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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002369-ME

WHITNEY BLAKE SPURGEON — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WALTER MAGUIRE, JUDGE
ACTION NO. 07-CI-00965

TAMARA DAWN SPURGEON — APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

MOORE, JUDGE: Whitney Blake Spurgeon, *pro se*, appeals orders from the Pulaski Circuit Court arising out of a dispute over modification of child support and proceedings subsequent thereto. Whitney's main contention is that the circuit court denied him his rights under the Servicemember's Civil Relief Act (SCRA),

50 U.S.C. App. 501, *et seq*.,[1] and we agree with him. Accordingly, this matter is remanded to the circuit court for proceedings consistent with the SCRA.

Because Whitney's SCRA claims are dispositive in this matter, we will only set forth the factual and procedural history germane to resolving these issues. Both parties briefed much of the history of the problems between them, but that history is not relevant to the issues before us; nor are they helpful to the resolution of this matter.

For general background information, Whitney and Tamara were married in 2002; they had two children. In an uncontested divorce proceeding commenced in 2006 and finalized in 2007 in Pulaski Circuit Court, the parties agreed that they would share the joint care and custody of their minor children, with Tamara designated as the primary residential custodian. Whitney was ordered to pay $492.03 per month in child support.

Whitney was--and still is-- a member of the United States Army and was deployed to Iraq in 2006. The fact of his military status did not impede the divorce proceedings.

Throughout the relevant time regarding the issues surrounding post-decree child support, Whitney has been stationed in Virginia. The record documents that Whitney was in the military.

[1] Whitney also raises in his appeal arguments that that his rights under the Americans with Disabilities Act of 1990 and the Health Insurance Portability and Accountability Act were violated; however, those issues are not properly brought in the family court action. Hence, we will not review them.

Although Whitney had counsel in the other post-decree proceedings in circuit court with Tamara, his counsel filed a motion to withdraw by the time that issues surrounding modification arose. The court granted the motion on January 27, 2009. No other counsel entered an appearance on behalf of Whitney.

On February 4, 2009, Tamara filed a motion to modify child support, and the motion was noticed for a hearing on February 13, 2009. The certificate of service shows that it was mailed to "**Ms**. Whitney Spurgeon" in Virginia. (Emphasis added). Whitney contends, consequently, that it was mailed to his current wife, not him. Having failed to properly notice Whitney of the hearing to modify child support, the motion was continued. An amended notice of the motion was then sent to Whitney on February 27, 2009, in Virginia for a March 13, 2009 hearing.

On March 3, 2009, Whitney sent a letter to the circuit court, entered in the record on March 6, 2009. In this letter, *inter alia*, Whitney stated that he represented himself *pro se* and he requested that "the court postpone any and all possible future proceedings until a telephonic hearing is properly scheduled and confirmed with all parties due to my out-of-state residency and military obligations." From another entry in the record, it appears that Whitney and the court arranged a telephonic conference for between 1:00 and 1:15 p.m. for the March 13 hearing. However, the court's signed docket entry states that the "case [was] called at 3:15 p.m. Mr. Spurgeon was unable to await the Court's availability for teleconference and, therefore, declined to participate." The court

relied on "public records available on the internet" to modify Whitney's child support obligations from $492.03 to $870.09. The order was to take effect on March 1, 2009.

On July 16, 2009, Tamara filed a motion for Whitney to show cause why he should not be held in contempt regarding her allegations that Whitney had failed to comply with the court's order modifying child support beginning on March 1, 2009. The motion was noticed for a hearing on July 24, 2009.

On July 23, 2009, Whitney, *pro se*, filed via facsimile[2] his response to the show cause order and a motion for a continuance. Whitney styled the motion, in part, as one for a continuance. But throughout the documents he submitted, he also used the term "stay." Liberally construing his motion, both under the SCRA and because of Whitney's *pro se* status, we determine that he properly requested a stay. In this latter motion, he also requested sanctions, an order of protection and a motion for reduction in his child support obligation.

In Whitney's response to the show cause order, he specifically stated that he is an active duty soldier in Virginia and that his Acting Commanding Officer specifically ordered him not to travel to Kentucky. He also stated that he had paid the full amount of child support owed.

[2] A notation regarding a facsimile dated July 23, 2009, on the docket sheet provides that "FOUND DATE STAMPED IN FILE BUT HAD NOT BEEN ENTERED IN COMPUTER SO ENTERED THIS DATE [July 30, 2009]." On the July 30, 2009 entry, an earlier date appears covered, and the document was date stamped as July 30, 2009.

