

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

AMANDA DUNCAN	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Petitioner-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
CHRISTOPHER DUNCAN	:	Case No. CT2010-0007
	:	
Respondent-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Domestic Relations Division, Case No.
DH2009-1098

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 1, 2010

APPEARANCES:

For Petitioner-Appellee

AMANDA DUNCAN, PRO SE
4025 Edwards Avenue
Zanesville, OH 43701

For Respondent-Appellant

ELIZABETH N. GABA
1231 East Broad Street
Columbus, OH 43205

Farmer, J.

{¶1} Appellant, Christopher Duncan, and appellee, Amanda Duncan, are married and have one child together. Appellee has two children from a previous relationship with Gregg Brocklehurst.

{¶2} On June 9, 2009, the parties argued and appellee alleged an incident of domestic violence. On June 12, 2009, appellee filed a petition for a civil protection order against appellant in the Court of Common Pleas of Licking County, Ohio. A hearing was held on June 18, 2009. By judgment entry filed June 22, 2009, the trial court dismissed appellee's petition.

{¶3} The Licking County Job & Family Services (hereinafter "LCJFS") became involved with the family. In December of 2009, the parties agreed to a visitation schedule for their child until they had the funds to pursue a divorce. Appellee received temporary custody and appellant received visitation.

{¶4} In the meantime, Mr. Bocklehurst filed a motion for the reallocation of parental rights and responsibilities regarding his two children in the Court of Common Pleas of Muskingum County, Ohio (Case No. DE2005-0772). The Muskingum County Court issued conditional orders to appellee, including the orders that appellee shall reside with her mother in Muskingum County, and shall seek a five year civil protection order against appellant from being present at any location where she is present or at any location where their two children are present.

{¶5} Following the orders, appellee filed a petition for a civil protection order against appellant in the Court of Common Pleas of Muskingum County, Ohio (Case No. DH2009-1098, the underlying case sub judice). A hearing before a magistrate was held

on December 22, 2009. By decision filed December 29, 2009, the magistrate recommended the issuance of the requested civil protection order. Appellant filed objections. By decision and judgment entry filed January 20, 2009, the trial court approved the magistrate's decision.

{¶6} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶7} "THE TRIAL COURT COMMITTED STRUCTURAL, CONSTITUTIONAL AND/OR PLAIN ERROR TO THE PREJUDICE OF APPELLANT, AND MAGISTRATE TOMPKINS EXCEEDED HIS STATUTORY AUTHORITY BY ORDERING PETITIONER TO FILE FOR A CPO AGAINST RESPONDENT THAT THE MAGISTRATE THEN HEARD AND GRANTED, AS A CONDITION TO HER ACQUIRING VISITATION OF HER CHILDREN IN HER CUSTODY CASE THAT HE WAS ALSO ADJUDICATING."

II

{¶8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY VIOLATING APPELLANT'S RIGHT TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS BY FIRST ORDERING THAT APPELLEE SEEK AND DILIGENTLY PURSUE A CPO AGAINST APPELLANT IN CASE NO. DE 2005 0772, AND THEN GRANTING APPELLEE'S CPO IN THIS MATTER."

III

{¶9} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT AND ABUSED ITS DISCRETION BY ENTERING COURT ORDERS THAT VIOLATED THE STATE AND FEDERAL CONSTITUTIONS' EQUAL PROTECTION CLAUSES."

IV

{¶10} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN THE MAGISTRATE PREJUDICED THE PROCEEDINGS AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL."

V

{¶11} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY GRANTING AN ORDER BASED ON A COMPELLED PETITION FOR CPO, WHICH WAS BASED ON ALLEGED EVENTS OCCURRING IN LICKING COUNTY AND ALREADY DISMISSED IN THE CASE FILED THERE. BOTH CLAIM PRECLUSION AND ISSUE PRECLUSION BARRED THE MUSKINGUM COUNTY COURT FROM HEARING THESE ALLEGATIONS ALREADY LITIGATED AND DISMISSED, AS NO NEW ACTS OF VIOLENCE OR THREATS OF VIOLENCE WERE ALLEGED BY PETITIONER."

