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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000772-ME

LYDIA HALL APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 19-D-500818-001

STEVEN SMITH APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; CALDWELL AND COMBS, JUDGES.

CALDWELL, JUDGE: Appellant Lydia Hall appeals the denial of an entry of a domestic violence order she sought against her former spouse, Appellee Steven Smith. While the exact assignment of error forwarded by Appellant is difficult to discern from the brief filed, it is generally alleged that the court erred in not granting a domestic violence order, by failing to enter adequate findings after so

determining, and by not holding a proper hearing. Upon thorough review, we vacate and remand this case to the trial court for further findings.

FACTS AND PROCEDURAL BACKGROUND

The parties were previously married and had two daughters. At the time of the filing of the petition, the children were ages 16 and 15. Although divorced some twelve years prior to the filing of the petition seeking a DVO, the parties were apparently still engaged in litigation in the family court concerning the custody of the children at the time of the filing of this petition and the resultant hearing.

On March 25, 2019, Appellant filed the petition seeking a domestic violence order restraining Appellee on her behalf and on behalf of the children. For cause, Appellant stated:

> I the petitioner used to be married to the respondent. We have two children in common that I would also like to file on behalf of. For 12 years the resp has been controlling and manipulative. He has been stalking and is very deceptive. There was physical abuse at the end of our marriage and before that, it was mental abuse. It has continued to go on with our children. The children are being mentally abused. He is demeaning towards them and views them as his property. They are miserable with him. I have a couple of videos showing the abuse towards them. I have audio of his violent tendencies, he has even pulled a gun on his ex-girlfriend and her boyfriend and was charged with aggravated assault. The resp is not supposed to be within 1000 feet of our home but he continues to drive down our street watching us. The kids are scared of him. The resp is very irrational

> and controlling and we are scared. Things are escalating. My daughter was scared because she saw a big gun on the counter and she never knew him to have a gun. We need him to leave us alone. I'm afraid he is going to hurt the kids and hurt me as well. We need an EPO because if we don't let him see them he will lash out and I'm scared of what that will look like.

The reviewing judge declined to enter an emergency protective order based upon the narrative contained in the petition, finding no imminent threat, but instead issued a summons for Appellee and a hearing was held on April 22, 2019. This hearing was before a different family court judge but the same judge who was hearing the ongoing post-divorce custody action. After reviewing the petition, the judge received sworn testimony from Appellant. The judge specifically inquired as to any actions of Appellee which might be relevant to a determination of imminent danger or acts of domestic violence. Despite this focused questioning, Appellant provided no testimony which supported the entry of a domestic violence order. Appellant requested to provide the testimony of her daughters, and the judge declined to hear the testimony, but allowed Appellant to place the children's testimony in the record by avowal. (KRE[1] 103(a)(2); "[T]he trial court, at its discretion, may direct the offer be by avowal." *Slone v. Commonwealth*, 382 S.W.3d 851, 856 n.2 (Ky. 2012)). Appellant now complains that the judge erred in not entering a domestic violence order in response to her petition and testimony, by

[1] Kentucky Rules of Evidence.

not allowing her to offer the testimony of the parties' daughters, depriving her of a full hearing and failing to enter adequate findings.

STANDARD OF REVIEW

The standard of review of a denial of entry of a domestic violence order is whether the denial was clearly erroneous or that the trial court abused its discretion. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986); *Petrie v. Brackett*, 590 S.W.3d 830, 833-34 (Ky. App. 2019). "A trial court is authorized to issue a DVO if it 'finds by a preponderance of the evidence that domestic violence and abuse has occurred and may again occur[.]' KRS[2] 403.740(1)." *Castle v. Castle*, 567 S.W.3d 908, 915 (Ky. App. 2019). "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." *Caudill v. Caudill*, 318 S.W.3d 112, 114 (Ky. App. 2010). A reviewing court may not substitute its findings of fact for the trial court's unless they are clearly erroneous. *Bennett v. Horton*, 592 S.W.2d 460, 464 (Ky. 1979); *Pasley v. Pasley*, 333 S.W.3d 446, 448 (Ky. App. 2010).

