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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001249-ME

PENNY MARIE WILLIFORD — APPELLANT

v.

APPEAL FROM SIMPSON FAMILY COURT
HONORABLE G. SIDNOR BRODERSON, JUDGE
ACTION NO. 18-D-00044-001

RUSSELL DRAUGHON WILLIFORD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, NICKELL AND L. THOMPSON, JUDGES.

ACREE, JUDGE: Appellant, Penny Williford, appeals the Simpson Family Court's August 1, 2018, domestic violence order entered against her at the urging of her husband, Appellee, Russell Williford. Penny claims she was not afforded a full evidentiary hearing and that evidence presented did not meet the preponderance of the evidence standard. After careful review, we affirm.

FACTS AND PROCEDURE

Russell filed a petition for an order of protection against Penny on July 18, 2018. He alleged that three days earlier Penny "threatened to blow my head off, to kill me, that I was going to be a dead person. Told her sister on the phone to give her mother a box after she kills me and herself. All 3 children heard their mom threatened me and she admitted it to the Sheriff in front of all of us." (R. at 1).

A hearing was held on August 1, 2018, before the Simpson Family Court. Russell testified that he lives in the marital residence at 2601 Temperance Road in Franklin with Penny and his three daughters Robbie (19), Rhaine (14), and Reece (10). Russell stated the incident started at 8:30 AM on July 18, 2018. He said he woke up to check on his daughters, Rhaine and Reece, who were sleeping in the same room.[1]

Russell stated that when he went in the room where his daughters were still asleep he heard someone talking loudly outside the window, apparently on a phone, saying: "Tell mom to take the box. If I go to jail or I kill myself, then just tell her to take it." Russell said he could not see the person speaking but that he recognized Penny's voice. Russell also testified that Penny said: "I'm going to go in there and get him in an argument and blow his head off."

[1] Robbie also resides in the home but sleeps in a separate room upstairs.

Russell stated neither he nor his wife own a firearm of which he was aware but that he took Penny's statements seriously. He said he then woke his two daughters because he was afraid they might have to get out of the house due to what he heard Penny say. Russell said he then asked his daughters to listen to what he heard outside the window because he said Penny made the above statements multiple times.

Russell next testified that he ran upstairs and woke the oldest child, Robbie, and brought her downstairs. Russell stated that the children appeared frightened and urged him to get out of the house, so they started making their way toward the front door to leave. While this was happening, Russell called 9-1-1 and a sheriff's deputy arrived shortly thereafter. After a conversation with the sheriff's deputy, Penny was instructed to leave the premises; Russell testified that he heard Penny admit to the sheriff's deputy that she made the statements he reported and that she threatened him.

On cross-examination Russell stated that Penny had threatened him multiple times over the course of their thirty-two-year relationship. He also testified that he never threatened or assaulted Penny.

Robbie testified next. Her version of the events corroborated Russell's earlier testimony. Robbie also stated that when Penny walked back in the house after her phone conversation she looked at Russell and said, "You're

dead." Robbie testified that she felt scared during this time and that she heard Penny's conversation with the sheriff's deputy in which she admitted to him that she was going to blow Russell's head off.

Robbie also stated that she heard Penny threaten Russell in the past. Robbie stated that early in June 2018, Penny said, referring to Russell: "He'll be dead soon enough, it doesn't matter. I can't wait till he's dead. He'll be dead soon."

Kimberley Ellis, Penny's sister, testified next for Penny. She was the person to whom Penny was speaking on the phone. Kimberley testified that during the phone conversation Penny was upset and venting, but she never mentioned with whom she was angry. Kimberley did state that Penny used the phrase: "I have taken all I can take, and I could shoot him." Kimberley said she never knew Penny to own a gun and that she never inquired as to whom Penny was referring when she said "him."

Penny was last to testify at the hearing. In response to Robbie's testimony, Penny stated she believed Robbie was not being truthful. Penny's position was that Russell assaulted her multiple times throughout the course of their relationship, but she never reported him when she could have. The family court gave her an opportunity to testify as to any previous assaults by Russell but

narrowed the line of questioning once Penny admitted that she neither reported Russell nor had any evidence of such assaults beyond her recollections.

