

**Petition for Writ of Habeas Corpus Granted and Memorandum Opinion filed  
February 4, 2010.**



**In The**

**Fourteenth Court of Appeals**

**NO. 14-09-00990-CV**

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**IN RE JASON PAUL BISHOP, Relator**

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**ORIGINAL PROCEEDING  
WRIT OF HABEAS CORPUS**

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**MEMORANDUM OPINION**

On November 23, 2009, relator, Jason Paul Bishop, filed a petition for writ of habeas corpus, claiming the orders under which he is being held are void. *See* Tex. Gov't Code Ann. § 22.221(d) (Vernon 2004); *see also* Tex. R. App. P. 52. On November 24, 2009, after a preliminary review of relator's petition for writ of habeas corpus, we ordered relator released upon his posting of a bond in the amount of \$500, pending a final determination of his petition. Because we conclude that relator is entitled to relief, we grant his petition for writ of habeas corpus, order relator released from the bond set by this court on November 24, 2009, and order him discharged from custody.

## **BACKGROUND**

On May 14, 2009, real party in interest, Cassie Bishop, filed a motion for enforcement of child support order, and order to appear. On June 4, 2009, Associate Judge Stephen Baker held a hearing on the motion for enforcement. The docket sheet indicates that, on June 19, 2009, the Honorable Janice Yarbrough adopted Judge Baker's recommendation.

On June 29, 2009, Judge Yarbrough signed the order holding relator in contempt for failure to pay child support, granting judgment for arrearages, and suspending commitment. Judge Yarbrough found that (1) on March 24, 2009, relator was ordered to make periodic child support payments of \$2,053.50 per month, with the first payment due on March 1, 2009; and (2) as of February 23, 2009, retroactive child support was owed in the amount of \$2,560.50, and relator was ordered to pay the retroactive child support in monthly installments of \$426.75 per month, with the first payment due on March 15, 2009, and like payments thereafter until the \$2,560.50 was paid in full.

Judge Yarbrough further found relator guilty of seven separate acts of contempt for failure to pay child support (March 1, March 15, April 1, April 15, May 1, May 15, and June 1, 2009), and that relator was in arrears in the amount of \$4,533.41. Judge Yarbrough awarded attorney's fees as child support in the amount of \$2,941.50. Relator was sentenced to 60 days in the Galveston County jail. However, the 60-day sentence was suspended and relator was placed on probation for two years on the condition that he pay (1) \$4,533.41 through the state disbursement unit as child support arrearage; (2) \$2,941.50 through the state disbursement unit as child support, which amount was incurred by Cassie as attorney's fees and costs; and (3) all child support as ordered by the court on March 24, 2009.

Relator was ordered to pay \$7,474.91 in monthly installments of \$625.00 through the state disbursement unit, with the first payment due on July 1, 2009. Relator was

further ordered to appear before the court on August 17, 2009 “for a hearing to determine whether [relator] has complied with the terms and conditions of the ‘Order Holding Respondent in Contempt for Failure to Pay Child Support, Granting Judgment for Arrearages’ and, if not, for commitment.” On August 17, 2009, the parties appeared for a compliance hearing, but the hearing was passed because relator was current on the child support payments.

After holding a compliance hearing on November 17, 2009, Judge Baker signed an order revoking suspension and for commitment to county jail. In the order, Judge Baker observed that relator appeared before the court on August 17, 2009, and advised that he had paid a lump sum payment of \$2,500.00 that day to bring the child support current. At that time, relator was ordered to appear for a hearing on November 17, 2009, to determine whether he had complied with the terms and conditions of the June 29, 2009 order.

Judge Baker found that relator had failed to comply with the terms and conditions of the June 29, 2009 order suspending commitment by failing to pay: (1) current child support of \$2,053.50 on the first day of July, August, September, October and November, 2009, although relator was able to comply on those dates; (2) child support not confirmed and reduced to a money judgment in the amount of \$284.81; and (3) child support confirmed and reduced to a money judgment in the amount of \$625.00 on the first day of July, August, September, October and November, 2009. Judge Baker awarded attorney’s fees and costs of \$3,112.00 for this proceeding in addition to the attorney’s fees and costs assessed in the June 29, 2009 order, and revoked the suspension of commitment.

Relator asserts in this petition for writ habeas corpus that both the contempt order and revocation order are void.

## STANDARD OF REVIEW

The purpose of a writ of habeas corpus is not to determine the guilt or innocence of the contemnor, but rather to determine whether he was afforded due process of law, or whether the order of contempt is void. *Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979) (orig. proceeding). A writ of habeas corpus will be issued if the order underlying the contempt order is void, or if the contempt order itself is void. *Ex parte Shaffer*, 649 S.W.2d 300, 302 (Tex. 1983) (orig. proceeding); *Gordon*, 584 S.W.2d at 688. An order is void if it is beyond the power of the court to enter it or if it deprives the relator of liberty without due process of law. *In re Markowitz*, 25 S.W.3d 1, 3 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding). The relator bears the burden of showing his entitlement to relief in a habeas corpus proceeding. *Ex parte Occhipenti*, 796 S.W.2d 805, 808 (Tex. App.—Houston [14th Dist.] 1990, orig. proceeding). In a habeas corpus proceeding, the order or judgment is presumed to be valid unless the contemnor discharges his burden to show otherwise. *Id.* at 809.

