[Cite as *In re Brewer*, 2001-Ohio-3196.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN RE:	)	CASE NO. 99 CO 29
	)	
JESSE H. BREWER	)	
A MINOR CHILD	)	
	)	O P I N I O N
	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas, Juvenile Division of Columbiana County, Ohio Case No. C96-0120
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee Brenda Brewer:	Atty. Randall B. Muth Muth & LaGuardia 116 Cleveland Avenue, N.W. Suite 309 Canton, Ohio 44702
For Defendant-Appellant: Herbert C. Eckert:	Atty. C. Bruce Williams Williams & Apple Co., L.P.A. Highland Corner 1376 East State Street Salem, Ohio 44460
	Atty. Richard C. Shelar 710 Columbia Street P.O. Box 231 Leetonia, Ohio 44431-0231

JUDGES:
Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: March 9, 2001

WAITE, J.

{¶1} This timely appeal arises from the conviction of Herbert C. Eckert ("Appellant") on contempt of court charges stemming from his violation of a shared parenting agreement. Appellant argues that the Columbiana County Juvenile Court did not have jurisdiction to hear the contempt action, that his due process rights were violated, that attorney fees should not have been awarded and that he received ineffective assistance of counsel. For the following reasons, we affirm the conviction and dismiss the appeal of attorney fees as premature.

{¶2} Appellant and Brenda Brewer ("Appellee") are the parents of Jesse Tyler Herbert Brewer[1], born on February 20, 1994. Appellant and Appellee were never married. On January 29, 1996, the Columbiana County Court of Common Pleas, Juvenile Division, filed an Agreed Judgment Entry allocating parental rights and responsibilities between the parties. Appellee was designated as the residential parent of Jesse, with Appellant granted visitation rights according to Columbiana County Loc.R. 9.4, Uniform Local Companionship Plan.

{¶3} On April 24, 1997, Appellant filed a Motion for Shared

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[1] The Notice of Appeal in this case referred to the minor child as "Jese," but it appears from the remainder of the record that the child's name is actually "Jesse," which is the form of the name used throughout the remainder of this opinion.

Parenting. On June 12, 1997, a hearing was held in which the parties entered into an Agreed Modified Shared Parenting Program. On July 11, 1997, the trial court journalized the June 12, 1997, modified agreement. Both parents were designated as residential parents. Jesse was to reside primarily with Appellee except for one week per month, when the child would reside with Appellant. Each party was granted visitation privileges according to Loc.R. 9.4 during those times when he or she was not the current residential parent. They also agreed to submit to mediation, "[i]n the event that there arises an event or crisis that both mature thinking adults cannot agree upon that involves the health, safety, education, well-being or change of any term, condition, amendment or alteration of this Shared Parenting Plan Agreement, * * *" (7/11/97 Judgment Entry, p. 5).

{¶4} Appellant was scheduled to have custody of Jesse during the weekend of February 12-14, 1999. Due to scheduling conflicts and other problems, the parties agreed that Appellant would pick up Jesse on Wednesday, February 10, 1999, and that he would return Jesse to Appellee on Monday, February 15, 1999. (5/10/99 Tr. pp. 41-42). The parties agreed that Appellant would bring Jesse to a counseling appointment at 3:00 p.m. on February 15, 1999, and that Appellee would pick up the child at the counselor's office.

{¶5} Appellant, without consulting with Appellee, canceled the February 15, 1999, counseling appointment, failed to deliver Jesse to Appellee and failed to make arrangements with Appellee for returning Jesse. On February 15, 1999, Appellant left a voice mail message for Appellee stating that he and Jesse were in Boston and that they would be gone a couple of days. (Tr. pp. 15-16). Appellant did not actually go to Boston, but instead drove Jesse to Florida to visit Disneyworld. (*Id.*). Appellee made numerous attempts during the next few days to meet Appellant so that she could regain custody of Jesse. (*Id.* at pp. 47-49). Appellee did not regain custody until February 22, 1999.

{¶6} On February 16, 1999, Appellee filed a Motion for Emergency Temporary Custody, based on Appellant's failure to return the child to Appellee. On February 19, 1999, she filed a Motion for Bench Warrant and a Motion to Show Cause alleging that Appellant was in contempt of court by violating the June 12, 1997, parenting agreement. Appellant specifically alleged that Appellee violated Loc.R. 9.4 by not returning Jesse at the required time.

