

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Thomas R. Tarini,	:	
	:	No. 12AP-336
Petitioner-Appellant,	:	(C.P.C. No. 11DV-2080)
v.	:	
	:	(REGULAR CALENDAR)
Steve Tarini,	:	
	:	
Respondent-Appellee.	:	

D E C I S I O N

Rendered on December 27, 2012

Dennis W. McNamara, for appellant.

Gerald T. Sunbury, for appellee.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations

BRYANT, J.

{¶ 1} Petitioner-appellant, Thomas R. Tarini, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, denying his request for a civil protection order against respondent-appellee, Steve Tarini. Because the trial court denied petitioner the opportunity to fully present his case, we reverse.

I. Facts and Procedural History

{¶ 2} On November 22, 2011, petitioner filed in the trial court a petition seeking a civil protection order against respondent, his brother. The addendum to the petition states respondent had been stalking petitioner for the last ten years and has attempted to prevent petitioner from working for his father in the family business. According to the addendum, respondent called petitioner, threatening to put a bullet in petitioner's body and to create circumstances so that his body would not be found. The addendum further

asserts that petitioner tried to "make things right," but respondent continued to threaten petitioner "in every way" so that petitioner was "in fear for [his] life this time." Petitioner requested an ex parte protection order, which the trial court granted the same day, effective until November 29, 2011.

{¶ 3} The trial court set the matter for a full hearing on November 29, 2011, but in view of both parties having recently retained counsel, the court continued the matter until January 5, 2012 so the parties could conduct discovery and any possible negotiations. The court ordered the November 22, 2011 order to remain in full force and effect until the next hearing, except as modified by a separate order that allowed respondent to carry a gun due to the nature of his work. On the scheduled hearing date of January 5, 2012, the court again continued the hearing, with the modified November 22, 2011 order remaining effective until February 21, 2012.

{¶ 4} On February 21, 2012, the court heard testimony from a number of petitioner's witnesses but continued the hearing because the court had a trial on another matter scheduled for that afternoon. The hearing on petitioner's request for a civil protection order was rescheduled for March 15, 2012, and the court emphasized that the "no contact order remains in effect until otherwise authorized by the Court." (Tr. 62.) The hearing resumed on March 15, 2012. Because the discourse between the court and counsel at the hearing is seminal to resolving petitioner's first assignment of error, we address it in some detail.

{¶ 5} As petitioner's counsel was conducting direct examination of petitioner, the court stated: "All right. I'm going to stop you at this point. You have met the threshold and I'm going to turn it over to [respondent's counsel] to put on your case in chief and rebuttal. I'm doing this because this is going to go on forever. It's not necessary at this point." (Tr. 116.) The court then addressed respondent, expressing its concern that a person in his position of authority would say he was going to put a bullet in petitioner's head. The court told him: "So it's time for you to call your witnesses. * * * But they have met their threshold for a [civil protection order]. So now the case goes to you." (Tr. 117.)

{¶ 6} Petitioner's attorney asked the court: "Depending what follows, I can call him back again later?" (Tr. 117.) The court responded: "Yes. You can always redirect based upon his cross." (Tr. 117.) Respondent's counsel then clarified: "So I understand your

position that I can cross him and then call - -." (Tr. 117.) The court answered: "As if it's fresh and new and then start your case. * * * They have met their threshold." (Tr. 117.)

{¶ 7} After respondent's attorney completed petitioner's cross-examination, counsel for petitioner stated: "I originally had a good bit more direct examination. At this point, do you want - - am - - Should I be limited just to the things [respondent's counsel] asked him about, or are we back at where I left off?" (Tr. 148.) The court responded: "Counsel, I indicated you had met your threshold. At this point, you are in his case in chief." (Tr. 148.) Petitioner's attorney replied: "Okay. Then just a few things." (Tr. 148.) Respondent's attorney followed redirect examination with recross-examination, and the court asked petitioner's counsel if he had anything else. Counsel for petitioner responded: "Not in the form of redirect or whatever that would be." (Tr. 155.) With that, the court allowed petitioner to step down from the witness stand.

