COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-12-00370-CV

IN RE W.H. RELATOR

ORIGINAL PROCEEDING

MEMORANDUM OPINION[1]

In this petition for writ of habeas corpus, relator W.H. seeks relief from two trial court orders finding him in criminal contempt and committing him to thirty-six days in jail. *See* Tex. R. App. P. 52. W.H. also asserts that he was entitled to, but denied, a jury trial. We requested a response from the real party in interest, K.H., which was timely filed. We modify the orders as set forth below, and we deny W.H.'s requested relief in all other respects.

[1]*See* Tex. R. App. P. 47.4.

PROCEDURAL BACKGROUND

Trial Court's August 19, 2011 Order

On August 19, 2011, the trial court issued an order "to enforce and/or clarify and supplemental temporary orders for possession or access," which stated in part that W.H. "shall have possession and access to the children pursuant to the Standard Possession Order as set forth in the Texas Family Code beginning on August 1, 2011," but only on the following conditions:

> . . . .
>
> [W.H.] shall undergo counseling, coordinated by Dr. Greer, at least two (2) times per month, regarding impulse control, anger management, conflict resolution, [and] co-parenting . . . with feedback as needed from Dr. Greer regarding putting the children's needs before his own and also deal with rectifying issues addressed in the psychological evaluation.

K.H.'s March 14, 2012 Enforcement Motion

On March 14, 2012, K.H. filed a motion for enforcement of the trial court's August 19, 2011 order. K.H. alleged that W.H. twice violated the trial court's order regarding counseling sessions that were to be coordinated by Dr. Greer. K.H. asked that W.H. be held in contempt and fined up to $500 for each violation.

Trial Court's May 1, 2012 "First Amended Temporary Orders in Suit to Modify Parent-Child Relationship"

On May 1, 2012, the trial court issued its "First Amended Temporary Orders in Suit to Modify Parent-Child Relationship," which ordered in part that the children shall continue counseling and/or therapy with Dr. Greer, that W.H. shall

pay for one hundred percent of the children's counseling costs, and that W.H. shall

> undergo individual counseling with Dr. Molly Kuzmich (located at 101 West Main Street, Suite 103, Lewisville, Texas 75057, Telephone Number: 972-754-7308) at least four (4) times per month, regarding impulse control, anger management, conflict resolution, co-parenting, putting the children's needs before his own, and also rectifying the issues addressed in the psychological evaluation prepared by Dr. Flynn herein. IT IS ORDERED that [W.H.] shall follow all recommendations made by Dr. Greer, Dr. Flynn, and Dr. Kuzmich, and shall execute any and all releases requested by any of the experts appointed herein to facilitate the exchange of information and coordination of their counseling efforts. IT IS FURTHER ORDERED that [W.H.] shall undergo family counseling, coordinated by Dr. Greer, upon the request or at the direction of Dr. Greer. IT IS ORDERED that [W.H.] shall pay for 100% of the costs of his individual and family counseling.

K.H.'s July 24, 2012 Enforcement Motion

On July 24, 2012, K.H. filed a motion for enforcement of the trial court's May 1, 2012 order. K.H. alleged that W.H. had violated the trial court's order in several ways. K.H. asked that W.H. be held in contempt, fined for each violation, and confined in the county jail for one month or until he complied with the court's order.

Trial Court's August 13, 2012 Hearing on K.H.'s Enforcement Motions

The challenged-orders indicate that the trial court held a hearing on August 13, 2012, and that K.H. and W.H. appeared in person and through their attorneys

of record.[2] The trial court heard K.H.'s March 2012 and July 2012 enforcement motions at that time.

Trial Court's First Contempt Order

On August 24, 2012, the trial court issued a contempt order finding that W.H. violated the trial court's May 1, 2012 order in five ways, including that he (1-2) failed to undergo counseling with Dr. Kuzmich at least four times during the months of May and June 2012, (3) refused to pay for one hundred percent of the costs of the children's counseling despite K.H.'s notification to him that one of the children, A.H., expressed a desire to attend counseling with Dr. Greer for the month of July 2012, (4) failed to participate in any family counseling since May 2012, and (5) failed to pay for one hundred percent of the costs of family counseling since May 2012. The trial court found that W.H. was able to comply with the trial court's May 2012 order and that W.H. was guilty of each separate enumerated violation. The trial court assessed punishment for each violation at thirty-six days in the county jail, with the sentences to run "concurrently and without good time credit."