In Whitney's motion for a continuance, sanctions, protection and a reduction in child support, he again stated that he was an active duty soldier stationed in Virginia and that he "respectfully requests under the Service Member's Civil Relief Act (SCRA) (50 USC 501-591) this court grant a 90 day continuance for the Motion to Show Cause." Thereafter, Whitney requested that "[i]n the event a 90 day continuance is not granted, the Respondent respectfully requests a 30 day continuance to obtain legal counsel." Finally, he requested that if none of his other requests was granted, that the court schedule a telephonic hearing. Attached to his motion for a continuance is a letter from his Acting Commander stating

1. SSG Spurgeon, Whitney is an active duty soldier stationed at Fort Eustis, in the State of Virginia.
2. SSG Spurgeon is currently recovering from surgery and will be continuing to receive additional medical treatment for an extended period of time.
3. To ensure SSG Spurgeon's physical and mental health, SSG Spurgeon is not authorized to travel to the State of Kentucky. Furthermore SSG Spurgeon is to refrain from any and all contact from Tamara Dawn Spurgeon.

In addition to the letter from Whitney's Acting Commander, his Nurse Case Manager submitted a letter which stated:

1. Service Member (SM) SSG Spurgeon, Whitney is currently on [sic] active duty soldier stationed at Fort Eustis, VA.
2. SM is currently enrolled in the Warrior Transition Unit and is receiving extensive medical treatment for injuries.
3. SM is [sic] underwent surgery on 19 June 2009 which requires intensive rehabilitation. SM is also currently being evaluated for another surgery which will again require intensive and extensive rehabilitation.

4. SM is currently under the care of a Mental Health Provider and will require further treatment and evaluation by that provider for no less than six months. . . .

A letter submitted by Whitney, which is filed in the record, provides that he had a telephone conversation with the Circuit Court Clerk, who stated that the court would accept the motion for the continuance via facsimile and that it would be placed in the court's file for the hearing. Regardless of whether Whitney's facsimiles of July 23 were in the court's file for the July 24 hearing, a review of the hearing reveals that Tamara's counsel specifically referenced that one of the issues raised by Whitney was that he requested a 90-day continuance; a 30-day continuance to obtain an attorney; or a telephonic hearing. Despite this and the fact the record fully reveals that Whitney was in the military, the court allowed the hearing to continue without comment on any of Whitney's requests or any inquiry into his military status.

During the brief hearing, Tamara testified regarding whether Whitney was in arrears. Her testimony was that since the court modified child support retroactively to March 1, 2009, Whitney was in arrears approximately $419.[3]

The court granted Tamara's motion, finding Whitney in contempt and fined him $500. The court ordered that Whitney could purge himself of the

[3] Tamara's testimony at the hearing was that Whitney had paid $500 each for the months of March, April and May, and the full amount for June and July. She testified that she had not yet cashed a check from Whitney in the amount of approximately $690.36. She stated she had not cashed the check "because she wanted to make certain she had everything right before she cashed the check."

contempt by bringing his child support obligations current within thirty days. The court also ordered Whitney to pay Tamara's attorney $250.

Whitney thereafter filed a motion to vacate the order modifying child support and all subsequent orders relevant thereto. Again, he noted that he is an active duty soldier and entitled to rights under the SCRA. He again attached the affidavit from his Acting Commander.

The court denied Whitney's

> motion(s) for telephonic hearings . . . due to "economy of justice" and other issues, including prior order for contempt entered 8/11/09, require the Respondent to appear before the Court to seek any relief. Today's motions are continued generally for a "reasonable time" to permit Mr. Spurgeon to make necessary leave and travel arrangements for his personal appearance w/in a "reasonable time" following his rescheduling of his motion for this date. His failure to do so w/in "a reasonable time" may result in his motions being stricken or denied.

(Capitalization changed).

Then on October 23, 2009, the court entered an order as follows:

> Respondent [Mr. Spurgeon] did not appear. Due to Mr. Spurgeon's failure to prosecute his motion to vacate, DNA testing having established that movant [Mr. Spurgeon] is biological father of the children in question, his motion to vacate is denied. Order to be entered.

(Capitalization changed).

Subsequently, the court entered a more comprehensive order on November 18, 2009, denying all relief Whitney sought upon a finding that "a reasonable period of time has passed for the Respondent to have made appropriate

arrangements and he has not appeared for the scheduled event." Whitney thereafter filed a notice of appeal.

Turning to the analysis of the issues, the SCRA applies to the judicial proceedings under review. 50 U.S.C. App. 512(a) & (b). We first note that 50 U.S.C. App. 522, not 50 U.S.C. App. 521 applies to the case before us. The primary difference relevant to the facts of this case is that Whitney had notice of the commencement of the proceedings against him. The provisions of 50 U.S.C. App. 521 apply to situations when a servicemember does not have notice of the proceedings commenced against him. Section 522 specifically applies, however, when a servicemember does have notice of proceedings commenced against him. Hence, pursuant to the SCRA, the provisions of section 522 apply herein because Whitney was on notice that Tamara sought a modification of child support.

