RENDERED: JULY 26, 2019; 10:00 A.M.
TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2018-CA-001504-ME

SARAI TIPAN APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE TARA HAGERTY, JUDGE
ACTION NO. 18-D-502641-001

JUAN TIPAN APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

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

NICKELL, JUDGE: Sarai Tipan has appealed from dismissal of her petition seeking a domestic violence order (DVO) against her father, Juan Tipan, by the Jefferson Circuit Court, Family Division Five. Following a careful review, we reverse and remand for further proceedings.

Sarai, her mother, and two minor siblings fled their home country of Ecuador in 2016, ostensibly to escape severe abuse perpetrated by Juan. They settled in Jefferson County, Kentucky. On September 4, 2018, Sarai filed a motion seeking a DVO against her father, wherein she alleged Juan had recently traveled from Ecuador to Jefferson County and began to harass, threaten, and stalk her and her minor siblings. Sarai averred her younger siblings had been placed in her care while their mother was in Texas pursuing a claim of asylum. The petition detailed the threats and abuse she and her siblings had suffered at the hands of their father. An emergency protective order was granted, and a hearing was scheduled on the petition for a DVO.

Juan moved to dismiss the petition, requested an expedited hearing date, and filed a notice to register a foreign order regarding an agreement between himself and his ex-wife regarding custody of the minor children. A combined hearing was convened on September 11, 2018, lasting approximately fifty-three minutes.[1] The first twenty-four minutes were consumed by preliminary discussions and arguments related to the contents and registration of the foreign order. The trial court then turned its attention to the DVO petition. Sarai was the only witness sworn. Approximately fourteen minutes into her direct testimony, the

[1] Because Sarai and Juan are native Spanish speakers, an interpreter was used for the benefit of all involved.

trial court stopped the proof and indicated its belief it had serious jurisdiction issues. The trial court stated it would have been more appropriate to determine custody issues in the mother's asylum action rather than in a DVO proceeding, indicated immigration issues should be handled in a different forum, and, believed even had domestic violence occurred, it was "not sure this is the appropriate venue for any kind of asylum to be protected from what would occur in Ecuador, purportedly. I—I'm not sure that a domestic violence order is appropriate." Counsel indicated the DVO petition was regarding acts of violence which had occurred in Kentucky since August and she had not been able to complete her proof. The trial court orally dismissed the petition, stating protection for the children and temporary custody issues should be handled in a different manner. Sarai objected, stating the purpose of the petition was to seek protection from domestic violence, not seek custody or asylum, and asked to continue putting on proof of the domestic violence which had occurred in Jefferson County and the risk of violence for the minor children. The trial court overruled the objection and again pronounced it was dismissing the petition. Although no written order was entered, a handwritten docket notation states:[2]

> Proof heard: R has hit her when she tried to break up fights btwn her mother + him. Mother was detained in assylum shelter – she is going through the process to seek assylum. since Feb. 24, 2018.

[2] No corrections to spelling or grammar have been made to the docket notation.

> mother of children has purportedly been seeking assylum since February, 2018. Ct. does not believe DV proceeding is appropriate way to proceed.
>
> Petition Dismissed.

This appeal followed.

Our review of a trial court's decision on entry of an order of protection is limited to "whether the findings of the trial judge were clearly erroneous or that he abused his discretion." *Caudill v. Caudill*, 318 S.W.3d 112, 115 (Ky. App. 2010) (citation omitted). We review conclusions of law *de novo*. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008).

Sarai presents three allegations of error in seeking reversal. First, she contends the trial court's refusal to permit a full evidentiary hearing was improper. Second, she asserts the trial court erred in failing to issue written findings of fact and conclusions of law justifying its dismissal of her petition. Finally, Sarai argues the trial court improperly based its decision on her perceived immigration status. This last assertion appears to graft a bias or discrimination claim based on immigration status onto her first two arguments. Because the trial court erred as alleged in Sarai's first two arguments, we need not comment on her final claim.

