

[Cite as *Hamper v. Dobrski*, 2015-Ohio-1381.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101770

ANGELA HAMPER

PETITIONER-APPELLEE

vs.

KENNETH DOBRSKI

RESPONDENT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DV-13-349178

BEFORE: Laster Mays, J., Keough, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: April 9, 2015

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ANITA LASTER MAYS, J.:

{¶1} In this case in which appellee Angela D. Hamper sought a domestic violence civil protection order (“DVCPO”) on behalf of herself and her children against appellant Kenneth A. Dobrski, Dobrski appeals from the domestic relations (“DR”) court orders that adopted the magistrate’s decision; the magistrate granted the DVCPO and found Dobrski in contempt of court for failing to obey the earlier temporary protection order (“TPO”) against him.

{¶2} Dobrski presents three assignments of error. He first asserts that because the record reflects he had not been served with the TPO prior to his alleged violation of it, he could not be held in contempt. He also asserts Hamper failed to support her burden to demonstrate she was entitled to the DVCPO. Lastly, he asserts that the magistrate denied him his right to present witnesses on his behalf.

{¶3} Upon a review of the record, this court disagrees with Dobrski’s assertions. Consequently, the DR court’s orders are affirmed. This case is remanded to the DR court to oversee Dobrski’s purge of the contempt finding.

{¶4} On October 11, 2013, Hamper filed a petition for a DVCPO pursuant to R.C. 3113.31. She averred in her petition that she and Dobrski resided in the same household and that he was the father of her infant daughter. Hamper further averred that her 12-year-old son from a previous relationship also resided in the household.

{¶5} Hamper claimed in her petition that, on October 10, 2013, Dobrski “followed her around [their] home, harassing and badgering” her, and also threatened to leave with

the infant and “never return.” Hamper claimed that Dobrski’s threats frightened her and the police came to their home that night but made no arrest. Hamper claimed that on the morning of October 11, 2013, Dobrski initially refused to permit her to drive with their daughter away from their home, but after he allowed her to leave, he then followed behind her in his own car, “tailgating” and “driving aggressively,” which forced her to proceed to the Strongsville police station for assistance. Hamper claimed that Dobrski’s threatening and menacing behavior caused her to fear for her safety and the safety of her children.

{¶6} The DR court assigned the case to a magistrate, who conducted an ex parte hearing on Hamper’s petition that same day. Hamper testified in more detail about the previous days’ events. She stated that Dobrski made threats against her and the children that placed her in fear for their safety, and that Dobrski’s actions while following her in his car endangered their daughter. She indicated that the police advised her to contact her attorney to seek a DVCPO. The magistrate granted Hamper a TPO and set the matter for a full hearing on October 21, 2013.

{¶7} The record reflects Hamper’s attorney was unable to serve Dobrski with a copy of the petition. On October 21, 2013, the scheduled date of the hearing, however, Dobrski’s counsel appeared before the court to represent him in the proceeding. In view of the fact that Dobrski had not yet personally been served with the TPO, the magistrate continued the matter until December 13, 2013. Although Hamper’s attorney filed an affidavit for service of the petition by publication on October 23, 2013, the docket reflects

that Dobrski received personal service of the petition on the afternoon of October 25, 2013.

{¶8} On October 28, 2013, Hamper filed a motion against Dobrski to appear in court and “show cause why he should not be held in contempt for failing to comply” with the TPO. She claimed that, despite his awareness of the existence of the TPO, on the morning of October 25, 2013, Dobrski had cancelled the utilities and mail service to the couples’ home.

{¶9} The full hearing on both matters commenced on December 13, 2013. At that time, Dobrski’s attorney stated for the record that she had intended to present the testimony of her client’s brother-in-law, minor nephew, and the infant’s pediatrician, but the magistrate had refused to permit the testimony. Hamper’s attorney made a similar representation. The magistrate acknowledged that decision and indicated the testimony was barred for the parties’ failure to comply with “Local Rule, Rule 12,” in that neither had filed with the court prior to the hearing a witness list.

{¶10} Hamper proceeded with her evidence by calling Dobrski as a witness on cross-examination. She then called her son to testify on her behalf. At that point, the magistrate continued the hearing.

{¶11} The hearing continued on January 14, 2014. Hamper presented the testimony of a Strongsville police officer and testified on her own behalf. Once again, the hearing was continued.

{¶12} The magistrate called the case on April 11, 2014, to conclude the hearing. At that time, Dobrski's attorney stated for the record that she and her client were "ready to move forward as far as presenting closing arguments for both sides." Counsel stated that "the testimony that's been given the previous two days [of the hearing] and after reviewing the transcript is a fair and accurate reflection of any further evidence that we would have as well."

