In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00306-CV

IN RE BRADLEY JORDAN

Original Proceeding

MEMORANDUM OPINION

Bradley Jordan requests habeas corpus relief from a judgment of civil contempt. The Attorney General and the child support obligee filed responses. We deny the petition for writ of habeas corpus without prejudice to its refiling.

On May 28, 2008, the trial court found Jordan in criminal contempt and ordered Jordan to serve concurrent 180-day sentences for failing to pay court-ordered child support on four specified dates. The order also found Jordan could pay $195,471.72 in child support arrearages and $10,000 in attorney's fees, and ordered Jordan to remain in confinement until he purged himself of contempt. The agreed judgment states

> The Court ORDERS the Sheriff of *MONTGOMERY* County, Texas, to arrest *BRADLEY JORDAN* and commit him to the county jail of Montgomery County, Texas, as set forth herein, said commitments to run concurrently.

> The Court ORDERS BRADLEY JORDAN to appear before the 359th District Court, Montgomery County Courthouse, 300 North Main, Conroe, Texas 77301, at 1:30 o'clock p.m., on the 20th day of June, 2008, to begin commitment to the county jail of Montgomery County, Texas. If *BRADLEY JORDAN* fails to appear for any deferred commitment date, the Court shall issue a warrant for his arrest. On each deferred commitment date, the Court may commit him to the county jail, further defer commitment, or suspend his commitment and place him on community supervision.

The trial court also entered a judgment on the amount of $330,804.75 on the child support arrearage, with a conditional judgment release of $135,333.03 if a $25,000 check submitted on May 9, 2008, cleared the bank. The trial court ordered Jordan to pay $25,000 by May 9, 2008, $27,100 by June 1, 2008, $25,000 by August 1, 2008, $25,000 by October 1, 2008, and $81,500 by December 1, 2008. The trial court ordered Jordan to pay $10,000 to the obligee's attorney by June 2, 2008. A chart attached to a motion to withdraw filed by Jordan's counsel on January 9, 2009, indicated that the child support division of the Attorney General's Office had recorded the May, June, August, and October payments that had been ordered in the arrearage judgment.

Jordan appeared and the trial court reset the deferred commitment on August 22, 2008, and October 27, 2008. Jordan failed to appear on January 9, 2009, and the trial court signed an order that directed the clerk to issue an arrest warrant and that ordered Jordan to be confined for 180 days in conformity with the court's order of May 28, 2008. An arrest warrant was issued on May 11, 2009. Jordan was taken into custody on October 13, 2010. On November 15, 2010, Jordan filed a request for a jail review

hearing on the deferred commitment order. The motion alleged that Jordan lacked the present ability to provide support in the amount ordered. On March 24, 2011, the trial court signed an order prohibiting Jordan's release until Jordan paid the arrearage and attorney's fees ordered in the May 28, 2008, judgment.

The docket sheet indicates that the trial court conducted an evidentiary hearing on an application for a writ of habeas corpus on June 3, 2011, and denied relief. Neither a reporter's record of this hearing nor a copy of the writ application is included in the habeas record.

Jordan argues that he is entitled to unconditional release because neither the January 9, 2009, order for the arrest warrant nor the May 11, 2009, arrest warrant provides for a coercive detention. The contempt judgment signed on May 28, 2008, does provide for coercive confinement, however, and the trial court's order of March 23, 2011, shows that the trial court ordered Jordan's confinement pursuant to the civil contempt judgment. Jordan argues that the March 23, 2011, order is too remote from the date of his detention to be effective, but until March 25, 2011, Jordan was being detained under the judgment of criminal contempt pursuant to the commitment that issued on January 9, 2009. Jordan's detention for the coercive contempt commenced on March 23, 2011.

Next, Jordan argues that the May 28, 2008, civil contempt judgment is not sufficient as an order of commitment because it contains a conditional release and was tantamount to a suspension of commitment. When the trial court suspends an order of

commitment on condition of compliance with a court order, no commitment may be ordered without a subsequent hearing to determine if a breach of the condition has occurred. *Ex parte Mackie*, 727 S.W.2d 129, 131 (Tex. App.—San Antonio 1987, orig. proceeding). Moreover, a hearing on a motion to revoke community supervision must be heard not later than the third working day after the respondent is arrested, and the hearing may not be held later than the seventh working day after the arrest. *See* Tex. Fam. Code Ann. § 157.216 (West 2008). The Attorney General argues that Jordan was not entitled to notice and a hearing regarding Jordan's compliance with the terms of release because the trial court merely deferred the commitment ordered on May 28, 2008.

