[Cite as *Doran v. Doran*, 2015-Ohio-2369.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TYNA D. DORAN

Petitioner-Appellee

-vs-

BRENT A. DORAN

Respondent-Appellant

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. Patricia A. Delaney, J.

Case No. 14-CA-86

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Domestic Relations Division, Case No. 2014 DR 00611
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 12, 1015

APPEARANCES:

For Petitioner-Appellee

JULIA K. FIX
VICKY M. CHRISTIANSEN
Christiansen Co., L.P.A.
172 Hudson Avenue
Newark, Ohio 43055

For Respondent-Appellant

LEE S. ROSENTHAL
Goldman & Rosenthal
2 Easton Oval, Suite 180
Columbus, Ohio 43219

Hoffman, P.J.

{¶1} Respondent-appellant Brent A. Doran appeals the September 23, 2014 Order of Protection issued by the Licking County Court of Common Pleas. Petitioner-appellee is Tyna D. Doran.

STATEMENT OF THE CASE AND FACTS

{¶2} Appellee filed a Petition for Domestic Violence Civil Stalking Protection Order pursuant to R.C. 3113.31 on May 23, 2014, seeking protection for herself and the parties' minor daughter, A.D. In the Petition, Appellee averred Appellant had perpetrated acts of domestic violence against her and A.D., including holding a loaded gun to his head in front of them and threatening suicide. Appellee explained Appellant suffers from depression, is paranoid, has violent mood swings, and is addicted to bestiality pornography. Appellee indicated she and A.D. are scared of Appellant and fear he will kill them. Appellee added both her own health and A.D.'s health have been adversely affected by Appellant's behavior. The trial court granted an ex parte civil protection order against Appellant on the same day, naming Appellee and A.D. as protected persons. The trial court scheduled a full CPO hearing on the petition for June 2, 2014.

{¶3} Although both parties and counsel were present on June 2, 2014, the full CPO hearing did not proceed. Attorney Carolyn J. Carnes, counsel for Appellee, filed a motion to withdraw on June 10, 2014, which the trial court granted that same day. Attorney Vicky M. Christiansen filed a notice of appearance on Appellee's behalf on June 12, 2014. On June 20, 2014, Attorney Stephen E. Schaller, counsel for Appellant, filed a motion to dismiss the Petition, arguing the trial court failed to conduct a full

hearing within the seven day statutory time period. Appellee filed a memorandum contra. The trial court denied Appellant's motion to dismiss and scheduled the full hearing for August 18, 2014.

{¶4} On August 15, 2014, the trial court continued the August 18, 2014 hearing to September 22, 2014. Neither party had requested the continuance. On August 20, 2014, Appellant filed a motion to modify the ex-parte CPO. Appellee filed a memorandum contra. In support of her memorandum contra, Appellee submitted her own affidavit, in which she averred Appellant had perpetrated numerous acts of domestic violence against her and A.D. on several different dates, including April 6, 2014, May 9, 2014, and May 18, 2014. The trial court denied Appellant's motion to modify on September 9, 2014.

{¶5} The hearing proceeded on September 22, 2014. At the hearing, Tiffany Korns, Appellee's co-worker, testified she observed Appellant enter Appellee's office on May 21, 2014, when Appellee was out of the office for the day. Appellant and Appellee work for the same company, but in different departments. Korns stated Appellant would have no legitimate business reason to be in Appellee's office.

{¶6} Appellee testified, on April 6, 2014, Appellant held a gun to his head in front of her and their daughter. When Appellee started to dial "911", Appellant stated, "press one more number bitch and see what happens." Appellant placed a rifle in his mouth, and Appellee attempted to talk him out of pulling the trigger. Appellee stated she thought Appellant was going to turn the gun on her and their child, then kill himself. Appellee has called "911" in the past due to Appellant's violent behavior. She indicated recently his behavior was escalating and getting worse. Appellee described an incident

which occurred on May 9, 2014, when Appellant trapped her in a closet. On that occasion, Appellant punched holes in several doors in the master bedroom, destroyed a light fixture, and smashed a bottle of shaving cream. Appellee recalled an incident which occurred on May 18, 2014, during which Appellant was screaming, and pounding on their daughter's bedroom door. Appellee submitted photographs of the damage Appellant caused during these episodes. On cross-examination, Appellee acknowledged she had not called the police during the recent incidents of domestic violence, but explained she did not do so because she "was scared of what else he would do if [she] did".

