NO. COA13-424

NORTH CAROLINA COURT OF APPEALS

Filed: 4 March 2014

ELIZABETH McDUFFIE RUDDER,
Plaintiff,

v. Carteret County
No. 10 CVD 1577

WILLIAM OVERTON RUDDER,
Defendant.

Appeal by defendant from orders entered 23 November 2010 by Judge L. Walter Mills and 28 September 2012 by Judge Kirby Smith in Carteret County District Court. Heard in the Court of Appeals 23 September 2013.

*No brief filed on behalf of plaintiff-appellee.*

*Wyrick Robbins Yates & Ponton, LLP, by Tobias S. Hampson, for defendant-appellant.*

GEER, Judge.

Defendant William Overton Rudder appeals from an ex parte domestic violence protection order ("DVPO") entered 23 November 2010 and a one-year DVPO entered 28 September 2012. Defendant primarily contends that the trial court erred in entering the one-year DVPO after the ex parte DVPO expired without being renewed. We agree and hold that the trial court did not, under those circumstances, have authority to enter a one-year DVPO

based on the allegations of the complaint. We, therefore, vacate the one-year DVPO.

Facts

On 23 November 2010, plaintiff Elizabeth McDuffie Rudder filed a complaint and motion for a DVPO against defendant, her husband. Plaintiff had permanently moved out of the marital home 14 November 2010. Plaintiff's verified complaint alleged:

> On November 1, 2010, I confronted Defendant about having an extra-marital affair. Defendant threw me on a couch, jumped on top of me and fractured my rib with his knee. The injury was documented by a physician. Defendant has attacked me physically on numerous occasions over the course of many years, including hitting me, throwing me on the floor and shoving me. Defendant encouraged me to kill myself by putting a gun in front of me and telling me to pull the trigger. Defendant has pointed a gun at me and said "click." Defendant has threatened to kill me and my immediate family.

The trial court entered an ex parte DVPO on the same day that plaintiff filed her complaint. The order found that defendant had committed acts of domestic violence against plaintiff, that there was a danger of future acts of domestic violence against plaintiff, and that defendant's conduct required that he surrender all firearms, ammunition, and gun permits. A hearing on whether a one-year DVPO should be entered was scheduled for 6 December 2010.

Thereafter, approximately 13 orders were entered continuing the hearing on the request for a one-year DVPO, but also continuing the ex parte DVPO in effect. The final continuance order entered 17 May 2012 continued the ex parte DVPO in effect until the date of the next-scheduled hearing, 4 June 2012. On 4 June 2012, however, no hearing took place, the trial court did not enter an additional continuance, and the court did not renew the existing ex parte DVPO. The ex parte DVPO, therefore, expired on 4 June 2012.

On 6 June 2012, defendant filed a motion pursuant to N.C. Gen. Stat. § 50B-3.1(f), requesting return of firearms seized from him pursuant to the ex parte DVPO. On 7 June 2012, plaintiff filed a Rule 60 motion, seeking relief from the 17 May 2012 continuance order "on the grounds of excusable neglect, clerical error, and mistake in that the date set for hearing this matter was explicitly intended to be heard during the June 4, 2012 *term* of court as opposed to the specific day of June 4, 2012." The record contains no indication that the trial court ever ruled on plaintiff's Rule 60 motion. Defendant, however, subsequently filed additional motions for return of his firearms on 12 June 2012 and 21 June 2012, using a pro se form.

The trial court calendared hearings on 31 August 2012 and 21 September 2012 to address various discovery-related motions

in a related but separate divorce proceeding, as well as defendant's motion for return of firearms. At the hearing, plaintiff conceded that the ex parte DVPO had expired, but requested that the trial court nonetheless enter a one-year DVPO based upon the underlying complaint. The trial court allowed plaintiff to present evidence to support the issuance of a one-year DVPO at the 31 August 2012 hearing. Defendant presented his evidence at the hearing on 21 September 2012.

On 28 September 2012, the trial court entered a one-year DVPO, finding that defendant intentionally caused bodily injury to the plaintiff, placed her in fear of imminent serious bodily injury, and placed her in fear of continued harassment that rose to such a level as to inflict substantial emotional distress. Specifically, the trial court found:

> On November 1, 2010, the defendant shoved the plaintiff down on a couch and jumped on top of her. The defendant threatened to kill the plaintiff and her immediate family. The defendant pointed a gun at the plaintiff and informed her he could kill her without anyone ever knowing. The defendant placed a gun in front of the plaintiff and told her to pull the trigger and kill herself. Over the course of the marriage, the defendant physically assaulted the plaintiff and committed further acts of domestic violence.

