Rel: March 26, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190816

Meagan Greene

v.

Sethe Greene

Appeal from DeKalb Circuit Court
(DR-16-900257.01)

THOMPSON, Presiding Judge.

The DeKalb Circuit Court ("the trial court") entered an October 1, 2016, judgment divorcing Meagan Greene ("the mother") and Sethe Greene ("the father"). In that divorce judgment, which incorporated an

agreement of the parties, the trial court, among other things, awarded the parties joint legal and physical custody of their two minor children.

On July 29, 2019, the mother filed in the trial court a petition seeking a modification of the divorce judgment. That action was designated as case number DR-16-9000257.01 ("the modification action") by the trial-court clerk. In her modification petition, the mother sought an award of sole custody of the parties' children, an award of child support, the enforcement of certain financial obligations imposed on the father by the divorce judgment, and an award of an attorney fee. The father answered and filed a counterclaim in which he sought to continue the award of joint legal and physical custody of the children but requested that the divorce judgment be modified to specify that the parties exchange custody of the children on a weekly basis rather than every three or four days.

The trial court court conducted an ore tenus hearing on October 22, 2019. On October 24, 2019, the trial court entered a temporary order leaving the custodial arrangement under the divorce judgment in place, instructing the parties not to consume alcohol in the presence of the

children, enjoining the father from consuming alcohol within 12 hours of his custodial periods, and requiring the parties to prepare and submit the child-support forms required by Rule 32, Ala. R. Jud. Admin.

On January 2, 2020, the mother filed a motion for an additional evidentiary hearing; as the basis for that motion, the mother alleged that the father's off-duty drinking might have endangered or resulted in the termination of his employment as a county deputy sheriff. On that same date, the trial court granted the mother's motion and scheduled an emergency hearing for January 10, 2020. However, on January 10, 2020, after a meeting between the parties, the mother withdrew her motion, and the emergency hearing did not take place.

On January 17, 2020, the trial court entered an order containing detailed findings of fact and conclusions of law regarding the parties' claims in the modification action. In that order, the trial court, among other things, awarded the mother "primary physical" custody of the children,[1] awarded the father scheduled visitation, and ordered the

[1]This court has explained that an award of "primary physical custody" is terminology often used by litigants and trial courts to describe

mother to submit a proposed child-support order to the trial court. On February 5, 2020, the trial court entered an order establishing the father's child-support obligation to be $1,007.10 per month. That February 5, 2020, order, together with the January 17, 2020, order, constituted a final judgment in the modification action. See Heaston v. Nabors, 889 So. 2d 588, 590 (Ala. Civ. App. 2004) ("A final judgment is one that disposes of all the claims and controversies between the parties."). We hereinafter refer to the January 17, 2020, order and the February 5, 2020, order as "the 2020 modification judgment."

On February 27, 2020, the father, proceeding pro se, filed in the trial court a letter directed "to whom it may concern" and a separate request, for, among other things, a modification of his child-support obligation. In those February 27, 2020, filings, the father alleged that he had recently lost his employment as a county deputy sheriff. The trial-court clerk designated the father's February 27, 2020, filings as initiating a new

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an award to a parent of sole physical custody under § 30-5-151, Ala. Code 1975. Whitehead v. Whitehead, 214 So. 3d 367, 371-72 (Ala. Civ. App. 2016).

action, and it assigned that action case number DR-9000257.02 ("the .02 action").

However, on March 11, 2020, the trial court entered an order stating that it would consider the father's February 27, 2020, filings as constituting a postjudgment motion filed pursuant to Rule 59(e), Ala. R. Civ. P., and it scheduled a hearing on that postjudgment motion. Also on March 11, 2020, the trial court ordered the dismissal of the .02 action.

