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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001823-ME

TERRY A. MOORE APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE M. BRENT HALL, JUDGE
ACTION NO. 15-D-00305-001

MEGHAN R. MOORE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT, AND VANMETER, JUDGES.

J. LAMBERT, JUDGE: Terry Moore appeals the Hardin Circuit Court's entry of a Domestic Violence Order (DVO) filed against him by Meghan Moore. Terry alleges that the trial court abused its discretion when it denied Meghan's motion to voluntary dismiss her petition for the DVO and when it found that domestic violence might recur. We affirm.

Relevant Facts

Terry and Meghan, who have been married for over 22 years, had been fighting for several days. Terry is a police officer. Terry told Meghan to not return to the marital residence, and that if she did he would "take it as an act of aggression and consider it somebody breaking in the house." The day prior to the events leading to Meghan's filing a DVO, Meghan moved a handgun to her side of the bed "because [she] was scared."

Meghan returned to the house the next day while Terry was sleeping. After Meghan had undressed to prepare for bed, Terry woke up and began hitting Meghan saying "What are you doing here, bitch? I told you not to come back, bitch!"[1] Meghan called Terry's mother, and Terry began kicking her on her back. Meghan pointed a gun at Terry. Terry stated "You don't pull a handgun on me, this is on!" Terry pulled a gun on Meghan, and told her that if she did not put down the gun he was going to shoot her. Meghan dropped the gun on the bed.

Terry then dragged Meghan to the kitchen by her hair. Terry asked Meghan to put her hands behind her back. When she wouldn't comply, he began hitting her. Meghan then placed her hands behind her back, and Terry handcuffed her. Terry continued to hit Meghan in the back with his hands, pulled her up by her hair and slammed her into the refrigerator. He then twisted her nipples, told her he "wanted [her] to feel pain like he felt," then threw her into the counter and

[1] Terry stated during the hearing that he woke up with her pointing the gun at him, telling him she was going to kill him.

onto the floor. He then lifted her up by her hair again and shoved his foot into her face "a couple" of times. Meghan was eventually able to flee the scene, naked, to a neighbor's house when Terry became distracted.

The first hearing concerning this matter took place on August 31, 2015. During the hearing, Meghan related the above events to the court. As Terry appeared *pro se*, the court asked Terry whether he would like to retain counsel for the DVO hearing. Terry said that he would and the trial court continued the matter until September 14, 2015.

On September 14, 2015, Terry's counsel stated that he had been contacted by Meghan, and he believed she had a statement to read. The trial court eventually allowed Meghan to read a statement into the record, in which she requested the trial court to dismiss the domestic violence petition. She stated that she did not fear Terry, that the day in question was an isolated incident and that she wanted their marriage to work. Meghan's counsel vigorously objected to Meghan's request to dismiss, stating that she feared for her safety in light of the seriousness of the incident of domestic violence. The court ultimately granted the DVO. Prior to that time, defense counsel objected, stating that he believed insufficient evidence existed in the record to show that domestic violence may occur again. This appeal followed.

Analysis

As a preliminary matter, we note that Meghan has chosen not to file an appellee brief in this case. Kentucky Rule of Civil Procedure (CR) 76.12(8)(c)

"provides the range of penalties that may be levied against an appellee for failing to file a timely brief." *St. Joseph Catholic Orphan Soc'y v. Edwards*, 449 S.W.3d 727, 732 (Ky. 2014). At our discretion, we 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). In this instance, we elect not to exercise any penalty. We assume that Meghan elected not to file a brief because she also disagreed with the result below.

An appellate court reviews the trial court's issuance of a DVO for an abuse of discretion and to determine whether the trial court's findings were clearly erroneous. *Holt v. Holt*, 458 S.W.3d 806, 812 (Ky. App. 2015). Kentucky Revised Statutes (KRS) 403.740(1) states that "if a court finds by a preponderance of the evidence that domestic violence and abuse has occurred and may again occur, the court may issue a domestic violence order[.]" Furthermore, "[t]he preponderance of the evidence standard is met when sufficient evidence establishes that the alleged victim 'was more likely than not to have been a victim of domestic violence.'" *Valentine v. Horan*, 275 S.W.3d 737, 739 (Ky. App. 2008) (quoting *Commonwealth v. Anderson,* 934 S.W.2d 276, 278 (Ky. 1996)).

