

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000530-ME

MATTHEW SEAN KINNEY

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JASON S. FLEMING, JUDGE
ACTION NO. 07-D-00015

JULIA S. KINNEY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

STUMBO, JUDGE: Matthew Kinney appeals from an Order of Protection of the Christian Circuit Court restraining him from any contact with his wife, Julia Kinney. He argues that the Circuit Court erred in rendering the order because there was no evidence tendered that he ever harmed or intended to harm Julia. For the reasons stated below, we affirm the order on appeal.

On January 12, 2006, Julia filed a Domestic Violence Petition/Motion in Christian Family Court. The petition alleged that on January 8, 2006, in Ft. Campbell,

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Kentucky, Matthew became irritated when told by Julia that she had signed him up for an anger management class. According to Julia, Matthew hit her in the face with “a bag filled with stuff” while she was in her vehicle. He then allegedly slammed the car door, struck the front passenger window with his hand, and then stood in front of the car preventing her from leaving. Julia alleged that Matthew walked around to the driver’s side window and punched it, then punched the driver’s side rear window as she drove off. The petition sought an order restraining Matthew from committing any further acts of domestic violence and abuse, contacting or communicating with Julia, and from disposing of or damaging any of the parties’ property.

On January 12, 2007, a 14-day Emergency Order of Protection was rendered by the Christian Family Court. A second 14-day order was rendered on January 23, 2007. And finally, a 12-month Order of Protection was rendered on February 6, 2007. As a basis for this order, the court made a finding that Julia established by a preponderance of the evidence that an act or acts of domestic violence or abuse had occurred and may occur again. Matthew was ordered to surrender his license to carry a concealed firearm and refrain from contacting Julia or approaching within 300 feet of Julia. This appeal followed.

Matthew now argues that the trial court erred in rendering the February 6, 2007, domestic violence order. Specifically, he contends that no evidence was presented to support the claim that he committed any acts of domestic violence or abuse, nor that he harmed nor wishes to harm Julia. Since no evidence was tendered in support of Julia’s

claim of domestic violence or abuse, he maintains that the Family Court improperly found that a preponderance of the evidence supported Julia's claim. He seeks an order finding reversible error and remanding the matter for additional proceedings.

KRS 403.720 states that, "'Domestic violence and abuse' means 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" KRS 403.750 goes on to provide that the court may restrain the adverse party from further contact with the petitioner and from committing further acts of domestic violence or abuse 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"

The dispositive question, then, is whether the record supports the Family Court's finding that Julia showed by a preponderance of the evidence that Matthew engaged in one or more acts of domestic violence or abuse and that such acts may occur again. Preponderance of the evidence is defined as "the greater weight of evidence . . . sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Black's Law Dictionary* (8th Ed. 2004). The preponderance is found with the party demonstrating the stronger evidence, "however slight the edge may be." *Id.*

In the matter at bar, Julia alleged that she did not feel safe around Matthew; that he hit her in the face with "a bag filled with stuff;" punched three windows of her car while she was occupying the car; and stood in front of the vehicle so she would not drive

away. She alleged that Matthew was very unstable, and that she had sought protection from him through the military's Family Advocacy Program. In a March 15, 2007, affidavit, Julia alleged that she contacted the military police after her vehicle disappeared. According to Julia, it was determined that Matthew took the vehicle, and she maintained that he must have been "stalking" her because she parked it "in a weird parking lot" that Matthew could only have known about if he was following her. Matthew denied Julia's allegations, and maintained that he had never engaged in domestic violence or abuse defined by KRS Chapter 403. He further stated that he had never given Julia any reason to fear injury or abuse from him. He did state, however, that there had been numerous arguments in the past between the parties, and that after one heated argument, he told Julia that he wished she were dead.

We cannot find any basis for altering the Family Court's finding that Julia's allegations were supported by a preponderance of the evidence. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01; *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986). Julia's allegation that Matthew struck her with "the bag filled with stuff," and repeatedly struck the vehicle she was occupying, constitute credible evidence upon which the Family Court reasonably concluded that her claims were supported by a preponderance of the evidence. This is especially true given Matthew's acknowledgment that the parties had previously engaged in numerous arguments, and that he once told Julia that he wished she were dead. Matthew's allegation that Julia had

injured him in November, 2006, is not relevant for purposes of determining whether Matthew had engaged - at some other time - in acts of domestic violence or abuse against Julia. In sum, the record when considered in its entirety reasonably supports the Family Court's finding that Julia's allegations were supported by a preponderance of the evidence. As such, we find no error.

For the foregoing reasons, we affirm the Order of Protection of the Christian Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE WAS FILED.

Dennis M. Ritchie
Hopkinsville, Kentucky