

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000117-MR

ALLEN LEWIS

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE ELISE GIVHAN SPAINHOUR, JUDGE
ACTION NO. 04-CI-00798

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

JONES, JUDGE: On August 22, 2007, the Bullitt Circuit Court entered an order finding the Appellant, Allen Lewis, in contempt for failure to pay child support and issued a bench warrant for Lewis's arrest. Nearly six years later, on June 7, 2013, Lewis was arrested. Thereafter, on July 26, 2013, Lewis's counsel filed a motion

to set aside the August 2007 contempt order on the basis that Lewis was not properly served with notice of the child support proceedings. The Bullitt Circuit Court denied Lewis's motion to set aside after finding that Lewis was properly served. This appeal followed. For the reasons more fully explained below, we AFFIRM.

I. Background

In 1993, the Jefferson Family Court entered a judgment of paternity and order of support against Lewis requiring him to pay child support in the amount of \$50.00 per week to Anna Foreman (now Hamilton), the mother of his child. In 1998, Lewis, represented by counsel, agreed to and signed an amended wage assignment order which raised his child support obligation to \$70.00 per week.

On August 18, 2004, the Commonwealth of Kentucky Cabinet for Families and Children, acting on behalf of Hamilton, filed a complaint in Bullitt Circuit Court seeking to enforce the Jefferson County child support order.¹ The record contains a summons showing that Lewis was personally served by a sheriff's deputy on September 2, 2004. Lewis did not file an answer or otherwise respond.

On September 29, 2004, the Commonwealth filed a motion for default judgment against Lewis. The Bullitt Circuit Court entered the default judgment on October 20, 2004, and also ordered a hearing for Lewis to show cause why he should not be held in contempt of court for failure to pay child support.

¹ Ms. Hamilton had moved from Jefferson County to Bullitt County.

The case was heard before the Domestic Relations Commissioner (“DRC”). There is nothing in the record to indicate that Lewis was present at the hearing, but the order does state that the DRC had considered the evidence offered by the parties. The circuit court adopted the DRC’s findings and entered an order holding Lewis in contempt of court for failure to pay child support in the amount of \$20,463.50 through January 15, 2005, and stating that he could purge himself of contempt by paying an additional \$25.00 per week towards the arrearage.²

On March 8, 2005, the Commonwealth moved for the imposition of a 179-day jail sentence for failure to pay child support as ordered. Several subsequent motions were filed by the Commonwealth alleging that Lewis was not paying. Two hearings were scheduled on the matter, but the summonses were returned with the envelopes labeled “return to sender” on both occasions. On May 4, 2007, the circuit court entered an order finding Lewis was indebted in the amount of \$15,580.00 for child support arrears through April 30, 2007, and ordering him to pay \$200 per month by wage assignment. On June 26, 2007, the Commonwealth filed a motion to show cause because Lewis had failed to comply with the May order.

A hearing was held on August 13, 2007, at which Lewis was not present. Testimony was presented that he owed child support arrears in the amount of

² The DRC’s report found the amount of the arrearage to be \$10,463.50. Neither party has addressed the discrepancy between this amount and the amount specified in the trial court’s order.

\$15,580.00. The circuit court entered a judgment finding Lewis to be in contempt, and issued a bench warrant for his arrest on August 22, 2007.

Nearly six years later, on June 7, 2013, Lewis was arrested. His counsel moved to set aside the judgment entered on August 22, 2007, on the basis that Lewis was not served with a copy of the summons and complaint on September 2, 2004.

At the hearing on the motion, Lewis's counsel contended that Lewis had never received notice of the August 2007 hearing, and should never have been found in contempt without being present at the hearing. Wayne Smallwood, an investigator for the public defender's office, testified that an individual named Gerald Len Knapp resided at the same apartment complex as Lewis at the time the summons was served. Defense counsel hypothesized that Knapp could have been served with the summons by mistake, pointing out that the deputy sheriff had written "Gerald Allen" as the name of the person who received service. Gerald is Lewis's middle name, and the summons listed "Allen Gerald Lewis" as the party to be served. Both Knapp and the deputy sheriff who served the summons in 2007 are deceased and thus unavailable to testify.

Lewis's sister testified that Gerald Knapp lived in the same complex as her brother during the relevant time, and, that to her knowledge, Lewis had never received any papers from the court. Lewis also briefly testified that he had not received any papers from the court.

The trial court did not find the testimony of Lewis or his sister to be definitive. Likewise, the trial court was not persuaded that Gerald Len Knapp's name was sufficiently similar to Lewis's name to suggest that Knapp was served by mistake. The trial court explained its duty to weigh the evidence in the record against Lewis's testimony and evidence. The trial court pointed to the proof of service of the summons in the record, and expressed disbelief that Lewis was unaware of his child-support obligation, noting that the record contained the original child support order and the amended wage assignment order that Lewis had signed with his counsel. The trial court entered an order denying Lewis's motion to set aside the finding of contempt and service of process, finding that Lewis was properly served in this action and that his contempt sentence had been fulfilled by time served as there was a pending felony case against him. This appeal followed.

II. Analysis

Lewis argues that the trial court failed to follow Kentucky Revised Statutes (KRS) 405.440, which requires notice of a monthly support obligation to be served in person or by certified mail. He contends that he was never properly served and that the summons was likely served upon his neighbor, Gerald Len Knapp.

The trial court's findings regarding the weight and credibility of the evidence shall not be set aside unless clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. Factual findings are not considered clearly erroneous if

they are supported by substantial evidence. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005). Questions as to the weight and credibility of a witness are purely within the province of the court acting as fact-finder and due regard shall be given to the court's opportunity to judge the witness's credibility. *Truman v. Lillard*, 404 S.W.3d 863, 868 (Ky. App. 2012).

As the trial court found, and the Commonwealth has emphasized, there is tangible proof of service in the record in the form of the return of service and copy of the summons signed and dated by a Jefferson County sheriff's deputy. There is also tangible proof in the form of two orders that Lewis was aware of his child support obligation. The trial court expressed doubts about the theory that the summons had been served in error on Gerald Lynn Knapp, did not find Lewis's sister's testimony to be definitive, and ultimately found that Lewis was not a credible witness. These determinations were all well within the trial court's purview. Additionally, we note that the trial court's July 17, 2007, order setting the contempt hearing for August 13, 2007, indicates that it was mailed to Lewis. Unlike the prior orders, this one was not returned to the court.³ In short, there is substantial evidence in the record to support the trial court's finding that Lewis was served with notice of the child support and related contempt proceedings. Consequently, it will not be disturbed on appeal.

III. Conclusion

The Bullitt Family Court order is AFFIRMED.

³ A review of the record indicates that the prior two orders were sent to an address on Hickman Avenue, but the final notice of the contempt hearing was sent to an apartment on Flintlock Drive.

ALL CONCUR.

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