

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

SARAH HYDE,	:	
	:	CASE NO. CA2014-09-193
Petitioner-Appellee,	:	
	:	<u>OPINION</u>
	:	5/4/2015
- vs -	:	
	:	
RANDY SMITH,	:	
	:	
Respondent-Appellant.	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DV14050360

Fred S. Miller, Baden & Jones Building, 246 High Street, Hamilton, Ohio 45011, for petitioner-appellee

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S. POWELL, P.J.

{¶ 1} Respondent-appellant, Randy Smith, appeals from the decision of the Butler County Court of Common Pleas, Domestic Relations Division, granting petitioner-appellee, Sarah Hyde, a domestic violence civil protection order (DVCPO) against him. For the reasons outlined below, we affirm in part and reverse in part.

{¶ 2} On March 11, 2013, Hyde filed a petition with the Franklin County Court of

Common Pleas, Division of Domestic Relations, requesting a DVCPO against Smith, her former live-in boyfriend and father of the parties' then nine-month-old son. As part of her petition, Hyde claimed Smith had come to her house uninvited on numerous occasions, wherein he would yell and bang on the door. Hyde also alleged that Smith had strangled her and previously threatened to kill her. It is undisputed that at the time she filed her petition, Hyde had been living in Franklin County with her son, having seemingly ended her relationship with Smith.

{¶ 3} On April 4, 2013, the domestic relations court granted Hyde's petition for a DVCPO against Smith, effective for one year expiring on March 10, 2014. However, almost immediately after the DVCPO was granted, Smith violated the terms of the DVCPO by contacting Hyde via text message and phone calls, stealing her car and jewelry, as well as by coming to her house uninvited and pounding on her windows. In total, Smith was found to be in violation of the DVCPO on three separate occasions for his threatening actions occurring in March, July and September 2013. As a result of these violations, Smith was initially ordered to attend anger management, followed by placement on probation, with sentencing for the third violation then still pending.

{¶ 4} Between December 2013 and February 2014, Hyde and her son moved into her parents' Butler County home in an attempt to put some distance between herself and Smith. Thereafter, on April 8, 2014, Smith filed a motion with the Butler County Court of Common Pleas, Juvenile Division, seeking legal custody of his son. A few weeks later, on May 13, 2014, Hyde filed a petition with the Butler County Court of Common Pleas, Domestic Relations Division, requesting a DVCPO against Smith, listing her father, mother, brother and son as additional protected parties. As part of her petition, Hyde alleged Smith had threatened to break in and burn down her house, blow up her car, and kill her, her father and the family dog, as well as hire the Mexican cartel to kidnap and kill her and her son. Hyde

also alleged Smith had recently driven by her parents' Butler County home and looked in all the windows. Following an ex parte hearing on the matter, a domestic relations court magistrate granted Hyde's petition for a temporary DVCPO against Smith. The magistrate then scheduled the matter for a full hearing to be held on May 28, 2014.

{¶ 5} After conducting a full hearing on Hyde's DVCPO petition, on June 3, 2014, the magistrate granted Hyde's petition for a DVCPO against Smith, effective for five years expiring on May 13, 2019, naming Hyde's father, mother, brother and son as additional protected parties. The magistrate also ordered Hyde, who appeared pro se at the hearing, to serve as the sole residential parent and legal custodian of her son "until a court of competent jurisdiction issues an order designating another person as the residential parent and legal custodian," whereas Smith was granted supervised parenting time to "continue * * * until further court order but not to extend past the Final CPO expiration date."

{¶ 6} Smith filed objections to the magistrate's decision, which, following a hearing on the matter, the domestic relations court denied, thereby affirming and adopting the magistrate's decision in its entirety. In so holding, the domestic relations court found that "stating that you want to kill someone or burn down their home * * * is clearly and undeniably a threat of serious physical harm." The domestic relations court further found it was "not prohibited from making parenting orders at least until such time that the Juvenile Court initiates orders concerning [the child]."

