GF who shot gun in self-defense is found True of Neglect

2020 WL 3124436
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NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

T.W., Appellant

v.

COMMONWEALTH of Kentucky; Cabinet for Health and Family Services; K.W., a Minor Child; E.W., Father; and C.C., Mother, Appellees

NO. 2019-CA-001702-ME

JUNE 12, 2020; 10:00 A.M.

APPEAL FROM BULLITT CIRCUIT COURT, HONORABLE MONICA K. MEREDITH, JUDGE, ACTION NO. 18-J-00292-002

Attorneys and Law Firms

BRIEF FOR APPELLANT: F. Todd Lewis, Louisville, Kentucky.

NO BRIEF FILED FOR APPELLEES.

BEFORE: CLAYTON, CHIEF JUDGE; MAZE AND K. THOMPSON, JUDGES.

OPINION

CLAYTON, CHIEF JUDGE:

***1** T.W. ("Grandfather") appeals from a Bullitt Family Court order finding he committed abuse of his minor grandson, K.W. ("Grandson") when he fired a gun at his son in the child's presence. Grandfather did not face criminal charges for the shooting after the Commonwealth attorney concluded he acted in self-defense. Grandfather argues that the determination he acted in self-defense precludes a finding of abuse. After careful review of the record, we reverse based on the insufficiency of the evidence supporting the family court's decision.

At the time of the shooting, Grandson was a 20-month-old toddler. His father ("Father"), who is Grandfather's son, had been released from jail about five months before, and Grandson's natural mother, C.C. ("Mother"), was homeless. Grandfather did not approve of Father associating with Mother because he believed she encouraged Father's abuse of illegal drugs such as heroin and methamphetamine. Grandfather testified that although Father had not used drugs for four months after his release from jail, he had recently been on a drug binge with Mother.

On the day of the shooting, Father called Grandfather and told him he, Mother, and Grandson were going to stay with him at his residence. Grandfather refused because he believed Father was high, and he did not want Mother on his property. He told Father he would pay for a motel but did not want them in his house.

About two hours later, when Grandfather drove up to his residence from a greenhouse on his property where he had been working, Father, Mother and Grandson were on his porch. Grandfather's assistant at the greenhouse could hear what was happening over Grandfather's phone. Grandfather enabled his Bluetooth listening device. Grandfather parked in his driveway and approached the house. Although Grandfather had never had a custodial relationship with Grandson, Father and Grandson had occasionally stayed with him, and he had a close relationship with Grandson. Grandson ran to Grandfather who kissed and cuddled him on the front steps.

Father demanded Grandfather allow them to stay at his house; Grandfather refused. Grandfather set Grandson down and told him to go see his mommy. Grandson ran to Mother who was seated at one end of the front porch. Father balled up his fists. Grandfather pushed him away; Father fell down the first two steps while Grandfather tried unsuccessfully to open his front door. Father grabbed Grandfather by the throat and squeezed it; he then punched Grandfather, breaking his jaw on both sides. Grandfather drew his handgun from his pocket. Father lunged at him and Grandfather shot him through the leg. The bullet passed through Father's leg and a fragment of the bullet struck Mother in the leg. Grandfather fled to his nearby vehicle and called for help.

Father was charged with assault in the first degree. Grandfather was not criminally charged because the Commonwealth attorney decided he acted in self-defense when he shot Father.

The Cabinet for Health and Family Services filed a dependency, neglect, or abuse petition as a result of the incident, naming Grandfather and Father as the persons responsible for neglect or abuse of Grandson. The Commonwealth moved to dismiss the petition as to Grandfather on the grounds that Father was charged with assaulting him, and neither the police nor the prosecutors disputed that Grandfather had acted appropriately in self-defense. The family court refused to dismiss the petition as to Grandfather. Grandfather successfully moved for recusal of the family court judge and the case was reassigned to a different division of the family court. Mother stipulated to neglect for having been under the influence of methamphetamine. Father was sentenced to five years in prison on an amended charge of second-degree assault against Grandfather, and he thereafter also stipulated to neglect.

