

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

CASE NO. 2009-CA-001385-ME

APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 09-D-501985-001

SEAN IAN RICE

APPELLANT

V.

STACY RICE

APPELLEE

BRIEF FOR APPELLANT

Submitted by:

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Certificate required by CR 76.12(6)

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by first class U.S. Mail on September 25, 2009: Joseph W. O'Reilly, Jefferson County Judicial Center, 700 W. Jefferson St., Suite 105, Louisville, Ky. 40202-4730 and Stacy Rice (address not listed). The undersigned does also certify that the record on appeal has been returned to the Jefferson Circuit Court Clerk on or before this date.


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1. INTRODUCTION

This is a case concerning the abuse of discretion of a trial court in issuing a DVO against an individual when the facts that were undisputed showed that (1) there was no physical injury; (2) there were no threats of physical injury made; (3) there were no criminal charges filed; and (3) there was no history of domestic violence whatsoever.

2. STATEMENT CONCERNING ORAL ARGUMENT

Counsel is willing to give oral argument before this Court if requested.

3. STATEMENT OF POINTS AND AUTHORITIES

- a. Gomez v. Gomez, 254 S.W.3d 838, 842 (Ky. App. 2008)
- b. Bennett v. Horton, 592 S.W.2d 460 (Ky. 1979)
- c. Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky. App. 2002)
- d. KRS 403.720(1)
- e. KRS 500.080

- f. Springer v. Commonwealth, 998 S.W.2d 439 (Ky. 1999)
- g. KRS 403.750(1)
- h. Wright v. Wright, 181 S.W.3d 49, 52 (Ky.App.2005)
- i. Hensley v. Hensley, 2008-CA-001916-ME (2009) (unpublished)

4. STATEMENT OF THE CASE

The Appellant contends that the trial court abused its discretion in finding that the Appellee, Stacy Rice, was a victim of domestic violence by her ex-husband, Appellant Sean Rice.

This was a pretty standard DVO in most respects. An EPO was requested, but not issued. Instead, a summons was issued for the DVO hearing. Both parties were present and testified at the DVO hearing. All representations by counsel as to statements made at that hearing are hereby certified to be true and correct to the best of counsel's knowledge. There should have been a videotape or an audiotape of the hearing, which lasted less than fifteen (15) minutes. However, it appears from the Certification of Record on Appeal that there may not be a videotape nor an audiotape available. Counsel for the Appellant will therefore summarize the testimony at the DVO Hearing.

The Appellee testified as to what happened to cause her to file for an EPO. She testified that the incident was a telephone call between herself and her ex-husband. He was very angry on the phone, and was yelling. He was angry over an issue relating to child support. He stated on the phone that he was coming over to talk to her, and straighten things out. She hung up the phone and called the police regarding this. She was advised by the police to file for an EPO. She testified that she was afraid of the Appellant. On cross examination the Appellee admitted that during her 19 year

relationship with the Appellant, there was no history of any kind of domestic violence. She testified that the Appellant never raised a hand to her. She testified that she had seen the Appellant so angry before that his face turned purple. However, he never once hit her or threatened to do so. She testified that during the phone call in question that he made no statements or specific threats against her, other than the statement that he was going to come over to talk to her.

The Appellant testified that he did call the Appellee, and that he was angry during the phone call. He admitted that he did yell at the Appellee on the phone. He testified that the Appellee kept hanging up on him when he wanted to discuss this particular child support issue, so he told her that he was going to come over to talk to her. He testified that he made no threats against her and certainly had no intention of doing so. He testified that he had never once hit or otherwise laid a hand on the Appellee during their 19 year relationship. Counsel for the Appellant would like to point out that the Appellant is 5'6" tall and weighs approximately 130 pounds. He testified that he is a coach for track and field, and a runner himself, and works with high school teams in Jefferson County, and that a DVO could have a significant negative effect on his ability to continue working as a coach with children.

The Family Court found that his statement that he was going to come over could be interpreted as a threat, and that he inflicted fear of imminent physical injury on the Appellee. Therefore, the Family Court granted the Motion for a DVO against the Appellant. The Appellant was ordered to complete domestic violence counseling, which he has been doing as ordered. These counseling sessions are expensive for the Appellant, and he was already having financial troubles.

The allegations made against him and the testimony of Stacy herself established that (1) the incident was a phone call where Sean was angry, was yelling, and said to Stacy that he was going to come over to try to straighten things out (he never went to her house) but that (2) Sean made absolutely no threats during the phone call. She called the police after that phone call and they suggested she try to get an EPO, which is what she did. There were no criminal charges filed.