VI

{¶12} "THE TRIAL COURT ERRED AS A MATTER OF LAW, TO THE PREJUDICE OF APPELLANT, BY GRANTING APPELLEE'S PETITION FOR CIVIL PROTECTION ORDER, BECAUSE IT WAS AGAINST BOTH THE MANIFEST WEIGHT OF THE EVIDENCE, AND THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE AWARD OF THE C.P.O."

I, II, III

{¶13} Appellant's first three assignments of error center on the magistrate's decision in the case from Muskingum County captioned *Gregg Brocklehurst v. Amanda Renee Paul (Duncan)*, Muskingum County Case No. DE2005-0772. Appellant claims

the following specific orders from the magistrate's December 9, 2009 decision were in error:

{¶14} "(14) Amanda Duncan's right to exercise parenting time under this order is conditioned upon the following:

{¶15} "(b) Amanda Duncan shall reside with her mother at 4025 Edwards Drive, Zanesville, OH.

{¶16} "(c) Amanda Duncan shall not resume cohabitation with Chris Duncan at any location.

{¶17} "(e) Amanda Duncan shall immediately seek and shall diligently prosecute a petition seeking a five year civil protection order prohibiting Chris Duncan from being present at any location where she is present or at any location where Logan or Lucas Brocklehurst is present."

{¶18} These orders were neither objected to nor appealed, and appellee complied with the magistrate's order.

{¶19} We find these assignments of error are not properly before this court for review. As the docketing sheet indicates, the judgment entry appealed from is the trial court's January 20, 2010 decision and judgment entry in Case No. DH2009-1098.

{¶20} Assignments of Error I, II, and III are denied.

IV

{¶21} Appellant claims he was denied his right to a fair trial because the magistrate who ordered the filing of the civil protection order in Case No. DE2005-0772 was the same magistrate who recommended the issuance of the civil protection order in Case No. DH2009-1098.

{¶22} Appellant argues appellee's own testimony substantiates the fact that the only reason she filed the petition for a civil protection order was because of the magistrate's order:

{¶23} "Q. Okay. Explain to me, then, why you're asking for the protection order.

{¶24} "A. It was one of the conditions of the court order, and there was an incident that took place on June 9th on a domestic violence that Job and Family Services picked up my kids, because they thought I couldn't safely protect us, and I was doing whatever it takes to get my kids back. I have made mistakes before, and I don't want to make any more." T. at 5-6.

{¶25} In his objections to the magistrate's decision, appellant objected to the same magistrate in both cases. In its judgment entry filed January 20, 2010, the trial court addressed the objection as follows:

{¶26} "Respondent further asserts that there was a conflict of interest for the Magistrate to hear and determine the issuance of the Protection Order in the present case. Respondent cites the case of Greg H. Brocklehurst v. Amanda Duncan, Case DE2005-0772 in the Court of Common Pleas, Muskingum County, Ohio, Domestic Relations Division, wherein a Magistrate's Order issued December 9, 2009, set forth 'Amanda Duncan shall immediately seek and shall diligently prosecute a Petition seeking a five year Civil Protection Order prohibiting Chris Duncan from being present at any location where she is present or at any location where Logan or Lucas Brocklehurst is present.' The ruling by the Magistrate in that case was based strictly upon the evidence received in that case and was entered to protect the best interest of the children who are the subject of that case. Had the Magistrate in the Brocklehurst

case ordered Amanda to 'obtain' a Protection Order, Respondent may have a different argument. The Order, however, that Amanda 'seek' a Protection Order which means that she would file a Petition for such and that the Petition would be heard on its merits. It is clear from reviewing the actual audio record of the proceedings that no mention of the Brocklehurst case or any evidence produced there under was received by the Magistrate and the evidence presented in the present case independently supports the issuance of a Civil Protection Order.

