RENDERED: OCTOBER 25, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001671-ME

HEIDI HILLARD — APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE KATHY STEIN, JUDGE
ACTION NO. 18-D-00882-001

JERVIS W. MIDDLETON — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; SPALDING AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Heidi Hillard appeals from the Fayette Family Court's order dismissing her temporary interpersonal protective order (TIPO) and denying her an interpersonal protective order (IPO) for stalking against Jervis W. Middleton, her former paramour. Hillard argues the family court erred by failing to enter findings of fact, abused its discretion in finding that stalking did not occur

given the evidence, wrongfully excluded evidence and improperly required that she prove she feared Middleton. Because we determine that the family court erred by failing to make any written factual findings and we cannot properly review the order without them, we vacate and remand.

Hillard filed for a TIPO and IPO on August 6, 2018, against Middleton, a sergeant with the Lexington Police Department, on the following basis:

> For over 1 year I have been sexually involved with [Middleton]. Over the past few months I have begun to feel alarmed that he may be watching me as he has known of too many things/coincidences that he shouldn't have. He had admitted to driving by my house multiple times, stolen & went though my cell phone, has shown up places I have been & otherwise known things about me that could have only been overheard. I have questioned this multiple times & voiced my concern to him. About 2 weeks ago, I cut things off for good. On Thursday evening around 11 pm, 8/2, I had company over @ my house. We were sitting on the couch in my living room when my friend noticed there was a man on my roof, laying flat, watching down on us through the window! Believing it was [Middleton], I ran outside only to hear someone jump off my neighbors 10 ft. roof & onto the ground. Moments later, a black SUV peeled away. I call[ed] the police, then call[ed] [Middleton]. Unbeknownst to the situation, he shows up at the scene w/n seconds. Since this event, I have come to realize he is a married man living at home w/his family. B/c of his status & the level of deceit, manipulation & stalking behavior—I fear for the temporary safety of myself & my son.

Hillard was granted a TIPO, which prohibited Middleton from coming within five hundred feet of Hillard and her son and required that his firearms be confiscated.

At a hearing held on August 30, 2018, both parties were represented by counsel and several witnesses were called. While Hillard repeatedly testified that she never feared Middleton, he had never hurt her and she was not physically afraid of him hurting either herself or her son, she eventually clarified she became afraid of him after she saw an unknown person on the roof and concluded it was Middleton spying on her and learned on the following day from a phone call from Middleton's wife that he was still married and living a double life. Hillard testified she wanted an IPO to protect her from the worst-case scenario.

Lieutenant Albert Johnson testified he investigated Middleton for possible misconduct based on Hillard's report and, as a result, determined Middleton had other officers run a license plate check on the man who was with Hillard when she observed the unknown person on the roof. A stipulation was entered that an official investigation was done on Middleton and, based on the findings, Middleton was charged with and there was probable cause to establish

official misconduct in the second degree.[1] The basis for this was that Middleton had other police officers run searches of license plate numbers for him for non-police purposes.

Other witnesses confirmed that Hillard was concerned about Middleton's conduct and whether he was spying on her. However, when they testified about their own personal observations of Middleton's conduct, the conduct they observed was largely innocuous, with Middleton happening to be at the same location as Hillard but not approaching her. While Hillard's witness was able to confirm that he also saw someone on the roof, neither that witness nor Hillard had any proof the person was Middleton.

The family court announced from the bench that Hillard could not prove the person on the roof was Middleton and Hillard failed to sustain her burden to receive an IPO for stalking. The family court requested that the defense prepare an order.

[1] Kentucky Revised Statutes (KRS) 522.030(1) reads in relevant part as follows: "A public servant is guilty of official misconduct in the second degree when he knowingly: (a) Commits an act relating to his office which constitutes an unauthorized exercise of his official functions; . . . or (c) Violates any statute or lawfully adopted rule or regulation relating to his office." It is a Class B misdemeanor. KRS 522.030(2).

On the docket sheet the court stated, "after hearing—dismissed for lack of proof." On the form IPO order the court indicated that the petition was "dismissed withdrawn." The additional findings were "insufficient proof for IPO."

