COURT OF APPEALS DECISION DATED AND FILED

August 30, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1220-FT **Cir. Ct. No. 1992FA21**

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT IV**

IN RE THE FINDING OF CONTEMPT IN RE THE MARRIAGE OF DENISE CECILE SMITH V. TIMOTHY SCOTT BAILEY SMITH, SR.

STATE OF WISCONSIN AND DENISE CECILE SMITH,

PETITIONERS-RESPONDENTS,

V.

TIMOTHY SCOTT BAILEY SMITH, SR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Timothy Smith, Sr., appeals a circuit court order finding him in contempt of a child support order and ordering 120 days in jail, stayed, with payment of support and other requirements as a condition for purging the contempt. He contends the circuit court erred because it failed to hold an evidentiary hearing prior to finding him in contempt, as required by WIS. STAT. § 785.03(1)(a) and due process. For the reasons explained below, we affirm the order of the circuit court.

BACKGROUND[2]

¶2 Smith was divorced from Denise Smith in a judgment entered in 1989 by a court in the State of Maine. They had three minor children. Denise and the children subsequently moved to Green County, Wisconsin. In 1992, based on a stipulation by Smith, a Maine court entered an order that he pay child support in the amount of $68 a week.

¶3 In 1999, Smith was charged in the circuit court of Green County, Wisconsin, with two felony counts of failure to pay child support contrary to WIS. STAT. § 948.22(2) (2001-02) for the periods from July 1, 1996, to August 18, 1997, and February 17, 1998, to July 2, 1999. Smith was convicted and appealed the judgment on the ground that the circuit court erred in refusing to instruct the jury that the child support order had to be issued by a court of competent

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] The facts in paragraphs 2 and 3 are taken from ***State v. Smith***, 2005 WI 104, 283 Wis. 2d 57, 699 N.W.2d 508.

jurisdiction,[3] the court erroneously exercised its discretion in admitting a copy of a certified copy of that order into evidence, and there was insufficient evidence to convict him without that order in evidence. ***State v. Smith***, 2004 WI App 116, ¶1, 275 Wis. 2d 204, 685 N.W.2d 821. (***Smith I***). We agreed with Smith and reversed the judgment of conviction. ***Id.***

¶4 The supreme court reversed our decision and affirmed the judgment of conviction in ***State v. Smith***, 2005 WI 104, ¶2, 283 Wis. 2d 57, 699 N.W.2d 508. (***Smith II***). The supreme court concluded that whether the Maine child support order was entered by a court of competent jurisdiction is not an element of the crime and the circuit court therefore did not err in not submitting the issue of the competency of the Maine court to the jury. ***Id***. The supreme court also concluded that litigation of the validity of the Maine child support order was barred by the doctrine of claim preclusion because a Maine court judgment held that the Maine court child support order was validly issued. ***Id.***, ¶¶21-22. Finally, the court held that the circuit court did not erroneously exercise its discretion in admitting a copy of a certified copy of the Maine child support order into evidence. ***Id.***, ¶2.

¶5 The motion for contempt that forms the basis for this appeal was filed by Green County corporation counsel in July 2006. The affidavit accompanying the motion referred to the 1992 Maine order and averred that the last child support payment received by the clerk of court from Smith was $68 on November 5, 2005; as of June 7, 2006, he owed $13,753.64 in arrears plus interest

[3] The definition of "child support" in WIS. STAT. § 948.22(1)(a) is "an amount which a person is ordered to provide for support of a child by a court of competent jurisdiction in this state or in another state …."

of $18,466.31; he knew about the 1992 child support order; and a demand had been made on him to comply with the order.

¶6 Smith appeared pro se at a hearing before the family court commissioner, who found that Smith had not made a good-faith effort to pay despite the ability to do so, and certified the matter for a hearing before the circuit court on contempt and the imposition of remedial sanctions. The court commissioner stated in its written decision that it had been advised that Smith had recently made a payment, and the amount due as of the hearing date was $13,041.62 in arrears plus interest of $18,598.20. The decision also stated that Smith had referenced laws from other states to defend his position and the commissioner ordered Smith to submit a brief seven days before the hearing in the circuit court on the statutes and law on which he was relying.

