

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000785-ME

ANNABELL LAYTON WOODS

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NOS. 07-D-00036 AND 07-D-00036-001

GERRITH BLAIN WOODS

APPELLEE

OPINION VACATING AND REMANDING

** ** * ** * ** *

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

WINE, JUDGE: Annabell Layton Woods (“Annabell”) appeals a domestic violence order (“DVO”) entered against her by the Hardin Circuit Court on February 22, 2007.

The DVO restrained Annabell from having contact with her husband, Gerrith Blain Woods (“Gerrith”), and restricted her from being within 500 feet of his person. Annabell argues the trial court improperly entered a DVO against her after having found that no domestic violence had occurred. No reply brief was filed on behalf of Gerrith in this

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.

action. For the reasons stated below, we are compelled to vacate the issuance of the DVO.

Annabell and Gerrith are separated with their divorce action pending in North Carolina. Annabell lives in North Carolina. Gerrith is a soldier stationed at Fort Knox, Kentucky. On February 7, 2007, Gerrith filed a domestic violence petition with the trial court alleging Annabell continually called and sent text messages containing threats and making accusations about him. In addition, Gerrith asserted that Annabell was making vulgar and harassing comments to Gerrith's superior officers at Fort Knox. Gerrith asserted these actions were negatively affecting his employment and caused him to voluntarily commit himself to the psychological unit at Hardin Memorial Hospital. While there, Gerrith was placed on 72-hour suicide watch and suffered from sleep deprivation. Gerrith noted that he was scheduled to be deployed to Iraq on February 23, 2007. He further petitioned the court to release him from having to pay support to Annabell. Based on the petition, the trial court issued an Emergency Protective Order ("EPO") and a summons for Annabell to appear at a hearing to be held February 19, 2007.

Gerrith appeared at the hearing on February 19, along with his mother, Teresa Kibbe ("Kibbe"), and Annabell's counsel. Annabell's counsel informed the court that Annabell was still in North Carolina and could not make the hearing. In addition, her counsel informed the court that he had a conflict of interest and could not represent Annabell in this matter. He requested the court postpone the hearing one week

so that Annabell could retain new counsel and be present at the hearing. The court opted to continue and heard the testimony of Gerrith and Kibbe.

Gerrith testified to the allegations made in the petition. He stated that Annabell's actions were primarily psychological in nature. Kibbe testified that she had actually seen Annabell physically hit Gerrith in the past when the two were arguing over money. Gerrith also told the court that his deployment to Iraq had been suspended because of his psychological evaluations.

After hearing the testimony, the trial court found that no domestic violence had occurred. Nevertheless, the court entered the DVO for a period of three years. The DVO requires that Annabell not have any contact and remain 500 feet away from Gerrith and his family or household. The court also found that Annabell had notice of this hearing but failed to appear. Consequently, the court issued a bench warrant for Annabell's arrest. The court did not address the issue of support but left that to be resolved in the parties' pending divorce action in North Carolina.

On February 28, 2007, Annabell petitioned the court for a new trial or to alter, amend or vacate the DVO. A hearing on the motion was held on March 12, 2007, at which Annabell's counsel presented the issues raised in Annabell's motion. Specifically, Annabell asserted that her due process rights were violated because she did not have an opportunity to be heard at the prior hearing, and the court lacked jurisdiction to enter a DVO without a finding of domestic violence pursuant to KRS 403.750. In addition, Annabell's counsel verbally requested the bench warrant be recalled. The trial

court recalled the bench warrant but denied the motions for a new trial or to alter, amend, or vacate the judgment. This appeal followed.

On appeal, Annabell's sole argument is that the court did not have authority to enter a DVO against her after having found that there was no domestic violence. We agree. A DVO may be entered by a court after a full evidentiary hearing "if it finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred or may again occur" KRS 403.750(1). "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 403.720(1). The 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." *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996).

Here, the trial court expressly stated on the record at the February 19, 2007, hearing that there was no domestic violence in this case. Further, in the court's additional findings, the court checked, "For the Respondent in that it was not established, by a preponderance of the evidence, that an act(s) of domestic violence or abuse has occurred and may again occur." (Order of Protection dated 2/19/07). Yet the trial court still issued the DVO against Annabell. Contrary to the trial court's statement at the February 19, 2007, hearing, KRS 403.750 clearly requires a finding that domestic violence and abuse

have occurred as a prerequisite to entry of a DVO. Because the trial court found that domestic violence and abuse had not occurred, it was without authority to enter a DVO.

Accordingly, the DVO entered by the Hardin Circuit Court against Annabell Woods is vacated and this matter is remanded to the circuit court for entry of an order dismissing the DVO.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE.

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