{¶27} "Accordingly, the Objection to Decision of Magistrate filed by Respondent Christopher Duncan on January 12, 2010, is overruled and the Domestic Violence Civil Protection Order issued December 29, 2009, is hereby affirmed as the Order of the Court."

{¶28} We note there was no objection to the magistrate prior to the hearing. "A party may be considered to have waived its objection to the judge when the objection is not raised in a timely fashion and the facts underlying the objection have been known to the party for some time. See *In re Disqualification of Pepple* (1989), 47 Ohio St.3d 606, 546 N.E.2d 1298." *Sims v. Sims* (2000), Cuyahoga App. No. 74425, at 2.

{¶29} From our reading of the transcript, we find the trial court was correct in its assessment that the magistrate's decision was based on the facts presented as to the specific incident of June 9, 2009. T. at 7-10.

{¶30} Assignment of Error IV is denied.

V

{¶31} Appellant claims it was error to consider the June 9, 2009 incident in determining the civil protection order because the same evidence had been considered and dismissed in the Licking County court.

{¶32} Res judicata is defined as "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, syllabus.

{¶33} Appellee voluntarily dismissed the Licking County action prior to adjudication; therefore, we find res judicata does not apply.

{¶34} Assignment of Error V is denied.

VI

{¶35} Appellant claims the granting of the civil protection order was against the sufficiency and manifest weight of the evidence as the evidence did not support the finding that appellee was in fear.

{¶36} A judgment supported by some competent, credible evidence 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. A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson*, 66 Ohio St.3d 610, 1993-Ohio-9.

{¶37} R.C. 3113.31 governs protection orders concerning domestic violence. Subsection (D)(1) states the following in pertinent part:

{¶38} "The court, for good cause shown at the ex parte hearing, may enter any temporary orders, with or without bond, including, but not limited to, an order described in division (E)(1)(a), (b), or (c) of this section, that the court finds necessary to protect the family or household member from domestic violence. Immediate and present danger of domestic violence to the family or household member constitutes good cause for purposes of this section. Immediate and present danger includes, but is not limited to, situations in which the respondent has threatened the family or household member with bodily harm***."

{¶39} Appellee testified to numerous acts of violence by appellant on June 9, 2009. Appellant first threw a cigarette at her, then grabbed her and pushed her up against a cabinet and smacked her across the face. T. at 7. Later he "hauled off and sucker-punched" her in the chest. T. at 8. Appellee testified she filed a police report because "this domestic violence thing is wrong." T. at 9. When asked if she feared appellant, appellee stated "[n]ot now" as she barely had contact with him. T. at 10-11. When asked if she felt a protection order was necessary, appellee stated, "I don't know if that's a fair question to ask." T. at 12.

{¶40} Appellant testified there were no physical altercations. T. at 13. Appellee merely tripped and fell on some broken steps and fell on a toy fire truck. T. at 14. Appellant testified they have had minimal contact since June 2009. T. at 18.

{¶41} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the

demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶42} Appellee's testimony, if believed, established an act of domestic violence. It is clear from the trial court's decision that the issue of credibility was resolved in appellee's favor. Appellant argues what is lacking in the trial court's decision is the issue of "continued" threat of harm or violence as this was not addressed by the trial court.

{¶43} The evidence established appellee no longer feared appellant and this was premised upon her lack of contact with him. The issue of domestic violence as contemplated by R.C. 3113.31 is "the existence or threatened existence of domestic violence." *Thomas v. Thomas*, (1988), 44 Ohio App.3d 6, 8. The record included testimony of domestic violence and therefore the mandates of the statute have been established.

{¶44} Assignment of Error VI is denied.

{¶45} The judgment of the Court of Common Pleas of Muskingum County, Ohio, Domestic Relations Division, is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Patricia A. Delaney

JUDGES

SGF/sg 922

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

AMANDA DUNCAN	:	
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Petitioner-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
CHRISTOPHER DUNCAN	:	
	:	
Respondent-Appellant	:	CASE NO. CT2010-0007

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio, Domestic Relations Division, is hereby affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Patricia A. Delaney

JUDGES