Despite Whitney's self representation, he was still under the protection of the SCRA. *Snodgrass v. Snodgrass*, 297 S.W.3d 878, 892 (Ky. App. 2009) ("Although [Appellant] chose to forego representation by a lawyer in the dissolution, he was under the protection of the Soldiers' and Sailors' Civil Relief Act of 1940."). As explained by this Court

> [t]he Act "is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575, 63 S.Ct. 1223, 1231, 87 L.Ed. 1587 (1943). Even where the service member does not seek a stay of the proceedings, the Act requires that before going forward the trial court has first "determined that the military service of the appellant would not have a material, adverse effect upon his rights [.]" *Cooper v. Roberts*, 722 S.W.2d 910, 911 (Ky.App.1987).

Snodgrass, 297 S.W.3d at 892.

Thus, when Whitney could not make a physical appearance at the hearing on Tamara's motion to modify child support due to his military obligations, "the Act require[d] that before going forward the trial court has first 'determined that the military service of the appellant would not have a material, adverse effect upon his rights[.]'" *Id.* The court did not undertake this inquiry.

The court did agree to schedule a telephonic hearing with Whitney on Tamara's motion to modify child support. According to a document filed in the record, the March 13, 2009 hearing was arranged with Whitney to be between 1:00 p.m. and 1:15 p.m. However, the telephonic hearing was not commenced by the court until 3:15 p.m. Regarding this, the court order noted that the "case was called [at] 3:15 pm. Mr. Spurgeon was unable to await the Court's availability for teleconference, and therefore, declined to participate."

We understand the court's need to manage its docket. However, given that the Act "is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation," we believe that the SCRA "trumps" day-to-day docket management, at least under the limited circumstances of this case. The court was required to give Whitney an opportunity to present his defense. Here, the court made no inquiry into whether Whitney could participate two hours later than the arranged time. Accordingly, Whitney was not given the opportunity, even through a telephonic hearing, to defend against Tamara's motion for modification of child support. Therefore, giving the SCRA a

liberal interpretation to fulfill its purpose of protecting the rights of servicemembers, we conclude that Whitney was deprived of his right to participate in the court proceeding, wherein his child support obligation increased from $492.03 to $870.09.

We next turn to whether the court erred in failing to grant a stay upon Whitney's July 23 request. To qualify for a stay, the servicemember must submit

> (A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.
> (B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

50 U.S.C. App. 522(b).

Regarding the application of a stay under the SCRA, Tamara cites to cases interpreting the Soldiers' and Sailor's Civil Relief Act of 1940 regarding the discretionary nature of granting or denying stays. However, that Act has been significantly amended since that time and in 2003 Congress enacted SCRA. Contrary to her argument, the patent language of the SCRA restricts the court's discretion with respect to a request for a 90-day continuance if the perquisites for the continuance are met. 50 U.S.C. App. 522 (b)(1). Liberally construing the requirements of the SCRA, as we are required to do, Whitney fulfilled the requirements for a mandatory stay of at least 90 days.

Regarding Whitney's contention that he is entitled to appointment of counsel, as noted *supra*, section 521 does not apply. Accordingly, he is not generally entitled to the appointment of counsel. However, Whitney "may apply for an additional stay based on continuing material affect of military duty on the [his] ability to appear." 50 U.S.C. App. 522 (d)(1). If Whitney meets the criteria for an additional stay, the court may grant his request. *Id.* Or, the court may deny the additional stay. But if it denies his request, the court must appoint counsel to represent Whitney. 50 U.S.C. App. 522(d)(2).[4]

In conclusion, having construed the SCRA liberally to fulfill its purposes, as we are required to do, Whitney was not afforded an opportunity to defend against Tamara's motion to increase child support. Moreover, the court was on notice that Whitney was in the military but did not review whether his service and inability to appear "would not have a material, adverse effect upon his rights[.]'" *Snodgrass*, 297 S.W.3d at 892. And, clearly it did as his child support obligation was nearly doubled. Accordingly, the court's order modifying child support is vacated, as is the subsequent order finding Whitney in contempt, fining him $500 and ordering him to pay Tamara's counsel $250. Additionally, we reverse the circuit court's orders denying Whitney's motion for a stay, and the court's denial of his motion to vacate the previous orders. We remand this matter to the circuit court with

[4] This section provides that "If the court refuses to grant an additional stay of proceedings under paragraph (1), the court shall appoint counsel to represent the servicemember in the action or proceeding."

instructions to comply with the SCRA in conducting proceedings on modification of child support in this matter.

ALL CONCUR.

BRIEF FOR APPELLANT:

Whitney Blake Spurgeon, *Pro Se*

BRIEF FOR APPELLEE:

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