

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MOHAMMED RIZK, JR.

Appellant

v.

FAWZIAH M. BARGHOUTT

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 898 MDA 2012

Appeal from the Order Entered on May 9, 2012
In the Court of Common Pleas of Dauphin County
Civil Division at No.: 2012-CV-02709 AB

MOHAMMED RIZK, JR.

Appellant

v.

FAWZIAH M. BARGHOUTT

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 914 MDA 2012

Appeal from the Order Entered on May 9, 2012
In the Court of Common Pleas of Dauphin County
Civil Division at No.: 2012-CV-02096 AB

BEFORE: BENDER, P.J., WECHT, J., and FITZGERALD, J.*

CONCURRING MEMORANDUM BY WECHT, J.: **FILED APRIL 14, 2014**

I join in the learned Majority's disposition of this matter, and I join the stated rationale as to all of the issues raised. I write separately to note that,

* Former Justice specially assigned to the Superior Court.

if Husband's third claim had not succumbed to waiver, I would be forced to conclude such claim, which includes a challenge to the trial court's refusal to allow Son to testify, is meritorious, and indeed, case-dispositive. Accordingly, for the benefit of the trial court and the parties, I offer this concurrence.

In his third issue, Husband alleges that the PFA court erred when it "declined to take testimony from the witnesses in support of the abuse allegations, including the child who was in court the day of the hearing as . . . directed[.]" Husband's Brief at 20. Although stated as a single question, Husband essentially is arguing that the PFA court erred in: (1) refusing to allow Husband to testify regarding what his minor son told him about the alleged abuse; *id.* at 18, and (2) refusing to allow the minor son to testify at the April 25, 2012 hearing, even though he was available. *Id.* Husband asserts: "It is clear that the hearing of April 25, 2012[,] did not comport with the necessary requirement of a hearing under Subsection 6107(a)[.]" *Id.* at 14. Husband essentially is claiming that the PFA court denied him an evidentiary hearing pursuant to 23 Pa.C.S. § 6107(a) by preventing his minor son, and Husband, from testifying.

The Majority concludes that Husband has waived this claim pursuant to our holding in ***Thompson v. Thompson***, 963 A.2d 474 (Pa. Super. 2008). In ***Thompson***, a mother filed a PFA order on behalf of her five children

against their father. At the PFA hearing, the father sought to introduce testimony from his daughter:

[P]rior to calling any witnesses, [f]ather's counsel and the PFA court discussed the nature of the daughter's proposed testimony and the testimony of another witness [f]ather intended to call on his behalf. The PFA court indicated its desire to hear [f]ather's testimony, and so [f]ather took the stand. Following [f]ather's testimony, [f]ather's counsel made no attempt to call any other witness to the stand. The PFA court at no time ruled that any witness was excluded from testifying.

Thompson, 963 A.2d at 476-77. Ultimately, the PFA court entered an order removing the children from the father's custody. On appeal, the father argued that the PFA court "impermissibly refused to allow [f]ather to present witnesses on his behalf." **Id.** at 476. This Court concluded that the father waived this issue by failing to object at the hearing:

"Even . . . constru[ing] the PFA court's request to hear Father's testimony at the outset as a prohibition against any other witness's testimony, Father's counsel never objected. The failure to object to a trial court's refusal to accept certain testimony results in waiver of the right to raise that issue on appeal. **Lough v. Charney**, 378 A.2d 951, 952 (Pa. Super. 1977). Thus, we find this issue waived[.]"

Id. at 477 (emphasis added).

The record in the instant case indicates that, following the PFA court's exclusion of the son's testimony, Husband's attorney did not enter an objection. N.T. at 16-18. The attorney merely replied, "All right." **Id.** at 17. Unlike in **Thompson**, Husband's attorney actually entered an initial request to present the excluded testimony in this case. Our holding in **Thompson** indicates that the father never actually requested that the PFA

court hear the disputed testimony from his daughter. 963 A.2d at 477 (stating that the father's testimony occurred "prior to [father] calling any witnesses"). Rather, the PFA court asked to hear the father's testimony and father never returned to the issue of his daughter's testimony. While I believe that it may be possible to distinguish **Thompson** in this case because Husband actually requested that the PFA court consider the excluded testimony, I defer to the Majority's conclusion that Husband's attorney failed to lodge an appropriately zealous objection before the PFA court. **See** Majority Op. at 11-12.

