[Cite as *McIntyre v. Johnson-Estes*, 2011-Ohio-1696.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95445

TYRONE MCINTYRE

PETITIONER-APPELLEE

vs.

LARONDA D. JOHNSON-ESTES

RESPONDENT-APPELLANT

JUDGMENT:
REVERSED AND VACATED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Domestic Relations Division
Case No. D-331223

BEFORE: Boyle, P.J., Celebrezze, J., and Sweeney, J.

RELEASED AND JOURNALIZED: April 7, 2011

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MARY J. BOYLE, P.J.:

Respondent-appellant, Laronda Johnson-Estes ("Johnson-Estes"), appeals a judgment of the Cuyahoga County Court of Common Pleas, Domestic Relations Division, granting a civil protection order ("CPO") to petitioner-appellee, Tyrone McIntyre, on behalf of himself and his minor child, A.M. She raises two assignments of error for our review:

"[1.] The trial court erred in granting petitioner/appellee's petition for a civil protection order as there was not sufficient credible evidence to support a finding that the respondent/appellant engaged in acts or threats of domestic violence.

"[2.] The trial court erred and abused its discretion in overruling respondent/appellant's objections to the magistrate's decision when it adopted the magistrate's decision under Civ.R. 53(E)(3), as the court's decision is not supported by sufficient credible evidence to support a finding that the respondent/appellant engaged in acts of domestic violence."

Finding merit to her arguments, we reverse the judgment of the trial court and vacate the CPO.

Procedural History and Factual Background

McIntyre and Johnson-Estes were never married, but had A.M. together in August 2003. Johnson-Estes then married Kenneth Estes and had two minor children with him. All three children lived with Johnson-Estes and Kenneth prior to April 8, 2010.

Kenneth Estes obtained an ex parte CPO against Johnson-Estes on April 9, 2010, on behalf of his two minor children, as well as A.M. Kenneth also obtained emergency custody of all three children as part of the ex parte CPO. But before Kenneth's full evidentiary CPO hearing, McIntyre filed a petition for an ex parte CPO, alleging that on April 8, 2010,

Johnson-Estes, while drunk, attempted to kill herself and her three children by driving her car into a lake, telling the children that they were going swimming.

The trial court granted McIntyre an ex parte CPO, naming both him and A.M. as protected persons, awarded him emergency custody of A.M., and temporarily suspended Johnson-Estes's visitation rights.

The full evidentiary CPO hearing was held before a magistrate on May 3, 2010. The magistrate found the following:

"[O]n or about August 8, 2010, [Johnson-Estes] and her husband argued. [Johnson-Estes] put all three children in a car and left. Sometime later she was stopped by police at a lakefront park. The police indicated to [Johnson-Estes] that they were responding to [her] threat to drop the children into the lake. [Johnson-Estes] was taken by the police to the mental health unit of a hospital, and all three children were taken to or retrieved by [Johnson-Estes's] husband. The husband contacted [McIntyre]. [McIntyre] retrieved [A.M.] from the husband. [McIntyre] notified the Cuyahoga County Department of Children and Family Services. [A.M.] remained with [McIntyre] and was residing with him at the time of the within trial."

The magistrate further found that Johnson-Estes remained hospitalized for four days, and upon her release, she was scheduled for a psychiatric intake appointment at a mental health facility.

The magistrate concluded that Johnson-Estes's "credibility was quite compromised," but found that McIntyre gave credible testimony. The magistrate then found that Johnson-Estes committed domestic violence as defined in R.C. 3113.31 and granted McInytre a CPO on behalf of A.M., effective until May 2, 2011. As part of the CPO, McIntyre obtained temporary custody of A.M., and Johnson-Estes received supervised visitation through the Safe and Sound Program or an equivalent program each Saturday afternoon.

Over Johnson-Estes's objections, the trial court adopted and ordered into the law the magistrate's decision in its entirety.

It is from this judgment that Johnson-Estes appeals. We will address her two assignments of error together as they are related. She argues that the trial court erred by denying her objections and adopting the magistrate's decision because there was no competent sufficient evidence that she committed domestic violence.

Standard of Review

Under Civ.R. 53, the trial court must conduct an independent review of the facts and conclusions contained in the magistrate's report and enter its own judgment. *Dayton v. Whiting* (1996), 110 Ohio App.3d 115, 118, 673 N.E.2d 671. The trial court, therefore, conducts a de novo standard of review in examining a magistrate's decision.

Because the ultimate authority and responsibility over the magistrate's findings and rulings is vested with the trial court, a decision to modify, affirm, or reverse a magistrate's

decision lies within the sound discretion of the trial court. *Mullins-Nessle v. Cardin*, 12th Dist. No. CA2009-07-036, 2009-Ohio-6748. We therefore review a trial court's decision to affirm a magistrate's decision under an abuse of discretion. *In re Estate of Mason*, 8th Dist. No. 92693, 2009-Ohio-5494, ¶34.

When an appellate court reviews a trial court's adoption of a magistrate's report for an abuse of discretion, such a determination will only be reversed where it appears that the trial court's actions were arbitrary or unreasonable. *Proctor v. Proctor* (1988), 48 Ohio App.3d 55, 60-61, 548 N.E.2d 287. Presumptions of validity and deference to a trial court as an independent fact finder are embodied in the abuse of discretion standard. *Whiting*, supra.

