

FIRST DIVISION
JUNE 30, 2015

No. 1-13-4038

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BRENDA MOBLEY,)	Appeal from the
)	Circuit Court of
Petitioner-Appellant,)	Cook County.
)	
v.)	No. 13 OP 77790
)	
NATTHER MURRAY,)	Honorable
)	Cynthia Ramirez,
Respondent-Appellee.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's denial of petitioner-appellant's petition for an order of protection against respondent-appellee pursuant to the Domestic Violence Act of 1986, following the respondent's conviction for committing domestic battery against petitioner and for violating a prior order of protection, is vacated. It is now apparent that the petitioner was entitled to a new order of protection due to the respondent's recent conviction for assaulting her shortly before the expiration of her prior order of protection, and that the trial court hearing the petition was mistaken in believing that a new order of protection had already been issued in the respondent's criminal proceeding.

¶ 2 Petitioner-appellant Brenda Mobley appeals from an order of the circuit court of Cook County denying her *pro se* petition seeking an order of protection against respondent-appellee Natther Murray.

¶ 3 BACKGROUND

¶ 4 The petitioner and the respondent were in a romantic relationship that lasted approximately seven years, until August 2011. On October 17, 2011, the respondent physically attacked the petitioner. For that incident, the respondent was charged with domestic battery and was convicted in November 2011. In conjunction with that conviction, the trial court entered an order of protection pursuant to the Domestic Violence Act of 1986 (750 ILCS 60/214 (West 2010)) that prohibited the respondent from having any contact with the petitioner. That order of protection was effective for approximately two years, with an expiration date of November 20, 2013.

¶ 5 On October 3, 2013, the respondent again assaulted the petitioner. As a result of that incident, the State prosecuted the respondent for one count of domestic battery as well as one count of violating the prior order of protection. At the respondent's bench trial on November 19, 2013, the petitioner testified that, on October 3, 2013, the respondent followed her after she left a convenience store and then attacked her. The petitioner testified that the respondent struck her in the face with his fist, picked her up and slammed her to the ground, and continued to "stomp" her face with his feet as she lay on the ground, rendering her unconscious. The respondent's arresting police officer, Officer Magura, testified that he had seen the respondent and the petitioner arguing as they left a convenience store. A short time later, after hearing a disturbance down the block, he went to the scene and observed the respondent standing over the petitioner

and kicking her as she lay on the ground. Officer Magura halted the attack and arrested the respondent.

¶ 6 At the bench trial, the State introduced a certified copy of the petitioner's November 2011 order of protection, which was admitted into evidence. Following testimony by the respondent, the court found the respondent guilty for both violating the 2011 order of protection as well as for a separate count of domestic battery. The court sentenced the respondent to 150 days in the Cook County Department of Corrections. Immediately after issuing this sentence, the trial court additionally told the respondent: "You'll be subject to an order of protection for two years." The State's attorney responded to the court: "We'll have to prepare that, your Honor."

¶ 7 After admonishing the respondent regarding his right to appeal, the court asked the State's attorney: "Do you need to pass it for the OP [order of protection]?" and the State's attorney answered affirmatively. Thus, the transcript of proceedings reflects that the "cause was passed and later recalled" the same day. Although the precise reason is not evident from the transcript, the petitioner was apparently escorted out of the courtroom before the proceedings in the respondent's criminal case resumed.

¶ 8 When the case resumed later on November 19, 2013, the trial court—despite its prior indication that it would impose a new two-year order of protection against the respondent—declined to do so upon learning from the State's attorney that the 2011 order of protection would not expire until the next day, November 20, 2013:

"THE COURT: All right. Are we ready on Murray?

[THE STATE]: The [petitioner] got escorted out of the building.

THE COURT: Are you going to serve [the respondent] with the OP?

[THE STATE]: We were having her – we had to create a new one since it was on an old case. The OP.

THE COURT: So what are you telling me?

[THE STATE]: That either we need to write up the new one based off the old one or if you want to – I mean, she technically still has the other OP in effect until tomorrow.

THE COURT: All right. Scratch the OP then."

Thus, although the respondent was sentenced on November 19, 2013 for his October 2013 assault on the petitioner, the petitioner was left with the original 2011 order of protection that was set to expire the very next day.

¶ 9 The petitioner's order of protection expired on November 20, 2013. Shortly thereafter, on November 26, 2013, the petitioner filed a *pro se* petition in the domestic violence division of the circuit court to obtain a new order of protection against the respondent pursuant to the Domestic Violence Act of 1986. In that petition, the petitioner detailed the respondent's October 3, 2013 attack and requested an order prohibiting the respondent from contacting her by any means.