Based on its findings, the trial court concluded that the "defendant has committed acts of domestic violence against the plaintiff," that "[t]here is danger of serious and immediate

injury to the plaintiff," and that "[t]he defendant's conduct requires that he[] surrender all firearms, ammunition and gun permits." The court entered a DVPO effective for one year. Defendant timely appealed both the ex parte DVPO and the one-year DVPO to this Court.

Discussion

Initially, we note that the ex parte DVPO expired 4 June 2012, and the one-year DVPO was set to expire 28 September 2013, five days after this case was heard by this Court. Regardless whether the one-year DVPO was renewed or expired, this appeal is not moot. *See Smith v. Smith*, 145 N.C. App. 434, 437, 549 S.E.2d 912, 914 (2001) (holding that defendant's appeal of expired DVPO was not moot because of "'stigma that is likely to attach to a person judicially determined to have committed [domestic] abuse[]'" and "the continued legal significance of an appeal of an expired domestic violence protective order" (quoting *Piper v. Layman*, 125 Md. App. 745, 753, 726 A.2d 887, 891 (1999))).

As explained in *Smith*, "there are numerous non-legal collateral consequences to entry of a domestic violence protective order that render expired orders appealable. For example, . . . 'a person applying for a job, a professional license, a government position, admission to an academic

institution, or the like, may be asked about whether he or she has been the subject of a [domestic violence protective order].'" *Id.* (quoting *Piper*, 125 Md. App. at 753, 726 A.2d at 891). We, therefore, may properly review both the ex parte DVPO and the one-year DVPO.

I

In reviewing the ex parte DVPO entered 23 November 2010, we determine "'whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal.'" *Hensey v. Hennessy*, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009) (quoting *Burress v. Burress*, 195 N.C. App. 447, 449-50, 672 S.E.2d 732, 734 (2009)).

Defendant argues (1) that the trial court's findings of fact were insufficient to support its conclusion that "defendant has committed acts of domestic violence against the plaintiff" and (2) that specific facts do not support its conclusion that "it clearly appears that there is a danger of acts of domestic violence against the plaintiff." We disagree.

The trial court used pre-printed form AOC-CV-304, Rev. 8/09, entitled "EX PARTE DOMESTIC VIOLENCE ORDER OF PROTECTION"

for its order. The form contains 12 pre-printed "Additional Findings." Before each numbered finding is a box corresponding to the finding as a whole. Some of the pre-printed findings contain subparts with additional boxes to check, blank spaces to fill in, or space to provide additional information.

In this case, the trial court made the following relevant findings of fact by marking the boxes next to certain pre-printed provisions and adding the information set out below in italics:

> [_] 2. That on . . . *11-01-2010*, the defendant
>
> [x] a. . . . [x] intentionally caused bodily injury to [x] the plaintiff . . .
>
> [x] b. placed in fear of imminent serious bodily injury [x] the plaintiff [x] a member of the plaintiff's family [x] a member of the plaintiff's household
>
> [x] c. placed in fear of continued harassment that rises to such a level as to inflict substantial emotional distress [x] the plaintiff [x] a member of plaintiff's family [x] a member of plaintiff's household
>
> . . . .

> [x] 3. The defendant is in possession of, owns or has access to firearms, ammunition, and gun permits described below. . . .
>
> *The Defendant is in possession of hundreds of firearms and approximately 1000 boxes of ammunition which are spread through the marital residence.*
>
> [x] 4. The defendant
>
> [x] a. . . . [x] threatened to use a deadly weapon against the [x] plaintiff . . .
>
> [x] b. has a pattern of prior conduct involving the . . . [x] threatened use of violence with a firearm against persons
>
> [x] c. made threats to seriously injure or kill the [x] plaintiff . . .
>
> . . .
>
> [x] e. inflicted serious injuries upon the [x] plaintiff . . . in that . . . :
>
> *Broken* [sic] *her rib*.

(Emphasis added to indicate information added by trial court to form.)

Defendant argues that by failing to mark the first box of Finding 2, which corresponds to Finding 2 as a whole, the trial court did not actually intend to make any of the findings marked

under paragraph 2. It is apparent, however, that this omission was merely a clerical error.

"'Clerical error' has been defined . . . as: 'An error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.'" *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting *Black's Law Dictionary* 563 (7th ed. 1999)). Clerical errors include mistakes such as inadvertently checking the wrong box on pre-printed forms. *See In re D.D.J., D.M.J.*, 177 N.C. App. 441, 444, 628 S.E.2d 808, 811 (2006).

Finding 2 on Form AOC-CV-304 corresponds to the definition of domestic violence set out in N.C. Gen. Stat. § 50B-1(a) (2013), which provides:

> (a) Domestic violence means the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:
>
> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
>
> (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued

> harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
>
> (3) Committing any act defined in G.S. 14-27.2 through G.S. 14-27.7.