I. The Trial Court's Denial of Meghan's Motion to Voluntarily Dismiss

Terry's first argument is that the trial court abused its discretion when it failed to grant appellee's motion to voluntarily dismiss the DVO. We note that

"[a] DVO proceeding is a civil matter[.]" *Rankin v. Criswell*, 277 S.W.3d 621, 624 (Ky. App. 2008). Therefore DVO proceedings are governed by the Kentucky Rules of Civil Procedure. Kentucky Rule of Civil Procedure (CR) 41.01 governs the voluntary dismissal of actions.[2] CR 1(2) provides that the Kentucky Rules of Civil Procedure "govern procedure and practice in all actions of a civil nature in the Court of Justice except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in the Rules." Although DVO proceedings are indeed "special statutory proceedings," *Erwin v. Cruz*, 423 S.W.3d 234, 236 (Ky. App. 2014), the legislature did not provide a separate rule for voluntary dismissal in the context of a DVO, and we conclude that CR 41.01 applies. *See id.* (discussing the applicability of the Civil Rules to DVO proceedings).

We note that Terry cites this Court to *Ruby v. Ruby*, 2008-CA-000122-ME, 2009 WL 153185, an opinion issued by this Court that was initially selected for publication but ultimately ordered not to be published by the Kentucky Supreme Court, which concurrently denied discretionary review. As that case was ordered unpublished, we are not permitted to consider it now.

CR 41.01(1) allows the plaintiff to move for dismissal "by filing a notice of dismissal at any time before service by the adverse party of an answer or of a

[2] Additionally, many jurisdictions, including the Hardin Family Court out of which this appeal arises, have adopted a statement in their appendices to their family court rules, which state that "No county shall adopt a blanket 'no-drop' policy. Domestic violence cases are civil matters within the purview of CR 41.01." These rules become binding after they are approved by the Chief Justice of the Kentucky Supreme Court. Kentucky Supreme Court Rule 1.040.

motion for summary judgment, whichever first occurs, or by filing a stipulation of dismissal signed by all parties who have appeared in the action." Dismissal under CR 41.01(1) "is automatic, leaving no discretion to the trial court as to whether it should be granted[.]" *Whaley v. Whitaker Bank, Inc.*, 254 S.W.3d 825, 829 (Ky. App. 2008).

We do not believe that the present case falls under CR 41.01(1), because Meghan never filed either a notice of dismissal or a signed stipulation with the court. Because Meghan merely read a statement into the record requesting that the DVO be dismissed, her motion to dismiss falls under CR 41.01(2). CR 41.01(2), which applies to dismissals other than those provided for in (1), states that "an action … shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."

A trial court retains broad discretion to dismiss an action under CR 41.01(2). *See Louisville Label, Inc. v. Hildesheim*, 843 S.W.2d 321, 325 (Ky. 1992) (quoting Bertelsman & Phillips, *Kentucky Practice,* 4th Ed., Civil Rule 41.01, p. 50). Dismissals under CR 41.01(2) are reviewed for an abuse of that discretion. *Id.* In *Sublett v. Hall*, 589 S.W.2d 888 (Ky. 1979), the Kentucky Supreme Court provided a variety of factors that should be considered in determining whether the trial court abused its discretion in regard to CR 41.01(2) dismissals:

> Many things must be taken into consideration by the trial judge prior to entering an order dismissing an action without prejudice.