{¶ 7} Smith now appeals from the domestic relations court's decision, raising four assignments of error for review.

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL COURT'S DECISION TO GRANT A FINAL CIVIL PROTECTION ORDER IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 10} In his first assignment of error, Smith argues the domestic relations court's

decision to grant Hyde's request for a DVCPO against him was against the manifest weight of the evidence. We disagree.

{¶ 11} A petition for a DVCPO is governed by R.C. 3113.31. *Crawford v. Bandon*, 12th Dist. Butler Nos. CA2013-08-150 and CA2013-08-151, 2014-Ohio-3659, ¶ 6, citing *Wolfe v. Wolfe*, 5th Dist. Stark No.2013CA00196, 2014-Ohio-2159, ¶ 7. Pursuant to that statute, in order to obtain a DVCPO, the petitioner must prove by a preponderance of the evidence that the respondent has engaged in an act of domestic violence against petitioner or petitioner's family or household members. *McBride v. McBride*, 12th Dist. Butler No. CA2011-03-061, 2012-Ohio-2146, ¶ 12, citing *Felton v. Felton*, 79 Ohio St.3d 34 (1997), paragraph two of the syllabus. As defined by R.C. 3113.31(A)(1), the phrase "domestic violence" means the occurrence of one or more of the following acts against a family or household member:

- (a) Attempting to cause or recklessly causing bodily injury;
- (b) Placing another person by the threat of force in fear of imminent serious physical harm or committing a violation of section 2903.211 [menacing by stalking] or 2911.211 [aggravated trespass] of the Revised Code;
- (c) Committing any act with respect to a child that would result in the child being an abused child, as defined in section 2151.031 of the Revised Code;
- (d) Committing a sexually oriented offense.

{¶ 12} "Threats of violence constitute domestic violence for the purpose of R.C. 3113.31 if the fear resulting from those threats is reasonable." *McGuire v. Sprinkle*, 12th Dist. Warren No. CA2006-06-069, 2007-Ohio-2705, ¶ 15, quoting *Lavery v. Lavery*, 9th Dist. Summit No. 20616, 2001 WL 1545663 (Dec. 5, 2001). "The reasonableness of the fear should be determined with reference to the history between the petitioner and the defendant." *Gatt v. Gatt*, 9th Dist. Medina No. 3217-M, 2002 WL 570389, *1 (Apr. 17, 2002),

citing *Eichenberger v. Eichenberger*, 82 Ohio App.3d 809, 816 (10th Dist.1992). "[I]n order to grant a civil protection order, past acts alone are not enough and there must be some evidence of current domestic violence, as set forth in the statute." *McGuire* at ¶ 22.

{¶ 13} "A trial court's decision to deny or grant a [DV]CPO will not be reversed where such decision is supported by the manifest weight of the evidence." *Glancy v. Spradley*, 12th Dist. Butler No. CA2012-02-024, 2012-Ohio-4224, ¶ 8. Under a manifest weight challenge, this court "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered." *Schneble v. Stark*, 12th Dist. Warren Nos. CA2011-06-063 and CA2011-06-064, 2012-Ohio-3130, ¶ 67; *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 20. A judgment will not be reversed "as being against the manifest weight of the evidence where the judgment is supported by some competent, credible evidence going to all essential elements of the case." *Ashburn v. Roth*, 12th Dist. Butler Nos. CA2006-03-054 and CA2006-03-070, 2007-Ohio-2995, ¶ 26, citing *C.E. Morris Co. v. Foley Const. Co.*, 54 Ohio St.2d 279 (1978), syllabus.