The statute thus specifies several alternative ways in which one may commit an act of domestic violence.

The subparts of Finding 2 on Form AOC-CV-304 set out all the possible alternative findings that could support a finding of fact that the defendant committed an act of domestic violence. The form allows the trial court to indicate which alternatives apply by marking the relevant subparts. Thus, by checking the box next to Finding 2, the trial court indicates an ultimate finding of fact: that defendant committed an act of domestic violence. By marking the boxes next to the subparts of Finding 2, the trial court then provides more specific findings regarding how the defendant committed an act of domestic violence and against whom.

Here, the trial court provided the "date of most recent conduct" in the first line of Finding 2 and marked the subparts indicating what acts the defendant committed and against whom. Additionally, the trial court concluded as a matter of law that the defendant committed acts of domestic violence against the

plaintiff. Under these circumstances, it is apparent that the trial court intended to mark the box next to Finding 2 and that its failure to do so was inadvertent and merely a clerical error. The error should, however, be corrected on remand. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'") (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)).

Defendant next argues that even if it is presumed that the trial court intended to mark Finding 2, the trial court's findings of fact are still insufficient. An ex parte DVPO may be issued "if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party . . . ." N.C. Gen. Stat. § 50B-2(c)(1) (2013). This Court has interpreted this provision to mean that "in order to issue an ex parte DVPO, the trial court must make findings of fact which include 'specific facts' which demonstrate 'that there is a danger of acts of domestic violence against the aggrieved party[.]'" *Hensey*, 201 N.C. App. at 61, 685 S.E.2d at 546 (quoting N.C. Gen. Stat. § 50B-2(c)).

Defendant argues that the ex parte DVPO in this case does not contain the required "specific facts."

In *Hensey*, the ex parte DVPO, which also was a pre-printed form order, did not itself set forth specific findings of facts in the DVPO, but rather appeared to incorporate by reference the allegations of the complaint. *Id.* at 62, 685 S.E.2d at 546. This Court concluded that "while it would be preferable for the trial court to set forth the 'specific facts' which support its order separately, instead of by reference to the complaint, the ex parte DVPO, read in conjunction with plaintiff's complaint, does provide sufficient information upon which we may review the trial court's decision to issue the ex parte DVPO." *Id.* at 64, 685 S.E.2d at 547.

In reaching its conclusion, the Court in *Hensey* rejected the defendant's argument that the ex parte DVPO must comply with Rule 52 of the Rules of Civil Procedure, which requires that a trial court sitting without a jury shall "'find the facts specially.'" *Id.* at 62-63, 685 S.E.2d at 546-57. The Court concluded that ex parte orders under N.C. Gen. Stat. § 50B-2 "need not contain findings and conclusions that fully satisfy the requirements of [Rule 52]" because such a requirement "would be inconsistent with the fundamental nature and purpose of an ex parte DVPO, which is intended to be entered on relatively short

notice in order to address a situation in which quick action is needed in order to avert a threat of imminent harm." 201 N.C. App. at 63, 685 S.E.2d at 547.

Here, in the space provided under Finding 2, the DVPO neither includes specific facts nor references the allegations of the complaint, although Finding 2 does specify the date of the most recent conduct by defendant. In addition, however, Finding 4 finds that defendant had threatened to use a deadly weapon against plaintiff, had a pattern of prior conduct involving the threatened use of violence with a firearm, had made threats to seriously injure the plaintiff, and had inflicted serious injuries on plaintiff by breaking her rib. While defendant argues that Finding 4 does not indicate whether defendant intentionally broke plaintiff's rib, that finding is included in Finding 2.

We hold that the combination of Finding 2 and Finding 4 are minimally adequate to supply the required "specific facts" necessary to support the conclusion that the defendant committed acts of domestic violence against the plaintiff and that "there is a danger of acts of domestic violence against the plaintiff." We, therefore, affirm the ex parte DVPO. We note, however, that the better practice would be to include more specific facts

under Finding 2 explaining the basis for the ultimate findings made by checking the boxes on the pre-printed form.

II

Defendant next contends that the trial court erred by entering the one-year DVPO on 28 September 2012 when the ex parte DVPO had expired after being in effect for more than a year and was no longer subject to renewal. We agree.

The North Carolina Domestic Violence Statute, set out in Chapter 50B of the General Statutes, specifies the procedural framework for the issuance of DVPOs. The statute defines a "protective order" as "any order entered pursuant to this Chapter upon hearing by the court or consent of the parties." N.C. Gen. Stat. § 50B-1(c). As used throughout the Chapter, the phrase "protective order" encompasses both DVPOs entered pursuant to a full hearing and ex parte DVPOs entered as a result of an ex parte hearing. *State v. Poole*, ___ N.C. App. ___, ___, 745 S.E.2d 26, 32 (2013), *appeal dismissed and disc. review denied*, ___ N.C. ___, 749 S.E.2d 885 (2013). *See also Hensey*, 201 N.C. App. at 60, 685 S.E.2d at 545 (noting N.C. Gen. Stat. § 50B-2 "requires that a 'hearing' be held prior to issuance of the ex parte DVPO").