> Some of the salient inquiries that the judge may desire to make could be:
> 1. What preparation has [sic] the opposing parties and their counsel made for trial?
> 2. What was the lapse of time between the filing of the complaint and the date of the motion to dismiss?
> 3. Will a dismissal without prejudice be prejudicial to the opposing parties?
> 4. Will the dismissal without prejudice act as an adjudication of the issues made by the pleadings?
> 5. Should the order of dismissal contain terms and conditions?
> 6. Would any term or condition attached to the order prejudice the movant?
> In essence, *the basic criterion is whether the opposing party will suffer some substantial injustice or be substantially prejudiced.* When we consider the full facts developed in this case, we do not find that the trial judge, in entering the order of October 15, 1975, or the order of March 21, 1978, abused his discretion.

Id. at 893 (emphasis added). *See also Huff v. Daniels*, 335 S.W.2d 332, 334 (Ky. 1960) ("The appellant has not shown that he suffered any injustice or prejudice by the dismissal of Shep's claim and the going ahead with the trial of Annabelle's claim, such as would establish an abuse of discretion by the trial court."). The Kentucky Supreme Court has never considered voluntary dismissals in the context of petitions for domestic violence.

In *Gibson v. Commonwealth*, 291 S.W.3d 686, 689 (Ky. 2009), our Supreme Court declined to extend *Sublett*'s analysis to criminal cases in part because "CR 41.01 contains several references to pleadings that exist only in civil actions, and have no analogous counterpart in the criminal context. When the references to those pleadings are omitted, it is exceedingly difficult to ascertain

what meaning the Rule would have in a criminal context." *Id.* at 689. Moreover, we note that our Supreme Court did not make the *Sublett* inquiries wholly inclusive, stating that they are "[s]ome of the salient inquiries that the judge may desire to make[.]" *Sublett* at 893.

We also note that, similarly to *Gibson*, *supra*, some of the factors discussed in *Sublett* do not seem to directly apply to domestic violence petitions. For example, the *Sublett* inquiries also refer to preparation for "trial," while a petition for a DVO results in only a hearing; the factors also discuss the filing of "pleadings" and a "complaint" instead of the filing of a petition.[3] Furthermore, domestic violence petitions would presumably always be dismissed under *Sublett*; it is difficult to imagine a situation in which an alleged perpetrator of domestic violence would be prejudiced by the petitioner's voluntary dismissal of a DVO. This is not the case with most other kinds of civil actions under CR 41.02; for example, dismissal in a civil suit may affect a defendant's counterclaim. We find the Supreme Court's analysis in *Gibson* applicable to domestic violence petitions. Thus, we conclude that the inquiries in *Sublett* do not encompass the entirety of a trial court's considerations for domestic violence petitions under CR 41.01(2). Certainly, the *Sublett* inquiries may still be considered by a trial court in determining whether to grant a motion to dismiss under CR 41.01(2), and the

[3] The text of CR 41.01 also mentions "motion[s] for summary judgment" and "counterclaim[s]," both of which are inapplicable to petitions for domestic violence.

degree of prejudice suffered by the respondent is still an important consideration.[4] However, we hold that the *Sublett* inquiries do not encompass the totality of a trial court's considerations in the context of a DVO petition.

We also find persuasive the Supreme Court's reasoning in *Van Wey v. Van Wey*, 656 S.W.2d 731 (Ky. 1983). In *Van Wey*, Ms. Van Wey filed a petition for a voluntary termination of her parental rights. *Id.* at 732. Following a hearing, Ms. Van Wey had "taken all steps that would be necessary on her part in order for a judgment terminating her parental rights to be entered. However, there were other steps involved that would not involve Ms. Van Wey." *Id.* After the hearing, however, Ms. Van Wey wrote to the judge claiming that she had been threatened and requesting to have her parental rights restored. *Id.* at 733. The Supreme Court, in concluding that a "best interest of the child" analysis controlled whether the appellant had a right to revoke her consent to terminate her parental rights, discussed CR 41.01. *Id.* at 736. While we acknowledge that in *Van Wey* the child had been named as a defendant, our Supreme Court described the child's interest as "paramount," giving the child's interests even more weight than both the biological mother and the child's potential adoptive parents (who were also named respondents in that case). *Id.* By placing the interests of one particular defendant above the interests of other defendants, our Supreme Court implicitly recognized that voluntary dismissals in termination of parental rights actions were inherently unlike dismissals in other kinds of civil cases and involve different sets of

[4] The failure to dismiss frivolous petitions for domestic violence, for example, would result in substantial prejudice to a defendant.

considerations. We conclude that domestic violence petitions are similar to termination of parental rights actions, and therefore involve different considerations than general civil cases.