ANALYSIS

The trial court reviewed the petition filed by Appellant and discerned no allegations of imminent threat of domestic violence or that an act of domestic

[2] Kentucky Revised Statutes.

violence had occurred. *Matehuala v. Torres*, 547 S.W.3d 142, 145 (Ky. App. 2018) ("In the instant case, no evidence of violence or harm was presented, nor was any testimony elicited regarding infliction of fear of imminent injury, abuse or assault."). Thus, it was right and proper that the judge refused to enter a DVO; to enter a DVO when there is no evidence to support a finding of imminent threat of physical violence is an abuse of discretion. "In the instant case, the record reflects that the trial court abused its discretion by entering the DVO. Specifically, we note that there were ***no*** allegations of physical abuse or physical injury, nor were there any allegations of threats of physical abuse in Ms. Pasley's petition for an emergency protective order." *Pasley*, 333 S.W.3d at 448.

Even after discerning no foundation for the entry of an order in the allegations contained in the petition, the judge questioned Appellant, giving her an opportunity to provide further testimony. Again, there was no testimony elicited which would provide a proper basis for entry of a domestic violence order as there was no testimony about an imminent danger of domestic violence. Finally, the trial court entered appropriate findings, concluding that she was not going to enter a DVO based on history, properly applying the standard and dismissing the petition.

As to Appellant's contention that the trial court erred in not allowing the testimony of the children, our review of the avowal testimony provides no

evidence which would support the entry of a DVO.[3] Again, there is no evidence of domestic violence occurring or likely to occur in the testimony proffered and thus there was no error in the exclusion of the children's testimony.

Finally, we address the trial court's findings or, rather, the lack of written findings. It has been held that the trial court must show its rationale for the issuance of a DVO. *Thurman v. Thurman*, 560 S.W.3d 884, 887 (Ky. App. 2018) In *Boone v. Boone,* 463 S.W.3d 767 (Ky. App. 2015), the Court held that the trial court is required to make written findings of fact for all DVOs, and that failure to make written findings is reversible error. The Court is aware and sympathetic to the work loads of family courts and in *Boone* the Court suggested that oral findings and handwritten notes *may* suffice. There is some question as to whether *Boone* should be read so broadly as to require a reversal in all DVO cases, particularly like the case in hand, where no EPO or DVO was issued and the petition dismissed. It would seem unduly burdensome and unnecessary for a court to make findings of fact that establish a non-finding of necessary facts. Kentucky's

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[3] KRE 103, as amended in 2007, no longer requires an "avowal" be made to preserve an objection to an evidentiary ruling. "The second of the changes involves the requirement that a party made a 'proper offer' of proof in order to preserve error when offered evidence is excluded by the trial judge. Under the 1992 version of this rule, lawyers were required to use witnesses when making a record of evidence ruled inadmissible by the judge; the rule left no room for what is known widely as a 'proffer' of evidence (i.e., where the lawyer states for the record what the witness would have said if allowed to testify). Under the 2007 amendment, lawyers are required to make the substance of excluded testimony 'known to the court by offer' but are not required to do so through testimony of witnesses (thereby opening the door to the use of 'proffers' of evidence)." KRE 103, Evidence Rules Review Commission Notes (2007).

standardized form for orders in DVO actions, AOC Form 275.3, provides boxes for "Additional Findings" by the trial court, including:

> ☐ For the Respondent in that it was not established by a preponderance of the evidence, that an act(s) of ☐ domestic violence and abuse, ☐ dating violence and abuse, ☐ stalking, ☐ sexual assault has occurred or may again occur;

It would appear to be appropriate and sufficient for the trial court to check the box stating that there was not sufficient finding of facts to support the entry of a DVO to satisfy *Boone* and *Thurman.* However, in the case before us, the trial court failed to even check the appropriate box to state that there was insufficient proof. Therefore, we must vacate and remand to the Jefferson Family Court for entry of a new order to set forth in writing the bases for the dismissal of the petition.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Thomas E. Clay Louisville, Kentucky	David B. Mour Louisville, Kentucky