***2** The Commonwealth again moved to have the petition dismissed as to Grandfather. The family court denied the motion and set the matter for trial. Testimony at the trial was heard from the Cabinet social worker who initiated the petition, the police detective who investigated the case, and from Grandfather. After noting that the standard for determining abuse and neglect differs from the criminal standard for self-defense, the family court concluded Grandfather had a duty to retreat from his residence because of the presence of Grandson, and he should not have discharged a firearm in Grandson's presence. This appeal by Grandfather followed.

Grandfather challenges the family court's ruling that he committed abuse of Grandson. Kentucky Revised Statute (KRS) 620.100(3) provides that the burden of proof in these cases rests upon "the complainant, and a determination of dependency, neglect, and abuse shall be made by a preponderance of the evidence." A "trial court's findings regarding the weight and credibility of the evidence shall not be set aside unless clearly erroneous." *K.H. v. Cabinet for Health and Family Services*, 358 S.W.3d 29, 30 (Ky. App. 2011) (citing Kentucky Rule of Civil Procedure (CR) 52.01). "Under this standard, an appellate court is obligated to give a great deal of deference to the trial court's findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them." *Cabinet for Health and Family Services on behalf of C.R. v. C.B.*, 556 S.W.3d 568, 574 (Ky. 2018) (quoting *D.G.R. v. Commonwealth, Cabinet for Health and Family Services*, 364 S.W.3d 106, 113 (Ky. 2012)). "Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people." *Id.* (citing *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971)).

The family court made the following findings of fact to support its ruling: Grandfather testified that he anticipated trouble between himself and Father. He was armed and cautious when he approached his residence and had previously arranged for his employee to overhear the ensuing events. Grandfather had reason to believe Father was under the influence of controlled substances. The family court noted that under these circumstances, Grandfather was required to report that Grandson was potentially abused, neglected, or dependent pursuant to KRS 620.030(1), which states: "Any person who knows or has reasonable cause to believe that a child is dependent, neglected, or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or to the Department of Kentucky State Police, the cabinet or its designated representative, the Commonwealth's attorney, or the county attorney by telephone or otherwise."

The family court found that when Grandfather "took [Grandson] in his arms with his vehicle immediately accessible to them for shelter or to leave the location, when he visually observed that [Father] and Mother were actually at that moment under the influence, when he instead moved onto the porch and set the child down and shooed him toward the mother and entered into a physical altercation with [Father], then drew a loaded weapon, released the safety and discharged that weapon with sufficient presence of mind to wound but not immobilize [Father], by his own testimony [Grandfather] committed neglect or abuse of [Grandson]." The family court further found that in addition to creating a risk of physical injury, Grandfather's action inflicted emotional injury on Grandson, as evidenced by the fact that Grandson had undergone counseling for a significant period of time after witnessing the altercation.

***3** On appeal, Grandfather does not contest the essential facts of the case, but contends the family court's conclusion is erroneous as a matter of law. He argues that the only person obviously to blame for causing any neglect or abuse of the child was Father, who, in keeping with the principle of criminal law, was solely responsible for the naturally foreseeable use of force by Grandfather in the attack. *See, e.g., Robertson v. Commonwealth*, 82 S.W.3d 832 (Ky. 2002) (holding that a criminal defendant may

be liable for the reasonably foreseeable consequences of his conduct). Under the family court's ruling, Grandfather contends that individuals are completely deprived of the benefits and protections of the "castle doctrine" and the principles of self-defense and are required to flee their own homes when children are present. He contends that the prosecutor's determination he acted in self-defense should automatically absolve him of abuse allegations.

