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(FILE NO. 2009-SC-0111-DE)

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000122-ME

JOHN H. RUBY — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 07-D-503634

JOSEFINA SISON RUBY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; HENRY,[1] SENIOR JUDGE.

THOMPSON, JUDGE: John H. Ruby, *pro se*, appeals a domestic violence order (DVO) entered against him by the Jefferson Family Court. He asserts the following errors: (1) the family court judge should have recused; (2) the family

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

court abused its discretion when it denied his counsel's request for a continuance; (3) his constitutional rights were violated when the family court denied him the opportunity to present witnesses on his behalf, the right to confront the witnesses against him and the right to assistance of counsel; (4) the family court erroneously denied his request to obtain the petitioner's mental health and prescription drug records; and (5) the family court erred when it refused to vacate the domestic violence order pursuant to an agreed order submitted by both parties.

Pursuant to a petition for a DVO filed by Josefina Sison Ruby, John's wife, on November 17, 2007, an emergency protective order was issued against John. A DVO hearing was scheduled on November 28, 2007; however, at John's request and over Josefina's objection, it was continued until December 12, 2007.

Josefina and her counsel appeared at the hearing but John failed to appear. Because John's counsel was ill, substitute counsel appeared on John's behalf and advised the court that it was her understanding that the court's secretary and court personnel had informed John's counsel that the hearing was continued. The court's secretary and court personnel denied advising counsel that the hearing was continued. The court secretary testified that she left a voicemail at counsel's office informing her that the hearing was not continued. The court then telephoned counsel who was ill at home and relayed that the hearing would proceed. Before proceeding, the family court denied a motion made on behalf of John for Judge O'Reilly to recuse.

Josefina testified that on November 17, 2007, she and John had an argument that culminated in John slamming her against a wall. Pictures entered as exhibits showed extensive bruising on Josefina's body. She was treated for her injuries at Norton Suburban's Emergency Room.

After hearing Josefina's testimony, the court ruled that it would conduct an additional hearing on December 19, 2007, at which time John could testify as to the alleged acts of violence. However, it stated that no other evidence would be admitted.

John testified at the December 19, 2007, hearing that an argument occurred on November 17, 2007, but that it was caused by Josefina's irrational behavior. He further testified that her injuries occurred when she tripped over an open dishwasher door.

After the court found that John had assaulted Josefina and that abuse may occur in the future, a DVO was entered on December 26, 2007. On December 28, 2007, John filed a motion to vacate the DVO stating that the parties were attempting reconciliation and included an agreed order in which both parties requested that the DVO be dismissed. The court denied the motion but amended the DVO from a "no contact order" to a "no unlawful contact order." John appealed.

We have reviewed this case without the benefit of a brief filed on behalf of Josefina. When an appellee fails to file a brief, the court may: "(i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment

if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." CR 76.12(8)(c). *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky.App. 2007). This court is vested with discretion when considering the possible alternative penalties. *Id.* at 396. Because it may be presumed that Josefina's failure to file a brief is consistent with her expressed desire to have the DVO vacated, we do not invoke any of the options provided in CR 76.12(8)(c). To do so would only avoid resolution of the recurrent dilemma presented to a family court when the victim of abuse chooses not to further litigate a DVO.

The initial issue we address is whether Judge O'Reilly was required to recuse because John is a practicing attorney within the Jefferson County court system and had previously practiced before Judge O'Reilly. Recusal is not necessary merely because an attorney has practiced before the judge. Although a judge should disqualify himself when his impartiality may be reasonably questioned, absent a showing of bias or prejudice, recusal is not required. *Lovett v. Commonwealth*, 858 S.W.2d 205 (Ky.App. 1993). John has failed to allege any facts that indicate Judge O'Reilly's possible bias against him. The record reveals that Judge O'Reilly conducted the hearing with appropriate judicial decorum and temperament. The motion to recuse was properly denied. However, since we remand this case to the family court and are not privy to any proceedings or contact

between John and Judge O'Reilly pending this appeal, a renewed motion for recusal based on sufficient grounds is not precluded.