{¶7} On March 4, 1999, the trial court overruled Appellee's motions for temporary custody and for a bench warrant. The court scheduled a contempt hearing for May 10, 1999. Both parties testified at the hearing. Considerable evidence was

introduced concerning the phone calls between the parties while Appellant had custody of Jesse.

{¶8} In its May 17, 1999, Judgment Entry the trial court found Appellant guilty of contempt for failing to return Jesse to Appellee on February 15, 1999. Appellant was sentenced to thirty days in jail, with fifteen days of the sentence held in abeyance pending further order of the court. Appellant was also ordered to pay court costs and to pay Appellee's reasonable attorney fees. The amount of such fees was to be determined at a later date.

{¶9} On May 25, 1999, Appellant filed this timely appeal.

{¶10} Appellant states five assignments of error as follows:

{¶11} "THE JUVENILE COURT MADE A FINDING OF CONTEMPT THAT IT DID NOT HAVE JURISDICTION TO MAKE"

{¶12} "THE JUVENILE COURT IMPOSED A SENTENCE FOR CRIMINAL CONTEMPT WHICH WAS NOT AUTHORIZED BY LAW."

{¶13} "THE JUVENILE COURT FAILED TO APPLY THE STANDARD OF PROOF OF BEYOND A REASONABLE DOUBT APPLICABLE, VIOLATED DEFENDANT-APPELLANT'S RIGHT AGAINST SELF-INCRIMINATION IN A CRIMINAL CONTEMPT PROCEEDING AND FAILED TO PROVIDE DUE PROCESS IN THE ORDER OF PROCEEDINGS."

{¶14} "THE TRIAL COURT ERRED IN FINDING DEFENDANT-APPELLANT GUILTY OF CONTEMPT SINCE HE OBEYED THE ONLY SPECIFIC ORDER EVER ISSUED TO HIM BY THE TRIAL COURT."

{¶15} "DEFENDANT-APPELLANT WAS PREJUDICED BY THE INEFFECTIVE ASSISTANCE OF HIS TRIAL COUNSEL IN THE CASE."

{¶16} No Appellee's brief was filed in this case. We may accept

true Appellant's statement of the facts and issues presented in his b and reverse the judgment if Appellant's brief reasonably appears to sustain such action. App.R. 18(C).

{¶17} Appellant's first assignment of error argues that the trial court did not have jurisdiction to rule on Appellee's motion for cont because the July 11, 1997, Modified Shared Parenting Program required parties to submit to mediation before filing any pleadings, motion or petition with the court. (7/11/97 Agreement, Article VIII). This argument is not persuasive.

{¶18} A judge of the juvenile division of a court of common pleas has the inherent power to enforce its orders by contempt proceedings. *State ex rel. Edwards v. Murray* (1976), 48 Ohio St.2d 303, 305. The juvenile court always has jurisdiction to invoke its contempt enforcement powers as long as it had proper jurisdiction to issue the original order which it is attempting to enforce. *Miller-Finocchioli v. Mentor Landscapes & Supply Co., Inc.* (1993), 90 Ohio App.3d 815, 818. The mediation clause in the court-ordered shared parenting program may have an impact on the court's final determination of whether its order was violated, but that does not deprive the court of jurisdiction to carry on with contempt proceedings. It is for the trial court to determine, in its broad discretion, whether its own order has been violated, even if that order contains a mediation clause.

See *In re Ayer* (1997), 119 Ohio App.3d 571, 576. Appellant's first assignment of error is without merit.

{¶19} We now address Appellant's third assignment of error out of order as it relates to the first assignment. In Appellant's third assignment of error, he argues that the trial court did not apply the correct standard of proof in the contempt hearing. The requisite standard in criminal contempt proceedings is proof beyond a reasonable doubt. *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 252. In cases of criminal contempt it must also be shown that the contemnor intended to defy the court. *Midland Steel Prods. Co. v. U.A.W. Local 486,* (1991), 61 Ohio St.3d 121, 127. A trial court is presumed to know the law and apply it accordingly. *Cleveland v. Odetellah* (1993), 91 Ohio App.3d 787, 794. Additionally, we apply the usual presumption that, "in a bench trial in a criminal case the trial court considered only the relevant material and competent evidence in arriving at its judgment, unless it affirmatively appears to the contrary." *State v. White* (1968), 15 Ohio St.2d 146, 151.