{¶ 14} At the full hearing before the magistrate, Hyde testified Smith's harassment and threats of domestic violence began in September 2011 when he assaulted her by dragging her out of bed and down two flights of stairs before strangling her and striking her multiple times. During this assault, Hyde testified Smith threatened to "kill [her] because he wasn't going to go to jail for hurting [her]." However, although she filed a police report, Hyde testified she did not go to court because she was "pregnant at the time and I was afraid for my life and the life of my unborn child because he threatened to end my life while I was pregnant." Hyde also testified Smith "had [her] hide behind the couch when the, um, person that serves you the papers come to the apartment and wouldn't let me answer the door."

Smith subsequently pled guilty to disorderly conduct regarding this incident.

{¶ 15} Although Smith continued to make threats of physical violence against her, Hyde testified she remained committed to Smith because he was the father of her child and believed that he would change, something Hyde claimed Smith always "promised" to do. Hyde also testified she simply "wasn't strong enough to leave." However, finally reaching her breaking point, and having seemingly ended her relationship with Smith, Hyde testified she filed a petition in Franklin County requesting a DVCPO against Smith after Smith made additional threats against her, her son and her family. Nevertheless, even after she received her DVCPO, Hyde testified Smith threatened her and claimed that "a piece of paper isn't gonna keep [you] safe." As noted above, it is undisputed that Smith has been found in violation of this DVCPO on three separate occasions, with sentencing for his third violation then still pending.

{¶ 16} Because Smith was still making threats against her, Hyde testified she moved her and her son out of her home in Franklin County and into her parents' home in Butler County. As Hyde testified, "I had to leave my home and come down here to try to get away from him." However, once in Butler County, Hyde testified Smith still "called and threatened to kill my dog, kill the puppies she had just had, burn my house down, blow my car up, [and] kill my father," with some of the threats occurring as recently as within the past several months. Hyde further testified that she and her mother had seen Smith slowly drive by their house, a home located on a cul-de-sac approximately 90 minutes away from Smith's own residence, when he stopped his car and looked in all the windows.

{¶ 17} Continuing, Hyde testified Smith threatened to break into her parents' Butler County home. Hyde also testified that Smith has called 9-1-1 making false accusations against her, as well as additional physical threats towards her friends. According to Hyde, although she repeatedly asked Smith to stop, the threats against her and her family have

occurred "[e]very week since this has started." Moreover, when asked why she thought she needed to be protected against Smith, Hyde testified "I'm still afraid for my life." Expounding on this testimony, Hyde testified she was "here today because I still fear for my life and this has been an ongoing thing [with Smith that] doesn't seem to have an end."

{¶ 18} Smith also testified at the full hearing before the magistrate. As part of his testimony, Smith acknowledged that he pled guilty to disorderly conduct resulting from his physical altercation with Hyde in September 2011, but denied that he prohibited her from going to court or that he made her hide behind the couch in order to avoid being served. Smith also admitted that he was found in violation of the DVCPO issued by Franklin County on three separate occasions. Smith, however, downplayed the severity of his violations, claiming the first was "over just text messages." Moreover, as it relates to the more recent allegations, Smith testified he never drove down the street where Hyde and her son were living with Hyde's parents. Smith further testified he never threatened to break in and burn down her house, blow up her car, or kill her dog and her father. According to Smith, Hyde's allegations against him were merely Hyde's attempts to retaliate against him for filing for legal custody of his son, something he claims would greatly impact the pending legal custody proceedings.

{¶ 19} After both parties rested, the magistrate took the matter under advisement, issuing its written decision granting Hyde's request for a DVCPO against Smith shortly thereafter. In so holding, the magistrate found, in pertinent part, the following:

The court can, and has, taken into consideration the history of domestic violence between [Smith] and [Hyde] in evaluating the reasonableness of Ms. Hyde's present fear of Mr. Smith.

* * *

Mr. Smith's testimony is simply not credible.

The parties' testimony reflects a history of domestic violence

between them.

This Court finds that Mr. Smith recently made threats of harm to Ms. Hyde and her immediate family. It appears that even though the final CPO issued by Franklin County Domestic Court has expired, he continues to threaten and intimidate Ms. Hyde.