On April 8, 2020, the parties filed a joint motion to extend the time for considering the father's February 27, 2020, postjudgment motion, and the trial court entered an order granting that joint motion. On May 11, 2020, the trial court held a postjudgment hearing, discussed in more detail below. On June 9, 2020, the trial court entered an order granting that part of the father's postjudgment motion insofar as it requested a modification of his child-support obligation. In doing so, the trial court cited "a substantial change" in the father's income, and it reduced the father's child-support obligation to $397 per month.

The mother filed a postjudgment motion on June 16, 2020, arguing that the trial court had erred in granting in part the father's postjudgment

motion and reducing his child-support obligation.[2] The trial court denied the mother's postjudgment motion, and the mother timely appealed. The mother's arguments on appeal pertain solely to procedural issues concerning the postjudgment proceedings. For that reason, no recitation of the facts underlying the bases for the 2020 modification judgment are set forth in this opinion.

At the May 11, 2020, postjudgment hearing, the trial court heard only the arguments of counsel. At that postjudgment hearing, the father's attorney represented to the trial court that the father had lost his job as a county deputy sheriff on approximately January 24, 2020, and the parties' attorneys asserted competing arguments regarding whether the father had lost his job as a result of his alcohol consumption. We note,

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[2]We note that the mother's June 16, 2020, postjudgment motion was properly filed pursuant to Rule 59(e), Ala. R. Civ. P., and did not constitute an impermissible, successive postjudgment motion. Ex parte Dowling, 477 So. 2d 400, 404 (Ala. 1985) ("If ... the judge has rendered a new judgment pursuant to a Rule 59(e) motion to alter, amend, or vacate a judgment ..., the party aggrieved by the new judgment may have had no reason to make such a motion earlier" and may seek relief with regard to any part of the postjudgment order that granted new relief adverse to that aggrieved party's interest.); and Woodall v. Woodall, 506 So. 2d 1005, 1007 (Ala. Civ. App. 1987).

however, that unsworn factual representations or statements made by a party's attorney do not constitute evidence. Tucker v. Nixon, 235 So. 3d 1102, 1105 (Ala. Civ. App. 2016); B.E.H., Jr. v. State ex rel. M.E.C., 71 So. 3d 689, 693 n.2 (Ala. Civ. App. 2011); Y.N. v. Jefferson Cnty. Dep't of Human Res., 37 So. 3d 836, 838 (Ala. Civ. App. 2009). Therefore, no evidence was presented to the trial court during the postjudgment hearing. See Tucker v. Nixon, supra; B.E.H., Jr. v. State ex rel. M.E.C., supra; and Y.N. v. Jefferson Cnty. Dep't of Human Res., supra. Regardless, the parties agree that the father lost his employment as a county deputy sheriff and that that job loss occurred after the October 22, 2019, hearing in the modification action.

The mother argues on appeal that the trial court erred in modifying the child-support provisions of the 2020 modification judgment through the entry of its June 9, 2020, postjudgment order because, she argues, the fact underlying the father's request for relief, i.e., his post-hearing job loss, does not warrant relief pursuant to a postjudgment motion. The mother contends that the father's job loss constitutes "new evidence" rather than "newly discovered evidence." As the mother contends, "newly discovered

evidence" is evidence that was in existence at the time of a hearing on the merits but " 'could not have been discovered with the exercise of due diligence' " at the time of the hearing on the merits. Startley Gen. Contractors, Inc. v. Water Works Bd. of Birmingham, 294 So. 3d 742, 752 (Ala. 2019) (quoting Welch v. Jones, 470 So. 2d 1103, 1112 (Ala. 1985)); Pacifico v. Jackson, 562 So. 2d 174, 177 (Ala. 1990); Davis v. City of Tuscaloosa, 496 So. 2d 82, 83 (Ala. Civ. App. 1986). "New evidence" is evidence that did not exist at the time of the trial or the hearing on the merits. Adkins v. Gold Kist, Inc., 531 So. 2d 890, 891 (Ala. 1987); see also Tice v. Tice, 100 So. 3d 1071, 1072 n.1 (Ala. Civ. App. 2012) (defining "new evidence" as "evidence regarding events and changes in circumstances occurring after the trial").