Trial Court's Second Contempt Order

This second contempt order, signed August 27, 2012, was essentially divided into two sections. In the first section, the trial court found that W.H. violated the August 19, 2011 order (1) by failing to undergo counseling,

[2]A transcript of the hearing was not filed in this court.

coordinated by Dr. Greer, at least two times per month, and (2) by "failing to undergo counseling, coordinated by Dr. Greer, regarding impulse control, anger management, conflict resolution, [and] co-parenting . . . with feedback from Dr. Greer regarding putting the children's needs before his own . . . ." The trial court assessed punishment for each violation at thirty-six days in the county jail, with the sentences to run "concurrently and without good time credit."

In the second section, the trial court found that W.H. violated a November 18, 2002 order that set out W.H.'s responsibilities in providing medical support for the children and child support. Regarding W.H.'s medical support obligations, the trial court found that W.H. committed five violations involving W.H.'s failure to provide health insurance for the children. Regarding W.H.'s child support obligations, the trial court found that W.H. "failed to pay child support as ordered to [K.H.] through the state disbursement unit," including on July 15, 2011, and on July 15, 2010. Regarding the medical and child support violations, the trial court assessed punishment at 175 days in the county jail for each violation, to run "concurrently and without good time credit," but then suspended W.H.'s commitment and placed him on community supervision for a period of sixty months, conditioned on W.H. making payments for current medical and child support obligations and arrearages and attorney's fees, expenses, and costs.

ANALYSIS

W.H.'s original habeas corpus proceeding in this court is a collateral attack on the contempt order. *In re Marks*, 365 S.W.3d 843, 844 (Tex. App.—Fort

Worth 2012, orig. proceeding). The purpose of the proceeding is to determine whether the contemnor was afforded due process of law or if the order of contempt is void. *See Ex parte Casillas*, 25 S.W.3d 296, 298 (Tex. App.—San Antonio 2000, orig. proceeding). A court will issue a writ of habeas corpus if the order underlying the contempt is void or if the contempt order itself is void. *Id.* "A contempt 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." *Id.* at 298–99. When collaterally attacked in a habeas corpus proceeding, a judgment is presumed valid until the relator has discharged his burden showing otherwise. *In re Marks*, 365 at 844–45.

The contempt order must set forth the terms of compliance in clear, specific, and unambiguous terms so that the person charged with obeying the order will readily know exactly what duties and obligations are imposed upon him. *See Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967) (orig. proceeding); *In re Davis*, 305 S.W.3d 326, 330–31 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding). The question of whether an order is enforceable by contempt depends on whether the order is definite and certain, and the focus is on the wording of the order itself. *In re Davis*, 305 S.W.3d at 331.

Issue Five

We address issue five first to avoid any confusion in our later holdings. Here, W.H. contends that the two orders committing him to thirty-six days in jail

"without good time credit" are void because the orders denied him the opportunity for good time credit.

The code of criminal procedure provides,

> The sheriff in charge of each county jail may grant commutation of time for good conduct, industry, and obedience. A deduction not to exceed one day for each day of the original sentence actually served may be made for the term or terms of sentences if a charge of misconduct has not been sustained against the defendant.

Tex. Code Crim. Proc. Ann. art. 42.032, § 2 (West Supp. 2012). Both the Texas Supreme Court and the Texas Court of Criminal Appeals have held that good-conduct credit is available to one serving a sentence for criminal contempt. *See Ex parte Roosth*, 881 S.W.2d 300, 301 (Tex. 1994) (orig. proceeding); *Ex parte Daniels,* 722 S.W.2d 707, 711–12 (Tex. Crim. App. 1987) (orig. proceeding); *Ex parte Acly*, 711 S.W.2d 627, 628 (Tex. 1986) (orig. proceeding); *Kopeski v. Martin*, 629 S.W.2d 743, 745 (Tex. Crim. App. 1982) (orig. proceeding). "The trial court does not have the authority to restrict a sheriff's discretion concerning the granting of good-conduct time." *Jones v. State*, 176 S.W.3d 47, 52 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

Because W.H. was taken into custody under an order holding him in criminal contempt, he is eligible for good-conduct credit. *In re Davis*, 305 S.W.3d at 333. Nonetheless, the trial court's August 24 and 27, 2012 commitment orders both provide,

> It is therefore ordered that [W.H.] is committed to the county jail of Denton County, Texas, for a period of thirty-six (36) days for each separate violation enumerated above.[3]
>
> It is ordered that each period of confinement assessed in this order shall run and be satisfied concurrently and without good time credit.

