ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
DIVISION IV

CA05-914

March 15, 2006

JOHN RUSSELL SPARKS
APPELLANT

v.

SUE BETH SPARKS (BATES)
APPELLEE

AN APPEAL FROM HOWARD COUNTY CIRCUIT COURT
[No. E-91-51]

HONORABLE TED C. CAPEHART, CIRCUIT JUDGE

AFFIRMED

Olly Neal, Judge

Appellant John Sparks brings this one-brief appeal from an order of the Howard County Circuit Court finding him in contempt for non-payment of child support and incarcerating him until all delinquent payments and attorney's fees were paid. Appellant raises seven points on appeal. We affirm.

Appellant and appellee Sue Sparks Bates were divorced by decree of the Howard County Chancery Court entered on June 26, 1991. The decree incorporated a stipulation agreement providing that the parties would have joint custody of their two minor children, Jared, born June 17, 1988, and Kayla, born October 19, 1989, with appellee to have primary residential custody. Appellant was to pay $60 per week in child support and was awarded visitation with the children.

On September 19, 1994, an agreed order was entered by the Hempstead County Chancery Court resolving several petitions and counterpetitions seeking enforcement and

modification of the decree.[1] The order found that appellant was in arrears in the payment of child support in the amount of $720 but that the parties agreed to compromise and settle appellant's monetary claims against appellee arising from the division of marital property in exchange for forgiveness of this arrearage. The order also modified the decree to provide that appellee had custody of the minor children, subject to appellant's specified visitation. Appellant's child-support obligation remained $60 per week. The case was transferred back to the Howard County Chancery Court.

On November 25, 1998, appellee filed a motion for contempt, alleging that appellant was $6,120 in arrears in his child-support payments. Appellant answered, admitting that he was in arrears in his support payments. On March 30, 1999, the trial court entered an agreed order finding that appellant had paid $3,000 towards the arrearage, that appellant was to continue to pay current support of $60 per week, that appellant was to pay $60 per month on the remaining arrearage of $3,000, and that appellant was to pay $25 per month for reimbursement of unpaid medical bills.

On January 21, 2005, appellee filed the petition leading to the present appeal. The petition alleged that appellant was in contempt for failing to pay child support and dental bills as ordered, stating that the arrearage was "in excess of $11,000." The petition also alleged that the circumstances had changed and that appellant's support obligation should be modified. Appellee's prayer for relief requested, in part, "that [appellant] be cited for contempt of court and punished until he has complied with previous orders of this Court." Appellant filed an answer denying the material allegations of the petition. He also filed a counterclaim seeking to reduce his child-support obligation, alleging that his income had

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[1] At appellant's request, the case had been transferred to Hempstead County pursuant to Ark. Code Ann. § 9-12-320 (Supp. 2005).

decreased. Appellant also sought to hold appellee in contempt for denying him visitation as specified in the September 1994 order.

Appellee Sue Sparks Bates testified that she was attempting to enforce the divorce decree because appellant was "some $11,000 in arrears." She identified an unpaid dentist bill in the amount of $300, together with a child-support check for $300 that had been returned unpaid. The $300 unpaid check needed to be added to the arrearage, according to appellee. She stated that appellant's child-support obligation of $60 per week had not been adjusted since the original divorce decree was entered and needed to be modified to reflect his current income. Appellee also denied that she and appellant had an agreement for appellant not to pay child support. She admitted that appellant performed electrical work at her businesses but stated that she did not know the value of those services.

Appellee stated that she had never denied appellant extended visitation with the children, asserting that appellant "just kind of quit getting them" and never asked for extended visitation of fourteen days. She also testified that she owned a convenience store and a fitness center and that the children work in the businesses. Appellee admitted that she had sometimes scheduled the children to work during appellant's visitation or that she may have called them in during his visitation. She denied that the children's working interfered with appellant's visitation but stated that, on one occasion, the children went to Hope rather than go to their scheduled visitation.

Bobbie Jo Green, the Howard County Circuit Clerk, testified that, according to her office's records, appellant was $11,460 in arrears before a payment was made on the morning of trial. She stated that her office attempts to log when a parent is given credit for extended visitation but the last time that appellant asked for or was given a credit for extended visitation was in 2000.

Gwen Sparks, appellant's wife, testified that she handled the payment of child support and medical and dental bills for appellant during the seven years they have been married. She stated that they had paid $5,859.91 in dental expenses and $6,417.30 in medical expenses since 1999, but she did not know about the $300 dental bill appellee was claiming as unpaid. To her knowledge, all medical and dental bills were current. She stated that, during the week prior to trial, appellant went to the child-support office to seek credit for the extended visitation appellant asserts he was denied. According to Mrs. Sparks's testimony, appellant was entitled to a credit of $1,260 for the total abatement of support during the periods of extended visitation. She identified an exhibit showing the periods claimed for abatement and a bill for $1,549.98 for electrical work by appellant at appellee's businesses and stated that appellant was seeking a setoff for this amount.

