

IN THE CIRCUIT COURT OF CLAY COUNTY, WEST VIRGINIA

KIMBERLY THOMAS,
Petitioner/ Appellant,

v.

JOSEPH B. MORRIS,
Respondent.

Case No. 08-DV-66
Judge Richard A. Facemire

ORDER

This matter is before the Court on the Petitioner, Kimberly Thomas', Second Petition for Appeal From Denial of a Domestic Violence Protective Order. The Court heard argument on the appeal on December 1, 2008, and thereafter the Court ordered the parties to submit proposed findings of fact and conclusions of law for the Court's consideration. The Court after reviewing the pleadings and record in this case, shall DENY the Petition of Appeal and uphold the rulings of the Family Court. The Court makes the following findings of fact and conclusions of law:

1. The Petitioner, and the Respondent, Joseph B. Morris, were in a long-term romantic relationship that ended December 2007. Beginning in May 2008, the Respondent made attempts to renew the relationship, and events on July 13, 2008, lead to the filing of this petition.
2. The Petitioner filed her domestic violence petition in Kanawha County, August 1, 2008, and the Kanawha County Magistrate Court issued an emergency protective order on that date. The events occurred in Clay County, and at the time of the incident the Petitioner resided in Clay County, but shortly thereafter she moved to Kanawha County. The Respondent resides in Clay County.
3. By order entered August 8, 2008, the case was transferred from the Kanawha County Family Court to the Clay County Family Court.

4. September 3, 2008, the Clay County Family Court entered an order denying the domestic violence protective order, finding that the Petitioner failed to prove the allegations of domestic violence or abuse by a preponderance of evidence, and that there was no evidence of immediate and present danger of abuse.
5. The Petitioner then appealed to the Circuit Court asserting that the Family Court applied the incorrect standard by requiring that the Petitioner prove that there was a danger of immediate and irreparable harm. The Petitioner also argued that the Family Court should have ruled that the actions of the Respondent constituted domestic violence. More specifically that the evidence supported a finding of domestic violence under W.V. Code §48-27-202(5), "Holding, confining, detaining or abducting another person against that person's will," and a finding under W.V. Code §48-27-202(3), "Creating fear of physical harm by harassment, psychological abuse or threatening acts."
6. By order entered September 27, 2008, this Court remanded the case back to the Family Court, finding that the Family Court applied the incorrect legal standard. The Family Court is to determine, based on the evidence, if domestic violence occurred, as domestic violence is defined by the statute. The petitioner in a domestic violence proceeding is not required to prove that he or she is in danger of immediate and irreparable harm, the petitioner must only prove by a preponderance of the evidence that an incident of domestic violence has occurred. This Court also ordered that the Family Court make a specific finding as to whether or not the evidence met the definition of domestic violence under W.V. Code §48-27-202(5).

2008 SEP 27 10:53

7. October 29, 2008, the Second Family Court Order Denying Domestic Violence Protective Order was entered, finding that the Petitioner failed to prove the allegations of domestic violence.
8. November 5, 2008, the Petitioner filed her second petition for appeal that is now under consideration by the Court. Upon the Respondents' motion to continue, the Court ultimately heard the appeal December 1, 2008, and then ordered the parties to submit proposed findings of fact and conclusions of law on or before December 11, 2008.
9. Pursuant to W.V. Code §48-27-510(d), the Court reviews the findings of fact of the Family Court under the clearly erroneous standard, and the application of the law to the facts under an abuse of discretions standard.
10. The Court believes that the Family Court was correct in finding that domestic violence did not occur. It was not an abuse of discretion for the Family Court to find that the Petitioner was not held, confined, detained, or abducted against her will as contemplated in W.V. Code §48-27-202(5). The Petitioner alleged that on July 13, 2008, the Respondent blocked her driveway with his car, and she and her then boyfriend, now husband, Ray Blake, were effectively trapped in her home for a period of one to two hours, while the Respondent stood outside the home yelling and banging on the door. Ultimately, the Petitioner and Ray Blake ran out the front door, as the Respondent was knocking on the back door. They ran to a neighbor's home, and called for a friend to pick them up. The Petitioner claimed she was fearful, and she felt trapped in the home in part because she knows of the Respondent to carry a concealed weapon. However, there was no testimony that the Respondent ever

CASE NO. 08-11193

brandished a weapon, threatened her with a weapon, or even had a weapon with him at the time of the incident.

11. While the Respondent's behavior was less than ideal, it did not rise to the level of domestic violence. The Respondent was outside of the Petitioner's home for a period of one to two hours, but his behavior was not such that he was actively trying to hold, confine, detain or abduct the Petitioner. He was outside her home, attempting to speak with her, and clearly she did not want to speak with the Respondent. However, the Court believes that W.V. Code §48-27-202(5) contemplates more aggressive and direct action. The Petitioner testified that she was afraid to leave her home while the Respondent was outside, but she was not physically restrained or confined within her home. There was no testimony that the Respondent barred the doors to the Petitioner's home, or in any way physically forced the Petitioner into her home, and held her there. The Petitioner's witness, Ray Blake testified that the Petitioner possibly could have gotten her car out of the driveway, and that the Respondent did not have the driveway completely blocked.

12. The Petitioner also contends that the Respondent's acts, "created fear of physical harm by harassment, psychological abuse, or threatening acts," as set forth in W.V. Code §48-27-202(3). Prior to the events of July 13, 2008, the Respondent had been contacting the Petitioner by phone (Respondent admits he called the Petitioner approximately 150 times between May and July), he also sent her flowers, offered her marriage, and offered his home, all in an attempt to rekindle their relationship. The Petitioner argues that when considering this history, the acts of the Respondent on July 13, 2008, were sufficient to create fear of physical harm in the Petitioner. While

10/13/2009 1:02 PM INJUDICIALCIRCUIT

the actions of the Respondent throughout the summer of 2008 were undoubtedly "persistent and annoying," as the Family Court found, there is no evidence that the Respondent ever threatened the Petitioner with physical harm during this time that would lead the Petitioner to reasonably believe the Respondent was threatening her with physical harm on July 13, 2008.

13. The Court also believes that the actions of the Petitioner following the July 13, 2008 incident are an indication of how fearful she was. Throughout the entire evening of July 13, 2008, law enforcement was not contacted, despite the fact that the Petitioner lived in close proximity to the West Virginia State Police barracks. The domestic violence petition was not filed until August 1, 2008. The Petitioner claims that the Respondent continued to call her after the July 13, 2008 incident, and that the increased calls prompted her to file the petition. However, had the Respondent's behavior been so threatening on July 13, 2008, it is not unreasonable to conclude that the Petitioner would have contacted law enforcement that evening. The Family Court did not abuse it's discretion in finding that the acts of the Respondent were not of a sufficiently threatening nature to create fear of physical harm.

Therefore, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The Petitioner's Petition for Appeal shall be DENIED, and the October 29, 2008 Second Family Court Order Denying Domestic Violence Protective Order, shall be AFFIRMED.
2. The Court shall note and preserve all parties' objections and exceptions to the Court's rulings.

2008-10-29 10:21 AM