{¶ 8} Respondent's counsel rested his case after respondent's testimony, and the court asked: "Do - - Have I looked at all the exhibits that you all have introduced?" (Tr. 218.) Respondent's attorney answered: "The warrant, the contract and the power of attorney." (Tr. 218.) Directing itself to counsel for petitioner, the court asked whether he was actually marking the contract, to which counsel responded he was not. The court remarked: "I have two. I have a warrant, which is B and a power of attorney. A was the tape." (Tr. 218-19.)

{¶ 9} The court then began to discuss the evidence presented and the court's reaction to it. In the middle of the court's statement, petitioner's attorney apparently did something to attract the court's attention because the court stated: "This is my turn, not your turn. You all rested." (Tr. 221.) Counsel for petitioner responded: "I didn't rest." (Tr. 221.) The court replied: "You should have. You submitted your documents. We are done here." (Tr. 221.) The court continued its statements about the evidence and ultimately stated: "I'm not going to grant the [civil protection order] at this time." (Tr. 225.)

{¶ 10} The court journalized its decision with an "Entry Denying Petition and Dismissing Case." In it, the court stated that it "conducted a Full Hearing on the matter on March 15, 2012." (R. 25-26.) The court determined that, after considering "the testimony of the parties, their witnesses (if any) and all the relevant evidence in the case, the Court finds that a *prima facie* of showing of attempting to cause or causing bodily injury to a

family or household member, or placing a family [or] household member by threat of force in fear of imminent physical harm, has not been established." (R. 25-26.) Accordingly, the order denied the petition and dismissed it without prejudice.

II. Assignments of Error

{¶ 11} Petitioner appeals, assigning two errors:

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED WHEN IT DENIED PETITIONER THE OPPORTUNITY TO COMPLETE HIS CASE IN CHIEF AND DENIED PETITIONER [sic] THE OPPORTUNITY TO PRESENT REBUTTAL EVIDENCE.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT'S DECISION DENYING A CIVIL PROTECTION ORDER WAS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

III. First Assignment of Error - Incomplete Hearing

{¶ 12} Petitioner sought a civil protection order pursuant to R.C. 3113.31. Under R.C. 3113.31(C), "[a] person may seek relief * * * on the person's own behalf * * * by filing a petition with the court," stating "[a]n allegation that the respondent engaged in domestic violence against a family or household member of the respondent, including a description of the nature and extent of the domestic violence." R.C. 3113.31(C)(1). The petition also shall contain "[t]he relationship of the respondent to the petitioner" and "[a] request for relief under this section." R.C. 3113.31(C)(2) and (3).

{¶ 13} If a person files a petition under R.C. 3113.31 and requests an ex parte order, the court is to hold a hearing the same day, and for good cause shown may enter an ex parte temporary order. R.C. 3113.31(D)(1). When the court, after an ex parte hearing, issues an ex parte order, "the court shall schedule a full hearing for a date that is within seven court days after the ex parte hearing." R.C. 3113.31(D)(2)(a).

{¶ 14} Although R.C. 3113.31 requires a "full hearing," the statute does not define the term. *Deacon v. Landers*, 68 Ohio App.3d 26 (4th Dist.1990). Even so, "in an unrelated context, a mere 'hearing' has been held to include the introduction of testimony and documents." *Id.* at 29, fn. 4, citing *State v. Johnson*, 29 Ohio App.2d 219, 222 (7th

Dist.1971). Accordingly, a full hearing generally "is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety of the step asked to be taken." *Deacon* at 30. "[W]here the issuance of a protection order is contested, the court must, at the very least, allow for presentation of evidence, both direct and rebuttal, as well as arguments." (Footnote deleted.) *Id.*

{¶ 15} Here, counsel for petitioner was in the course of questioning petitioner on direct examination when the court announced that, because petitioner met his threshold showing for a civil protection order, the court was halting counsel's direct examination. Petitioner's counsel inquired whether he would be able to call petitioner back at a later time, and the court, perhaps misunderstanding counsel's question, assured him he would be able to question petitioner on redirect examination. The court then turned to respondent's counsel and advised he could proceed with his case-in-chief, including cross-examination of petitioner who remained on the witness stand.