{¶7} Appellee started to testify regarding the A.D.'s poor school attendance and health issues, including migraines, which Appellee believed were caused by A.D. witnessing Appellant's violent behavior. Counsel for Appellant objected on the basis of materiality, explaining, "we're not talking [parenting]." The trial court sustained the objection. Appellee played an audio tape of a fight between herself and Appellant, during which Appellant verbally abuses her and states he intends to get her fired. Appellee testified A.D. heard the verbal abuse Appellant inflicted upon Appellee.

{¶8} Appellant testified on his own behalf. Appellant recalled, on April 6, 2014, he and Appellee were having an argument about her "lies or omissions about prior boyfriends". During the course of the argument, he went to the master bedroom, retrieved a loaded gun, and locked himself in another bedroom. He explained he did this because he and A.D. had been asking Appellee for years to see a doctor about her depression as "she was constantly lying and getting into arguments with" him. Appellant admitted his physical acts could lead Appellee to believe he was threatening

suicide, but reasoned he was merely "trying to finally get her attention." He denied threatening her when she called 911. Appellant repeatedly stated he only wanted to get Appellee's attention as things had escalated to the point of ruining their twenty one year marriage, and it was hurting their daughter.

{¶9} At the conclusion of the hearing, the trial court determined the evidence was sufficient to warrant the issuance of a full civil protection order against Appellant for a period of five years. The trial court found Appellant had violated R.C. 2903.211[1], which constituted domestic violence under R.C. 3113.31. On September 23, 2014, the trial court issued an Order of Protection, naming Appellee and A.D. as protected persons.

{¶10} It is from this order Appellant appeals, assigning as error:

{¶11} "I. THE COURT ERRED IN FAILING TO DISMISS WIFE'S PETITION FOR DOMESTIC VIOLENCE CIVIL PROTECTION ORDER WHEN THE COURT FAILED TO HOLD A FULL HEARING WITHIN SEVEN (7) DAYS OF THE ISSUANCE OF THE EX-PARTE CIVIL PROTECTION ORDER WITHOUT CONTINUING THE FULL HEARING PURSUANT TO O.R.C. 3113.31(D)(2)(a)(i-iv).

{¶12} "II. THE COURT ERRED IN CONSIDERING EVIDENCE OF ALLEGED DOMESTIC VIOLENCE THAT WAS NOT CONTAINED WITHIN WIFE'S PETITION FOR DOMESTIC VIOLENCE CIVIL PROTECTION ORDER.

{¶13} "III. THE COURT ERRED IN INCLUDING THE MINOR CHILD OF THE PARTIES AS A PROTECTED PERSON UNDER THE CIVIL PROTECTION ORDER

[1] R.C. 2903.211 provides: "No person by engaging in a pattern of conduct shall knowingly cause another person to believe that offender will cause physical harm to the other person, or cause mental distress to that other person."

BECAUSE WIFE FAILED TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT HUSBAND ENGAGED IN DOMESTIC VIOLENCE AGAINST THE MINOR CHILD.

{¶14} "IV. THE COURT ERRED IN GRANTING THE CIVIL PROTECTION ORDER IN FAVOR OF WIFE BECAUSE WIFE FAILED TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT HUSBAND ENGAGED IN DOMESTIC VIOLENCE AGAINST HER."

I

{¶15} In his first assignment of error, Appellant contends the trial court erred in denying his motion to dismiss Appellee's Petition for Domestic Violence Civil Stalking Protection Order because the trial court failed to conduct a full hearing within seven days of the issuance of the ex-parte CPO as required by R.C. 3113.31(D).