John's asserted constitutional deprivations are intertwined with the contention that the family court erroneously denied his motion for a continuance of the December 12, 2007, hearing. He alleges that he was denied the right to present witnesses on his behalf, to confront Josefina who was the sole witness against him and the right to assistance of counsel. All of these contentions are based on events that occurred at the initial DVO hearing and the family court's rulings as a result of the denial of the continuance.

Whether to grant a continuance is within the sound discretion of the trial court and, therefore, only an abuse of that discretion will justify a reversal of its denial. *Riordan v. Riordan*, 252 S.W.2d 901 (Ky. 1952). In this case, we conclude there was no abuse of discretion.

The family court did not deny the continuance to impose a penalty upon John. Instead, it appropriately relied on the language contained in KRS 403.740 which provides that the hearing date shall be fixed no later than the expiration of the emergency protective order. The court previously granted one continuance. Moreover, the judge called his secretary as a witness to clarify the confusion as to whether John's counsel was informed that the case was continued and telephoned his counsel to question her regarding her conversation with the secretary and other court personnel. He reasonably concluded that no court personnel had represented that the case was continued. Because a DVO hearing

must be conducted within the time prescribed by statute and a continuance had previously been granted to John, we conclude there was no abuse of discretion.

John argues that because the December 19, 2007, hearing was limited to his testimony alone, he was denied his right to offer the testimony of witnesses in his defense. *See Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019, 1023 (1967). Under the circumstances, it would have been within the family court's discretion to hear Josefina's testimony on the hearing date and render its decision on that testimony alone. However, the court scheduled an additional hearing for the limited purpose of permitting John to testify. In an exercise of caution, the family court gave John more than that to which he was entitled. There was no error.

The family court denied the continuance and, consequently, John who was not present, could not directly cross-examine Josefina. Because of illness, his most recent counsel was likewise absent. However, substitute counsel on his behalf was present on the date of the hearing and did cross-examine Josefina. Thus, John's claims that he was denied assistance of counsel and the right to confront the sole witness against him are simply without factual or legal foundation.

The claim that he was denied the right to compel witnesses on his behalf is equally unpersuasive. John subpoenaed Joseph Sison and Lynn Sison, Josefina's brother and sister-in-law; neither, however, appeared at the hearing. The family court refused to hold the witnesses in contempt stating that it was

John's responsibility to ensure their attendance. It was also apparently convinced that their proposed testimony regarding Josefina's past acts of aggression, mental history, and failure to take her prescribed medication was not relevant to the DVO proceeding.

KRS 421.110 states that "[d]isobedience of a subpoena . . . may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required." KRS 421.130 further provides that the court "may issue a warrant for arresting and bringing him, before the court . . . ." The use of the term "may" renders the decision to exercise the court's contempt power discretionary. The family court permitted John's counsel to search the courthouse for the witnesses but was not willing to issue an arrest warrant which would have had the effect of granting John's continuance. When weighed against the possible relevancy of the testimony regarding the victim's past aggressive behavior toward family members other than John, the delay caused by the exercise of the court's contempt power justified its refusal.

The family court also denied John's request to compel Josefina's psychiatrist to provide her medical and pharmacy records. Prior to the hearing on December 12, 2007, John made a written motion to compel the production of the documents pertaining to Josefina's medical and prescription drug records. However, the motions were improperly noticed and not heard by the court. The oral motion made by John's counsel at the December 12, 2007, hearing was

appropriately denied. Again, if granted, John would have received the continuance he sought which, we are convinced, was properly denied.

We conclude that the arguments thus far discussed are without merit. One remains.