¶7 Smith filed a motion to dismiss and a number of exhibits, apparently considered by him to be a brief in compliance with the court commissioner's order. In the motion, Smith listed numerous items on which he stated he was prepared to "submit evidence," most of them legal propositions relating to the validity of the 1992 Maine order and the propriety of a Wisconsin court proceeding based on that order. Some items cite to findings of fact in the family court commissioner's order, but the footnotes or context give the impression that his objections are legal or procedural. The attached exhibits and the relief requested relate to Smith's arguments regarding the legal validity of the Maine 1992 order and the propriety of a Wisconsin court proceeding based on that order.

¶8 The hearing before the circuit court was rescheduled because Smith's motion and exhibits were not in the clerk of court's file and the corporation counsel had not been provided a copy. The order rescheduling the

hearing stated that payments were being received and the arrears at that time were $12,599.60 plus interest of $18,727.14, and service of process fees of $50.

¶9 Before the rescheduled hearing, Smith filed a number of motions with the circuit court asking the court to require the corporation counsel to respond to the points of law in his motion to dismiss. It appears from these motions that the corporation counsel did respond by letter or letter brief, but Smith did not view that as adequately responding to his arguments. In a "motion to strike," Smith asked the court to strike corporation counsel's response as inadequate and dismiss the contempt proceeding. Smith also responded to what appear to be arguments made by the corporation counsel based on claim preclusion (res judicata)[4] and issue preclusion (collateral estoppel)[5] by saying that "the instant matter is in the beginning stages and has never had any issues decided by any court of record," and he is "unaware of any evidence being properly admitted in the instant matter, for proper and objective consideration by any court of record …."

¶10 At the rescheduled hearing before the circuit court, Smith, appearing pro se, began by arguing that the corporation counsel's response was inadequate and had failed to "establish a jurisdictional basis for this court to act upon." The court elicited from Smith that he had proceeded in the federal system in a habeas

[4] Under the doctrine of claim preclusion, formerly called res judicata, a final judgment is conclusive in all subsequent proceedings on all matters that were litigated or that might have been litigated between the parties or their privies in the former proceeding. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995).

[5] Issue preclusion, formerly called collateral estoppel, bars re-litigation in a subsequent action of an issue of fact or law that has actually been litigated and decided in a prior action. ***Bugher***, 189 Wis. 2d at 550-51; the party against whom issue preclusion is applied must have been a party or in privity to a party or have had sufficient identity of interest to a party in the prior proceeding. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 226, 594 N.W.2d 370 (1999).

case after the decision in ***Smith II***. It appears that Smith wanted the circuit court to consider cases that had not specifically been addressed by either the Wisconsin supreme court or the federal court that went to the validity of the 1992 Maine order or of proceedings based on that order, and he presented copies of some cases to the circuit court. The court stated that the issue had been resolved in Smith's criminal case, that it did not have the authority to overturn ***Smith II***, and even if it did, it declined to do so. The court denied Smith's motions.

¶11 At that point, Smith asked if there "has been any evidence admitted in this proceeding? This is a civil proceeding." The court responded: "This is not an evidentiary proceeding. The evidentiary proceeding was the trial." When Smith replied that this civil proceeding is separate from the criminal action, the court stated its view that "the matter" had "been totally litigated" in the criminal case, which had a higher burden of proof.

¶12 The court asked the corporation counsel to draft the order. The corporation counsel referred to a copy of the child support agency records he had showing Smith's payments and nonpayments since 2001; he stated he was providing it to Smith right then to look at. The court directed counsel to provide a complete copy to Smith, and counsel said he would do so before Smith left the building. Smith asked for a copy of all records going back to 1992, when the "alleged order" was issued in Maine "so there [could] be an accurate accounting," and the court directed corporation counsel to provide Smith with a copy of all the records the State of Wisconsin had.

¶13 The corporation counsel then addressed the penalty it was seeking for contempt—120 days in jail with work release privileges, stayed to allow Smith to purge the contempt. The requested purge conditions were: payment in full and

on time for twenty-four months; a lump sum payment of $272 within sixty days time because Smith had not paid support for the last month; if unemployed, specified seek work requirements; and reporting and other related requirements.