On cross, Penny also admitted that in her phone conversation she "was referring mostly to her husband," and corroborated Russell's and Robbie's testimonies concerning her discussion with the sheriff's deputy.

After the hearing, the trial court entered a domestic violence order for a three-year period to end on August 1, 2021. In the additional findings, the family court checked one box, such that the findings read: "For [Russell] against [Penny] in that it was established, by a preponderance of the evidence, that an act(s) of domestic violence and abuse has occurred and may again occur . . . ." This appeal followed.

STANDARD OF REVIEW

When we review a decision of the family court, "the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion." *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008) (quoting *B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky. App. 2005)).

The preponderance of the evidence standard is met when sufficient evidence establishes that the petitioner is "more likely than not" to have been a victim of dating violence and abuse, sexual assault, or stalking. *See Baird v.*

Baird, 234 S.W.3d 385, 387 (Ky. App. 2007) (applying the preponderance of the evidence standard in the context of the issuance of a domestic violence order).

Additionally, CR[2] 52.01 provides that a trial court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See also Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Findings are not clearly erroneous if they are supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is evidence of sufficient probative value that it permits a reasonable mind to accept as adequate the factual determinations of the trial court. *Id.* A reviewing court must give due regard to the trial court's judgment as to the credibility of the witnesses. *Id.*

ANALYSIS

First, Penny argues the family court denied her a full evidentiary hearing by not allowing her to present testimony concerning her relationship with Russell. She asserts the family court did not consider her relevant testimony in making its determination that domestic violence and abuse occurred and may occur again. After careful review of the hearing, we disagree.

"[A] DVO has significant long-term consequences for both parties[.]" *Rankin v. Criswell*, 277 S.W.3d 621, 625 (Ky. App. 2008). "[T]he

[2]Kentucky Rules of Civil Procedure.

impact of having an EPO or DVO entered improperly, hastily, or without a valid basis can have a devastating effect on the alleged perpetrator." *Wright v. Wright*, 181 S.W.3d 49, 52 (Ky. App. 2005).

A DVO "cannot be granted solely on the basis of the contents of the petition." *Rankin*, 277 S.W.3d at 625. Due process is not satisfied when a DVO is granted without a full hearing, such as when testimony is not presented, or is cut short. *Wright*, 181 S.W.3d at 53. "[A] party has a meaningful opportunity to be heard where the trial court allows each party to present evidence and give sworn testimony before making a decision." *Holt v. Holt*, 458 S.W.3d 806, 813 (Ky. App. 2015). Without a full hearing, a trial court cannot make a finding based upon a preponderance of the evidence. *Wright*, 181 S.W.3d at 53.

Here, we examine the family court's actions in the hearing related to Penny's testimony. Following Russell's presentation of the case, Penny testified in her own defense. After answering some preliminary questions, the following exchange took place:

Penny's counsel:	Has [Russell] ever assaulted you before?
Russell's counsel:	Objection. I would say that's not relevant because its Russell Williford versus Penny Williford. It has nothing to do with . . .
Family court:	Overruled. I will allow a little bit of latitude on that.

. . . .

Penny's counsel: If you could tell the court my other question, has he ever assaulted you?

Penny: Yes.

Penny's counsel: How many times?

Penny: Quite a few. I cannot tell you dates and times, I can tell you from the beginning to now, like I said I went to both of my proms with bruises. When his family was down we got into a confrontation upstairs and he bruised my neck. That was when I lived next door to my parents, I went next door to their house and everyone in the house saw it and my dad was upset about that.

Family court: Let's move along.

. . . .

Penny's counsel: Did he try to impair your attempts to meet with me in my office?

Penny: Well, when we first got in…

Russell's counsel: Objection, relevance.

Family court: Sustained.

Penny's counsel: Your honor, it is my position that it leads to the ultimate definition of imminent fear.

Judge: Well, the question is whether or not [Russell] was placed in fear, not

[Penny].