Another Court of Appeals considered a similar due process issue in a habeas proceeding challenging a deferred commitment. *See In re Casey*, No. 01-08-00928-CV, 2009 WL 1162282 (Tex. App.—Houston [1st Dist.] Apr. 30, 2009, orig. proceeding) (mem. op.) (op. on reh'g). In that case, the trial court sentenced Casey to concurrent terms of confinement for criminal contempt, but deferred commitment through a series of resets while Casey made child support payments. *Id.* at *1. Casey appeared at a hearing without counsel. *Id.* The trial court found Casey to be noncompliant, ordered Casey to be taken into custody, and entered a commitment order. *Id.* On habeas petition to the Court of Appeals, the Attorney General argued that the trial court did not err in failing to admonish Casey on his right to counsel because the original order neither suspended the commitment nor ordered a compliance hearing. *Id.* at *2. The Court of Appeals held that

because incarceration was one of the possible outcomes, the hearing was sufficiently similar to a hearing on a motion to revoke a probated sentence so as to trigger Casey's right to counsel. *Id.* The Court of Appeals held that Casey was entitled to unconditional release from the commitment order entered after the hearing at which Casey appeared without counsel, but the court declined to hold that the original order was void. *Id.*

In this case, the order of May 28, 2008, ordered the sheriff to arrest Jordan and take him to jail "as set forth herein" and immediately thereafter ordered Jordan to appear before the trial court on June 20, 2008, to begin his confinement. The trial court deferred commitment and reset the hearing for a date after the next time Jordan was ordered to make a payment on the child support arrearage. The trial court repeated this process until Jordan failed to appear for a hearing. Continued deferment of the commitment was not made contingent on compliance with payment on the arrearage judgment, but under the terms of the order of May 28, 2008, incarceration was a possibility whether or not he appeared for the hearing. Because incarceration was a possibility, due process required notice and a hearing. *See Ex parte Hardin*, 344 S.W.2d 152, 153 (Tex. 1961). Jordan received notice of the January 9, 2009, hearing on October 27, 2008, but the hearing did not occur on that date because Jordan failed to appear. For the trial court to continue to hold Jordan after his arrest, Jordan was entitled to a hearing to determine whether the trial court should "commit [Jordan] to the county jail, further defer commitment, or suspend his commitment and place him on community supervision." *See Casey*, 2009 WL

1162282, at *2 (applying due process rights to a hearing in which confinement was one of the possible outcomes). We agree with the Attorney General's contention that this is not a compliance hearing, as Jordan was merely ordered to appear on January 9, 2009, for a determination by the trial court regarding further action on the contempt judgment, but Jordan's present ability to comply with the order for coercive contempt would affect the scope of the trial court's discretion on the matter. *See In re Gawerc*, 165 S.W.3d 314, 315 (Tex. 2005) ("[A] petitioner may not be confined for civil contempt unless he or she has the ability but refuses to perform the conditions for release.").

On this record, we cannot determine whether Jordan has received such a hearing. On November 15, 2010, Jordan filed a request for a jail review hearing on the deferred commitment order. In that motion, Jordan alleged that he presently lacked the ability to comply with the contempt judgment. The trial court ordered Jordan's commitment for civil contempt on March 23, 2011, and on April 15, 2011, set a hearing for May 3, 2011. The docket sheet indicates that a hearing was conducted on May 12, 2011, that the hearing was recessed and reconvened on May 25, 2011, and continued on June 3, 2011, at which time testimony was heard.

"The involuntary inability to comply with an order is a valid defense to contempt, for one's noncompliance cannot have been willful if the failure to comply was involuntary." *In re Briggs*, 965 S.W.2d 743, 745 (Tex. App.—Beaumont 1998, orig. proceeding [habeas denied]). The party seeking relief has the burden to establish his

inability to comply with the judgment of contempt. *See In re Coppock*, 277 S.W.3d 417, 418 (Tex. 2009) ("In a habeas corpus action challenging confinement for contempt, the relator bears the burden of showing that the contempt order is void."). *See also Ex parte Barnett*, 600 S.W.2d 252, 254 (Tex. 1980) ("For this Court to order the release of relator, the trial court's order of commitment must be void, either because it was beyond the power of this Court or because it deprives the relator of his liberty without due process of law."). In a habeas proceeding before the appellate court, the relator must bring forward an adequate record to establish the invalidity of the order of which he complains. *See In re Lausch*, 177 S.W.3d 144, 150 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding); *see also* Tex. R. App. P. 52.7(a). Without a record of the hearing before the trial court, we cannot determine whether the trial court provided Jordan an opportunity to establish his inability to comply with the civil contempt judgment. *See Casey*, 2008 WL 4965161, at *2; *In re Turner*, 177 S.W.3d 284, 288-89 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding [habeas denied]).

We deny relator's petition for writ of habeas corpus without prejudice to his refiling a petition for writ of habeas corpus with an adequate supporting record.

PETITION DENIED.

PER CURIAM

Submitted on June 23, 2011
Opinion Delivered August 11, 2011

Before McKeithen, C.J., Kreger and Horton, JJ.