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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001728-ME

PAUL WILLIAM MARTIN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KATHY STEIN, JUDGE
ACTION NO. 18-D-00951-001

DONNA HOPE CONNELLY
AND O.X.C., A MINOR CHILD — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND LAMBERT, JUDGES.

JONES, JUDGE: Paul William Martin appeals, *pro se*, from an interpersonal protective order ("IPO") entered by the Fayette Circuit Court, Family Division, on behalf of Donna Hope Connelly and her daughter, O.X.C.[1]

[1] Also pending before this Court is Martin's motion to strike Connelly's brief. We have addressed the motion by separate order.

The communication at issue in this action involves relatively benign social encounters in public places and emails and texts that, while undesired, were not implicitly or overtly threatening. While Martin's conduct was clearly unwanted and distressing, this fact alone is not sufficient to justify entry of an IPO based on stalking. The IPO statute enacted by our General Assembly requires that stalking behaviors be accompanied by an implicit or explicit threat sufficient to place the individual in reasonable fear of sexual conduct, physical injury, or death. Even though we might agree from a logical standpoint that entry of an IPO was necessary to prevent further unwanted contact, we cannot ignore that the General Assembly plainly intended to require the *additional* threat element. We cannot agree that the record contains evidence that Martin's communications were either explicitly or implicitly threatening. Therefore, we must reverse.

However, we caution that our decision to reverse entry of the IPO should in no way be viewed as an invitation for Martin to continue to pursue the affections of Connelly and her daughter. The record is crystal clear that neither Connelly nor her daughter desires to have any further contact or communication with Martin. He should avoid all future contact with them. Any further efforts by Martin to contact them may not be viewed as benign in light of the parties' history and Connelly and her daughter's clear efforts to sever all ties with Martin.

I. FACTUAL AND PROCEDURAL BACKGROUND

Martin and Connelly were previously in a dating relationship from February 2015 until Connelly ended the relationship in April 2017. Connelly petitioned the family court for an IPO on August 20, 2018. On the basis of her petition, the family court entered a temporary IPO on behalf of Connelly and O.X.C. until such time as a formal hearing could be held.

A hearing was held on October 31, 2018. The family court heard testimony from both parties and Connelly's brother. Prior to the hearing, the family court quashed Martin's subpoena for O.X.C. to testify and subsequently denied Martin's requests for reconsideration of that decision.

Connelly testified to a number of issues during the parties' relationship which prompted her to end the relationship in April 2017. These issues mostly concerned Connelly's belief that Martin desired to recreate his life as a father with her daughter more than he valued his time with Connelly. Aside from two instances when Martin placed his hand on her neck during sex, Connelly did not testify to any physical abuse in the relationship. With respect to these instances, Connelly described the conduct as unwanted, but she did not testify that she was physically harmed or that she believed Martin's intent in engaging in these acts was to hurt her. She also testified to one conversation she had with Martin wherein she expressed that she found it a little "creepy" that they had to walk so

far to reach his car after having dinner out one night. He responded by asking if she was afraid "he was going to cut her up into little pieces." While Connelly found the comment inappropriate and indicative of instability, she did not testify that she perceived it as an implicit or explicit threat. Martin testified that this comment, which was made a considerable time before the parties ended their relationship, was in jest.

Martin also testified to some communication and intimacy issues between the two during their relationship. At one point, Martin asked Connelly to go to couples' therapy, which she did. Throughout the course of the relationship, the parties went on trips together and Connelly permitted Martin to interact and have a relationship with her daughter. With respect to that relationship, Connelly ultimately requested Martin not to text her daughter without her being included and to refrain from all communication with her daughter after 10:00 p.m. Martin did not always comply with Connelly's directives.

Despite the parties' disagreements and difficulties during their relationship, they dated for over two years. During the course of the relationship, Connelly found Martin's behavior unusual, odd, and sometimes socially inappropriate. Eventually, Connelly began to question Martin's emotional and mental stability. Nothing in the record, however, indicates Martin inflicted any mental or physical abuse on Connelly or her daughter or that Connelly felt either

herself or her daughter to be at risk of imminent harm from Martin during the course of their relationship. After considering the testimony, the family court determined none of the conduct which occurred during the parties' relationship warranted consideration with respect to issuance of an IPO.