We hold that the portions of the trial court's August 24 and 27, 2012 commitment orders withholding good-time credit in connection with W.H.'s thirty-six day concurrent jail sentences are void. But if a severable portion of a contempt or commitment order is void, an appellate court may strike the offending portion and deny relief as to the valid portion of the order. *See In re Zapata*, 129 S.W.3d 775, 780–81 (Tex. App.—Fort Worth 2004, orig. proceeding) (citing *Ex parte Roosth*, 881 S.W.2d at 301); *see also In re Durant*, No. 02-09-00079-CV, 2009 WL 2914300, at *3 (Tex. App.—Fort Worth Sept. 10, 2009, orig. proceeding) (mem. op.). We therefore modify the portion of both orders set out above by deleting the phrase "without good time credit." *See In re Davis*, 305 S.W.3d at 333; *In re Durant*, 2009 WL 2914300, at *4. W.H.'s fifth issue is sustained.

Issues One, Two, and Three

Of W.H.'s first three issues, we initially address issue two because it informs our analysis of the other two issues. In issue two, W.H. asserts that the trial court's underlying May 1, 2012 order requiring him to undergo individual counseling with Dr. Kuzmich four times a month was "not set forth in clear and

[3]One order refers to "thirty-six (36) days," and the other order refers to "36 days."

unambiguous terms" and contained no beginning and no ending date. W.H. also contends that "the order simply states that at some time under the new order [W.H.], without being instructed to begin on a date certain, should attend counseling sessions" and that "there is no finding by the court that [W.H.] had the ability to compel Molly Ku[z]mich to perform as required by the order. Thus holding [W.H.] in contempt for acts he cannot compel third parties to perform violates due process of laws." He asserts that, therefore, the trial court's first contempt order based on those requirements is unenforceable.

Although W.H. does not state which specific contempt findings he is contesting, only two of the five contempt findings in the first contempt order address his failure to undergo counseling with Dr. Kuzmich. W.H. does not attack, however, the remaining three contempt findings, including that he refused to pay for one hundred percent of the costs of the children's counseling, that he failed to participate in any family counseling since May 2012, and that he failed to pay for one hundred percent of the costs of family counseling since May 2012. Because W.H. did not challenge all of the trial court's contempt findings in the first contempt order, he did not carry his burden of proof; therefore, the contempt findings that he did not attack remain enforceable. *See In re Scariati*, 988 S.W.2d 270, 272–73 (Tex. App.—Amarillo 1998, orig. proceeding); *see also In re Zapata*, 129 S.W.3d at 780–81 ("Void portions of a contempt order are capable of being severed from the valid portions of the order."); *In re Patillo*, 32 S.W.3d 907, 909 (Tex. App.—Corpus Christi 2000, orig. proceeding) (holding that when a trial

court lists each failure to comply with an order separately and assesses a separate punishment for each failure to comply, only the invalid portion of the contempt order is void and the remainder of the contempt order is enforceable). Thus, we do not decide whether the trial court's two contempt findings regarding W.H.'s failure to undergo the required counseling with Dr. Kuzmich are void. *See In re Scariati*, 988 S.W.2d at 273. Any decision on those findings would not affect W.H.'s jail term because each separate violation carried a sentence of thirty-six days (with each to run concurrently with the others), and W.H. does not challenge the three remaining contempt findings. *See id.* at 272–73. Thus, we hold that the trial court's first contempt order is enforceable as modified.

In his first issue, W.H. challenges the second contempt order and asserts that the underlying August 2011 order requiring W.H. to undergo counseling coordinated by Dr. Greer is unclear and ambiguous. In his third issue, W.H. asserts that the second "contempt order does not clearly state what part of the court's earlier order of August 19, 2011 was violated and when." We do not decide these two issues, however, because our decisions would not affect W.H.'s jail term. We have already determined that the trial court's first contempt order committing W.H. to thirty-six days in jail is enforceable, and thus, W.H. must serve thirty-six days (less any good-time credit) regardless of the enforceability of

the portion of the second contempt order committing W.H. to thirty-six days in jail.[4] We overrule W.H.'s first, second, and third issues.

Issue Four

In his fourth issue, W.H. asserts that the trial court should have afforded him the right to a jury trial.