¶ 10 On November 26, 2013, the petitioner appeared *pro se* in support of her petition before the trial court, who was not the same judge who had presided over the respondent's criminal trial for the October 3, 2013 assault. At the outset of the hearing on the petition, the court asked the petitioner to confirm that the respondent had been found guilty for "the exact same incident that you are listing as a basis for your request for an order of protection." The petitioner confirmed

that the respondent had been found guilty and sentenced to 150 days in prison. The following exchange ensued:

"THE COURT: 150 days. All right, so he's currently incarcerated; correct?

THE PETITIONER: Yes.

THE COURT: All right. And as part of that order there was also an order of protection that was entered on your behalf pursuant to that finding?

THE PETITIONER: Yes.

THE COURT: All right. So based on that information, you're not entitled to a second order of protection. You already have one?

THE PETITIONER: My first one expired already.

THE COURT: I'm sorry?

THE PETITIONER: The first order, order of protection expired November 22nd. I don't got it. It's – that's over with.

THE COURT: You have something to show me that it expired because our records reflect that you currently have an order of protection?

THE PETITIONER: They never gave me [an] order of protection that day. They put me out the building that day. I ain't never got none.

THE COURT: What are you talking about they put you out the building?

THE PETITIONER: Because when I went to trial November 19th, they supposed gave me [sic] my order of protection, but they put me out because I, because I said something in court.

THE COURT: Ah –

THE PETITIONER: Yes.

THE COURT: -- so you were kicked out of court? Okay.

Your case is dismissed."

¶ 11 Without further discussion, the trial court dismissed the petition on November 26, 2013. The accompanying written dismissal order states that: "Petitioner presented insufficient evidence of an EOP [Emergency Order of Protection] *** and does not meet the standards provided for in the Illinois Domestic Violence Act ***."

¶ 12 The petitioner retained counsel and filed a notice of appeal from the dismissal order on December 26, 2013. The notice of appeal was served upon the respondent by mail at the correctional facility where he was incarcerated. However, after the respondent was released from prison on or about February 28, 2014, the petitioner could not find an address in order to serve him with subsequent filings in this appeal. As a result, on May 8, 2014, the petitioner moved this court for leave to serve the respondent by publication. On May 14, 2014, this court denied that motion, without prejudice, instructing the petitioner to contact the Illinois Department of Corrections (IDOC) regarding the respondent's current address. On May 21,

2014, the petitioner renewed her motion, supported by an affidavit stating that her counsel had since contacted the IDOC as well as the Cook County Department of Corrections (CCDOC), neither of which had a current address for the respondent. The affidavit further stated that the petitioner had attempted, without success, to serve the respondent at the last known address for the respondent provided by the CCDOC. Based on that affidavit, on June 4, 2014, this court allowed the petitioner to serve the respondent by publication. The respondent failed to file any brief or other submission in this appeal. Accordingly, we consider this case upon the record and the petitioner's brief only.

¶ 13

ANALYSIS

¶ 14 We have jurisdiction to decide this appeal because the petitioner filed a timely notice of appeal from the denial of her petition. See Ill. S. Ct. R. 303(a) (eff. May 30, 2008).

¶ 15 The petitioner's appellate brief asserts three arguments for reversal of the denial of her petition for an order of protection: (1) that the trial court's denial of the petition was against the manifest weight of the evidence; (2) that the trial court violated her procedural due process rights by denying her an opportunity to be heard; and (3) that the trial court failed to make the requisite findings under section 214 of the Domestic Violence Act of 1986 (the Act). 750 ILCS 6-/124 (West 2012). As set forth below, we agree with the petitioner that the petition should not have been dismissed.

¶ 16 A petition seeking an order of protection is governed by the Act, which provides that "[i]f the court finds that petitioner has been abused by a family or household member or that petitioner is a high-risk adult who has been abused, neglected or exploited *** an order of protection prohibiting the abuse, neglect or exploitation shall issue ***." 750 ILCS 60/214

(West 2012). Our supreme court has emphasized the mandatory language of the Act that "once the trial court finds that the petitioner has been abused, 'an order of protection *** *shall issue*.'" (Emphasis in original.) *Best v. Best*, 223 Ill. 2d 342, 348 (2006) (quoting 750 ILCS 60/ 214(a) (West 2004)).

¶ 17 "[P]roceedings to obtain an order of protection are civil in nature and governed by a preponderance of the evidence standard." *Best*, 223 Ill. 2d at 348; 750 ILCS 60/205(a) (West 2012). Thus, "whether the petitioner has been abused is an issue of fact that must be proven by a preponderance of the evidence." *Best*, 223 Ill. 2d at 348.