The General Assembly enacted KRS[3] 403.715 to 403.785 to give victims of domestic violence and abuse an avenue to obtain protection against

---

[3] Kentucky Revised Statutes.

further violence. Pertinent to this appeal, the statutory scheme requires an evidentiary hearing to be convened if, after a preliminary review, the trial court determines the allegations "indicate[] that domestic violence and abuse exists[.]" KRS 403.730(1)(a). Following the hearing, a trial court may enter a DVO only if it "finds by a preponderance of the evidence that domestic violence and abuse has occurred and may again occur[.]" KRS 403.740(1).

In *Wright v. Wright*, 181 S.W.3d 49, 53 (Ky. App. 2005), after discussing the enormous impact and significance of domestic violence, the public policy of protecting victims from abuse, and the obligation to protect improperly charged alleged abusers from unwarranted consequences, this Court unequivocally held trial courts are required to afford parties a "full evidentiary hearing" on DVO petitions. In the instant matter, just as in *Wright*, the trial court prohibited counsel from completing direct examination of the petitioner before announcing its decision. This was plainly improper. "Because there was . . . insufficient evidence presented to meet the applicable standard or [sic] proof, we must vacate [the dismissal] and remand the matter[] for a 'full hearing' as contemplated by the statute, comprised of the full testimony of any appropriate witnesses sought to be presented." *Id*.

Although we are remanding this matter based on the trial court's failure to afford the parties a full evidentiary hearing, we believe it important to comment on Sarai's challenge to the trial court's failure to enter written findings of fact and conclusions of law to prevent further errors on remand. Recently, in *Castle v. Castle*, 567 S.W.3d 908 (Ky. App. 2019), this Court had the opportunity to examine and reiterate the mandatory requirement of a trial court making factual and legal findings in the context of a DVO petition. In *Castle*, we noted

> [a] trial court "speaks only through written orders entered upon the official record." *Kindred Nursing Centers Ltd. Partnership v. Sloan*, 329 S.W.3d 347, 349 (Ky. App. 2010). "[A]ny findings of fact and conclusions of law made orally by the circuit court at an evidentiary hearing cannot be considered by this Court on appeal unless specifically incorporated into a written and properly entered order." *Id*. There are no written findings in this case. Moreover, no findings made from the bench were incorporated into the standard form used to enter the DVO, nor the written order denying the motion to alter, amend or vacate the DVO. Hence, all the trial court's oral findings are beyond our consideration.
>
> *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. A . . . court is obligated to make written findings of fact

> showing the rationale for its actions taken under KRS Chapter 403, including DVO cases, even if the rationale may be gleaned from the record. *See, e.g., Keifer v. Keifer*, 354 S.W.3d 123, 125-26 (Ky. 2011); *Anderson v. Johnson*, 350 S.W.3d 453, 458-59 (Ky. 2011).

*Id*. The DVO entered in this case is no better than the one struck down in *Thurman*.

*Pettingill v. Pettingill*, 480 S.W.3d 920, 925 (Ky. 2015), 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[.]

*Pettingill* goes on the [sic] say, "the judge [must] engage in at least a good faith effort at fact-finding and that the found facts be included in a written order." *Id*. (quoting *Anderson*, 350 S.W.3d at 458). 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. The same cannot be said in this case. The trial court made no written findings. . . . "One should not have to ask a court to do its duty, particularly a mandatory one." *Anderson*, 350 S.W.3d at 458.

*Castle*, 567 S.W.3d at 916. On the strength of *Castle*,[4] we hold the trial court erred in failing to perform its mandatory duty of entering written findings of fact and conclusions of law revealing the rationale for its decision. We trust this omission, now drawn to the trial court's attention, will not be repeated on remand.

For the foregoing reasons, the judgment of the Jefferson Circuit Court, Family Division Five, is REVERSED and the matter is REMANDED for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Megan Metcalf
Louisville, Kentucky

BRIEF FOR APPELLEE:

Bryan Gowin
Louisville, Kentucky

[4] We are aware *Castle* was decided after the ruling was handed down in the instant case and did not include language expressly making its holding retroactive. However, *Castle* did not announce a new rule of law, but rather reiterated the state of the law regarding the mandatory obligations placed on trial courts in DVO proceedings.