Although an absolute right to trial by jury in contempt proceedings does not exist, an alleged contemnor possesses such a right in criminal contempt cases in which the punishment assessed is "serious." *See Muniz v. Hoffman*, 422 U.S. 454, 475–77, 95 S. Ct. 2178, 2190–91 (1975); *Ex parte Griffin*, 682 S.W.2d 261, 262 (Tex. 1984) (orig. proceeding); *In re Newby*, 370 S.W.3d 463, 466 (Tex. App.—Fort Worth 2012, orig. proceeding). Punishment assessed for criminal contempt beyond 180 days is considered "serious" and may not be assessed unless there was a jury trial or a jury waiver. *Ex parte Sproull*, 815 S.W.2d 250, 250 (Tex. 1991) (orig. proceeding); *In re Newby*, 370 S.W.3d at 466. Section 21.002(b) of the Texas Government Code provides that punishment for a single act of contempt of court is a fine of not more than $500 or confinement in the county jail for not more than six months or both. Tex. Gov't Code Ann. § 21.002(b) (West 2004). Punishment within these limits is characterized as

[4]The pleadings indicate that W.H. was booked into jail on August 24, 2012 (the date of the first contempt order); however, when the trial court issued the second contempt order on August 27, 2012, it granted W.H. four days' credit against his sentence.

"petty." *See Ex parte Werblud*, 536 S.W.2d 542, 547 (Tex. 1976) (orig. proceeding); *In re Newby*, 370 S.W.3d at 466.

W.H. asserts that he was entitled to a jury trial because K.H.'s first enforcement motion—requesting that the trial court hold W.H. in contempt for each alleged violation, place him in jail for up to 180 days (with each period of confinement to run concurrently), and place him on community supervision for ten years on release from jail—demonstrated that there was a possibility that the trial court would assess "serious" punishment. The two cases cited by W.H. support the position that "[a] charge for which confinement *may* exceed six months is serious." *See Ex parte York*, 899 S.W.2d 47, 48 (Tex. App.—Waco 1995, orig. proceeding) (emphasis added) (quoting *Ex parte Sproull*, 815 S.W.2d at 250 (Tex. 1991) (orig. proceeding)); *Ex parte Howell*, 843 S.W.2d 241, 244 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). However, the trial court's August 24 and 27, 2012 orders state that W.H. "was not subject to incarceration for greater than six months, and was not entitled to a trial by jury. Therefore, all questions of fact and of law were submitted to the Court." Because the trial court was not considering a "serious" sentence, W.H. was not entitled to a jury trial based solely on K.H.'s pleadings.

W.H. also argues that he should have been afforded the right to a jury trial because "the court sentenced [him] to five years probation, a serious contempt punishment." W.H. does not, however, carry his burden of demonstrating his right to relief; that is, W.H. does not cite any authority or include any argument or

discussion as to why five years' of community supervision constitutes a serious punishment for purposes of triggering any right to a jury trial, and he does not argue for the extension of existing authority.[5] We overrule W.H.'s fourth issue.

[5]Regardless, it does not appear that W.H. is subject to any restraints on his liberty as a result of the conditions of his community supervision. *See Ex parte Hughey*, 932 S.W.2d 308, 310–11 (Tex. App.—Tyler 1996, orig. proceeding) (holding that probated contempt sentence which required relator to pay child support, arrearages, attorney fees, and court costs was not a restraint on liberty); *cf*. *In re Ragland*, 973 S.W.2d 769, 771 (Tex. App.—Tyler 1998, orig. proceeding) (holding that community service imposed as condition of probation was a restraint on liberty). Indeed, the conditions of W.H.'s community supervision require that he make payments for current medical and child support obligations and arrearages and attorney's fees, expenses, and costs. We also note that if W.H. were to violate the conditions of community supervision, his confinement would not exceed 180 days. *See generally In re Zevallos*, No. 14-11-01080-CV, 2012 WL 359301, at *1–3 (Tex. App.—Houston [14th Dist.] Feb. 2, 2012, orig. proceeding) (mem. op.) (holding that relator was not entitled to a jury trial where trial court sentenced her to nine 180-day sentences to be served concurrently and placed her on community supervision until she "purged herself of contempt by complying with the terms of the enforcement order," noting that "[i]f relator violates the conditions of probation, her confinement will not exceed 180 days.").

CONCLUSION

Because we conclude that the trial court's August 24 and 27, 2012 commitment orders are void only to the extent that they withhold good-time credit in connection with W.H.'s thirty-six day concurrent jail sentences, we modify these two commitment orders by deleting the phrase "without good time credit." In all other respects, we deny W.H. habeas relief.

ANNE GARDNER
JUSTICE

PANEL: GARDNER, MCCOY, and MEIER, JJ.

DELIVERED: September 17, 2012