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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001333-ME

LOGAN KUMMER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LAUREN ADAMS OGDEN, JUDGE
ACTION NO. 18-D-502230-001

CHELSEA VALLA

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: ACREE, J. LAMBERT, AND MAZE, JUDGES.

ACREE, JUDGE: Logan Kummer brings this appeal from the Jefferson Family Court's grant of a Domestic Violence Order (DVO) to Chelsea Valla. After careful review of the statutes governing domestic violence orders, we reverse.

FACTS AND PROCEDURE

Chelsea Valla and Kummer lived together for five years before their break up on April 14, 2018. Three and a half months later, on July 30, 2018, Valla filed a petition for an emergency protective order against Kummer. She alleged in the petition that: Kummer showed up at her work site (Taco Bell) and knocked on the entrance door and jiggled the handles demanding entry; he refused to leave even after multiple requests; he contacted Valla's friends and coworkers to discover her new address; he stalked and harassed her, showed up unannounced, and followed her everywhere; he showed up at her place of work when she opened the store by herself; she had to call the police because she fears for her safety; Kummer harasses her by calling her using telephones or telephone numbers other than his own. She stated that she feared for her safety because he owns guns and is afraid of what he might do.

The family court granted an emergency protective order and conducted a hearing on August 7, 2018, to determine if a domestic violence order should be issued. At the hearing, Valla appeared *pro se* and Kummer appeared with counsel. Kummer contested the allegations related to stalking on the basis that a proper finding of stalking requires a pattern and not a single incident. Valla testified that Kummer showed up at her workplace in part because he works

nearby.¹ She also stated that Kummer has not showed up at her house but only because he does not know where she lives. Kummer did not testify.

Although Valla acknowledged that Kummer never actually threatened or hurt her in any way, the family court was not persuaded by Kummer's argument. The court found there was some "stalking-like behaviors and that there may be a need for a cooling off period for the parties." (Video Transcript ("VT") at 11:44:00). On the AOC-275.2 form granting the DVO, the family court placed a check mark in a box indicating "that an act of domestic violence and abuse . . . has occurred and may again occur." (R. at 22). The family court entered the DVO against Kummer on August 7, 2018. Kummer immediately filed this appeal.

STANDARD OF REVIEW

The ruling and review of a DVO is governed by KRS² 403.740, as follows: "Following a hearing ordered under KRS 403.730, 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[.]" KRS 403.740(1).

¹ Valla also testified that following Kummer's uninvited appearance at her place of work, she went to the nearby Kroger to get a money order to pay her rent. She stated that Kummer was present at Kroger because he works there.

² Kentucky Revised Statutes.

The preponderance of the evidence standard is met when sufficient evidence establishes that the petitioner is “more likely than not” to have been a victim of dating violence and abuse, sexual assault, or stalking. *See Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007) (applying the preponderance of the evidence standard in the context of the issuance of a domestic violence order).

When we review a decision of the circuit court, “[t]he test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.” *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008).

ANALYSIS

Kummer asserts that for the family court to find he “stalked” Valla, all the elements of stalking must be proven. Specifically, Kummer argues that because KRS 403.720(1) was amended in 2017 to include the term “stalking,” the family court must prove the elements of stalking before a petition for a DVO can be granted. We agree.

Domestic violence is governed by KRS 403.715, *et seq.*, which provides that domestic violence petitions must contain “[t]he facts and circumstances which constituted the alleged domestic violence and abuse.” KRS 403.725(3)(c). “Domestic violence and abuse” is defined as:

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 between family members or members of an unmarried couple[.]³

KRS 403.720(1).⁴ When the basis of the DVO is stalking, we must turn for guidance to the relatively new set of statutes governing interpersonal protective orders, KRS Chapter 426. *Halloway v. Simmons*, 532 S.W.3d 158, 161 (Ky. App. 2017) (“IPO statutes are relatively new and were enacted by the legislature in January 2016.”).

Under the IPO statutes, “stalking” refers to conduct prohibited under KRS 508.140 or KRS 508.150. KRS 456.010(7). Those statutes define the difference between first-degree and second-degree stalking. For domestic violence related instances, we analyze under the second-degree stalking statute but start with the definition of stalking. That definition is found in KRS 508.130, and states as follows:

(1)(a) To “stalk” means to engage in an intentional course of conduct:

1. Directed at a specific person or persons;

³ KRS 403.720(5) defines “member of an unmarried couple” as: “each member of an unmarried couple which allegedly has a child in common, any children of that couple, or a member of an unmarried couple who are living together or have formerly lived together.” We note that Kummer and Valla were in an unmarried relationship in which they lived together in the same residence over a period of approximately five years.