Mrs. Sparks further testified that appellant was seeking a reduction in his child-support obligation based on his average monthly income of $757.14 for the years 2002, 2003, and 2004 and identified tax returns filed for those years. She acknowledged that appellant was in arrears in his support payments. However, she disputed appellee's testimony concerning visitation, stating that appellant had not been allowed his full summer or holiday visitation. Mrs. Sparks also stated that there were occasions during weekend visitation when appellee asked that the children work at her businesses and that, on at least two occasions, appellant refused. Finally, she admitted that appellant adopted her two children in 2004.

Appellant testified that he was aware of his obligation to pay child support of $60 per week but asserted that he did not intentionally not pay his support. He also stated his belief that he had an agreement with appellee not to pay support during the time he was having to go to court over the adoption of Gwen Sparks's children. Appellant testified that he believed that appellee would notify him when he needed to catch up in his support payments. He testified that he was seeking a reduction in his child support due to a reduction in his income

since the divorce in 1991. Appellant testified that he was a master electrician and that his charge for a service call had recently increased to $50. Appellant also stated that he sometimes bids on jobs, calculated at $40 per hour. He stated that he did not bill appellee for the electrical work, stating that he did not consider it fair for appellee to pay him if he was not paying appellee child support. He admitted that he did the work expecting to be paid. He also said that the electrical work had nothing to do with his child support.

Appellant said that he was asking the court to hold appellee in contempt for interfering with his visitation. He stated that he has not exercised consistent weekend visitation for a variety of reasons, including that the children were working for appellee, the children were on a cruise on Father's Day, and attended other family functions with appellee's family. He also described an incident when his daughter wanted to go to Hope to go bowling during his visitation period. He refused to allow her to go, but, he said, appellee overruled his decision and allowed Kayla to go.

Kayla Sparks, the parties' daughter, testified that appellee had not prevented her from visiting with appellant. She said that her work for her mother's businesses did not prohibit her visitation. Although she had spent spring break with her father, Kayla stated that appellant had never asked her to spend several weeks in the summer with him. She could not recall whether her stepmother asked for her to spend spring break with appellant. She admitted that there were times when her mother's family plans prevented visitation but denied that they were "numerous." She also admitted that there were times when her mother asked her to work at her business during visitation. She denied telling her father that she did not want to visit.

The trial court ruled from the bench, finding that appellant was in arrears in the amount of $11,700, including a $300 check returned due to insufficient funds. The court allowed appellant a setoff of $1,549.98 for electrical work performed on appellee's business.

The trial court further found that appellant's testimony concerning appellee denying visitation was not credible, stating that it was an afterthought trying to get out of paying child support. As to appellant's income, the trial court stated that appellant's testimony that his net income as a master electrician was $136 to $147 per week for some weeks was not credible. Appellant was imputed with a net income of $250 per week, resulting in his support obligation remaining at $60 per week, to continue after the parties' older child reached the age of eighteen. Finally, the trial court ordered appellant incarcerated until he paid the full amount of the arrearage. The trial court set review hearings. These findings were memorialized by written order entered on May 18, 2005. Appellant's motion for temporary stay and petition for writ of certiorari and habeas corpus were denied by the supreme court on May 19, 2005. This appeal followed.

For reversal, appellant raises seven points: (1) the trial court violated his due-process rights by imposing incarceration as a penalty for contempt without a specific pleading requesting this relief; (2) the trial court erred in holding appellant in contempt and incarcerating him without specific findings of willful disobedience and ability to pay; (3) in the alternative, the trial court's implicit findings that appellant had the ability to pay and was in willful contempt of court were against the preponderance of the evidence; (4) the trial court's ruling that appellee was not in violation of the court's previous order on visitation was against the weight of credible evidence; (5) the trial court's refusal to grant appellant child-support abatement credit for the visitation he was denied was against the weight of credible evidence; (6) the trial court's ruling that appellant's income was understated was without evidentiary support; and (7) the trial court's denial of appellant's request for a retroactive reduction in child support was against the weight of credible evidence.

As a preliminary matter, we must determine whether appellant was subject to civil contempt or criminal contempt. In determining whether a particular action by a judge

constitutes criminal or civil contempt, the focus is on the character of relief rather than the nature of the proceeding. *Fitzhugh v. State*, 296 Ark. 137, 138, 752 S.W.2d 275, 276 (1988). Because civil contempt is designed to coerce compliance with the court's order, the civil contemnor may free himself or herself by complying with the order. *See id.* at 139, 752 S.W.2d at 276. This is the source of the familiar saying that civil contemnors "carry the keys of their prison in their own pockets." *Id*. at 140, 752 S.W.2d at 277 (quoting *Penfield Co. v. S.E.C.*, 330 U.S. 585, 593 (1947)). Here, the trial court ordered appellant incarcerated until he purged himself of the contempt by paying all of the past-due support, an attorney's fee, and costs. This indicates a finding of civil contempt. Another factor indicating that this was a civil contempt is the fact that the trial court scheduled periodic reviews to determine whether appellant had the ability to pay. *See Alexander v. Alexander*, 22 Ark. App. 273, 742 S.W.2d 115 (1987).

