

[Cite as *Patton v. Patton*, 2010-Ohio-2096.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KIM R. PATTON

Petitioner-Appellee

-vs-

RUSTY J. PATTON

Respondent-Appellant

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. William B. Hoffman, J.

Hon. Sheila G. Farmer, J.

Case No. CT2009-0031

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Muskingum County Court
of Common Pleas, Domestic Relations
Division, Case No. DH 2003-0790

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

May 11, 2010

APPEARANCES:

For Petitioner-Appellee

For Respondent-Appellant

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Hoffman, J.

{¶1} Respondent-appellant Rusty J. Patton appeals the June 9, 2009 Judgment Entry of the Muskingum County Court of Common Pleas, Domestic Relations Division, which renewed a domestic violence civil protection order in favor of Petitioner-appellee Kim R. Patton.

STATEMENT OF THE CASE AND FACTS

{¶2} Appellee filed a petition for a domestic violence civil protection order against Appellant on December 29, 2003. The trial court granted Appellee's motion issuing a protection order on February 24, 2004. The order set forth an expiration date of February 23, 2005. The trial court then renewed the civil protection order on May 11, 2005 setting forth an expiration date of May 6, 2009.

{¶3} On April 24, 2009, Appellee filed a petition to again renew the domestic violence civil protection order. Specifically, Appellee sought an additional five year protection order as her previous order was due to expire on May 6, 2009. The trial court assigned the petition for hearing on May 4, 2009. The trial court subsequently continued the hearing, but denied Appellee's request to extend the original petition pending the hearing. Accordingly, the May 11, 2005 civil protection order expired on May 6, 2009.

{¶4} On May 21, 2009, Appellant moved the trial court to dismiss Appellee's petition for renewal of the civil protection order.

{¶5} On June 5, 2009, the trial court proceeded with the hearing on the petition, and granted an additional five year civil protection order. At the hearing, Appellee testified Appellant continued in his attempts to intimidate and harass her after the civil

protection order was issued. Appellee described her fear of Appellant in exchanging her children for visitation. Appellant testified as to previous physical abuse by Appellant and her continual fear. Appellant did not testify or call witnesses at the hearing. Appellant did not present any defense to the petition for civil protection order, and did not provide any support in favor of his motion to dismiss the same. Via Judgment Entry of June 9, 2009, the trial court renewed the domestic relations civil protection order in favor of Appellee.

{¶6} Appellant now appeals the June 9, 2009 civil protection order, assigning as error:

{¶7} "I. APPELLANT'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER BOTH THE U.S. CONSTITUTION AND THE CONSTITUTION [SIC] OF OHIO WERE VIOLATED.

{¶8} "II. DECISION WAS ERRONEOUS IN RULING BASED ON OLD FACTS. DOUBLE JEOPARDY.

{¶9} "III. APPELLEE'S ATTORNEY WAS CAUGHT LYING AND DECEIVING THE COURT.

{¶10} "IV. APPELLELL [SIC] WAS CAUGHT LYING AND DECEIVING THE COURT.

{¶11} "V. MAGISTRATE SHOULD OF [SIC] DISQUALIFIED HIMSELF. DUE PROCESS REQUIRED HIS RECUSAL."

{¶12} Initially, we will address Appellee's argument Appellant failed to object to the decision of the Magistrate, thereby waiving any error on appeal pursuant to Civil Rule 53. The rule reads:

{¶13} “(2) *Magistrate's order; motion to set aside magistrate's order.*

{¶14} “(a) *Magistrate's order.*

{¶15} “(i) *Nature of order.* Subject to the terms of the relevant reference, a magistrate may enter orders without judicial approval if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party.

{¶16} “(ii) *Form, filing, and service of magistrate's order.* A magistrate's order shall be in writing, identified as a magistrate's order in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys.

{¶17} “(b) *Motion to set aside magistrate's order.* Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

{¶18} “(3) *Magistrate's decision; objections to magistrate's decision.*

{¶19} “(a) *Magistrate's decision.*

{¶20} “***

{¶21} (iii) *Form; filing, and service of magistrate's decision.* A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically

designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

{¶22} *“(b) Objections to magistrate's decision.*

{¶23} *“(i) Time for filing.* A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

{¶24} *“(ii) Specificity of objection.* An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

{¶25} *“(iii) Objection to magistrate's factual finding; transcript or affidavit.* An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If

a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

{¶26} “(iv) *Waiver of right to assign adoption by court as error on appeal.* Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).”

{¶27} Upon review, the June 9, 2009 entry of the trial court is entitled “Domestic Violence Civil Protection Order” and is not identified in the caption or referred to as a magistrate’s decision or order. To the contrary, the entry is signed by both the Magistrate and the Judge, apparently on the same date. Further, the order clearly states the same is a final appealable order. Accordingly, we do not find Appellant waived the arguments on appeal pursuant to Civil Rule 53.

I, II.