{¶20} The evidence indicates that Appellant was subject to a visitation schedule which stated:

{¶21} "COMPANIONSHIP BETWEEN THE CHILDREN AND THE NON-RESIDENTIAL PARENT SHALL TAKE PLACE AT SUCH TIMES AND PLACES AS THE PARTIES MAY AGREE BUT WILL NOT BE

LESS THAN:

{¶22} "1. Weekends: Alternate weekends from Friday at 6:00 p.m. until Sunday at 6:00 p.m. This alternating weekend schedule shall not change, even if interrupted by holiday and birthday, summer and/or vacation companionship."

{¶23} (7/11/97 Judgment entry, Exh. A, emphasis in original).

{¶24} The evidence also shows that the parties were subject to a mediation clause as part of the shared parenting program which state

{¶25} "In the event that there arises an event or crisis that both mature thinking adults cannot agree upon that involves the health, safety, education, well-being or change of any term, condition, amendment or alteration of this Shared Parenting Plan Agreement, the MOTHER and FATHER agree to submit the same to the Columbiana County Mediator assigned by the Columbiana County Court of Common Pleas, Juvenile Division, before any pleading, motion or petition is filed with a Court of competent jurisdiction.

{¶26} "The fees and costs of mediation shall be paid equally by the MOTHER and FATHER.

{¶27} "If the issue or issues cannot be resolved to the satisfaction of both MOTHER and FATHER, then in this event, the MOTHER and FATHER may petition a Court of competent jurisdiction for relief."

{¶28} (*Id.*)

{¶29} Appellant appears to argue that the shared parenting program allowed the parties to change the terms of visitation, that they regularly changed the visitation schedule and that Appellee did not insist on strict compliance with the visitation schedule. Thus, Appellant argues, there was no enforceable order that he return Jesse to Appellee on February 15, 1999.

Based on the record before us, we must determine that Appellant's argument is specious and unpersuasive.

{¶30} The record reveals that the parties agreed to the time and place for Appellant to return Jesse to his mother, that Appellant unilaterally canceled the counseling appointment which was to be the rendezvous point, that Appellant deceived Appellee as to the whereabouts of Jesse, that Appellant took Jesse to Florida after his visitation period had ended without discussing the matter with Appellee and that Appellant only returned Jesse after the juvenile court judge intervened by way of a telephone conference call with the parties' lawyers. Appellant admitted that the reason he told Appellee that he and Jesse were in Boston was only to be spiteful. (5/10/99 Tr. p. 18). Appellant also failed to deliver Jesse to Appellee at 3:30 p.m. on February 23, 1999, as arranged by Appellee's attorney, but instead took Jesse to a birthday party. (*Id.* at 27). The record contains abundant evidence that Appellant knew when and where he was required to return Jesse to Appellant and that he intentionally failed to do so in violation of the shared parenting program.

{¶31} Appellant also contends that he was not given fair notice that the proceedings against him were in the nature of criminal contempt rather than civil contempt. Although

Appellant is correct that a defendant in a criminal contempt action is entitled to the constitutional protections afforded to criminal defendants generally, including due process rights, such rights must be asserted at the trial level or else the rights are waived. *State v. Phillips* (1995), 74 Ohio St.3d 72, 74; *Turner v. Turner* (May 18, 1999), Franklin App. No. 98 AP-999, unreported. Appellant did not object to the sufficiency of his notice at trial and the issue was thereby waived. *Turner, supra; State v. Bidinost* (1994), 71 Ohio St.3d 449, 452; *State v. Coleman* (1989), 45 Ohio St.3d 298, 300; *Brooks v. Tennessee* (1972), 406 U.S. 605. In addition, Appellant did receive notice of the charge against him, both by Appellee's February 19, 1999, show cause motion and by the trial court's March 4, 1999, Judgment Entry which set the date for the contempt hearing. Appellee's show cause motion specifically stated that the motion was based on Appellant's failure to return Jesse to Appellee in violation of the shared parenting program.