{¶13} On May 19, 2014, the DR court adopted the magistrate's decision to grant Hamper and her two children a DVCPO against Dobrski. The following day, the DR court granted Hamper's motion to show cause and found Dobrski in contempt of court. The court imposed a 30-day jail sentence, but stated Dobrski could purge the contempt by paying Hamper \$750 "towards attorney fees" and "presenting the court's community service liaison with a report from a licensed clinical psychologist verifying that Dobrski had discussed the decision with the psychologist." On July 18, 2014, the DR court overruled Dobrski's objections to the decision.

{¶14} Dobrski appeals from the DR court's orders and presents the following three assignments of error:

I. The trial court erred and abused its discretion in finding the appellant/respondent in contempt, when there was no evidence that the appellant/respondent had been served or had actual knowledge of the specific terms of the Civil Protection Order until after the alleged violation occurred.

II. The court erred and abused its discretion in overruling the respondent's objection to the issuance of the Civil Protection Order after full hearing, when the petitioner had not been physically assaulted, had not

been threatened, and there was insufficient evidence to sustain the theory of menacing by stalking.

III. The court abused its discretion in denying the respondent his right to call witnesses in support of his defense.

{¶15} In his first assignment of error, Dobrski argues that he could not be found in contempt of court for violating the TPO when he had not been served with a copy of it. He cites *State v. Smith*, 136 Ohio St.1, 2013-Ohio-1698, 989 N.E.2d 972, as authority for his argument. However, the Ohio Supreme Court's decision in *Smith* is inapposite because it concerned a criminal prosecution for violation of a protection order. In contrast, this case concerns the issue of whether Dobrski could be held to be in indirect civil contempt of the court's protection order, where the burden of proof is that of "clear and convincing evidence." *Brown v. Executive 200, Inc.*, 64 Ohio St.2d 250, 416 N.E.2d 610 (1980).

{¶16} Contempt is defined as a disregard of, or disobedience to, an order or command of judicial authority. *State v. Flinn*, 7 Ohio App.3d 294, 455 N.E.2d 691 (9th Dist.1982). This court cannot reverse a finding of contempt by a trial court unless that court abused its discretion. *State ex rel. Ventrone v. Birkel*, 65 Ohio St.2d 10, 417 N.E.2d 1249 (1981). An abuse of discretion consists of more than an error of judgment; it connotes an attitude on the part of the trial court that is unreasonable, unconscionable, or arbitrary. *Rock v. Cabral*, 67 Ohio St.3d 108, 616 N.E.2d 218 (1993). In applying this standard of review, an appellate court is not free to substitute its judgment for that of the trial court. *In re Jane Doe 1*, 57 Ohio St.3d 135, 566 N.E.2d 1181 (1991).

{¶17} Indirect contempt is misbehavior that occurs outside the actual or constructive presence of the court. *Strauss v. Strauss*, 8th Dist. Cuyahoga No. 94129, 2010-Ohio-6166, ¶ 10. One accused of indirect contempt is entitled to a hearing on the charge, at which the court must investigate the charge, hear any answer or testimony that the accused makes or offers, and then determine whether the accused is guilty. *Pirtle v. Pirtle*, 2d Dist. Montgomery No. 18613, 2001-Ohio-1539. The alleged contemnor is thus furnished with an opportunity to explain his actions. *Id.*

{¶18} A review of the record demonstrates that Dobrski did not indicate in the DR court that he was unaware of the terms of the TPO. In fact, he testified that he knew as of October 21, 2013, when he appeared in court with his attorney, that the TPO forbade him from interfering with Hamper's occupation of the couples' home, including cancellation of the utilities. Dobrski provided no excuse for his disobedience of the TPO. The DR court did not abuse its discretion under these circumstances.

{¶19} Moreover, Dobrski waited until he filed objections to the magistrate's decision before he claimed that he should not be held in contempt because he had not been served with a copy of the TPO at the time he turned off the utilities. A party who fails to raise an argument in the court below at a time when the trial court can correct the error waives his or her right to raise it on appeal. *Evans v. Evans*, 10th Dist. Franklin No. 08AP-398, 2008-Ohio-5695, ¶ 8, quoting *State ex rel. Zollner v. Indus. Comm.* 66 Ohio St.3d 276, 278, 611 N.E.2d 830 (1993). Because Dobrski did not indicate to the

DR court in a timely fashion that he lacked notice of the terms of the TPO, his claim is rejected. Dobrski's first assignment of error is overruled.