Instead, the family court focused on the events that occurred when Connelly decided to sever ties with Martin. To this end, Connelly testified that she decided to end the relationship after the parties went on a weekend trip during April of 2017. During the trip, Martin told Connelly that his daughter and Connelly's daughter were his priority over her. This caused Connelly to question Martin's motives for the relationship and she decided it was time to end the relationship. After the trip, Connelly sent Martin a letter via certified mail. In the letter, Connelly told Martin that she wanted to end their relationship and that she did not want him to contact her or her daughter again. In the letter, Connelly provided Martin with instructions regarding how to retrieve any property of his she had in her possession so that the two would not have to see each other when he did so. She also returned via check some money Martin had either loaned or given Connelly and her daughter during their relationship.

Martin did not immediately contact Connelly after receiving the letter. However, the next day he did send a text message to Connelly's daughter expressing that he loved her and would miss her. He contacted Connelly's

daughter again in August of that year via text message. The message included a link to over two thousand pictures Martin had taken of Connelly and her daughter during the parties' relationship.[2] Neither Connelly nor her daughter responded to these texts.

Connelly's brother testified to being present at Connelly's home on the day Martin went to Connelly's home to pick up some of his belongings. On that day, Connelly's brother found gifts for Connelly and her daughter left by Martin accompanied by a letter expressing his love for both Connelly and her daughter. Connelly's brother was concerned about Martin's behavior and assisted Connelly in installing a security system in her home. Later in 2017, Martin sent Connelly and her daughter each a Christmas card. The Christmas cards were the last contact for several months.

On July 28, 2018, the parties both attended Lakeside Live, a public event in Lexington, Kentucky. Connelly testified to speaking to Martin for some time at the event. He invited her to lunch or dinner at a later date. She did not give him an answer. Following this encounter, Martin emailed Connelly restating his invitation. In her response, Connelly declined his invitation but stated she was agreeable to speaking if they ran into each other at other public events.

[2] It should be noted that the evidence indicated that Martin was an avid photographer who took his camera almost everywhere he went.

On August 2, 2018, the parties both attended Thursday Night Live, another public event in Lexington. Martin approached Connelly, who was accompanied by her brother and sister-in-law. Connelly testified that Martin appeared to be shaking, which he testified was a result of anxiety. During this conversation, Martin admitted to knowing Connelly had moved to a new residence because he found this information in the records of the Fayette County Property Valuation Administrator. He also made statements about the neighborhood where she was living which Connelly found insulting. This interaction ended when Martin walked away from Connelly. He sent her an email apologizing for his comments about her home. Connelly did not respond.

On August 11, 2018, the parties both attended an event at the Red Mile racetrack in Lexington. Connelly said hello to Martin and quickly left the event. Martin again sent Connelly email messages following the event. He expressed his love for her in these messages and indicated a clear desire to rekindle the parties' relationship.

On August 18, 2018, the parties both visited the Woodland Art Fair in Lexington. Upon seeing Martin approaching them at the event, Connelly and her daughter went into the restroom. When they exited the restroom a couple of minutes later, Martin was waiting outside. Connelly and her daughter walked away from him without speaking to him. Martin did not follow them or attempt to

continue the conversation. Following this interaction, Connelly sent Martin an email stating that she wished to have no further contact with him. Martin responded by stating that he would not contact Connelly or her daughter anymore, but that he intended to contact her daughter after she turned eighteen years old to ask if she would like to continue to communicate with him. Connelly testified that this message prompted her petition for protection for herself and her daughter.