{¶28} Appellant’s first and second assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶29} Appellant asserts the June 9, 2009 order of protection violates his right to counsel and his right against double jeopardy.

{¶30} Motions for civil protection orders are civil in nature, not criminal. *Butcher v. Stevens* (2009), 182 Ohio App. 3d 77. Appellant was not threatened with incarceration or another form of punishment. Therefore, the constitutional rights to counsel and against double jeopardy do not attach. *Westlake v. Patrick*, 2005-Ohio-4419.

{¶31} Accordingly, the first and second assignments of error are overruled.

III, IV.

{¶32} Appellant's third and fourth assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶33} Appellant maintains Appellee's attorney was caught lying and deceiving the trial court, and Appellee herself lied and deceived the court. We note Appellant has not alleged any error on the part of the trial court in regard to either assignment. However, in the interests of justice, we will treat the assignments as challenging the manifest weight of the evidence.

{¶34} We have reviewed the record of the proceedings before the trial court and find the court did not abuse its discretion in the conduct of the proceedings. A judgment supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. As the trier of fact, the judge is in the best position to view the witnesses and their demeanor in making a determination of the credibility of the testimony. "[A]n appellate court may not simply substitute its judgment for that of the trial court so long as there is some competent, credible evidence to support the lower court's findings." *State ex rel. Celebrezze v. Environmental Enterprises, Inc.* (1990), 53 Ohio St.3d 147, 154, 559 N.E.2d 1335. As trier of fact, the trial court is free to believe all, part or none of a witness' testimony.

{¶35} In *Woolum v. Woolum* (1999), 131 Ohio App.3d 818, the court found a civil protection order could be renewed even if no new acts of violence had been committed since the original civil protection order was issued. Rather, the court found the petitioner's testimony she continued to fear the respondent supported renewing the civil protection order, and such matters should be determined on a case by case basis.

{¶36} In the case sub judice, Appellee testified at the June 5, 2009 hearing:

{¶37} "Ms. Eubanks: can you describe what your marriage was like to Mr. Patton?"

{¶38} "Ms. Patton: Uhh, I was not allowed to have any contact with family, friends. I was not allowed to use the phone to call personal friends. I was [sic] supposed to have any. He wouldn't let me go anywhere without him in tow. Umm, there were times that he would be violent and hurt me. He's tried to kill me once or twice..."

{¶39} "Ms. Eubanks: Tell me about the times that he has tried to kill you.

{¶40} "Ms. Patton: The one that I remember the most is, I was on the floor in the kitchen and he was over top of my [sic] trying to choke me with his hands, banging my head on the linoleum floor in the kitchen, with my little boy sittin [sic] next to me.

{¶41} "Ms. Eubanks: He had both of his hands around your neck? Do you remember how that came to an end?"

{¶42} "Ms. Patton: Uhh, probably because my sun [sic] was screamin [sic], I think that's what did it. Umm, then, of course, I couldn't make a report because when ever these things occurred, Mr. Patton would stay in the house for two to three days and stay there so that I couldn't go anywhere. For fear that I might tell somebody. He would

just sit there like he was guarding me from goin [sic] anywhere, and I had a shirt on to cover up the bruises that were on my neck. I was afraid. I had a little baby, I mean I, and kids to worry about...

{¶43} “Ms. Eubanks: Was that the only time that Mr. Patton made bruises on you

{¶44} “Ms. Patton: No there’ve been various time where that’s happened. I’ve had my hair pulled out by the roots, shoved up against walls, I’ve been picked up off the floor, I mean...

{¶45} “Ms. Eubanks: When, umm, when you had bruises, what did Mr. Patton typically do?

{¶46} “Ms. Patton: Would stay in the house for a day or two to make sure that I didn’t go anywhere, or tell anybody, or call anybody. Because he had his own business, he was able to do that.

{¶47} “Ms. Eubanks: Did Mr. Patton make threats to anybody?

{¶48} “Ms. Patton: [sigh] I was threatened that if I tried to leave, he wouldn’t let [sic] have my kids or see them or anything. He wasn’t going to let me take the kids with me. He, he would not, he would hunt me down if I tried to leave, like the dog that I was...

{¶49} “Ms. Eubanks: Did he say that to you?

{¶50} “Ms. Patton: Yes.

{¶51} “Ms. Eubanks: Uhh, did he make threats to your parents?

{¶52} “Ms. Patton: Yes.

{¶53} “Ms. Eubanks: What did he say to your parents?

{¶54} “Ms. Patton: He’s threatened my parents on the phone when I had left at one point, that was years ago. Umm, he called my brother, threatened to kill him on the phone. Umm, course, you know how guys are, my brother didn’t want to call the cops, but, he threatened to kill my brother and his family. And he was very upset over that, because my brother didn’t have anything to do with it. I hadn’t talked to him, because I wasn’t allowed to, but yet he would call and threaten to kill him.