Stacy admitted that Sean made no threats. Stacy admitted that she had known Sean for 19 years and **not once** had Sean ever hit her or injured her. She also testified that in the past he has gotten angry and yelled, and his face had turned “purple” but again, he never once struck her. Therefore, she has been in his presence, in the past, when he was just as angry as he had gotten on the phone during the incident at issue, and not once was she ever in any danger. There is no history whatsoever of domestic violence between these parties. The sole reason that Stacy sought the EPO (an EPO was never issued, rather the trial court issued a summons prior to the DVO hearing) and the DVO was because she didn’t want Sean to call her or argue with her. She stated in her Petition that she wanted him to “stay away.” Although she did testify to the trial court that she was “afraid” of him or of what he might do, there was no factual basis for her to actually be afraid of her ex-husband. Therefore, the trial court abused its discretion in issuing this DVO. It is extremely unfair to the Appellant to have a DVO issued against him when he did not do anything to deserve it. If an angry phone call is a basis for a DVO (without any other indications of domestic violence) then counsel would estimate that every person in this country should have a DVO issued against them.

5. ARGUMENT

a. STANDARD OF REVIEW

Gomez v. Gomez, 254 S.W.3d 838, 842 (Ky. App. 2008) (quoting Anderson, 934 S.W.3d at 278) states: “[CR] 52.01 provides that a trial court's findings of fact may be set aside if clearly erroneous. The Court of Appeals in reviewing the decision of a trial court has to make a determination as to whether the court's findings were clearly erroneous or that it abused its discretion. Abuse of discretion occurs when a court's decision is unreasonable or unfair.”

A reviewing court may not substitute its findings of fact for the trial court unless they are clearly erroneous. Bennett v. Horton, 592 S.W.2d 460 (Ky. 1979). A factual finding is not clearly erroneous if it is supported by substantial evidence. "Substantial evidence' is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky. App. 2002).

b. KENTUCKY LAW ON DOMESTIC VIOLENCE ORDERS

The District Court may only issue a protective order when an act of "domestic violence and abuse" is alleged to have been committed. KRS 403.720(1) defines "Domestic Violence and Abuse" as physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple". Furthermore, KRS 500.080 defines the terms “(13) ‘Physical injury’ means substantial physical pain or any impairment of physical condition; ... (15) ‘Serious physical injury’ means physical injury which creates a substantial risk of death, or which causes serious

and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ..." Springer v. Commonwealth, 998 S.W.2d 439 (Ky. 1999) defines "Imminent" as "impending danger, and, in the context of domestic violence and abuse as defined by KRS 403.720, belief that danger is imminent can be inferred from a past pattern of repeated serious abuse."

KRS 403.750(1) provides that the district court may enter a domestic violence order if it finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur." Under the current state of affairs, Petitioners who allege these fact situations and meet the additional requirements should and are liberally given petitions by the courts. Unfortunately, Domestic Violence Orders are being issued when the fact situations clearly do not warrant it. This is because many members of the public are abusing this statute and asking the court to exceed its authority. They are asking for petitions in situations where there is no physical injury and no real fear of physical injury or sexual abuse. This case is a perfect example of this kind of abuse.

c. ABUSE OF DOMESTIC VIOLENCE STATUTES

Wright v. Wright, 181 S.W.3d 49, 52 (Ky.App.2005) discussed, in detail, the pros and cons of DVOs. The Court stated:

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 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.

Although technically a DVO is a civil order, its effects are just as significant as any criminal conviction for the individual involved. The DVO will appear on any and all background checks of that individual. In this case, the Appellant was required to attend and complete domestic violence counseling, which has taken a great deal of time and expense on the Appellant. It has also made it impossible for the Appellant to sustain a good relationship with his teenage daughter who resides with the Appellee.

Victims of domestic violence are not without protection under Kentucky Law, even without a domestic violence order. Conduct of an individual that legitimately constitutes "domestic violence" should under virtually all circumstances constitute criminal conduct that the individual will be held accountable for by the imposition of criminal charges. In a criminal case, the defendant can be ordered to have no contact with the victim, which is the same as the DVO does. A defendant convicted can be held accountable and ordered to have no further contact with the victim, and if that defendant violates such order, that defendant can be subjected to further criminal charges. In particular, in any case where physical injury actually occurs, counsel believes that it would be insupportable for the perpetrator of such injury not be charged criminally for

his or her conduct. However, if a complaint is lodged against an individual with the police, and instead of arresting and charging that individual with a criminal offense, the complainant is advised to seek a DVO instead, it seems clear to counsel that the criminal justice system does not view the complaint nor the conduct as serious enough to warrant criminal charges. In such a case, it seems that a trial court should seriously consider that the complainant was not the victim of domestic violence, but instead, has other motivations or reasons for pursuing the DVO, such as using it simply as a “restraining order” to keep the other party from making any contact, or some other similar reason.