This court has held that a trial court may not consider a postjudgment motion that relies on new evidence and that a postjudgment motion that relies on newly discovered evidence is not favored. Bates v. State, 503 So. 2d 856, 858 (Ala. Civ. App. 1987); see also Tice v. Tice, 100 So. 3d at 1072 n.1 (citing Marsh v. Smith, 67 So. 3d 100, 107-08 (Ala. Civ. App. 2011)). See also Goodyear Tire & Rubber Co. v. Haygood, 93 So. 3d

132, 141 (Ala. Civ. App. 2012) ("[A] judgment cannot be vacated or revised on the ground of new evidence that comes into existence after the trial.").

Our analysis is somewhat complicated by the fact that the father sought relief pursuant to a postjudgment motion based on allegations that he had evidence to support his motion; however, the father did not actually attempt to present evidence, whether new or newly discovered, to the trial court during the postjudgment hearing. Regardless, the father alleges that he lost his employment as a county deputy sheriff after the hearing on the merits in the modification action. Thus, because that job loss could not have been discovered at the time of the modification hearing, any evidence that could have been presented in support of the father's allegations could not be said to be newly discovered evidence. See Startley Gen. Contractors, Inc. v. Water Works Bd. of Birmingham, supra. Instead, the father's claimed loss of employment came into being after the hearing on the merits, and, therefore, if properly supported by evidence, it would constitute "new evidence." See Adkins v. Gold Kist, Inc., supra.

New evidence may not form the basis for seeking relief pursuant to a Rule 59(e), postjudgment motion, and a trial court may not amend a

judgment based on new evidence. Bradley v. Murphy, 221 So. 3d 459, 462 n.2 (Ala. Civ. App. 2016); Bates v. State, supra; Tice v. Tice, supra; and Marsh v. Smith, supra. This court has explained that "new evidence does not support the reopening of the evidence or the vacation of the judgment because it does not assail the evidence upon which the judgment was based." Marsh v. Smith, 67 So. 3d at 108. See also Bates v. State, 503 So. 2d at 858 ("Relief is barred when it is based on [new] evidence because trials would have the potential to become never-ending.").

This court has held that when, as in this case, a change in a parent's income occurs after the hearing on the merits, any such change in income constitutes new evidence rather than newly discovered evidence. Estrada v. Redford, 855 So. 2d 551, 554 (Ala. Civ. App. 2003). Thus, the allegation that the father lost his employment as a county deputy sheriff, which allegedly occurred after the hearing on the merits, would have amounted to new evidence (had evidence been presented) in support of the father's postjudgment motion. Tice v. Tice, 100 So. 3d at 1072 n.1.

We note that new evidence, such as evidence pertaining to the father's purported loss of employment following the hearing on the merits

in this case, may be presented to the trial court in a separate modification action, see Tice v. Tice, 100 So. 3d at 1072 n.1, and Estrada v. Redford, 855 So. 2d at 554, and that, in this case, the father did file in the trial court a request seeking to modify his child-support obligation, which the trial-court clerk designated as the .02 action. However, the trial court treated that filing as a postjudgment motion, and it dismissed the .02 action. The father did not file a notice of appeal from the dismissal of the .02 action, and, therefore, the propriety of that ruling is not before this court. Wilkerson v. Waldrop, 895 So. 2d 347, 349 (Ala. Civ. App. 2004).

The trial court's consideration of "new evidence" after the entry of the 2020 modification judgment was error and warrants the reversal of the trial court's June 9, 2020, order that amended the 2020 modification judgment. In light of this holding, we pretermit discussion of the other argument the mother raises on appeal.

REVERSED AND REMANDED.

Edwards, Hanson, and Fridy, JJ., concur.

Moore, J., concurs in the result, without writing.