¶14 When the court gave Smith the opportunity to reply to this, Smith returned to his argument that the circuit court had the authority to consider legal arguments that had not been presented in his criminal case because of ineffective assistance of appellate counsel and, he contended, these arguments supported his position that a court in Wisconsin could not properly consider the 1992 Maine order. The corporation counsel responded that the ineffective assistance of appellate counsel claim was the subject of the federal court proceeding and the federal district court had rejected it. When the court suggested that Smith ask the federal district court to reconsider its decision, Smith twice asked if he could "make a record," and the court allowed him to do so. Smith then argued extensively on a point of law that, he contended, the court in ***Smith II*** had overlooked. When he was finished, the court returned attention to the "thousands and thousands of dollars" of support Smith owed and what the court viewed as Smith's insistence in challenging his support obligation rather than supporting his children. The court then stated that the matter was concluded, and, when Smith asked to "state one more thing" the court did not permit him to do so, repeating that the proceeding was concluded.

¶15 The court issued a written order stating its conclusion that the issue of the validity of the underlying support order had been resolved by the Wisconsin supreme court in Smith's criminal case. The court found that Smith intentionally disobeyed the orders of the court by not paying $68 per week for arrearages of record and was in continuing contempt. The penalty and purge conditions were those sought by the corporation counsel.

DISCUSSION

¶16 Smith, now represented by counsel, appeals the circuit court's order on the ground that the court did not hold an evidentiary hearing before finding him in contempt. He relies on ***Evans v. Luebke***, 2003 WI App 207, ¶24, 267 Wis. 2d 596, 671 N.W.2d 304, in which we held that WIS. STAT. § 785.03(1)(a) requires that an "on-the-record-hearing must be held" prior to the imposition of an order for remedial sanctions for contempt. That statute provides:

> **(1)** NONSUMMARY PROCEDURE. (a) *Remedial sanction*. A person aggrieved by a contempt of court may seek imposition of a remedial sanction for the contempt by filing a motion for that purpose in the proceeding to which the contempt is related. The court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

Section 785.03(1)(a).

¶17 Smith points out that no records showing the amount of child support he owed were introduced into evidence by the corporation counsel. We do not understand Smith to be arguing that the circuit court erred in not permitting Smith to relitigate the issues of the validity of the 1992 order or whether it could properly be the basis for the contempt proceeding. Rather, we understand him to be arguing that the State should have presented admissible evidence to establish the amount Smith owed, his ability to pay, and a willful refusal to pay.

¶18 The State responds that an evidentiary hearing was unnecessary because Smith's "sole area" of challenge was to the validity and admissibility of the 1992 Maine child support order and those issues had been resolved by ***Smith II***.

¶19 The question of whether the circuit court followed the proper procedures in exercising its contempt power presents a question of law, which we review de novo. ***Evans***, 267 Wis 2d 596, ¶16.

¶20 In ***Evans***, we stated that

> [u]pon the filing of a motion seeking remedial sanctions for contempt, an on-the-record hearing must be held "for due process purposes." The evidence adduced at the hearing must support resultant findings of fact that the contemnor engaged in "intentional … [d]isobedience … of the … order of a court." WIS. STAT. § 785.01(1)(b).

Id., ¶24 (citations omitted, second and third ellipses added). We observed in ***Evans*** that there was no evidentiary proceeding and no stipulated facts that would support the actual findings on whether the party was able to comply with the order and whether refusal to comply was willful. ***Id.***, ¶24 & n.12. We concluded that the lack of evidentiary proceedings and absence of proper findings to support the sanctions violated both WIS. STAT. ch. 785 and due process. ***Id.***, ¶24. We considered and rejected the respondent's argument that the appellant had waived any objection to the failure to hold an evidentiary hearing by not requesting one; we concluded the appellant had sufficiently raised the issue in the circuit court, thus giving the court the opportunity to correct the procedural deficiencies. ***Id.***, ¶25 n.13.

¶21 Thus, although in ***Evans*** we recognized that WIS. STAT. ch. 785 and due process require an evidentiary hearing before a finding of contempt, we also implicitly recognized that an objection to a deficient proceeding could be waived if not brought to the attention of the circuit court. ***Id.***, ¶¶24, 25 & n.13.