{¶16} R.C. 3113.31(D), which sets the time limit for a trial court to conduct a full hearing on a petition for a domestic violence civil protection order after the granting of an ex parte order, provides:

> (2)(a) If the court, after an ex parte hearing, issues an order described in division (E)(1)(b) or (c) of this section, the court shall schedule a full hearing for a date that is within seven court days after the ex parte hearing. If any other type of protection order that is authorized under division (E) of this section is issued by the court after an ex parte hearing, the court shall schedule a full hearing for a date that is within ten court days after the ex parte hearing. The court shall give the respondent notice of, and opportunity to be heard at, the full hearing. The court shall

> hold the full hearing on the date scheduled under this division unless the court grants a continuance of the hearing in accordance with this division.
>
> * * *

{¶17} In *Donoghue v. Donoghue*, Fairfield App. No. 08-CA-82, 2009-Ohio-3834, this Court addressed the same issue Appellant raises herein. In *Donoghue,* the appellant argued the seven-day time frame in which the trial court is to conduct the full hearing was mandatory; therefore, the trial court's failure to comply with such rendered the five year order of protection void. This Court disagreed, explaining:

> Where a statute contains the word "shall", the provision will generally be construed as mandatory. *Dorrian v. Scioto Conservancy Dist.* (1971) 72 Ohio St.2d 102, paragraph 1 of the syllabus. "A mandatory statute may be defined as one where noncompliance * * * will render the proceedings to which it relates illegal and void." *State Ex. Rel Jones v. Farrar* (1946), 146 Ohio St. 467, 471-472, 66 N.E.2d 531.
>
> Nonetheless, even with "shall" as the operative verb, a statutory time provision may be directory. "As a general rule, a statute providing a time for the performance of an official duty will be construed as directory as far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure." *Id.* at paragraph three of the syllabus. This rule applies "unless the object or purpose of a statutory provision requiring some act to be performed within a specified period of time is discernible from the language employed." *Id.* Therefore, where a statutory time requirement evinces an object or

> purpose to limit a court's authority, the requirement will be considered jurisdictional. For example, R.C. 2941.401 involving speedy trial rights for untried indictments provides if the action is not brought within the required time, “no court any longer has jurisdiction thereof, the indictment * * * is void, and the court shall enter an order dismissing the action with prejudice.”
>
> The time restriction set forth in R.C. 3113.31(D) is a time restriction on the performance of an official duty. The statute does not include any expression of intent to restrict the jurisdiction of the trial court for untimeliness. Once the trial court's subject matter jurisdiction is properly invoked the trial court's failure to follow time constraints renders the judgment subject to attack on direct appeal as an improper exercise of such jurisdiction. Such failure by the trial court does not render the judgment void.

{¶18} The reason as to why the trial court did not conduct the full hearing on the originally scheduled date of June 2, 2014, does not appear in the record. However, Appellant, in his motion to dismiss and in his Brief, openly states the hearing did not occur because the parties had reached a settlement agreement on all issues prior to the commencement of the June 2, 2014 hearing. Appellant explains said agreement was to be reduced to a judgment entry to be drafted and prepared by counsel for Appellee. Counsel for Appellee withdrew approximately one week later, and the settlement agreement was never prepared. Appellant’s statement suggests the full hearing was cancelled for “good cause”.

{¶19} We find Appellant's failure to ask for a new hearing when the settlement agreement was not prepared is akin to invited error. Assuming such failure was not invited error, we find the failure of the trial court to conduct a hearing within the seven day period did not divest the trial court of jurisdiction to conduct a full hearing on another date.

{¶20} Appellant's first assignment of error is overruled.

II

{¶21} In his second assignment of error, Appellant maintains the trial court erred in considering evidence of alleged incidents of domestic violence which were not included in Appellee's Petition.

{¶22} Appellant challenges the trial court's allowing Appellee to present testimony regarding incidents of domestic violence which occurred on May 9, 2014, and May 18, 2014, as well as an argument which took place on May 22, 2014. Appellant submits these dates were not mentioned in Appellee's Petition; therefore, he had "no notice of these allegations and it was manifestly unfair for him to have to hear and defend these allegations, for the first time, at trial." Brief of Appellant at 16.