⁴ In 2017, the Kentucky General Assembly amended legislation governing domestic violence protection to now include “stalking” in the definition of domestic violence. *Id.*

2. Which seriously alarms, annoys, intimidates, or harasses the person or persons; and

3. Which serves no legitimate purpose.

(b) The course of conduct shall be that which would cause a reasonable person to suffer substantial mental distress.

KRS 508.130(1). Notably, “ ‘Course of conduct’ means a pattern of conduct composed of two (2) or more acts, evidencing a continuity of purpose.” KRS 508.130(2). Second-degree stalking is defined by KRS 508.150, which states:

(1) A person is guilty of stalking in the second degree when he intentionally:

(a) Stalks another person; and

(b) Makes an explicit or implicit threat with the intent to place that person in reasonable fear of:

1. Sexual contact as defined in KRS 510.010;

2. Physical injury; or

3. Death.

KRS 508.150(1). That is, second-degree stalking requires a course of conduct – not a single act – by someone who makes an explicit or implicit threat with the intent to place the target of the stalking in reasonable fear of sexual contact, physical injury, or death. KRS 508.150(1)(b); *see Holloway*, 532 S.W.3d at 162.

After the hearing, the family court made the following finding:

Ok, I'm finding that there is a pattern [of stalking]. So I'm going to go ahead and just do this [issue a DVO]. With his access to weapons, he's going to need to turn those in and not have those for the term of the domestic violence order that's granted. I think it's a cooling off period that's needed and a clear signal that the parties should not be communicating and there's no need for them to communicate in the future.

(VT at 11:47:35).

The family court checked the box on the AOC form making a finding that an act of domestic violence and abuse had occurred and may again occur. KRS 403.740(1). The form includes acts of dating violence and abuse, sexual assault, and stalking listed within the IPO statute, but the court did not check the box for any of those circumstances. As we review, we note that a DVO, “entered improperly, hastily, or without a valid basis can have a devastating effect on the alleged perpetrator.” *Boone v. Boone*, 463 S.W.3d 767, 769 (Ky. App. 2015) (citing *Wright v. Wright*, 181 S.W.3d 49, 52 (Ky. App. 2005)).

The family court erred by finding Kummer stalked Valla because the statutory requirements of KRS 403.720 were not met. Although we find Kummer's behavior of some concern, we cannot agree that testimony from the hearing constitutes substantial evidence sufficient to support the family court's finding of second-degree stalking. That finding does not meet the statutory requirements of KRS 508.150.

The family court is permitted to make a finding of second-degree stalking to issue a DVO if an explicit or implicit threat was made with the intent to place that person in reasonable fear of physical injury or death. *Halloway*, 532 S.W.3d 158, 162. Valla's own testimony refutes any such finding.

Valla: I have never received any injuries from [Kummer]. I have never needed medical attention.

(VT at 11:35:10).

Court: Has [Kummer] made any serious physical threats or threats on your life?

Valla: No, that's why I don't understand why it's a DVO instead of just an EPO.

Court: Oh, like an IPO, that's because you two lived together for a time, so that would put you in family court.

(VT at 11:35:20).

Kummer's Counsel: He's never, it's my understanding from the questions from the judge, he's never threatened you in any way or hurt you?

Valla: No.

(VT at 11:38:09).

Upon review of the record before us, we find insufficient evidence to support the family court's finding that Kummer stalked Valla. Specifically, we see no evidence that Kummer "made an explicit or implicit threat with the intent to

place Valla in reasonable fear of sexual contact, physical injury, or death.” *See* KRS 508.150.

Valla’s fear of Kummer is certainly important to the family court’s consideration of whether dating violence or abuse, sexual assault, or stalking has occurred and may again occur, but a general allegation of fear while denying the existence of any sort of specific threat or fear of threat from Kummer does not entitle Valla to the issuance of a domestic violence order.⁵ We believe the family court accomplished its intent to provide the parties a “cooling off period” through the process of this appeal, but we cannot affirm such reasoning as a valid basis for the issuance of a DVO. We find the family court’s decision that Kummer is guilty of stalking Valla to be clearly erroneous based on the evidence offered.

CONCLUSION

For the foregoing reasons, we reverse the August 7, 2018, DVO issued by the Jefferson Family Court as clearly erroneous given the evidence presented in the record, and we dismiss Valla’s petition without prejudice pursuant to KRS 403.730(1)(a).

ALL CONCUR.

⁵ At the hearing, Valla unequivocally stated that she did not wish to obtain a DVO against Kummer: “Yeah, like I don’t want to ruin [Kummer’s] record at all and I don’t want him to have a DVO because there’s no domestic violence in [the petition]” (VT at 11:47:20).

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

Clay Kennedy
Louisville, Kentucky