In an unpublished case by this Court, Hensley v. Hensley, 2008-CA-001916-ME (2009), this Court vacated a DVO that was issued by the Jefferson Family Court. There are several facts in that case that are similar to the facts in this case. In fact, that case did involve physical proximity of the parties, while this one does not. A summary of the facts of that case are as follows:

The facts are not disputed. In fact, Amy stipulated that Doug did not lay a hand on her. Instead, Doug stood by during a physical altercation between the two women. Standing by, while perhaps not the most commendable behavior, does not itself inflict physical injury. Furthermore, since Doug did nothing, to infer that he inflicted fear of imminent physical injury is not supported by the evidence. No evidence was provided to the court that Doug threatened to attack Amy. Although apparently a dispute existed as to the retrieval of the children's bicycles, and perhaps harsh words were exchanged, Amy provided no specific testimony of statements by Doug threatening to harm her or have his girlfriend harm her. Although Amy contends that Doug incited or directed the assault, she provided no such statements by him. Bolstering the fact that Doug's inaction did not inflict fear, the record shows that the parties had a fifteen-year relationship history with no family court history of domestic violence. Further, Doug's criminal record shows no cases indicating a history of violence. While the judge analogized the situation to Doug pointing an attack dog (the girlfriend) at Amy, we do not find this analogy appropriate or accurate. Nor are we aware of any duty on the part of Doug to intervene in this situation. Indeed, we are cognizant that, had Doug intervened, he could have placed himself in legal jeopardy. In sum, the fact that Doug's girlfriend attacked Amy, his ex-wife, is too remote and attenuated to establish domestic violence on the part of Doug. Id. At 6-7.

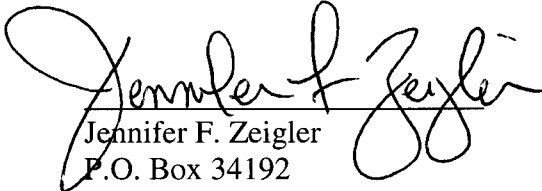
In Hensley, there were “harsh words,” but no specific statements by the defendant threatening to harm the victim. There was no physical injury inflicted on the victim by the defendant. There was no family court history of domestic violence in this fifteen-year relationship. These facts are very similar to the facts of this case. (1) There was no physical altercation; (2) there were no specific statements by the Appellant threatening to harm the Appellee; and (3) There was no history of domestic violence as the Appellee herself testified that she had never been the victim of domestic violence at the hands of the Appellant during their nineteen-year relationship. Furthermore, the Appellant never went to the Appellee’s house. In the Hensley case, Doug Hensley went to his ex-wife’s house, with his girlfriend, where the altercation between the ex-wife and the girlfriend occurred. This Court stated in Hensley: “Given the circumstances of the confrontation between Amy and Doug's girlfriend, we find the standards, under KRS 403.750 and Anderson, 934 S.W.2d 276, have not been met. Amy suffered no injury of any type by Doug. Hence, pursuant to the statutes, she was not a victim of domestic violence.”

6. CONCLUSION

In conclusion, the Appellant requests that this Court vacate the Domestic Violence Order that was entered against him by the Jefferson Family Court. The facts did not warrant the issuance of the DVO. The court was unreasonable in its finding that Appellant’s conduct constituted the “infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members.” There was no reasonable basis for the Appellee to believe that the Appellant would injure her. She

simply wanted the Appellant to leave her alone. She didn't want to deal with him, or his concerns over their daughter, anymore, and decided that a DVO would solve her problem with him. This DVO did not "promote justice" or "effect the objects of the law." In Hensley v. Hensley, 2008-CA-001916-ME (2009), the court stated: "We cannot fail to note that the imposition of a DVO is a significant limitation on a person. Where there has been violence, it is appropriate, but where the statute has been stretched beyond its intent, a DVO diminishes its effectiveness and can create great harm. ...[w]here the challenge involves matters of fact, or application of law to facts, however, an abuse of discretion should be found only where the factual underpinning for application of an articulated legal rule is so wanting as to equal, in reality, a distortion of the legal rule." This was the case in Hensley and this is the case here.

Respectfully Submitted:



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