{¶20} Dobrski argues in his second assignment of error that Hamper did not sustain her burden of proof to support the issuance of the DVCPO; therefore, the DR court should not have overruled his objections and adopted the magistrate's decision. This court disagrees.

{¶21} A trial court's decision to adopt a magistrate's report will not be reversed on appeal unless the decision amounts to an abuse of discretion. *In re M.I.S.*, 8th Dist. Cuyahoga No. 98138, 2012-Ohio-5178, ¶ 11. So, too, does the decision to grant a civil protection order lie within the sound discretion of the trial court. *Friedlander v. Friedlander*, 8th Dist. Cuyahoga No. 100245, 2014-Ohio-2180, ¶ 17, citing *Hoyt v. Heindell*, 91 Ohio App.3d 373, 2010-Ohio-6058, 946 N.E.2d 258, ¶ 39 (11th Dist.).

{¶22} R.C. 3113.31 governs a petition for a DVCPO. *Wolfe v. Wolfe*, 5th Dist. Stark No. 2013CA00196, 2014-Ohio-2159, ¶ 7. Pursuant to that statute, in order to obtain a DVCPO, "the petitioner must prove by a preponderance of the evidence that the petitioner, petitioner's family, or petitioner's household members are in danger of domestic violence." *Felton v. Felton*, 79 Ohio St.3d 34, 1997-Ohio-302, 679 N.E.2d 672, paragraph 2 of the syllabus. As defined by R.C. 3113.31(A)(1), the phrase "domestic violence," in pertinent part, means either placing a family or household member by the threat of force in fear of imminent serious physical harm, or committing upon a family or household member a violation of R.C. 2903.211, menacing by stalking.

{¶23} In this case, the DR court did not abuse its discretion in adopting the magistrate's decision. Hamper testified that Dobrski's comments that he was "poisoning [her] food," thought about "cutting [her] brake lines," and decided he would "do anything to make [her] life a living hell" and "wanted revenge" were "scary" to her. She testified that Dobrski refused to permit her to take their daughter for a walk without "silently" accompanying her. Hamper also testified that Dobrski "several" times had "shoved" her with an arm or his chest and left bruises on her wrist after grabbing her. Similarly, Hamper's 12-year-old son testified that Dobrski occasionally "would shove [him] on the ground" in order to hurt him, and that Dobrski threatened him. Hamper also stated that on October 11, 2013, Dobrski followed her car as she drove so closely with his own that she feared that he would hit her if she stopped suddenly. Dobrski did not desist until the police officers blocked in his car.

{¶24} Dobrski corroborated some of this testimony during his own. He admitted that on October 11, 2013, he was waiting in his car for Hamper to leave the house with their daughter, and that he followed Hamper as she drove because he wanted to "see where she went." Dobrski expressed displeasure at the police officers' blockade of his car; he stated that he "didn't understand" why the officers simply waved Hamper on her way. In short, Dobrski "engaged in a pattern of threatening incidents." *Rauser v. Ghaster*, 8th Dist. Cuyahoga No. 92699, 2009-Ohio-5698, ¶ 21.

{¶25} Because the preponderance of the evidence in this case supported the magistrate's decision, the DR court did not abuse its discretion in adopting that decision

and issuing the DVCPO. *Friedlander*, 8th Dist. Cuyahoga No. 100245, 2014-Ohio-2180, ¶ 24. Dobrski's second assignment of error is overruled.

{¶26} In his third assignment of error, Dobrski asserts that the magistrate improperly limited his ability to present his defense to Hamper's petition. The record, however, belies his assertion. Although on December 13, 2013, when the hearing on Hamper's petition commenced, the magistrate indicated that neither party would be able to present witnesses, the matter had to be continued. By the time the hearing recommenced on January 14, 2014, the magistrate had reconsidered that position, permitting Hamper to call her "next witness." Then, after Hamper testified, the matter was once again continued. When the magistrate next called the case on April 11, 2014, Dobrski's attorney stated for the record that her client had no further evidence to present and would rely on the "testimony that's been given the previous two days" of the hearing.

{¶27} Under these circumstances, Dobrski had the opportunity to call witnesses on his behalf, but simply chose not to do so. *Nagel v. Nagel*, 9th Dist. Lorain No. 09CA009704, 2010-Ohio-3942, ¶ 36. Therefore, his third assignment of error is overruled.

{¶28} The DR court's orders are affirmed. This case is remanded for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share 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.

ANITA LASTER MAYS, JUDGE

ANN KEOUGH, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR

KATHLEEN