¶22 A fair reading of the record here—the family court commissioner's decision, Smith's motions to the circuit court, and his argument to the circuit court

at the hearing—is that the "evidence" he considered relevant to his objection to the contempt motion related to the 1992 Maine order; that is, what Smith considered "evidence" was the cases and statutes he thought supported his view that the 1992 Maine order was an improper basis for the contempt procedure. It also appears from Smith's filings and arguments that, in his view, the 1992 Maine order needed to be in "evidence" in this proceeding before he could be found in contempt and he believed he had legal arguments that would prevent its admission. Thus, when Smith asked the circuit court whether any evidence had been submitted in this proceeding, we, as the circuit court evidently did, understand that he was referring to evidence relating to the 1992 Maine order. Given that understanding, which we view as reasonable, the court's answer that, "This was not an evidentiary hearing. The evidentiary hearing was the criminal trial," was apparently intended to convey to Smith that the court was not going to permit relitigation of the validity of the 1992 Maine order and its propriety as a basis for the motion for contempt. Smith appears to have understood this is what the court meant, because his subsequent argument was directed at why ***Smith II*** was wrong.

¶23 We recognize that Smith was proceeding pro se before the family court commissioner and the circuit court. Therefore, we have carefully reviewed the record to determine whether there is any indication that he wanted the corporation counsel to present evidence on the amount of support he owed, his ability to pay, or his willful refusal to pay or wanted to present evidence on those points (aside from evidence related to the 1992 Main order). We do not see any indication.

¶24 We have also carefully reviewed the transcript of the hearing before the circuit court to determine whether Smith had an opportunity to have evidence on those issues presented by either the corporation counsel or himself, in the event

the circuit court was mistaken in its understanding that his sole challenge to the contempt motion was to the fact that it rested on the 1992 Maine order. We conclude Smith did have that opportunity. The court asked for Smith's responses to the corporation counsel's arguments, allowed Smith to speak at length, and did not cut him off until it became apparent that he was repeating his argument that ***Smith II*** was wrongly decided. During the discussion of the records of what he had paid and not paid, Smith had the opportunity to say that he wanted time to review them or the opportunity to dispute them, but he did not. Even when the court asked for his response to the penalties requested by the corporation counsel, Smith did not indicate that there was a factual dispute on the amount he owed, his ability to pay, or his reasons for not paying; instead Smith continued to try to persuade the court it could and should re-examine the Wisconsin supreme court's opinion in ***Smith II***.

¶25 We conclude Smith waived the right to review of his claim that the circuit court erred in not holding an evidentiary hearing on the amount of support he owed, his ability to pay, or his reasons for not paying. The circuit court acted reasonably in viewing Smith's challenge to the contempt motion as solely directed to the 1992 Maine order; if that view was mistaken, Smith had adequate opportunity to correct the impression, but he did not. We do not read ***Evans*** or WIS. STAT. ch. 785 as requiring an evidentiary hearing where the only issues the party proceeded against brings to the court's attention are legal issues.

¶26 Similarly, we do not agree with Smith that his right to due process was violated. "The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner." ***American Eagle Ins. Co. v. Wis. Ins. Securities Fund***, 2005 WI App 177, ¶44, 286 Wis. 2d 689, 704 N.W.2d 44. Smith had ample opportunity to tell the court, if

the court's impression was incorrect, that he wanted to have the State present evidence of the amount he owed and his ability to pay or that he wanted to present his own evidence on these issues and on his reasons for not paying.

¶27 Although we have concluded that Smith has waived the right to review of his claim, we might consider overlooking the waiver[6] if Smith had explained in his brief in this court what facts are in dispute. However, he has not done so. We therefore cannot tell whether a reversal and remand for an evidentiary hearing would serve any purpose. Accordingly, we decline to overlook the waiver.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

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[6] Waiver is a matter of administration, not of authority, and we may choose to address a waived issue. *See* ***County of Columbia v. Bylewski***, 94 Wis. 2d 153, 171-72, 288 N.W.2d 129 (1980).