A family court is not permitted to "abdicate its fact-finding and decision-making responsibility under CR 52.01." *Bingham v. Bingham*, 628 S.W.2d 628, 629 (Ky. 1982). The Commonwealth attorney's decision in the criminal proceedings that Grandfather acted in self-defense could not be automatically dispositive of the family court's ruling on the DNA petition. Rather, it was one piece of evidence to be considered by the family court in its role as the finder of fact. The purpose of the dependency, neglect, and abuse statutes is not the assignment of criminal culpability to the parties, but "to provide for the health, safety, and overall wellbeing of the child." *C.R.*, 556 S.W.3d at 574 (citing KRS 620.010).

A family court's findings must, however, be based on the facts offered into evidence. There was no evidence presented at the trial, beyond the fact his vehicle was in the driveway, to support the finding that Grandfather could have seized Grandson and safely fled from his home with the child without incurring a violent reaction from Father and possibly placing Grandson in further danger. It is also unclear whether Grandfather would have been justified in unilaterally deciding to remove Grandson, with whom he did not have a custodial relationship, based only on his own suspicion that Father and Mother were under the influence of illegal drugs. The testimony did show that Grandfather tried to avoid Father by attempting to get inside his own house but was prevented from doing so by Father strangling him. Admittedly, Grandfather was carrying a gun, but there was no evidence this was not his usual practice or that he was carrying the gun solely in anticipation of shooting Father. The family court's decision in this case was based on a speculative theory, formulated in hindsight, prescribing how Grandfather should have acted under what were undoubtedly volatile circumstances.

The evidence presented at trial does not support the family court's finding that Grandfather could have avoided the risk of physical or emotional injury to Grandson, and consequently its ruling that he committed abuse of Grandson must be reversed. Because of our ruling on this issue, Grandfather's argument that he does not meet the statutory definition of an individual who can be adjudicated to have committed abuse or neglect of a child is rendered moot and need not be addressed here.

For the foregoing reasons, the Bullitt Family Court's opinion and order finding Grandfather committed abuse of Grandson is reversed.

THOMPSON, K., JUDGE, CONCURS.

MAZE, JUDGE, CONCURS WITH SEPARATE OPINION.

MAZE, JUDGE, CONCURRING:
I fully agree with the reasoning and result of the majority opinion, but I write separately to add an additional point. Under KRS Chapter 610, actions adjudicating dependency, neglect, and abuse are premised upon the existence of some sort of custodial or other special relationship with a child. In pertinent part, an "abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when:

> ***4** (a) His or her parent, guardian, *person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child*:
>
> 1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
>
> 2. Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means[.]

KRS 600.020(1) (emphasis added).

A person in a position of special trust is defined as "a position occupied by a person in a position of authority who by reason of that position is able to exercise undue influence over the minor[.]" KRS 532.045(1)(b). In this case, Grandfather never had a custodial relationship with Child. The only relationship was that Father and Child had previously lived with Grandfather several months earlier. The family court concluded that Child's prior residence, coupled with the mandatory reporting duty under KRS 620.030, placed Grandfather in a position of special trust with respect to Child.

I cannot agree. The family court's interpretation of the statutory duties would extend custodial duties to any person with whom the Child has resided and who may have knowledge of the parent's neglect or abuse. Such a reading is untenable and totally unsupported by the clear language of the statutes. Thus, I would also conclude that the family court clearly erred in denying the motion to dismiss Grandfather as a party to the petition.

Finally, I again agree with the majority's analysis that Grandfather's actions do not meet the statutory definition of abuse or neglect. Indeed, the family court's finding of neglect was based entirely on its post hoc determination that Grandfather should have done something to avoid the confrontation. The record plainly refutes this conclusion. Father made a vicious and unprovoked attack on Grandfather and Grandfather appropriately responded in self-defense. The family court clearly erred in finding that Grandfather bears any blame for the emotional injury caused to the child. Therefore, I wholly join in the majority opinion so finding.

All Citations

Not Reported in S.W. Rptr., 2020 WL 3124436

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