

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001893-ME

MICHAEL DOUGLAS WILSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEBORAH DEWEESE, JUDGE
ACTION NO. 18-D-503571-001

AMANDA HARPER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, LAMBERT, AND K. THOMPSON, JUDGES.

LAMBERT, JUDGE: Michael Douglas Wilson appeals the domestic violence order (“DVO”) entered by the Jefferson Circuit Court, Family Division, on December 17, 2018. We affirm.

On December 11, 2018, Amanda Harper petitioned the Jefferson Circuit Court for a DVO against Wilson, her former husband. At the hearing on

Harper's petition, Wilson moved to dismiss the petition on the basis that no threat presently existed and the allegations contained in the petition were insufficient to support entry of a DVO. The trial court denied the motion and proceeded with a hearing.

At the hearing, Harper testified that, on November 30, 2018, Wilson drove to her home, yelled that he was "going to finish what he started" at her when she was standing in her front yard, and then turned around and sped away. She stated that she was fearful of him because he threw her out of a moving vehicle three years prior, which resulted in a head injury causing ongoing seizures. Wilson pled guilty to a charge of assault in the fourth degree as a result of this incident.

Harper presented photographs she alleged to have taken of Wilson's vehicle as he drove away on November 30, 2018.¹ She also gave the license plate number from the vehicle to law enforcement when she reported the incident. The police were able to connect the vehicle to Wilson with the license plate number given to them by Harper. As a result of this incident, Wilson was charged with terroristic threatening in Oldham County, Kentucky.

On cross examination, Harper admitted to having filed a petition based upon the November 30, 2018, incident in Oldham County prior to filing her petition in Jefferson County. The Oldham County case was dismissed. Harper

¹ These photographs are not available for review because they were not entered into the record.

explained that she filed her petition in Jefferson County after she fled Oldham County to stay with her step-daughter. She further admitted to suffering from memory problems because of her head injury. However, she testified to having a clear memory of the November 30, 2018, incident.

Wilson testified that he has not seen or spoken to Harper since their divorce in 2015. He denied driving to her home and threatening her on November 30, 2018. He further denied having pushed her from a moving vehicle despite having pled guilty to assault in the fourth degree. He presented photographs alleged to be of his vehicle, arguing it was different from the vehicle depicted in the photographs presented by Harper.²

The trial court expressed concern that a court in Oldham County previously dismissed a petition based on the same incident. Although the trial court stated this prior dismissal would ordinarily be dispositive, it found by a preponderance of the evidence that Wilson assaulted Harper three years ago and recently threatened her. Specifically, the trial court based its decision on Harper's reporting of Wilson's license plate number to law enforcement and its determination that the photographs presented by the parties depicted the same

² These photographs were not made part of the record and, consequently, are not available for our review.

vehicle. On this basis, the trial court entered a DVO on behalf of Harper against Wilson. This appeal followed.

First, Wilson argues Harper’s petition is barred by *res judicata* based upon the Oldham Family Court’s previous dismissal of a petition based on the same incident. He concedes he did not raise *res judicata* as a defense before the trial court and thus argues the issue should be reviewed for palpable error under CR³ 61.02.

Res judicata is an affirmative defense, specifically listed in CR 8.03, “which operates to bar repetitious suits involving the same cause of action.” *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 464 (Ky. 1998). “[A]s a general rule, failure to assert timely an affirmative defense waives that defense and precludes its consideration by the trial court and this Court.” *Bowling v. Kentucky Dep’t of Corrections*, 301 S.W.3d 478, 485 (Ky. 2009) (citation omitted). To allow palpable error review where an appellant fails to plead an affirmative defense before the trial court would undermine the settled timeliness requirement for such pleadings and would effectively allow an appellant to entirely circumvent the requirements of CR 8.03. *See American Founders Bank, Inc. v. Moden Investments, LLC*, 432 S.W.3d 715 (Ky. App. 2014) (holding “a party’s failure to timely assert an affirmative defense waives that defense” unless the trial

³ Kentucky Rules of Civil Procedure.

court permits it to be presented later); *see also Rose v. Ackerson*, 374 S.W.3d 339 (Ky. App. 2012) (holding that raising an affirmative defense in post-trial proposed findings of fact and conclusions of law is “both untimely and inadequate” to preserve the issue for appeal). Here, Wilson failed to argue *res judicata* as a defense at any time before the trial court and now raises it for the first time on appeal. This failure constitutes waiver of the defense and is fatal to Wilson’s claim of error on appeal.

Wilson next argues evidence was insufficient to support entry of the DVO. “[T]he standard of review for factual determinations is whether the [trial] court’s finding of domestic violence was clearly erroneous.” *Dunn v. Thacker*, 546 S.W.3d 576, 578 (Ky. App. 2018) (citations omitted). A trial court’s findings are not clearly erroneous if they are “supported by substantial evidence.” *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (citation omitted). “Substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion and evidence that, when taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men.” *Id.* (citations and internal quotation marks omitted).

A trial court may enter a DVO if it finds “by a preponderance of the evidence that domestic violence and abuse has occurred and may again occur[.]”

KRS⁴ 403.740(1). “The preponderance of the evidence standard is satisfied when sufficient evidence establishes the alleged victim was more likely than not to have been a victim of domestic violence.” *Dunn*, 546 S.W.3d at 580 (citing *Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007)). “Domestic violence and abuse” includes “physical injury, serious physical injury, stalking, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault[.]” KRS 403.720(1).

At the hearing, Harper was able to give Wilson’s license plate number when she reported the incident to law enforcement and presented photographs the trial court determined to be of Wilson’s car. “[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court.” *Moore*, 110 S.W.3d at 354. In light of all of the evidence, the trial court found Harper’s testimony credible regarding the incident, past violence, and her fear of Wilson. Additionally, in domestic violence proceedings, the trial court may consider a respondent’s criminal history in determining whether to enter a DVO. KRS 403.735(1)(a). Therefore, the trial court properly took into consideration Wilson’s prior conviction for assault in the fourth degree where Harper was the victim.

⁴ Kentucky Revised Statutes.

We conclude, based on the record, the trial court did not clearly err in finding by a preponderance of the evidence an act of domestic violence had occurred and was likely to occur again without entry of the DVO. Therefore, entry of the DVO was proper.

For the reasons stated above, the judgment of the Jefferson Circuit Court, Family Division is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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