Penny counsel: It's my position that this retaliatory. That he is trying to control her and this is part of it.

Judge: Well, I have heard some proof on that and I understand what you're saying but the issue here is domestic violence or abuse and it's a fairly narrow focus, so I'll sustain the objection.

(Domestic and Interpersonal Violence Hearing, VT 08/01/2018; 10:15:40-10:20:09).

After reviewing the entirety of the hearing, we cannot agree with Penny that the family court denied her a full evidentiary hearing as it related to her potential status as a domestic violence victim. Penny was permitted to testify concerning alleged abuse by Russell as well as Russell's behavior toward her (Penny Williford testimony, VT 08/01/2018; 10:15:40; 10:17:40). The family court even went so far as to overrule an objection to her testimony concerning alleged assaults by Russell and only ended that line of questioning when it became apparent that no evidence could be gleaned from Penny's testimony except for her recollections. On this basis we cannot make a finding that the family court erred or abused its discretion concerning this portion of Penny's testimony.

Second, Penny asserts that the evidence presented at the hearing was not sufficient proof beyond a preponderance that either domestic violence and abuse occurred or that it may occur again. We disagree.

A court may issue a DVO, "[f]ollowing a hearing ordered under KRS 403.730, if a court finds by a preponderance of the evidence that domestic violence and abuse has occurred and may again occur . . . ." KRS 403.740(1). " 'Domestic violence and abuse' means physical injury, serious physical injury, stalking, sexual abuse, strangulation, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, strangulation, or assault between family members or members of an unmarried couple[.]" KRS 403.720(1); *see Pettingill v. Pettingill*, 480 S.W.3d 920, 924-25 (Ky. 2015). We also note that the family court is in the best position to judge the credibility of the witnesses and weigh the evidence presented. *Hohman v. Dery*, 371 S.W.3d 780, 783 (Ky. App. 2012).

Here, the family court was required to determine whether, by a preponderance of the evidence, Penny inflicted fear of imminent physical injury, serious physical injury, sexual abuse, or assault and whether fear, injury, abuse, or assault might occur in the future. We note that Russell, Robbie, and Penny gave very similar accounts of Penny's phone conversation. While Penny's sister may

disagree as to the target of Penny's threats, even Penny eventually agreed that she was discussing Russell, a fact she also admitted to the sheriff's deputy.

As the fact-finder, the family court relied on the testimony of Russell and Robbie and found them to be more credible than either Penny or Kimberley. It was well within the family court's discretion to find that Russell's and Robbie's testimony about Penny's threats was "[e]vidence that a reasonable mind would accept as adequate to support a conclusion[.]" *Moore v. Asente,* 110 S.W.3d 336, 354 (Ky. 2003) (quoting BLACK'S LAW DICTIONARY 580 (7th ed. 1999)). As such, we will not disturb the family court's findings that we conclude are supported by substantial evidence.

The evidence presented was sufficient for the court to reasonably infer that Penny's conduct caused Russell to fear imminent physical injury; accordingly, the court's finding of domestic violence was not clearly erroneous.

Finally, because Penny's claims of error did not include a claim of insufficient findings of fact, this majority opinion does not address that issue as the dissent does. Those points made in the dissent, in proper context, are well-taken and any apparent confusion should be addressed by our Supreme Court.

For now, the Administrative Office of the Courts provides a form for use in these proceedings that, in effect, require only certain specific findings. They are pre-printed on the form as follows: (1) "[t]hat [the court] has jurisdiction

over the parties and subject matter, and the Respondent [Penny] has been provided with reasonable notice and opportunity to be heard"; and (2) "[f]or the Petitioner [Russell] against the Respondent [Penny] in that it was established, by a preponderance of the evidence, that an act(s) of . . . domestic violence and abuse . . . has occurred and may again occur . . . ." AOC Form 275.3.