¶ 18 In *Best*, our supreme court established that the applicable standard of review is the deferential "manifest weight" standard. "[W]hen a trial court makes a finding by a preponderance of the evidence, this court will reverse that finding only if it is against the manifest weight of the evidence." (Internal quotation marks omitted). *Id.* at 348-49. Thus, a "circuit court's finding on whether abuse or neglect occurred will not be disturbed on appeal unless contrary to the manifest weight of the evidence." (Internal quotation marks omitted). *Id.* at 349.

¶ 19 "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *Id.* at 350. Under that standard, a reviewing court "give[s] deference to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and witnesses" and "will not substitute its judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn." *Id.*

¶ 20 The transcript of proceedings indicates that the trial court denied the petition due to its mistaken belief that the petitioner had already obtained a new order of protection as a result of the criminal proceeding against the respondent for the October 2013 assault.

¶ 21 Notably, although the trial judge hearing the petition referenced the criminal proceeding, it is not apparent that the judge had access to the transcript from the respondent's criminal trial. That transcript was not included in the original record on appeal prepared by the clerk of the circuit court, but our court granted a motion by the petitioner to supplement the appellate record with that transcript on April 1, 2014. Thus, the trial judge who denied the petition on November 26, 2013 was likely unaware that the judge in the respondent's criminal trial had declined to impose a new order of protection on November 19, 2013 because the order of protection from the 2011 assault had not yet expired on that date. That is, it appears the trial judge hearing the petition was simply mistaken in believing that an order of protection was already in place, leading to the trial court's dismissal of the petition on November 26, 2013 on the basis of "insufficient evidence" to warrant an order of protection.

¶ 22 However, an opposite conclusion is warranted in light of the respondent's November 19, 2013 conviction for domestic battery (only one week prior to the petition) arising from the respondent's October 2013 attack on the petitioner. That criminal conviction established beyond a preponderance of the evidence—in fact, it established beyond a reasonable doubt—that the petitioner had been abused by the respondent and was entitled to an order of protection.

¶ 23 The trial court considering the petition did not dispute that the petitioner had been abused, as the court recognized the respondent's recent conviction for the October 2013 assault on the petitioner which was the basis for the petition. Rather, the trial court apparently assumed

(incorrectly) that a new order of protection had already been issued to the petitioner, as the court told her that "our records reflect that you currently have an order of protection."

¶ 24 The transcript of the proceedings at the respondent's criminal trial, however, makes clear that the petitioner's initial order of protection, issued in November 2011, expired on November 20, 2013—several days before the petitioner filed her petition for a new order of protection. It is apparent that the trial court in the respondent's criminal proceeding initially indicated at the respondent's November 19, 2013 sentencing that the court intended to issue a new two-year order of protection against the respondent, but that it later declined to impose a new order of protection *only* because, on that date, the initial 2011 order was still in effect for one more day.

¶ 25 As the respondent's abuse of the petitioner was established by his criminal conviction for the October 2013 assault, and the petitioner's previous order of protection expired on November 20, 2013, the trial court's November 26, 2013 finding of "insufficient evidence" to support a new order of protection should be vacated and the matter remanded for further proceedings. Accordingly, we need not discuss the petitioner's alternative suggestion that the trial court denied her petition on the improper basis of her removal from the courtroom during the respondent's prior criminal proceeding. Likewise, we also need not decide the petitioner's additional arguments that the trial court violated the petitioner's due process rights or failed to make requisite findings under the Act.

¶ 26 We therefore vacate the dismissal and remand for further proceedings for the trial court to take formal judicial notice of the respondent's conviction for the October 2013 assault on the petitioner and enter a corresponding order of protection in favor of the petitioner against the respondent. Notably, the trial court on remand should first determine whether the respondent

should be given notice and an opportunity to be heard regarding the appropriate scope of the order of protection. In this regard, section 217 of the Act permits the issuance of an emergency order of protection, without notice to the respondent, if the petitioner establishes that "the harm which that [order of protection] is intended to prevent would be likely to occur if the respondent were given any prior notice *** of the petitioner's efforts to obtain judicial relief." 750 ILCS 60/217(a)(3)(i) (West 2012). Otherwise, issuance of an interim order of protection under section 218 of the Act, or a plenary order of protection under section 219 of the Act, requires that the respondent receive notice of the proceeding. See 750 ILCS 60/218, 219 (West 2012). Thus, on remand, the trial court should determine whether there is currently risk of harm to the petitioner sufficient to justify an *ex parte* emergency proceeding, or if notice to the respondent is required.

¶ 27 For the foregoing reasons, we vacate the judgment of the circuit court of Cook County and remand the case to the trial court for proceedings consistent with this order.

¶ 28 Vacated and remanded.