During his testimony, Martin introduced several exhibits, primarily images from his Facebook page, which he claimed proved that he regularly attended public events in Lexington, Kentucky including Lakeside Live, Thursday Night Live, and events at the Red Mile racetrack. Martin claimed that he went to these events more regularly than Connelly and denied that he attended the events for the purpose of seeing Connelly. In the hearing he described the parties' series of public encounters in the summer of 2018 as mere coincidence.[3]

At the close of evidence, the family court entered an IPO on behalf of Connelly and her daughter. The court found, by a preponderance of the evidence, that acts of dating violence and abuse had occurred and were likely to occur again. In oral findings, the family court characterized Martin's behavior as bizarre. The court called Martin's behavior toward Connelly's daughter obsessive. The court's

[3] At the time, his emails to Connelly referred to the "chance" meetings as "fate" having brought them back together.

written findings state, "[Court] finds that [Martin] continued to contact [Connelly] long after she advised that she no longer wanted any contact [with] him. [Martin] obsessively continued pursuit of the attention of [Connelly's] teen-age daughter."

The family court denied Martin's motion to alter, amend, or vacate the IPO. This appeal followed.

II. STANDARD OF REVIEW

Entry of an IPO is proper if, following a hearing, the family court "finds by a preponderance of the evidence that dating violence and abuse, sexual assault, or stalking has occurred and may again occur[.]" KRS[4] 456.060(1). The preponderance of the evidence standard is met when "sufficient evidence establishes that the alleged victim was more likely than not" a victim of dating violence and abuse, sexual assault, or stalking. *Gomez v. Gomez*, 254 S.W.3d 838, 842 (Ky. App. 2008) (internal quotation marks and citation omitted).

Findings of fact are reviewed for clear error. *Castle v. Castle*, 567 S.W.3d 908, 915 (Ky. App. 2019). "Findings are not clearly erroneous if they are supported by substantial evidence." *Id*. (citing *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003)). In our review of an IPO, "the test is not whether we would have decided it differently, but whether the findings of the [family] judge were clearly erroneous or that he abused his discretion." *Cherry v. Cherry*, 634 S.W.2d 423,

[4] Kentucky Revised Statutes.

425 (Ky. 1982) (citation omitted). "Abuse of discretion occurs when a court's decision is unreasonable, unfair, arbitrary or capricious." *Castle,* 567 S.W.3d at 915 (citation omitted). "[W]e give much deference to a decision by the family court, but we cannot countenance actions that are arbitrary, capricious or unreasonable." *Id.* at 916 (citation omitted).

III. ANALYSIS

On appeal, Martin first argues the family court erred in including Connelly's daughter, O.X.C., as a person protected by the IPO. He argues that, because he and O.X.C. were not and had never been in a dating relationship, the family court could not find she was a victim of dating violence and abuse. He further argues that O.X.C. should have been required to file a separate petition on her own behalf because she reached the age of majority while her mother's petition was pending before the family court.

Martin misstates the law related to the issuance of IPOs. Once a family court has found that dating violence and abuse, sexual assault, or stalking has been established by a preponderance of the evidence, the IPO may include a number of restraints on the respondent's actions. KRS 456.060(1). These may include restraining the respondent from "[a]ny unauthorized contact or communication with the petitioner or *other person specified by the court*[,]" as well as prohibiting the respondent from "[a]pproaching the petitioner or *other*

person specified by the court[.]" KRS 456.060(1)(a)2-3 (emphases added). Additionally, the family court may prohibit "*any other actions* that the court believes will be of assistance in eliminating future acts of dating violence and abuse, stalking, or sexual assault[.]" KRS 456.060(1)(b) (emphasis added).

"The purpose of statutory construction is to give effect to the intent of the legislature." *Cosby v. Commonwealth*, 147 S.W.3d 56, 60 (Ky. 2004) (internal quotation marks and citation omitted). "[T]he domestic violence statutes should be construed liberally in favor of protecting victims from domestic violence and preventing future acts of domestic violence." *Barnett v. Wiley*, 103 S.W.3d 17, 19 (Ky. 2003) (citation omitted). Because "the purpose and intent behind, and the interpretation of, the [domestic violence order] statutes are almost identical to that of the IPO statutes[,]" the reasoning in *Barnett* is applicable here. *Calhoun v. Wood*, 516 S.W.3d 357, 360 (Ky. App. 2017).