{¶23} Upon review of the record, we find Appellant did have notice of the specific incidents about which Appellee testified. In her memorandum contra Appellant's motion to modify the ex-parte CPO, Appellee submitted an affidavit in which she stated Appellant had perpetrated numerous acts of domestic violence against her and the parties' daughter on several different dates, including April 6, 2014, May 9, 2014, and May 18, 2014. In the affidavit, Appellee also indicated he had photographs of the damage caused by Appellant's violence and she intended to present such as

evidence at the full CPO hearing. Accordingly, we find any assertion by Appellant he did not have notice of these allegations is not supported by the record and the trial court did not error in admitting the evidence.

{¶24} Appellant's second assignment of error is overruled.

III, IV

{¶25} Because Appellant's third and fourth assignments of error require similar analysis, we choose to address them together. In his third assignment of error, Appellant asserts the trial court erred in including the parties' minor child as a protected person in the civil protection order as Appellee failed to prove, by a preponderance of the evidence, Appellant engaged in domestic violence against the child. In his fourth assignment of error, Appellant submits the trial court erred in granting the civil protection order in favor of Appellee and against Appellant as Appellee failed to prove by a preponderance of the evidence Appellant engaged in domestic violence against her.

{¶26} "The decision to grant or dismiss a request for a civil protection order is within the discretion of the trial court." *Rangel v. Woodbury,* 6th Dist. Lucas No. L–091084, 2009–Ohio–4407, ¶ 11, citing *Deacon v. Landers,* 68 Ohio App.3d 26, 31, 587 N.E.2d 395 (4th Dist.1990). "An appellate court will not reverse a trial court's decision regarding a civil protection order absent an abuse of discretion." *Id.,* citing *Parrish v. Parrish,* 146 Ohio App.3d 640, 646, 767 N.E.2d 1182 (4th Dist.2000). An abuse of discretion connotes that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "If the trial court's decision is supported by credible and competent evidence, the

appellate court will not reverse the decision as an abuse of discretion." *Rangel* at ¶ 11, citing *Jarvis v. Jarvis,* 7th Dist. Jefferson No. 03–JE–26, 2004–Ohio–1386, ¶ 13.

{¶27} Pursuant to R.C. 3113.31, in order to obtain a domestic violence CPO, the petitioner must prove by a preponderance of the evidence the respondent has engaged in an act of domestic violence against petitioner or petitioner's family or household members. *McBride v. McBride,* 12th Dist. Butler No. CA2011–03–061, 2012–Ohio–2146, ¶ 12, citing *Felton v. Felton,* 79 Ohio St.3d 34 (1997), paragraph two of the syllabus. As defined by R.C. 3113.31(A)(1), the phrase "domestic violence" means the occurrence of one or more of the following acts against a family or household member:

(a) Attempting to cause or recklessly causing bodily injury;

(b) Placing another person by the threat of force in fear of imminent serious physical harm or committing a violation of section 2903.211 [menacing by stalking] or 2911.211 [aggravated trespass] of the Revised Code;

(c) Committing any act with respect to a child that would result in the child being an abused child, as defined in section 2151.031 of the Revised Code;

(d) Committing a sexually oriented offense.

{¶28} R.C. 2903.211 provides, in relevant part: "(A)(1) No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person. "

{¶29} In issuing the civil protection order, the trial court specifically found Appellant had violated R.C. 2903.211, which constituted domestic violence under R.C. 3113.31. Upon our review of the record, we cannot find the trial court abused its discretion in issuing the domestic violence civil protection order. Appellee's testimony, if believed, established Appellant engaged in a pattern of conduct that knowingly caused her, as well as the parties' minor child, mental distress as prohibited by R.C. 2903.211(A)(1), and placed Appellee in fear of serious physical harm. Moreover, we must give deference to the trial court's implicit determination Appellee's testimony was more credible than Appellant's because "the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). Based on the record, we do not find the trial court's decision in this regard to be unreasonable, arbitrary, or unconscionable.

{¶30} Appellant's third and fourth assignments of error are overruled.

{¶31} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur