducting a meaningful appellate review on the merits of [the petitioner's] domestic violence allegations, and we must reverse because this amounts to palpable error affecting [her] substantial rights.

Id. at *8.

Denasia has not filed a brief. In *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky. App. 2007), we explained as follows:

[W]here an appellee does not file a brief, CR^[2] 76.12(8)(c) provides three alternative avenues of action for an appellate court—all essentially punitive to the appellee:

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.

The decision as to how to proceed in imposing such penalties is a matter committed to our discretion.

Having carefully reviewed the record, we elect to exercise our discretion to reverse the trial court’s judgment because Joseph’s brief reasonably appears to sustain such action. CR 76.12(8)(c)(ii).

Therefore, we reverse and remand this case to the circuit court and instruct it to vacate the IPO entered against the Appellant, Joseph Michael Grapner.

² Kentucky Rules of Civil Procedure.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Jason Rapp
Lexington, Kentucky