However, assuming, *arguendo*, that Husband had not waived this claim, I would find it dispositive with respect to Son's testimony.¹ "In the context of a PFA order, we review the trial court's legal conclusions for an error of law or abuse of discretion." **Lanza v. Simconis**, 914 A.2d 902, 905 (Pa. Super. 2006). "An abuse of discretion is not merely an error of

¹ My review of the transcript from the April 25, 2012 hearing indicates that, immediately following the PFA court's exclusion of Son's testimony, Husband's attorney began to ask the PFA court to allow Husband to testify regarding the allegations of abuse. Notes of Testimony ("N.T."), 4/25/2012, at 17. However, the proceedings suddenly broke down into a discussion of the allegations related to hot peppers discussed above, as well as custody matters. **Id.** at 18-20. Immediately thereafter, Husband was sworn in and permitted to address the court at length. **Id.** at 20-26. Husband's testimony consisted solely of allegations that he had discovered new evidence related to Wife's separate PFA petition against him. I have been unable to locate any ruling from the PFA court in the transcript that actually restricted Husband's testimony. To the contrary, Husband was allowed to testify. Therefore, in the absence of waiver, I would conclude that Husband's claims related to **his** testimony are without merit.

judgment, but it in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or record, discretion is abused.” **Commonwealth v. Hunt**, 858 A.2d 1234, 1238 (Pa. Super. 2004) (*en banc*). In cases involving whether a PFA defendant has been afforded sufficient due process, we have “held that a defendant has been afforded due process where [the appellant] was entitled to present witnesses in his own defense and to cross-examine witnesses including [the petitioner].” **Leshko v. Leshko**, 833 A.2d 790, 791 (Pa. Super. 2003) (internal citation omitted); **see Lanza**, 914 A.2d at 906 (“[T]he parties must, at a minimum, have the opportunity to present witnesses, testify on one’s behalf, and cross-examine the opposing party and his/her witnesses.”); **R.G. v. T.D.**, 672 A.2d 341, 343 (Pa. Super. 1996).

Instantly, Husband’s attorney requested that the PFA court allow the minor son to testify regarding Husband’s allegations of abuse at the April 25, 2012 hearing. Notes of Testimony (“N.T.”), 4/25/2012, at 16. The PFA court denied the request, stating that “it’s pretty clear that he’s been – as [Children & Youth caseworker Courtney McCann said,] he’s been interviewed too many times. I’m not going to further traumatize him by interviewing him [i]n this situation.” **Id.** at 17. In relevant part, the McCann testimony to which the PFA court referred is as follows:

[The minor son’s] been interviewed way too many times. It’s been really hard to tell at this point what’s going on. This has

been a mess. Both parents talk to him about what's going on, way too often. He knows . . . his father's attorney's name. [H]e knows things that[are] going on, you know. On [Wife's] end as well, he hears [his parents] on the phone. I mean, he knows way too much. So it's very hard for me to get an effective interview from him at this point. I would absolutely say that.

Id. at 12-13. Based upon the above testimony, the PFA court determined that "the child had been previously interviewed by professionals on at least six occasions[,]" and that caseworker McCann "had a personal knowledge of the children, [and] the allegations[.]" P.C.O. at 7. Thus, the PFA court resolved "not to subject this young child to further interrogation." **Id.**

It is clear to me that the PFA court's decision to exclude the minor son's testimony was a consequence of its understandable desire to shield the child from the burden of speaking about this matter, again, in open court. However, the practical effect of the PFA court's *sua sponte* determination to prevent the son from testifying was to exclude the only putative victim who could testify directly regarding the alleged abuse.² Instead, the PFA court relied solely upon McCann's recitation of events in determining that Husband's allegations of abuse were unfounded.³ The PFA court has justified this exclusion by asserting that "[i]n such cases as this, questioning of a young child is at the [c]ourt's discretion." P.C.O. at 7. However, the PFA

² The other child implicated in this case was approximately two years old at the time of the April 25, 2012 hearing.