{¶55} “* * *

{¶56} “Ms. Patton: Over the last year I’ve tried to be cordial. I figured if I could be, you know, nice, and go in and drop the kids off and try to be decent with Mr. Patton, that it would be better for my kids. Uhh, the more that I tried to be polite and nice, the more I had to listen to his ranting and raving. And I just couldn’t take it. At one point, he tried to shove pictures of a dead dog in my face and I told him that I didn’t want nothin [sic] to do with it. He started yellin [sic] at me, that I was crazy, because I was tryin [sic] to get out the door and leave so I didn’t have to listen to it. And, that was the last time that I went, because I just didn’t want to have to deal with it. Now, on occasion, I still have to go drop them off, but it is only when my son can’t do it, my oldest son does it for me now. Cause [sic] I just, I don’t want to get into conflict in front of the kids, there’s no need for that.

{¶57} “Ms. Eubanks: Are you afraid to go to the Police Station?

{¶58} “Ms. Patton: Yes, Mr. Patton, when you go down there, one minute he’s nice to you and the next minute he’s somebody else, I don’t’ know, he gets, he’ll start talkin [sic] about how cops are out to get him, he can’t do this, you know, when things are going bad for him, that’s when he gets really upsetting [sic].

{¶159} “Ms. Eubanks: During your marriage did you see Mr. Patton get angry with people?”

{¶160} “Ms. Patton: Oh yes, all the time.

{¶161} “Ms. Eubanks: Umm, was there a particular incident that sticks out in your mind about Mr. Patton becoming angry?”

{¶162} “Ms. Patton: There’ve been a lot of them. I mean, I don’t know.

{¶163} “Ms. Eubanks: Do you have reason to believe that he might be doing things like lying in wait for you or something like that?”

{¶164} “Ms. Patton: There are times when this one guy that he was mad at, it was a friend of his, he was waiting for him in the alley various times, he was going to ambush him in the alley is what he told me. And, I just, I just know that he is very, he remembers things, he doesn’t forget, and the only reason that I want this Protection Order is because I feel safe knowing that that paper’s there, because he doesn’t want to go to jail. And, it keeps him from coming after me, because, repeatedly I have been told, by my children, that he hates me, I’m the reason that his whole life’s miserable. And, he’s goinna [sic] get them away from me sooner or later. And, in order for me not to have to deal with all this and worry that he’s coming after me, I just want to make sure that its’ in place, should anything happen.

{¶165} “Ms. Eubanks: Umm, what kind of things are you afraid are going to happen?”

{¶166} “Ms. Patton: Mr. Patton used to carry a gun or [sic] a regular basis. When we left, officers had to pat him down, there were bullets in his pockets. It was in a Police report. Umm I’ve seen him put it under the front seat of the car various times.

He's always afraid that somebody's out to get him. I don't feel comfortable. He can blow up at the slightest wrong word or sentence, and you don't know who he is anymore.

{¶167} “* * *

{¶168} “Ms. Eubanks: Are you scared of Mr. Patton?”

{¶169} “Ms. Patton: Yes.

{¶170} “Ms. Eubanks: When you have, uhh, conflict at the Police Station, how does that make you feel?”

{¶171} “Ms. Patton: It scares me, because, number one, I know what he's like, I loved with him, I lived with him ten years. Luckily I'm not alone now. There have been times where he snaps and [inaudible] I never know if I was gonna wake up the next day. I don't want to live like that, and I don't want to have to worry that he's coming after me. So, I would like to feel comfortable knowing that if I see him around where I'm at, or where I live, that I can call someone and they; so somethin [sic].

{¶172} “Ms. Eubanks: What do you think will happen if the CP is not renewed?”

{¶173} “Ms. Patton: I feel Mr. Patton will start harassing me. Probably following me until he figures out what I do where he can get at me alone. And that's what I am most afraid of.”

{¶174} Tr. at 9-19.

{¶175} Based upon the above, we find the trial court's order renewing the domestic violence civil protection order is based on competent, credible testimony, and is not against the manifest weight of the evidence. There is ample testimony Appellee continues to fear for her safety which supports the renewal of the protection order.

V.

{¶76} In the fifth assignment of error, Appellant maintains the Magistrate was improperly biased; therefore, should have recused himself.

{¶77} Ohio Civil Rule 53(D) governs disqualification of magistrates for bias:

{¶78} “(6) *Disqualification of a magistrate.* Disqualification of a magistrate for bias or other cause is within the discretion of the court and may be sought by motion filed with the court.”

{¶79} Upon review, we find there is no demonstration of undue bias exercised by the magistrate in the record before the trial court. Further, Appellant did not file a motion with the trial court to disqualify the magistrate, nor did he raise the issue at hearing. Accordingly, the assignment of error is overruled.

{¶80} For the reasons set forth above, the June 9, 2009 Order of the Muskingum County Court of Common Pleas, Domestic Relations Division, is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Farmer, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