Although an ex parte DVPO and a one-year DVPO are entered upon different procedures, *see* N.C. Gen. Stat. § 50B-2, both

types of protective orders are subject to the substantive provisions regarding what type of relief may be granted. *See* N.C. Gen. Stat. § 50B-3(a) (2013) (listing relief "protective order" may provide). Section 50B-3(b) provides:

> Protective orders entered pursuant to this Chapter shall be for a fixed period of time not to exceed one year. The court may renew a protective order for a fixed period of time not to exceed two years, including an order that previously has been renewed, upon a motion by the aggrieved party filed before the expiration of the current order; provided, however, that a temporary award of custody entered as part of a protective order may not be renewed to extend a temporary award of custody beyond the maximum one-year period. The court may renew a protective order for good cause. The commission of an act as defined in G.S. 50B-1(a) by the defendant after entry of the current order is not required for an order to be renewed.

This section refers generally to "protective orders" and does not by its terms limit its provisions to DVPOs entered pursuant to a full hearing. Because the statute requires a party to file a motion for renewal prior to the expiration of the current order, it follows that once a protective order expires, it is no longer subject to renewal under the statute. *See, e.g.*, *Little v. Little*, ___ N.C. App. ___, ___, 739 S.E.2d 876, 881 (2013) ("On remand, in the event the [DVPO] was not renewed, the trial court shall enter an order vacating the [DVPO]. If the [DVPO] was properly renewed, then defendant is

entitled to a new trial."); *Smith*, 145 N.C. App. at 436, 549 S.E.2d at 914 (describing DVPO as "'effective for six months [and] subject to renewal on or before August 21, 2000'").

That an ex parte DVPO is not subject to renewal once it expires by its own terms is further shown by N.C. Gen. Stat. § 50B-3.1(e) (2013), which is the only section of the statute that specifically authorizes the court to take action after the expiration of an order:

> If the court does not enter a protective order when the ex parte or emergency order expires, the defendant may retrieve any weapons surrendered to the sheriff unless the court finds that the defendant is precluded from owning or possessing a firearm pursuant to State or federal law or final disposition of any pending criminal charges committed against the person that is the subject of the current protective order.

The defendant may file a motion for return no "later than 90 days after the expiration of the current order." N.C. Gen. Stat. § 50B-3.1(f).

"Upon receipt of the motion, the court shall schedule a hearing and provide written notice to the plaintiff who shall have the right to appear and be heard and to the sheriff who has control of the firearms . . . ." *Id.* At the hearing, the court is required to inquire as to:

> (1) Whether the protective order has been renewed.

> (2) Whether the defendant is subject to any other protective orders.
>
> (3) Whether the defendant is disqualified from owning or possessing a firearm pursuant to 18 U.S.C. § 922 or any State law.
>
> (4) Whether the defendant has any pending criminal charges, in either State or federal court, committed against the person that is the subject of the current protective order.

*Id.*

In other words, "the trial court [is] required to conduct an inquiry before returning defendant's firearms and find facts as to the only substantive issue raised by the motion: '[W]hether the defendant [is] subject to any State or federal law or court order that preclude[s] the defendant from owning or possessing a firearm.'" *Gainey v. Gainey*, 194 N.C. App. 186, 188-89, 669 S.E.2d 22, 24 (2008) (quoting N.C. Gen. Stat. § 50B-3.1(f)). Additionally, we note that the inquiry under the statute is whether the protective order *has been renewed*, not whether the protective order *should be* renewed. This suggests that once a protective order expires, an aggrieved party may not proceed on a request to renew the expired protective order. Nevertheless, nothing prevents the party from filing a new complaint and reinitiating the process.

Here, it is undisputed that defendant's ex parte DVPO expired by its own terms. The ex parte DVPO could not, therefore, be renewed. At that point, the only issue properly before the trial court was whether defendant was entitled to the return of his firearms under N.C. Gen. Stat. § 50B-3.1(f). Because we have found no authority within Chapter 50B allowing the trial court to enter a DVPO after the previous order expired, we vacate the one-year DVPO and remand for a hearing on defendant's motion for return of firearms. Because of our disposition of this appeal, we need not address defendant's remaining arguments regarding the one-year DVPO.

Affirmed in part, vacated in part, and remanded in part.

Chief Judge MARTIN and Judge STROUD concur.