Although some family courts do make separate additional findings of fact for which no space is provided on the form, many more courts lack sufficient judicial resources of the most essential nature – time – that might allow them to do so. Some courts incorporate the fact-finding notations they make on their docket sheets during the hearing, as the judge did in *Pettingill*. 480 S.W.3d at 922. But in *Pettingill*, the Supreme Court said:

> Following the hearing, the family court found that Sara had met the burden above and entered a DVO against Jeffrey. To document this order, the court *completely and accurately filled out AOC Form 275.3* and, under the "Additional Findings" header, *checked the box corresponding to "for [Sara] against [Jeffrey] in that it was established, by a preponderance of the evidence, that an act(s) of domestic violence or abuse occurred and may again occur."* To supplement this finding, the family court *made further factual findings on its docket sheet*[.]
>
> . . . .
>
> The family court's written findings of fact were more than sufficient to satisfy CR 52.01. In addition to clearly finding that an act or acts of domestic violence had occurred and may occur again on the form, the court

> also listed on its docket sheet nine specific findings to support its order. . . . *This effort more than satisfies the court's good faith duty to record fact-finding*.

Id. at 925 (emphasis added). If the family court's reference to fact-finding notations on the docket sheet "*more than* satisfies the court's good faith duty to record fact-finding[,]" then, logically, completely and accurately filling out AOC Form 275.3 and checking the appropriate box under "Additional Findings" on the form, in and of itself, must "satisf[y] the court's good faith duty to record fact-finding."

A party always has the authority under CR 52.02 to request additional findings if she believes the court's fact-finding on AOC 275.3 alone is insufficient. Penny did not avail herself of that opportunity and, as noted, she has not objected to the sufficiency of the fact-finding, only the substance of the fact-finding made on the form.

For these reasons, the majority opinion respectfully declines to address the issue first raised by the dissent.

CONCLUSION

Based on the foregoing, we affirm the August 1, 2018, domestic violence order of the Simpson Family Court.

THOMPSON, L., JUDGE, CONCURS.

NICKELL, JUDGE, DISSENTS AND WRITES SEPARATELY.

NICKELL, JUDGE, DISSENTING. Although I believe Russell was likely entitled to entry of the DVO, I am troubled by the trial court's complete lack of factual findings and the majority's holding the trial court's "findings" were supported by substantial evidence.

> 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. . . . One should not have to ask a court to do its duty, particularly a mandatory one.

Anderson v. Johnson, 350 S.W.3d 453, 458 (Ky. 2011).

Our Supreme Court has emphasized "the trial judge's duty is not satisfied until the findings have been reduced to writing[,]" and even if "the trial court's rationale is readily determinable from the record, . . . compliance with CR 52.01 and the applicable sections of KRS Chapter 403 requires *written* findings." *Keifer v. Keifer*, 354 S.W.3d 123, 126 (Ky. 2011).

Pettingill, a more recent case, quotes CR 52.01,

> [i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.]

In *Pettingill*, the trial court "listed on its docket sheet nine specific findings to support its order" which the respondent challenged as neither inaccurate nor

unproved. As a result, the trial court in *Pettingill* was deemed to have carried out its fact-finding duty. *Id.* at 925.

Thurman v. Thurman, 560 S.W.3d 884, 887 (Ky. App. 2018), specifies a "court must make written findings to support the issuance of the DVO." *Thurman* struck down a DVO consisting

> entirely of the court's checking a single box on AOC Form 275.3 indicating it found [the respondent] had committed domestic violence[.] The court made no additional written findings, either on the form itself or the accompanying docket sheet.

Id.

Even more recently, this Court reiterated the mandatory fact-finding obligations placed on trial courts in DVO proceedings are not satisfied by merely checking a box on the preprinted form. *Castle v. Castle*, 567 S.W.3d 908 (Ky. App. 2019). That is precisely what occurred in this case, as noted by the majority.

Based on these authorities, I do not believe the trial court fulfilled its fact-finding duty in this matter. I am mindful of the heavy burdens and high caseloads carried by our trial courts and the need for speedy resolution of DVO matters. However, the importance of adequate written factual findings cannot be overstated, and it is essential trial courts satisfy their obligation to render them. That simply did not occur here. For these reasons, I respectfully dissent. I would reverse and remand for entry of written findings of fact.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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