"Abuse of discretion" is a term of art, describing a judgment neither comporting with the record, nor reason. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678, 148 N.E. 362. "A decision is unreasonable if there is no sound reasoning process that would support that decision." *AAAA Enterprises, Inc. v. River Place Comm. Redevelopment* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597. Further, an abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland,* 176 Ohio App.3d 401, 2008-Ohio-1720, 892 N.E.2d 454, ¶15.

With this standard in mind, we must determine if the trial court abused its discretion in adopting the magistrate's decision and granting McIntyre the CPO.

Standard for Granting a CPO

"When granting a protection order, the trial court must find that petitioner has shown by a preponderance of the evidence that petitioner or petitioner's family or household members are in danger of domestic violence. R.C. 3113.31(D)." *Felton v. Felton*, 79 Ohio St.3d 34, 1997-Ohio-302, 679 N.E.2d 672, paragraph two of the syllabus.

This court has held that "[b]ecause R.C. 3113.31 expressly authorizes the courts to craft protection orders that are tailored to the particular circumstances, it follows that the trial court has discretion in establishing the scope of a protection order, and that judgment ought not be disturbed absent an abuse of discretion. When the issue is whether a protection order should have issued at all, however, the resolution of that question depends on whether the petitioner has shown by a preponderance of the evidence that the petitioner or the petitioner's family or household member was entitled to relief. *Felton*, 79 Ohio St.3d 34, 679 N.E.2d 672, paragraph two of the syllabus." *Abuhamda-Sliman v. Sliman*, 161 Ohio App.3d 541, 2005-Ohio-2836, 831 N.E.2d 453, ¶9.

We further explained in *Abuhamda-Sliman* that "[t]he *Felton* court held that there was 'sufficient, credible evidence to prove by a preponderance of the evidence that appellee had engaged in acts of domestic violence,' *** without expressing any view as to whether the lower court abused its discretion. It is reasonable to infer from *Felton* that when a respondent contends that it was error to issue a protection order, the question on review is

whether there was sufficient credible evidence to support a finding that the respondent had engaged in acts or threats of domestic violence." Id. at 10.

Although Johnson-Estes is also challenging the terms of the CPO, contending that the trial court should not have awarded custody of A.M. to McIntyre, she is really claiming that the trial court erred in issuing the protection order at all. Thus, in accordance with *Abuhamda-Sliman* and *Felton*, we must decide whether the court's decision was supported by sufficient competent, credible evidence.

Analysis

After reviewing the record on appeal, we find that Johnson-Estes's arguments have merit. The magistrate found that McIntyre met his burden and proved that Johnson-Estes committed domestic violence against A.M. after it determined Johnson-Estes's testimony lacked credibility, and McIntyre's testimony was more credible. But notably, McIntyre did not testify — at least not to anything that proved Johnson-Estes did anything, let alone put A.M. in danger.

The transcript reveals that McIntyre did not testify to anything (he tried to explain to the court what Kenneth Estes had told him and what A.M. had told him, but was not permitted to continue by the court when Johnson-Estes objected to hearsay being offered), he did not offer any witnesses, nor did he cross-examine Johnson-Estes when she testified. Essentially, he did nothing but rest on the facts he alleged in his petition.

But it is well established that the petition is not evidence. *Felton*, 79 Ohio St.3d at 42-43. The trier of fact cannot determine that a preponderance of the evidence established that Johnson-Estes committed domestic violence when there was no evidence — at all — presented at the hearing showing she put A.M. in any danger.

Indeed, the only admissible evidence presented at the hearing that the court could consider in its decision was the testimony of Johnson-Estes and her mother. Johnson-Estes explained that on the night of April 8, 2010, she and Kenneth had gotten into an argument and she left their house with the three children. She said that she intended to go to her mother's and that is what she told Kenneth. She further testified that she never made it to her mother's because she had stopped at her friend's house first and that is where the police stopped her. Her friend lived next to Sims Park and Cultural Gardens in Euclid, across from Lakeshore Cinema.

Johnson-Estes stated that when the police stopped her, they told her that they pulled her over because her husband had called them and told them that his cousin said she was threatening to drop the children into the lake. The police did not arrest her, but asked her if she would agree to being evaluated by mental health professionals, which she agreed to voluntarily do. She stated that she "voluntarily went with the police to the hospital," where she remained until April 12, 2010. She offered into evidence a discharge report from Huron

Hospital showing that she was released in "stable condition" on April 12, 2010. The report further indicated that she had a follow-up appointment with a psychiatrist on May 5, 2010.

Johnson-Estes's mother testified that she had never seen her daughter hit her children, abuse her children in any way, threaten to kill her children, or take her anger out on her children.

Accordingly, we find that the trial court's adoption of the magistrate's decision granting McIntyre a CPO, on behalf of himself and A.M., was not based on any competent, credible evidence, let alone sufficient competent, credible evidence. Thus, we conclude that the trial court abused its discretion when it granted McInytre a CPO without any evidentiary basis. We therefore reverse the judgment of the trial court and vacate the CPO in its entirety.

Judgment reversed and CPO vacated.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
JAMES J. SWEENEY, J., CONCUR