{¶32} Appellant further maintains that his constitutional rights were violated because he was not informed of his privilege against self-incrimination and because he was called as the first witness in the contempt hearing. There is no general requirement that a criminal defendant who has retained private counsel be independently warned at trial about the

consequences of testifying at trial and Appellant makes no argument in favor of creating such a rule. Appellant has also waived any error regarding the order of witnesses at trial because he failed to object when he was called as a witness at the start of Appellee's case in chief. *Bidinost, supra,* at 452; *Coleman, supra,* at 300. Appellant's citation to *Brooks v. Tennessee, supra*, is inapposite because in *Brooks* there was a state statute which required criminal defendants to testify first, during the defense phase of trial, or else lose the right to testify. Also in *Brooks*, the defendant's counsel objected to the constitutionality of the statute at trial. In the instant case, the trial court simply stated to Appellee's counsel, "Very well. Attorney Muth, you may proceed." (Tr. p. 2). Appellee's counsel then called Appellant to take the stand and Appellant did so without offering any objections. Appellant's third assignment of error is therefore without merit.

{¶33} Appellant's fourth assignment of error is merely a restatement of part of his third assignment of error, arguing that the trial court erroneously found that there was proof beyond a reasonable doubt that Appellant disobeyed a court order. For the reasons stated in our analysis of Appellant's third assignment of error, we find that there is no merit in the fourth assignment of error.

{¶34} Appellant's fifth assignment of error alleges that he received ineffective assistance of counsel in five aspects of his contempt trial. A reversal of a conviction for ineffective assistance of counsel requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687.

{¶35} Appellant fails to present any reasoning or support relating to the first four alleged errors of his attorney. The fifth alleged error of his trial counsel was the failure to object to Appellant being cross-examined by opposing counsel prior to a prima facie case of contempt being made. Appellant again cites to *Brooks v. Tennessee, supra,* in support, arguing that his being called as the first witness in the case interfered with his Sixth Amendment right to conduct a defense.

{¶36} It has often been stated that, "debatable trial tactics do not constitute ineffective assistance of counsel." *State v. McNeill* (1998), 83 Ohio St.3d 438, 449; *State v. Clayton* (1980), 62 Ohio St.2d 45, 48-49. There is no rule which would prevent the state, or prevent any other opposing counsel, from calling the contemnor as a witness in its case in chief. In such a situation, whether the contempt be civil or criminal

in nature, the contemnor may refuse to answer by invoking the right against self-incrimination. *Shrader v. Equitable Life Assur. Soc. of U.S.* (1983), 10 Ohio App.3d 277, 278. We consider that Appellant's choice not to invoke his Fifth and Fourteenth Amendment rights against self-incrimination was a trial tactic. *State v. Bey* (1999), 85 Ohio St.3d 487, 489. There is a strong presumption that licensed attorneys are competent and that the challenged action is the product of sound trial strategy. *State v. Nichols* (1996), 116 Ohio App.3d 759, 764. We find no compelling reason to treat Appellant's decision to testify during Appellee's case in chief anything other than a sound trial strategy. Appellant's fifth assignment of error is without merit.

{¶37} Turning now to Appellant's second assignment of error, Appellant argues that a trial court cannot award attorney fees in a criminal contempt proceeding. The record reveals that no determination as to the actual amount of attorney fees has been made in this case. Thus, no final order as to fees has been made. We dismiss that portion of the appeal which it relates to attorney fees because that aspect is premature and is not ripe for review. *Bilder v. Hayes* (Jan. 25, 1995), Summit App. No. 16704, unreported, at *1.

{¶38} Having found all of Appellant's assignments of error

to be without merit, we affirm the May 17, 1999 Judgment Entry. We dismiss the appeal as premature in reference to the portion of the judgment requiring Appellant to pay Appellee's reasonable attorney fees because no final determination as to those fees appear in the record. The prior stay of execution order issued by this Court on June 1, 1999, is vacated and set aside. Costs to be taxed against Appellant.

Donofrio, J., concurs.

Vukovich, P.J., concurs.