Because CR 41.01(2) implicates a trial court's discretion, and because the *Sublett* factors do not encompass the entirety of a trial court's analysis in considering voluntary motions to dismiss domestic violence petitions, we hold that a trial court may consider other circumstances in deciding whether to grant a victim's request for a voluntary dismissal of a DVO under CR 41.01(2). Although these considerations would certainly encompass prejudice to the respondent under *Sublett*, trial courts may also consider circumstances unique to cases involving domestic violence. We believe that a trial court's consideration of circumstances other than mere prejudice to the respondent effects the legislature's intention reflected in our domestic violence statutes, as those statutes were intended to "[a]llow victims to obtain effective, short-term protection against further wrongful conduct in order that their lives may be as secure and as uninterrupted as possible[.]" KRS 403.715(1).

This Court has previously discussed the potential impact for both parties that comes with the issuance of a DVO:

> The filing of a DVO petition has enormous significance to the parties involved. If granted, it may afford the victim protection from physical, emotional, and psychological injury, as well as from sexual abuse or even death. It may further provide the victim an opportunity to move forward in establishing a new life away from an abusive relationship. In many cases, it

> provides a victim with a court order determining custody, visitation and child support, which he or she might not otherwise be able to obtain. The full impact of EPOs and DVOs are not always immediately seen, but the protection and hope they provide can have lasting effects on the victim and his or her family.
>
> On the other hand, the impact of having an EPO or DVO entered improperly, hastily, or without a valid basis can have a devastating effect on the alleged perpetrator. To have the legal system manipulated in order to "win" the first battle of a divorce, custody, or criminal proceeding, or in order to get "one-up" on the other party is just as offensive as domestic violence itself. From the prospect of an individual improperly accused of such behavior, the fairness, justice, impartiality, and equality promised by our judicial system [sic] is destroyed. In addition, there are severe consequences, such as the immediate loss of one's children, home, financial resources, employment, and dignity. Further, one becomes subject to immediate arrest, imprisonment, and incarceration for up to one year for the violation of a court order, no matter what the situation or circumstances might be.

Wright v. Wright, 181 S.W.3d 49, 52 (Ky. App. 2005). By allowing the trial court to consider the particular circumstances of a domestic violence petition, the trial court may come to a more equitable conclusion given those unique circumstances. Furthermore, by determining that trial courts are not required to hold a separate hearing to determine the voluntariness of a petitioner's dismissal in the context of a DVO, we avoid creating a separate, new rule for DVOs under CR 41.01(2).

We need not make an exhaustive list of considerations for DVOs under CR 41.01(2) now, although we hold that the trial court relied upon such an acceptable consideration here. In the present case, the trial judge stated, in relevant part:

> At the hearing held on September 14, 2015, as indicated above, the Petitioner's position had drastically changed. Against advice of her counsel, she read a written statement into the record, requesting the DVO not be entered. The Court has concern that there may have been some contact between the parties given the Petitioner's drastic change in position.

The trial judge explicitly asked Meghan if she had had "any contact with anyone in the family of the respondent" since the time the EPO was issued, and she stated that she called Terry's mom on the day that Meghan's daughter had an epileptic seizure. Terry's counsel stated that the contact had been reported to him, and that he immediately reported it to the county attorney's office. Because Meghan did dramatically change her position from the first day she appeared in court to the second, and because Meghan testified that she had been in contact with Terry's family, we cannot say that the trial court abused its discretion when it denied Meghan's motion to voluntarily dismiss the DVO on the grounds that contact had taken place between the petitioner and the respondent's family. No error occurred.