{¶ 20} Smith filed objections to the magistrate's decision. After holding a hearing on the matter, the domestic relations court overruled Smith's objections, thereby affirming and adopting the magistrate's decision in its entirety. As relevant here, in reaching this decision, the domestic relations court found:

The hearing before the Magistrate is replete with [Hyde's] repeated statements she fears for her life and the safety of her family and the parties' minor child. [Hyde] obtained a DVCPO in Franklin County, Ohio for the term of one year. Thereafter, there were three violations of the protection order. [Hyde] claims [Smith] pled guilty to a third felony violation of the order and sentencing was pending. [Hyde] claims the threats continue and [Smith] was witnessed driving by [Hyde's] residence "looking through windows." He continues to threaten her and when pressed for [a] timeline, indicates in the past six months he has threatened to burn her home down [and] blow up her car. She claims the threats are continuous. She claims [Smith] threatens [her] friends.

Concluding, the domestic relations court stated:

In order for the court to find [Smith] committed an act of domestic violence under [R.C. 3113.31(A)(1)(b)] the court must find, by a preponderance of the evidence, that he placed [Hyde] by threat of force in fear of imminent serious physical harm or committed a violation of R.C. 2903.211 or R.C. 2911.211. In the matter at hand, stating you want to kill someone or burn down their home is clearly and undeniably a threat of serious physical harm.

{¶ 21} After a thorough review of the record, we find the domestic relations court's decision to grant Hyde's request for a DVCPO against Smith was not against by the manifest weight of the evidence. As outlined above, the domestic relations court heard testimony that Smith had assaulted and repeatedly harassed and threatened Hyde for a period of several years. In order to stop the harassment, Hyde received a DVCPO from Franklin County,

something which Smith admittedly violated on three separate occasions. This includes contacting Hyde via text message and phone calls, stealing her car and jewelry, and coming to her house uninvited and pounding on her windows. Thereafter, when Smith's harassment and threats against her did not stop, Hyde was forced to move her and her son into her parent's Butler County home. As Hyde testified, "I had to leave my home and come down here to try to get away from him."

{¶ 22} However, instead of curtailing his harassment, Smith's behavior and repeated threats of physical violence merely intensified. This included claims Smith threatened that he was going burn down Hyde's house and blow up her car, allegations Hyde stated placed her in fear for her life. Hyde also testified Smith threatened to break into her parents' Butler County home where she and her son were then living. Although Smith denied these allegations, the domestic relations court found Smith's testimony was "simply not credible." As this court has stated previously, "[i]t is not the role of the appellate court to substitute its own determination of credibility in place of the trial court." *Weismuller v. Polston*, 12th Dist. Brown No. CA2011-06-014, 2012-Ohio-1476, ¶ 24. Moreover, although it should generally go without saying, just as the domestic relations court found, "stating you want to kill someone or burn down their home is clearly and undeniably a threat of serious physical harm."

{¶ 23} Despite this, Smith argues the domestic relations court's decision to grant Hyde's request for a DVCPO against him must be reversed because the majority of her testimony was based on allegations that occurred one to three years prior, "all of which had been previously addressed by courts in Columbus, Franklin County, Ohio." Smith also claims the domestic relations court's decision must be reversed because there was "no evidence of present domestic violence" that would place her in imminent fear. The record does not support either of Smith's claims and otherwise mischaracterizes Hyde's testimony.

{¶ 24} As the record indicates, after moving back into her parents' Butler County home, Hyde testified Smith still "called and threatened to kill my dog, kill the puppies she had just had, burn my house down, blow my car up, [and] kill my father," with some of these threats occurring within the past several months. Hyde further testified that Smith had threatened to break into her parents' Butler County home, and that she and her mother had seen Smith slowly drive by their house, a home located on a cul-de-sac approximately 90 minutes away from Smith's own residence, when he stopped his car and looked in all the windows. According to Hyde's testimony, Smith's harassment and threatening behavior occurred "[e]very week since this has started," thereby placing her in fear for her life. In fact, when specifically asked why she was seeking a DVCPO, Hyde explicitly stated "I'm still afraid for my life."