## ANALYSIS

### Contempt Order

Relator argues that the June 29, 2009 contempt order is void because he did not waive his right to counsel after the associate judge advised him of his right to counsel at the contempt hearing. At the hearing on the motion for enforcement, the following occurred:

THE COURT: Let me give him a warning before we go further.

Mr. Bishop, you're charged with contempt of this court. As such you are entitled to be represented by an attorney. And if you are too poor to afford one, a court appointed attorney will represent you. You are entitled to have a record made of this hearing by a court reporter. The charge against you must be proven beyond a reasonable doubt. You may not be forced to testify in this hearing if you do not wish to do so. If the charge against you results in prison for more than six months, you are entitled to a trial by jury.

Do you understand what I've read to you, sir?

MR. BISHOP: Yes, sir.

THE COURT: Are we ready to proceed?

MS. REITZ: Yes, sir.

THE COURT: Mr. Bishop

MR. BISHOP. Yes, sir.

THE COURT: Call your first witness

MS. REITZ: I'd like to call Cassie Bishop.

Relator complains that the trial court did not inquire if he wished to waive his right to counsel or request appointed counsel before proceeding with the contempt hearing. Absent an affirmative waiver of his right to counsel on the record, relator asserts that the contempt order is void.

The United States Constitution's Fourteenth Amendment guarantee of due process incorporates the Sixth Amendment assurance that the accused in a criminal prosecution has the right to counsel. *In re Butler*, 45 S.W.3d 268, 271 (Tex. App.—Houston [1st Dist.] 2001, orig. proceeding). Contempt proceedings in Texas are considered to be quasi-criminal proceedings, and should conform as nearly as practicable to those in criminal cases. *Ex parte Johnson*, 654 S.W.2d 415, 420 (Tex. 1983) (orig. proceeding). Thus, in a child support contempt proceeding, a relator facing incarceration must be informed of his right to counsel and must waive that right or be provided with court-appointed counsel. *In re Pass*, No. 2-05-457-CV, 2006 WL 668744, at \*1 (Tex. App.—Fort Worth Mar. 16, 2006, orig. proceeding) (mem. op.).

A contempt order is void when the record does not demonstrate that the contemnor knowingly and intelligently waived his right to counsel. *See Ex parte Keene*, 909 S.W.2d, 507, 508 (Tex. 1995) (orig. proceeding) (per curiam) (“In the absence of a

knowing and intelligent waiver by Keene of his right to counsel, made on the record, the trial court had no authority to hold him in contempt.”); *Ex parte Gunther*, 758 S.W.2d 226 (Tex. 1988) (orig. proceeding) (per curiam) (same); *see also In re Lehr*, No. 04-05-00934-CV, 2006 WL 228941, at \*3 (Tex. App.—San Antonio, Feb. 1, 2006, orig. proceeding) (mem. op.) (“There is nothing in the record to support the recitation in the judgment that [relator] knowingly and intelligently waived his right to counsel. In the absence of a knowing and intelligent waiver of the right to counsel made on the record, the order holding [relator] in contempt is void.”).

We conclude that the record of the enforcement hearing does not reflect that relator knowingly and intelligently waived his right to counsel. Therefore, the contempt order is void.<sup>1</sup>

### **Revocation Order**

Relator asserts that the revocation order is void because he did not have notice of the subject matter, possible consequences, or allegations that would be considered at the November 17 compliance hearing. We agree.<sup>2</sup> “[A] party affected by the order may file a verified motion alleging specifically that certain conduct of the respondent constitutes a violation of the terms and conditions of community supervision.” Tex. Fam. Code Ann. § 157.214 (Vernon 2008). Cassie did not file a motion to revoke the suspension of commitment. The requirement that relator appear at a compliance hearing does not provide notice that allegations of noncompliance will be made or what they will be. *See In re Zandi*, 270 S.W.3d 76, 77 (Tex. 2008) (orig. proceeding) (per curiam). Relator was entitled to receive notice in advance of the hearing. *See id.* “[W]hen a person appears at

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<sup>1</sup> Relator further asserts that the contempt order is void because the associate judge lacked the authority to hear the motion for enforcement in light of Cassie’s objection in her motion to the associate judge hearing the matter. Because we hold that the contempt order is void due to relator’s failure to knowingly and intelligently waive his right to counsel, we need not address this argument.

<sup>2</sup> A void contempt order cannot support the revocation order. In her response to relator’s petition, Cassie concedes that the revocation order is void. We, nonetheless, address this argument.

a status hearing set by the court in a contempt or commitment order as a condition of suspension of his sentence for failure to pay child support, without notice of any assertion that suspension will be revoked, the court cannot revoke suspension without notice and a second hearing.” *Id.* at 78 (supp. op. on reh’g). Here, the trial court was required to set another hearing on Cassie’s allegations that relator was not in compliance with the contempt order, but failed to do so. Therefore, we hold that the revocation order is void.

#### CONCLUSION

Because both the contempt order and revocation orders are void, we grant relator’s petition for writ of habeas corpus, order relator released from the bond set by this court on November 24, 2009, and order relator discharged from custody.

/s/ John S. Anderson  
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Boyce.