After the DVO was entered, the parties signed an agreed order pursuant to which the parties stated their desire to reconcile and dismiss the DVO. The quandary presented to the court was that it found that domestic violence occurred and was likely to re-occur, yet it was requested by the victim to vacate an order entered for her protection. It declined and instead limited the DVO to "no unlawful contact" thereby permitting the parties to have contact in their attempt to reconcile. The question presented is whether the family court was required to dismiss the DVO or whether it had discretion to deny the request. We begin with the proposition that DVO proceedings are designed to protect victims of domestic violence from the intimidation and influence of their abusers.

Our domestic violence statutes are intended to allow victims to "obtain effective, short-term protection against further violence and abuse in order that their lives will be as secure and as uninterrupted as possible[.]" KRS 403.715(1). The legislature has declared that there is a public interest in preventing domestic violence. Nevertheless, the filing of a domestic violence petition is a civil matter governed by our civil rules. *Roberts*, 218 S.W.3d at 397 (holding that CR 60.02 relief is available in cases involving domestic violence orders).

While a petition for domestic violence is pending, a persuasive argument can be made that, as in any civil action, the parties may seek a voluntary dismissal under CR 41. It is a private action that only the victim can pursue. This case presents a different situation.

The family court heard the testimony and was convinced that Josefina was the victim of violence inflicted by John and that it was likely he would commit future acts of violence. While KRS 403.750 provides that upon motion either party may seek to amend a DVO, there is no statutory provision mandating that the motion be sustained. As a matter of public policy, we believe that the family court has the discretion under limited circumstances to deny the parties' requests to vacate a DVO.

Our reasoning is premised on the unfortunate realities of domestic violence. The victim is frequently intimated and influenced by the abuser and emotionally unable to cope with the consequences of separation from the abuser. The propensity to forgive the abuser and recant the allegations of abuse is a recognizable factor. Although the parties may reconcile, their relationship is often again plagued by violence with injurious consequences. Thus, we conclude that the court must take a proactive role in protecting the victim and not accept the parties' agreed order to vacate an existing DVO without inquiring into the voluntariness of the victim's participation in the request.

Our conclusion is not unique in the context of domestic relations. Because of the potential for undue influence, emotional reactions, and intimidation,

the court cannot accept a property settlement agreement in a dissolution action without finding that its terms are not unconscionable. KRS 403.180(3). Although our domestic violence statutes contain no similar language, the protection afforded a person's property interests in a dissolution action should extend to protection of the person from physical harm in a DVO proceeding. We conclude that consistent with public policy, an agreed order vacating an existing DVO cannot be approved unless the family court conducts a hearing to determine whether the victim made the request free from intimidation and coercion by the abuser.

In this case, the family court simply asked Josefina if she desired to have the DVO vacated to which she responded, "Yes." Without further inquiry, it refused to accept the agreed order. Although we hold that the family court was not mandated to vacate the DVO, it was required to inquire as to the circumstances that caused Josefina to enter into the agreement and could deny it only after rendering findings that support the court's decision.

Based on the foregoing, the order of the Jefferson Family Court denying the motion to vacate the DVO is reversed and the case remanded for the limited purpose of a hearing and appropriate findings.

MOORE, JUDGE, CONCURS.

HENRY, SENIOR JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

HENRY, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART: While I agree with almost all of the well-written and

reasoned opinion of the majority, I respectfully dissent from that part of the opinion vacating and remanding the family court's order denying the joint motion to dismiss the Domestic Violence Order. I cannot agree that the family court abused its discretion by summarily denying a joint motion to dismiss a DVO that it had entered only two weeks earlier after a full-blown hearing. It appears that the family court took pains to fully hear this matter and to be fair to both sides. KRS 403.750, the statute which permits motions to amend a DVO, does not require findings nor does it specifically allow motions to dismiss. The family court did amend its order to permit the parties to have contact in order to try to work out their differences as long as there is no violence. In my view the family court is in the best position to determine whether a full hearing and findings are required. I would affirm in full.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
John H. Ruby, *Pro Se* Louisville, Kentucky	No brief filed for appellee