{¶ 25} While we recognize Hyde's testimony does not contain specific dates as to when Smith's harassing and threatening behavior occurred, we find her testimony provides ample evidence that such offending behavior was widespread and continuous over a period of several years up to and including when Hyde and her son moved into her parent's Butler County home. Again, as Hyde testified, "this has been an ongoing thing [with Smith that] doesn't seem to have an end." Therefore, as the domestic relations court's decision granting Hyde's request for a DVCPO against Smith was not against by the manifest weight of the evidence, Smith's first assignment of error is overruled.

{¶ 26} Assignment of Error No. 2:

{¶ 27} THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION IN NAMING ADDITIONAL INDIVIDUALS AS PROTECTED PARTIES IN THE FINAL CIVIL PROTECTION ORDER.

{¶ 28} In his second assignment of error, Smith initially argues the domestic relations court erred by including Hyde's father, mother, and brother as additional protected parties as

they were not a "family or household member" as that term is defined by R.C. 3113.31(A)(3).

Pursuant to that statute, the term "family or household member" means:

(a) Any of the following who is residing with or has resided with the respondent:

(i) A spouse, a person living as a spouse, or a former spouse of the respondent;

(ii) A parent, a foster parent, or a child of the respondent, or another person related by consanguinity or affinity to the respondent;

(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the respondent, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the respondent.

(b) The natural parent of any child of whom the respondent is the other natural parent or is the putative other natural parent.

{¶ 29} As part of her appellate brief submitted to this court, Hyde concedes there was no evidence presented at the full hearing to indicate her father, mother or brother fit within the definition of "family or household member" as defined by R.C. 3113.31(A)(3). As a result, Hyde states that she has no objection to their removal from the DVCPO as additional protected parties. In light of Hyde's concession, and because Hyde does not object to their removal, we find the trial court erred by including Hyde's father, mother and brother as additional protected parties. Therefore, in regards to the domestic relations court's inclusion of Hyde's father, mother and brother as additional protected parties within the DVCPO, Smith's argument is sustained.

{¶ 30} Smith also argues the domestic relations court erred by including his son as an additional protected party. In support of this claim, Smith does not dispute that his son qualifies as a "family or household member" pursuant to R.C. 3113.31(A)(3)(a)(ii). Rather, Smith claims it was improper to include his son as an additional protected party where there was no evidence he had ever committed domestic violence against him. However, although

there was no evidence that Smith ever caused his son physical harm, there was evidence Smith had made threats to do so, including threats to break in and burn down Hyde's parents' Butler County home where his son was then living.

{¶ 31} Hyde also testified that Smith "uses his son to get to me" and that Smith had warned Hyde that if he "wants to come to the house because I live there his son lives there and he wants to see us, he'll come." Under these circumstances, we find no error in the domestic relations court's decision to include the parties' son as an additional protected party. Therefore, in regards to the domestic relations court's inclusion of the parties' son, Smith's argument is overruled.

{¶ 32} In light of the foregoing, having found the domestic relations court erred by including Hyde's father, mother and brother as additional protected parties, but not his son, Smith's second assignment of error is sustained in part and overruled in part.

{¶ 33} Assignment of Error No. 3:

{¶ 34} THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOCATING PARENTING RIGHTS AND RESPONSIBILITIES OF THE PARTIES MINOR CHILD.