Appellant's first point is that the trial court violated his due-process rights by imposing incarceration as a penalty for contempt without a specific pleading requesting this relief. We cannot address this issue because it was not made to the trial court. It is elementary that an issue, even a constitutional issue, must first be raised before the trial court. *Ivy v. Keith*, 351 Ark. 269, 92 S.W.3d 671 (2002). Here, that was not done.

Because appellant's second and third points are argued in the alternative, we also discuss them together. Appellant argues that the trial court erred in holding appellant in contempt and incarcerating him without specific findings of willful disobedience and ability to pay or, in the alternative, the trial court's implicit findings that appellant had the ability to pay and was in willful contempt of court were against the preponderance of the evidence. Our standard of review for civil contempt is whether the finding of the circuit court is clearly against the preponderance of the evidence. *See Omni Holding & Dev. Corp. v. 3D.S.A., Inc.*,

356 Ark. 440, 156 S.W.3d 228 (2004); *Gatlin v. Gatlin*, 306 Ark. 146, 811 S.W.2d 761 (1991).

Our supreme court has held that the failure of the trial court to state its findings of fact and conclusions of law does not render a contempt order void. *Widmer v. State*, 243 Ark. 952, 422 S.W.2d 881 (1968); *Johnson v. Johnson*, 243 Ark. 656, 421 S.W.2d 605 (1967). Appellant cites *Whitworth v. Whitworth*, 331 Ark. 461, 961 S.W.2d 768 (1998), in support of his argument. There, the trial court never made a finding on the issue, nor was it asked to do so. Instead, the trial court simply ordered Whitworth "incarcerated until such time as he purges himself of paying the [wife's house payments, one-half of the value of husband's business, and reimbursement for insurance premiums]." 331 Ark. at 465, 961 S.W.2d at 770. The supreme court remanded the case to the trial court for its findings on Whitworth's ability to pay. *Whitworth* does not apply in this case because, here, the trial court, in its written order, specifically found appellant in contempt. Further, the trial court implicitly found that appellant had the ability to pay the support when it imputed income of $250 per week to appellant.

We cannot say that the trial court was clearly erroneous in its finding that appellant had the ability to pay and willfully failed to do so. We affirm on these points.

In his fourth point, appellant argues that the trial court erred in not finding appellee in contempt for violating the visitation provisions of the decree. The standard of review where the trial court has refused to punish a contemnor is abuse of discretion. *See Jones v. Jones*, 320 Ark. 449, 898 S.W.2d 23 (1995); *Gerot v. Gerot*, 76 Ark. App. 138, 61 S.W.3d 890 (2001). Appellee's testimony is contradictory because she testified that she never denied appellant his extended visitation, stating that appellant never asked for the visitation. However, she also admitted that there was some interference in that she scheduled the children to work during appellant's visitation. The trial court specifically found that

appellant's testimony that appellee denied him visitation was not credible. It is the province of the trier of fact to determine the credibility of the witnesses and resolve any conflicting testimony. *Crismon v. Crismon*, 72 Ark. App. 116, 34 S.W.3d 763 (2000); *Shoptaw v. Shoptaw*, 27 Ark. App. 140, 767 S.W.2d 534 (1989). Since the question of preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the superior position of the trial court. *Watts v. Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986). We affirm on this point.

In appellant's fifth point, he contends that the trial court erred in not allowing a total abatement of child support for periods when he had visitation with the children in excess of seven days. First, Section VI of Administrative Order No. 10 provides that, before there can be an abatement, the extended period must be at least fourteen days, not seven. Second, that same section provides that any abatement should not exceed 50% of the support obligation. Third, the terms of Section VI provide that the trial court "may" prorate any reduction. *See Guest v. San Pedro*, 70 Ark. App. 389, 19 S.W.3d 62 (2000). Under these circumstances, we cannot say that the trial court abused its discretion in denying the abatement.

Because appellant argues his sixth and seventh points together, we do likewise. In those points, appellant contends that there is no evidentiary support for the trial court's ruling that appellant understated his income and that the trial court's denial of a retroactive reduction in child support was against the weight of the evidence. Our standard of review for an appeal from a child-support order is de novo on the record, and we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001).

The trial court was not in error. According to appellant's Exhibit 3, his net income is $757 per month. The child-support guidelines for that level of income with two children provide for an obligation of $262 per month. Appellant's current support obligation is in line

with that amount ($60/week x 4.334 weeks = $260.04/month). It is unclear from the record whether the issue of the amount of child support for one child is ripe for decision. Documents in the record indicate that Jared will not turn eighteen until June 2006. However, both parties testified that Jared turned eighteen in June 2005. Arkansas Code Annotated section 9-14-237(b) (Supp. 2005) discusses how to calculate the obligor's remaining obligation after a child turns eighteen.

Affirmed.

GLADWIN and GRIFFEN, JJ., agree.