II. The Trial Court's Finding that Domestic Abuse Would Recur

Terry next contends that the trial court erred when it found sufficient evidence in the record that domestic violence "may again occur" under KRS 403.740(1). A trial court may consider various factors in determining whether domestic violence "may again occur" under KRS 403.740(1), including the nature and extent of the underlying act of domestic violence, any past history of domestic violence or protective orders, the petitioner's reasonable fear of the respondent

based upon past actions, continuing threatening behavior on behalf of the respondent, the nature and history of the parties' previous relationship and the physical proximity of the parties. This list is not meant to be exhaustive, and this inquiry is one to be examined primarily on a case-by-case basis. Although a reviewing court may consider the extent of the underlying domestic violence, we emphasize that a singular act is never sufficient to support a finding that domestic violence may recur without some additional indication, however small, that domestic violence may recur.

There is no question in the present case that the underlying act of domestic violence was severe. Both parties had apparently pointed guns at each other, and the situation could easily have ended in death. The severity of this event clearly weighs in favor of granting a DVO.

Very little testimony was elicited from either party as to the general nature of Terry's and Meghan's relationship. Meghan did state at the first hearing that she and Terry had been "fighting for a couple of days." During Meghan's prepared statement, she stated "We've had our share of arguments and hardships in the past 22 years together . . ." even though she continued to state that their level of fighting was analogous to that of most couples.

Meghan stated that she believed the incident to be a singular, isolated occurrence. At the initial hearing, she testified "he never put his hands on me until that day." She reiterated this several times at her second hearing, stating

> Your honor, I don't… I'm not scared of Terry and I'm not… I don't fear Terry. I will say I get upset when I talk to you [her counsel] and you tell me that I need to get a gun, learn how to use it, change the locks on my door. I don't feel like I have to do that. I don't feel threatened by Terry. Yes, we had a very bad day, but I don't want us to be punished for the rest of our lives for it. I love Terry. I want to work things out with Terry, and I know in my heart he feels the same way. And I'm just requesting, judge, that you do not put these through.

She also testified at the second hearing that she was scared of Terry the day that she originally testified in the family court, but that she was not scared thereafter. She stated that "In our 22 years together I can say that Terry hasn't laid his hands on me in any way. I don't know what would make him act the way he did that day." She then stated that she believed that he had been in "severe pain for days over a broken tooth" and an injury to his toe and that the attack was likely "some sort of diabetic episode." Later, she reiterated again "I love Terry with all my heart and I don't feel that I am in any danger of Terry. I do not fear him in any way."

Generally, testimony by the petitioner in a domestic violence action that domestic violence was a singular, isolated occurrence is strong evidence that domestic violence will not recur. However, in the present case we cannot conclude that the trial judge abused his discretion in determining that domestic violence may recur, given the totality of the circumstances. Meghan testified at the hearing that Terry had been drinking heavily on the day of the incident, and there was no indication at the time the trial judge entered the DVO that Terry had attempted to

get substance abuse counseling or to otherwise remedy the situation. We believe that this, in combination with the seriousness of the underlying incident of domestic violence and the fact that the parties lived together, was sufficient to support the trial court's finding that domestic violence might recur under KRS 403.740(1). "The predictive nature of the standard requires the family court to consider the totality of the circumstances and weigh the risk of future violence against issuing a protective order." *Pettingill v. Pettingill*, 480 S.W.3d 920, 925 (Ky. 2015). No error occurred.

Conclusion

In sum, we hold that the trial court, in its discretion, may rely on considerations unique to domestic violence petitions outside of the *Sublett* inquiries in determining whether to grant a voluntary motion to dismiss under CR 41.01(2). We hold that the trial court did not abuse its discretion in the present case when it denied the petitioner's voluntary motion to dismiss, based on its concerns that the petitioner had been intimidated.

We also hold that the evidence was sufficient in the record for the trial court to have made a finding that domestic violence may recur in this case due to the physical proximity of the parties, the fact that the respondent had substance abuse issues which had not been addressed, and the severity of the underlying incident.

The Hardin Circuit Court's Domestic Violence Order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Barry Birdwell Elizabethtown, Kentucky	No brief filed for appellee