Nowhere in KRS Chapter 456 has the legislature included any requirement that an "other person" protected by an IPO separately prove he or she is a victim of dating violence and abuse, sexual assault, or stalking. Instead, KRS 456.060 gives the family court wide latitude to restrict the respondent's behavior in order to eliminate future acts of dating violence and abuse, stalking, or sexual assault, including prohibiting contact with specified persons, other than the petitioner, who are protected by the order. Therefore, the family court was not

obligated by statute to separately find by a preponderance of evidence that O.X.C. is a victim of dating violence and abuse, stalking, or sexual assault.

By the same reasoning, nothing in KRS Chapter 456 requires that "other persons" protected by an IPO be minors or that someone be required to separately petition for protection if he or she reaches the age of majority while a petition is pending before the family court. Therefore, O.X.C. was not obligated to separately petition the family court for protection after her eighteenth birthday.

Next, Martin alleges Connelly failed to meet her burden to prove by a preponderance of the evidence that acts of dating violence and abuse had occurred and were likely to occur again. He alleges Connelly did not prove any of the acts listed in KRS 456.010(2), which are required to support a finding of dating violence and abuse. He further alleges that Connelly failed to prove his behavior was threatening to Connelly, as required by KRS 508.150.

At the time the IPO was entered in this case, dating violence and abuse was defined as "physical injury, serious physical injury, stalking, sexual assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault occurring between persons who are or have been in a dating relationship[.]" KRS 456.010(2).[5] Of specific importance to the case at

[5] Subsequent to entry of the IPO in this case, the General Assembly amended KRS 456.010(2) to include strangulation and the infliction of fear of imminent strangulation in the definition of dating violence and abuse. 2019 Ky. Acts ch. 183, §4 (effective June 27, 2019).

hand, KRS 456.010(7) defines stalking as "conduct prohibited as stalking under KRS 508.140 or 508.150[.]" KRS 508.140 defines stalking in the first degree and is not applicable to the facts in this case. However, stalking in the second degree is defined as follows:

> A person is guilty of stalking in the second degree when he intentionally:
>
> (a) Stalks another person; and
>
> (b) Makes an explicit or implicit threat with the intent to place that person in reasonable fear of:
>
> 1. Sexual contact as defined in KRS 510.010;
>
> 2. Physical injury; or
>
> 3. Death.

KRS 508.150(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 persons; 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.

KRS 508.130(1).

Here, on form AOC-275.3, the family court found "by a preponderance of the evidence that an act(s) of . . . dating violence and abuse . . . has occurred and may again occur." Additionally, the family court's written findings refer only to Martin's continued contact with Connelly and her daughter when Connelly no longer desired contact. Throughout the hearing, the family court referred to this matter as a "stalking case." The court also informed the parties that it would only consider testimony regarding events which occurred after the parties' relationship ended.

In total, the family court heard testimony regarding four public events both Connelly and Martin attended, email communication between the parties, Christmas cards sent to Connelly and O.X.C. by Martin, gifts left by Martin for Connelly and O.X.C., and a text message and email to O.X.C. from Martin. Many of Martin's emails to Connelly apologized for past behaviors and expressed his love for her. He repeatedly stated Connelly was the last person he would love.

It is clear that Martin interpreted Connelly's act of conversing with him at the Lakeside Live event in late July 2018 quite differently than she intended for him to do. What Connelly viewed as merely the exchange of pleasantries with a former romantic partner, Martin mistook as a potential invitation to rekindle their prior relationship. Connelly asserts that the series of encounters over the next few

weeks suggests some orchestration by Martin; however, there was no evidence produced to show that Martin monitored Connelly's activities in any way.

Additionally, the parties' face-to-face encounters were all in public places. In one of those instances, Connelly found Martin's comments to be rude, but there was no evidence that he was threatening to her during them. The final encounters upset Connelly because she did not want to see Martin anywhere. However, as this Court has previously observed, a person is free to go to public places even if his or her presence at those places may be upsetting to others. *See Halloway v. Simmons*, 532 S.W.3d 158, 162 (Ky. App. 2017) ("The mere fact that Simmons may have been jealous of Halloway and her new relationship, and that seeing her upset him, does not meet the stalking standard[.]").