{¶ 16} At the conclusion of respondent's case-in-chief, respondent rested, and the court inquired about documents. Rather than returning to petitioner to allow him to resume proof and attempt to rebut the evidence respondent presented, the court advised petitioner he was done and had rested. In doing so, the court deprived petitioner of a full hearing under R.C. 3113.31. *See Deacon* at 29 (noting "[t]he fundamental requisites of due process of law are notice and an opportunity to be heard"); *see also Cleveland v. Schaffer*, 112 Ohio App.3d 631 (8th Dist.1996) (pointing out the trial court's refusal to allow defendant to present a trial defense, coupled with other factors, precluded a fair resolution of credibility and weight of the evidence so as to deprive defendant of fundamental due process and a fair trial).

{¶ 17} Respondent attempts to circumvent the trial court's abbreviated hearing by contending petitioner failed to proffer the evidence he would have presented had the court permitted him the opportunity. "A trial court's determination as to the admissibility of evidence is generally a matter within the sound discretion of the trial court." *Davis v. Killing*, 171 Ohio App.3d 400, 2007-Ohio-2303, ¶ 11 (11th Dist.). "[J]udges have broad discretion in admitting or excluding evidence, and controlling the order of interrogating witnesses." *State v. McGuire*, 80 Ohio St.3d 390, 400-01 (1997). As a result, even

though "[o]ne of the fundamental due process rights is the right to present witnesses in one's behalf," the "right may be tempered by judicial discretion and the laws of evidence." *In re Houseman v. Houseman*, 4th Dist. No. 831 (Oct. 30, 1981). Nonetheless, "[l]itigants are entitled to a fair and impartial trial, and in order to have this their witnesses should be permitted to testify, under the rules of the court, within the proper bounds of judicial discretion, and under the law governing the testimony of witnesses." *Id.*, quoting *Fessenden v. Fessenden*, 32 Ohio App. 16 (9th Dist.1928).

{¶ 18} The present case does not present an issue of proffer; it presents a due process issue, as "[p]arties to [a] suit are entitled to testify, if qualified under the law, and counsel are entitled to be heard. These are not only statutory, but the constitutional rights of litigants." *Id.*, quoting *Fessenden*. As the Supreme Court of Ohio explained in *Totten v. Miller's Estate*, 139 Ohio St. 29 (1941), paragraph two of the syllabus: "When a witness is precluded from testifying on the ground of his alleged incompetency as a witness and not on the ground that his proposed testimony is incompetent, his exclusion, if erroneous, will be presumed to be prejudicial, and it is not necessary to proffer his proposed testimony in order to challenge or review the action of the court as to his exclusion." A competent witness is "one who is legally qualified to be heard to testify in a cause." *Black's Law Dictionary* 284 (6th Ed.1990).

{¶ 19} Here, the trial court excluded one competent witness, and perhaps more than one competent witness, not because of the nature of the testimony to be elicited, but because of its understanding of the procedural posture of the case. Under those circumstances, a proffer is not necessary.

{¶ 20} Finally, even if the trial court's refusal to allow petitioner to present direct and rebuttal evidence is in itself not sufficient to deprive petitioner of due process, the trial court's actions during the hearing, coupled with the judgment entry terminating the action, demonstrate a due process violation. During the hearing, the court assured petitioner he had met his threshold and then gave respondent the opportunity to present evidence. In using "threshold," the court can be understood only as informing petitioner he presented a *prima facie* case entitling him to a civil protection order; the court otherwise would have had no reason to allow respondent to proceed with his case-in-chief. Yet, in the judgment entry terminating the action, the court concluded petitioner

failed to present a prima facie case. We, then, are left with the trial court's having denied petitioner the opportunity to present additional evidence but dismissing his request for civil protection order because his evidence did not establish a prima facie case for such an order.

{¶ 21} Petitioner's first assignment of error is sustained. As a result, his second assignment of error is premature.

IV. Disposition

{¶ 22} Having sustained petitioner's first assignment of error, rendering his second assignment of error not yet ripe for review, we reverse the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, and remand for further proceedings consistent with this decision.

*Judgment reversed
and case remanded.*

KLATT and FRENCH, JJ., concur.