{¶ 35} In his third assignment of error, Smith argues the domestic relations court erred by temporarily allocating parenting rights and responsibilities regarding his son – in this case, designating Hyde as the sole residential parent and legal custodian with Smith receiving only supervised parenting time – when his motion for legal custody of his son was pending before the juvenile court. In support of his claim, Smith cites to R.C. 3113.31(E)(1)(d), which states, in pertinent part:

After an ex parte or full hearing, the court may grant any protection order, with or without bond, or approve any consent agreement to bring about a cessation of domestic violence against the family or household members. The order or agreement may:

* * *

(d) Temporarily allocate parental rights and responsibilities for the care of, or establish temporary parenting time rights with regard to, minor children, if no other court has determined, or is determining, the allocation of parental rights and responsibilities for the minor children or parenting time rights.

{¶ 36} In other words, "the court from which a petitioner seeks relief for domestic violence has no jurisdiction under R.C. 3113.31(E)(1)(d) if any other court, including divisions of the same county court, has determined or is determining parental rights and responsibilities." *Couch v. Harrison*, 12th Dist. Clermont No. CA2000-08-063, 2001 WL 121108, *4 (Feb. 12, 2001). That statute, however, has been limited to allow a domestic relations court "to make emergency decisions, on an interim basis, to protect children from imminently dangerous situations." *Hoyt v. Heindell*, 191 Ohio App.3d 373, 2010-Ohio-6058, ¶ 31 (11th Dist.). That is exactly what the domestic relations court did here.

{¶ 37} As the record firmly establishes, the domestic relations court designated Hyde as the sole residential parent and legal custodian only "until a court of competent jurisdiction issues an order designating another person as the residential parent and legal custodian" pursuant to R.C. 3109.042. The domestic relations court further stated that Smith's supervised parenting time with his son was to "continue * * * until further court order but not to extend past the Final CPO expiration date." Additionally, in ruling on Smith's objections to the magistrate's decision, the domestic relations court found it was "not prohibited from making parenting orders at least until such time that the Juvenile Court initiates orders concerning [the child]."

{¶ 38} Due to Smith's repeated threats, including his more recent threats to break in and burn down the house in which Hyde was then living with her son, we agree with the domestic relations court in this matter. In so holding, we note that because Smith had only recently filed his motion for legal custody, the juvenile court had yet to make any decision or

even hold a hearing on the matter. In turn, while it is clear the juvenile court had not yet allocated the parties' parental rights and responsibilities, we question whether the juvenile court was even in the process of "determining the allocation" of such rights as that phrase is used in R.C. 3113.31(E)(1)(d).

{¶ 39} Regardless, as the Ohio Supreme Court previously stated, the domestic relations court has extensive authority under R.C. 3113.31(E) "to tailor the domestic violence protection order to the exact situation before it at the time" in order to carry out the legislative goals of protecting victims of domestic violence. *Felton*, 79 Ohio St.3d at 38, 44-45. Therefore, based on the facts and circumstances of this case, we find no error in the domestic relations court's decision to temporarily provide for the care of the parties' son until the juvenile court could initiate its own orders concerning the child. Accordingly, Smith's third assignment of error is overruled.

{¶ 40} Assignment of Error No. 4:

{¶ 41} THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN RESTRICTING APPELLANT'S PARENTING RIGHTS AND IN ORDERING SUPERVISED PARENTING TIME BETWEEN APPELLANT AND HIS CHILD FOR THE DURATION OF THE PROTECTION ORDER (FIVE YEARS).

{¶ 42} In his fourth assignment of error, Smith argues the domestic relations court erred by ordering him to have supervised parenting time with his son. However, due to Smith's repeated harassment and threats, including his more recent threats to break in and burn down the house where Hyde and the child were living, we find no error in the domestic relations court's decision. In so holding, we note Smith's supervised visitation with his son was not ordered to continue for the DVCPO's entire five year period as Smith suggests, but rather, was to "continue * * * until further court order but not to extend past the Final CPO expiration date." Smith's fourth assignment of error is therefore without merit and overruled.

{¶ 43} Judgment affirmed in part and reversed in part.

RINGLAND and HENDRICKSON, JJ., concur.