There was no evidence that Martin attempted to isolate Connelly during these encounters, that he followed her out of the events, or that he ever tried to contact her at her home or work. His contact with Connelly was limited to a series of brief encounters in public and to email and text messages. Martin's communications and continued professions of love and devotion to Connelly were over-the-top. He should have left well enough alone as it was clear that neither Connelly nor her daughter desired any further contact with Martin, and his continued communications were distressing to them. What is absent in this case, however, is any threatening nature to the communications.

The text message that Connelly contends placed her in fear is the final one where Martin said he would not contact Connelly any more, but that he planned to reach out to her daughter after she turned eighteen and would communicate with the daughter if she wanted to do so. This is characterized by Connelly as an implicit threat insomuch as Martin was telling Connelly that after her daughter turned eighteen there was nothing Connelly could do to stop him from contacting her daughter, an implicit threat Connelly contends would place any parent in reasonable fear of physical injury or sexual contact to themselves or their child. We cannot agree that this statement is explicitly or implicitly threatening of any future physical or sexual harm. In fact, in the message itself, Martin indicated that he would cease contact if the daughter instructed him to do so.

The family court stated on the record that Connelly did not have to be fearful of Martin for the court to make a finding of stalking. This is incorrect. KRS 508.150(1) requires that stalking behaviors be accompanied by an explicit or implicit threat with the intent to place that person in reasonable fear of sexual contact, physical injury, or death. Without proof of such a threat, stalking for purposes of issuing an IPO cannot be established. Therefore, the family court abused its discretion in finding by a preponderance of evidence that acts of dating violence and abuse had occurred and were likely to occur again. This requires us to reverse entry of the IPO against Martin.

We caution that our opinion should not be read to suggest that continued and repeated unwanted communication can never rise to the level of being implicitly threatening. The volume, nature, manner and content of the communications are relevant. In this case, however, the record is limited to a handful of brief encounters in public places, followed by some emails and text messages. There is no evidence in the nature, content or volume of the contacts of an explcit or implicit threat of sexual contact, physical harm or death.

We would be remiss if we did not reiterate that Martin exercised the poorest of judgment in his interactions with Connelly and her daughter. If our present IPO statute required only stalking behaviors (*i.e.*, repeated unwanted contact that is alarming, annoying, intimidating, or harassing), we would affirm without reservation. However, the current IPO statute requires conduct that amounts to stalking plus an implicit or explicit threat. While we have concluded that the family court erred in issuing the IPO because the limited contacts set forth in the record were not threatening up to that point, we *strongly* caution Martin that this decision in no way, shape or form should be seen as condoning any future contact by him with either Connelly or her daughter. In light of the great lengths Connelly and her daughter have now gone to forever sever their ties with Martin, any further conduct could be viewed as exceeding the threshold necessary for it to be seen as implicitly threatening.

We are reversing on the basis that Connelly failed to prove that Martin's conduct was sufficient to justify entry of the IPO against him. As such, it is not necessary for us to delve into Martin's argument that the family court wrongly refused to allow him to call Connelly's daughter, O.X.C., as a witness in great detail. Nevertheless, we will briefly address that issue because it implicates Martin's due process rights.

An IPO can result in significant deprivations of liberty. Before entry of an IPO, the accused should be afforded the right to call witnesses and present evidence in his defense. While the family court can limit questioning on relevancy or prejudice grounds, it should exercise restraint in doing so because of the significant liberty interests at stake. In this case, we have no doubt that O.X.C. did not want to testify. However, she was an adult by this time, and there is nothing in the record to substantiate that she was unable to testify. She was an eyewitness to several of the encounters at issue and was the direct recipient of some of the text messages Connelly relied on. Her testimony would have been both relevant and probative. Therefore, we agree with Martin that the family court erred when it ruled that Martin did not have the right to subpoena her as a witness.

IV. CONCLUSION

For the reasons stated above, the IPO entered on October 31, 2018, is reversed.

ALL CONCUR.

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