On September 10, 2018, Hillard filed a combined motion to alter, amend or vacate the court's findings of fact and conclusions of law pursuant to Kentucky Rules of Civil Procedure (CR) 59.05 and for more specific findings pursuant to CR 52.02.

On September 19, 2018, an order was entered denying Hillard's petition for an IPO, stating "[t]he Court finds there is insufficient evidence that dating violence and abuse, sexual assault or stalking has occurred and may again occur[.]" That same day, Middleton filed a response to Hillard's motion. On September 20, 2018, the family court denied the motion to vacate through a docket order.

On October 10, 2018, a second identical order was entered denying Hillard's petition for an IPO. That same day, the family court again denied Hillard's motion to vacate.

Hillard argues that the family court erred by failing to comply with CR 52.01 by not entering specific findings of fact. She argues she preserved this error by requesting more specific findings of fact in her September 10, 2018 motion. Middleton argues that because Hillard failed to request factual findings

after the final order denying the IPO was entered that this error was waived pursuant to CR 52.04.

In *Anderson v. Johnson*, 350 S.W.3d 453, 458 (Ky. 2011), the Kentucky Supreme Court reconciled the language of CR 52.04 and CR 52.01 by explaining that when a court fails to make any findings of fact, an objection is not required to preserve such an error for appeal:

> To the extent possible, this Court should read the rules in harmony, rather than in conflict, to avoid rendering any of the language surplusage. This can be done by reading CR 52.01 as creating a general duty for the trial court to find facts, and 52.04 as applying only after the court has complied with its general duty. 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. Thus, CR 52.04 does not conflict with this reading of CR 52.01, because CR 52.04 only bars reversal or remand "because of the failure of the trial court to make a finding of fact on *an issue* essential to the judgment" when a litigant fails to bring it to the court's attention by a written request for a finding.

Therefore, when a trial court only makes a conclusion of law and fails to include any "findings of fact to support this conclusion . . . a request for findings is not necessary for purposes of review" but a request for further factual findings is needed when a trial court makes "good-faith but incomplete findings." *Id.* at 459.

"A bare-bone, conclusory order . . . setting forth nothing but the final outcome, is inadequate and will enjoy no presumption of validity on appeal." *Keifer v. Keifer*, 354 S.W.3d 123, 126 (Ky. 2011) (footnote omitted). Even if a trial court's rationale for its decision is readily determinable from oral findings contained in the record,[2] "compliance with CR 52.01 . . . requires *written* findings." *Id*. *See Castle v. Castle*, 567 S.W.3d 908, 916 (Ky.App. 2019); *Thurman v. Thurman*, 560 S.W.3d 884, 887 (Ky.App. 2018).

[2] We do not believe the oral findings on this record would have been sufficient if reduced to writing. As explained in *Halloway v. Simmons*, 532 S.W.3d 158, 162 (Ky.App. 2017) (citations omitted):

> for [Hillard] to be granted an IPO for stalking, . . . she . . . at a minimum [had to] prove by a preponderance of the evidence that, [Middleton] intentionally engaged in two or more acts directed at [Hillard] that seriously alarmed, annoyed, intimidated, or harassed [her], that served no legitimate purpose, and would have caused a reasonable person to suffer substantial mental distress, and that these acts may occur again. Additionally, [Hillard had to] prove that there was an implicit or explicit threat by [Middleton] that put [Hillard] in reasonable fear of sexual contact, physical injury, or death.

While the factual finding on the roof incident was important, the family court also had to make factual findings on whether other alleged incidents occurred and whether they were sufficient to meet the required standard. *Compare Calhoun v. Wood*, 516 S.W.3d 357, 361 (Ky.App. 2017) (sufficient evidence to establish stalking for IPO) *with Halloway*, 532 S.W.3d at 162 (insufficient evidence to establish stalking for IPO). *See also Morgan v. Commonwealth*, 189 S.W.3d 99, 112 (Ky. 2006), *overruled on other grounds by Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007) (holding that a pattern of two or more stalking acts could not be established where the victim did not know of the first of two acts when it occurred and thus suffered no distress prior to learning of the first act on the occasion of the second act).

The general duty for trial courts to make written findings of fact applies to domestic violence cases. *Castle*, 567 S.W.3d at 916; *Boone v. Boone*, 463 S.W.3d 767, 768-69 (Ky.App. 2015). The justification for such a result also extends to IPO cases.