³ Husband's testimony at the hearing did not concern the instant allegations of abuse, but was directed at Wife's separate PFA petition.

court has cited no persuasive authorities to support this conclusion. My review of our statutes and precedents has uncovered nothing that would permit a PFA court, as a matter of law, to exclude the testimony of a minor witness solely for the purpose of shielding the child from trauma.⁴ To the contrary, Pennsylvania law unambiguously indicates that “[e]very person is competent to be a witness except as otherwise provided by statute,” Pa.R.E. 601(a), and that “the presumption of competency also applies to child witnesses.” **Commonwealth v. Boich**, 982 A.2d 102, 109 n.6 (Pa. Super. 2009).⁵

⁴ I note that the exception to the admissibility of testimony from child victims or witnesses, 42 Pa.C.S. 5985.1, is inapplicable in the PFA context. **See K.D. by K.H.-D. v. J.D.**, 696 A.2d 232, 234-35 (Pa. Super. 1997).

⁵ I also note the following century-old wisdom from our Supreme Court:

So far as the record here shows the witness was excluded solely because of the fact that he was little more than seven years of age. No test was made of his intelligence, of his capacity to recall the occurrence as to which he was expected to testify, or his understanding of the obligation he was under to speak the truth. How can it be said that this was done in the exercise of a legal discretion? It was in clear disregard of our rules. The ultimate decision in such cases rests with the trial judge, it is true, but where, as here, an infant is excluded from the witness stand without applying the test prescribed by law, it is an arbitrary conclusion and not one resting in judicial discretion.

Piepkke v. Philadelphia & R. Ry. Co., 89 A. 124, 126 (Pa. 1913) (holding that a seven-year-old boy improperly was excluded from testimony where the trial court failed to evaluate his ability to testify).

Had Husband not waived this claim, I would be constrained to conclude that the PFA court denied Husband a proper hearing pursuant to subsection 6107(a). Although I appreciate the PFA court's reluctance to expose the child in this case to further questioning, PFA hearings are, as a matter of law, adversarial. **Leshko**, 833 A.2d at 791 (describing the "adversarial nature of the PFA proceedings"). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." **Lanza**, 914 A.2d at 905. It seems plain that the due process safeguards recognized pursuant to subsection 6107(a) operate to ensure that PFA petitioners are permitted the opportunity to present a cogent case before the trial court. **See Leshko, Lanza, supra**. This Court has held that denying a PFA petitioner the ability to present witnesses violates the petitioner's due process.⁶ **See Lanza**, 914 A.2d at 906 (holding that no evidentiary hearing had been held where the petitioner "as not given an opportunity to submit witnesses in support of her allegation of abuse"). By refusing to allow the minor son to testify in this case without a clear legal basis, the PFA court effectively prevented Husband from presenting witnesses in support of his PFA petition. Thus, absent waiver, I would

⁶ My review of the transcripts from the April 25, 2012 hearing indicates that McCann testified at the behest of the PFA court, and was not called as a witness by either Husband or Wife. **See** N.T. at 3-4 (the PFA court stating that it had asked McCann to testify, and McCann confirming that request).

conclude that the PFA court denied Husband the benefit of an evidentiary hearing pursuant to subsection 6107(a).

As noted earlier, in the final analysis, I am constrained to agree with the Majority's conclusion that Husband waived this issue for failure to lodge an objection. While the issue of waiver in this case presents a close question, I do not believe that our holding in ***Thompson*** can be distinguished in a way that is true to the principles articulated in that case. Accordingly, I join the majority's holding.