While we are not unsympathetic to the work load family courts undertake and note that the form order provides little space to write factual findings, factual findings need not be elaborate to enable review. *See Pettingill v. Pettingill*, 480 S.W.3d 920, 925 (Ky. 2015) (holding that specific factual findings on a docket sheet incorporated into a judgment could satisfy a court's fact-finding duty).

We express no opinion on whether Hillard did or did not present sufficient evidence to merit an IPO for stalking or consider her other claimed grounds of error.

Accordingly, we vacate and remand to the Fayette Family Court for entry of a new order setting forth in writing the family court's findings of fact and conclusions of law based upon the evidence that was presented at the evidentiary hearing.

CLAYTON, CHIEF JUDGE, CONCURS.

SPALDING, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

SPALDING, JUDGE, DISSENTING: I respectfully dissent in this matter. I believe the court's order of September 19, 2018 is sufficient to allow this Court to review its decision. Specifically, in Subsection 1 of the order the court found "there is insufficient evidence that dating violence and abuse, sexual assault or stalking has occurred and may again occur." The court, therefore, in Subsection 2 of the order denied the petitioner's petition for an interpersonal protective order. A "court must make written findings to support **the issuance of [a Domestic Violence Order] DVO.**" *Thurman v. Thurman*, 560 S.W.3d 884, 887 (Ky. App. 2018) (emphasis added). The trial court must show its rationale for the decision. *Id*. In the case of *Castle v. Castle*, 567 S.W.3d 908 (Ky. App. 2019), it was reiterated that sufficient factual findings need to be established to allow for the issuance of a DVO.

However, in this matter, we have the contrary situation. KRS 456.060(1) states after "a hearing ordered under KRS 456.040, if a court finds by a preponderance of the evidence that dating violence and abuse, sexual assault, or stalking has occurred and may again occur, the court may issue an interpersonal protective order[.]" The court in its written finding found that there was insufficient evidence that dating violence and abuse, sexual assault or stalking had occurred and may again occur. This is essentially the same language used to support a denial of a petition for protection in Kentucky's standardized form for

such an order contained in Administrative Office of the Courts (AOC) Form 275.3, revised January 2016.[3] The finding in this matter was that the evidence did not support a finding that an act contrary to the statute occurred. That finding sufficiently concluded the case.

This leads to the question of what is a sufficient finding for denial of a petition for an order of protection based on insufficient evidence. In *Burnett v. Burnett*, 516 S.W.2d 330, 332 (Ky. 1974), the then Court of Appeals held when "a motion is denied, the reason necessarily is that the movant did not sustain his burden of showing the required change of conditions. There is no need for findings of evidentiary facts[.]" This holding was reviewed in the case of *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011). In *Anderson*, the court denied a motion for relocation which was based on the language it was not in the best interest of the child to relocate. The court stated that was insufficient because the court did not answer the question of why the court did not believe relocation was in the best interests of the child. *Id*. at 459. Here, the court's finding did answer the question of why the petition was not granted. There was insufficient evidence to prove the case by a preponderance of the evidence. Like the finding contained in

[3] The finding to deny an IPO on AOC Form 275.3 states "it was not 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[.]"

AOC Form 275.3, that is sufficient to support the decision not to grant the order of protection.

I believe it is unnecessary for a trial court to make findings to support non-findings of fact. Such statements may make clearer the thoughts of the trial judge but are really explanations, not findings of fact. Such explanations are not necessary for review of the determination to deny an IPO. The question is, did the court err in not finding the evidence established the grant of an IPO?

The court's written decision clearly provided the rationale for its opinion pursuant to *Thurman*. Based on that order, this Court can review whether that factual decision was clearly erroneous and not supported by substantial evidence as is the standard for evidentiary decisions. *Caudill v. Caudill*, 318 S.W.3d 112, 114-15 (Ky. App. 2010). I do not believe the decision of the court below was clearly erroneous and, therefore, I would affirm the decision of the Fayette Family Court.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Spencer A. Mancillas Lexington, Kentucky	Scott A. Crosbie Eric C. Eaton Lexington, Kentucky