IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

MICHAEL D. PATTISON,

Appellant,

v.

TERRY LYNN PATTISON,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D16-0615

Opinion filed February 24, 2017.

An appeal from the Circuit Court for Okaloosa County.
Michael Flowers, Judge.

William L. Ketchersid and A. Richard Troell of Ward & Ketchersid, P.A., Destin, for Appellant.

Terry Lynn Pattison, pro se, Appellee.

KELSEY, J.

The order on appeal in this post-dissolution proceeding finds Appellant, the former husband, in contempt for failing to pay alimony. Former Husband does not dispute his failure to pay. He challenges provisions of the order that operate prospectively as automatic findings of future contempt punishable by immediate

incarceration without further hearing for any of Husband's future failures to make the required monthly payments of alimony and arrearages. We conclude that the trial court erred in ordering automatic future contempt and incarceration, and we reverse those provisions of the order. We affirm in all other respects.

The trial court found that Former Husband had the ability to pay alimony and arrearages and had willfully failed to do so (specifically, that the nonpayment was "dilatory and egregious" and his attempts to make excuses were "an insult to all who have heard this case"). The court then imposed the following conditions on Former Husband's future performance of his obligations (emphasis added):

> As punishment for contempt, the Former Husband is sentenced to eleven (11) months and twenty-nine (29) days in the Okaloosa County Jail suspended upon compliance with the remaining terms of this order. To purge himself of contempt, beginning February 1, 2016, and due on the first day of each month thereafter, the Former Husband shall pay the full amount of regular ongoing monthly alimony in the amount of $1,493.00 plus $250.00 to be applied toward the remaining established arrearage. ALL payments shall be made through the Clerk of Court Central Depository along with the Clerk's fee.
>
> Upon non-compliance with the terms of Section 4(b) above [alimony obligations and arrearages], the Former Wife shall file an affidavit of non-compliance and contact the Family Law Case Manager at (850) 609-5495. *Without further hearing, the suspended sentence shall then be reinstated and the Court shall issue a Writ of Bodily Attachment remanding the Former Husband into the custody of the Okaloosa County Sheriff's Department to serve his sentence*.

While an automatic finding of contempt and immediate incarceration for future nonpayment has efficiency on its side, and is perhaps an understandable

reaction given the protracted and contentious history of this litigation and Former Husband's willful failures to make required payments that Former Wife desperately needs, such an automatic, prospective arrangement fails the due process test. The trial court certainly has discretion to fashion a contempt order sufficient to coerce Former Husband's compliance with his support obligation. *Bowen v. Bowen*, 471 So. 2d 1274, 1277 (Fla. 1985). However, a court may order incarceration for civil contempt upon intentional violation of a court order only after finding that the contemnor has the *present* ability to purge the contempt and refuses to do so. *Id.*; *see also Pugliese v. Pugliese*, 347 So. 2d 422, 424 (Fla. 1977) ("[I]t is said that the contemnor 'carries the key to his cell in his own pocket.'"); *Ponder v. Ponder*, 438 So. 2d 541, 543 (Fla. 1st DCA 1983) ("[I]n every case, *present* ability to pay the purge amount is a necessary predicate to committing a civil contemnor to jail for failing to comply with the court's order."). The trial court's order deprived Former Husband of his due process right to defend against any future allegations of non-payment by showing either that he had made the payment, or that he is not at that time able to pay through no fault of his own.

We agree with the Fourth District's analysis in a case directly on point, *Hipschman v. Cochran*, 683 So. 2d 209, 210 (Fla. 4th DCA 1996). The order at issue in *Hipschman*, like the order now before us, required future payments of alimony, failing which the former wife and her counsel were permitted to file an

affidavit of non-payment that would result in immediate issuance of a writ of bodily attachment and incarceration. 683 So. 2d at 210. We agree with our sister court's conclusion that such an order violates due process requirements, as follows:

> It is clear that civil contempt orders may not provide for incarceration based on future, anticipated noncompliance with a court's periodic support order. *Phillips v. Phillips*, 502 So. 2d 2 (Fla. 4th DCA 1986); *Miller v. Miller*, 587 So. 2d 601 (Fla. 5th DCA 1991). There must be a hearing before incarceration, where a contemnor may challenge the allegation of noncompliance and defend on the ground that he does not have the present ability to pay under *Bowen*.

Hipschman, 683 So. 2d at 211. This analysis and conclusion apply with equal force here.

Accordingly, we AFFIRM the trial court's finding of contempt, but REVERSE the improper provisions of the contempt order and REMAND to the trial court to fashion a remedy, consistent with due process, sufficient to ensure that the Former Husband complies with his financial obligation.

WINSOR, J., CONCURS; MAKAR, J., CONCURS WITH OPINION.

MAKAR, J., concurring.

After a pre-incarceration hearing involving pro se former spouses, the trial court held the former husband in contempt for willfully violating court orders to pay past-due alimony ($5,945.50) to his disabled former wife (who has "serious health issues requiring a special dietary formula through a feeding tube") despite having the present ability to do so (he makes $175,000 yearly), sentencing him to just short of a year in jail. The trial court found that the former husband's non-payment was "egregious," if not worse ("The word evil comes to my mind. Greed comes to my mind."). The trial court's written order provided for a purge of contempt if the former husband (a) repaid the past-due alimony via monthly $250 payments, **plus** (b) timely paid all future monthly alimony obligations, short of which the former husband would go to jail without another hearing.

Called into question is whether a second pre-incarceration hearing is required under due process principles, making it important to distinguish between future payment of *future* alimony obligations versus future payment of *past-due, accrued* alimony that formed the basis of the current contempt order (both forms of future payments are woven together in the order).

As to the future payment of *future* alimony, the order is faulty by failing to provide any hearing at all. It is necessary under basic principles of due process to accord notice and a pre-incarceration hearing because the former husband might

encounter significant, unforeseen economic hardships in the future that might warrant judicial reconsideration of his ability to comply with a court order. See Hipschman v. Cochran, 683 So. 2d 209, 212 (Fla. 4th DCA 1996) (en banc) ("For nonpayment of *future* support obligations, a hearing comporting with due process requirements is always necessary to determine both the fact of nonpayment and whether the defaulting payor has the ability to pay such amount before any incarceration may begin."). On that basis, this portion of the order must be stricken; the former husband must be accorded due process via notice and hearing should contempt be sought as to his *future* non-payment of *future* alimony obligations. On this basis, such a hearing would not be a second pre-incarceration hearing; it would be the initial hearing on the issue of non-payment of future alimony obligations.

More nuanced is what pre-incarceration process is due if the former husband fails to make the monthly $250 payments for the $5,945.50 of *past-due, accrued* alimony that he willfully failed to pay, resulting in a finding of contempt. As discussed in Hipschman, a second pre-incarceration hearing is not legally required in all circumstances. Id. (noting that cases involving future payment of future obligations "are not analogous to the situation where incarceration is ordered for non-compliance with *past, accrued and unpaid* support obligations-i.e., arrearages"). For example, where a trial court determines after a contempt hearing

that a former spouse "had not made court ordered payments and had the ability to purge within a short time frame . . . . due process does not automatically require a *second* hearing before arrest on the question of whether the contemnor has the ability to pay the purge amount." Id. (noting that "[n]either constitutional principle, nor rule of procedure, nor common sense impose the requirement of an additional pre-incarceration hearing on a busy trial court to reconsider fact issues already determined"). Nothing precludes a trial court from requiring payment immediately or within a "relatively brief purge period" provided adequate findings are made as to the present ability to pay immediately or during such period. Id. Thus, had the order in this case concluded that the former husband had the present ability to either make full payment immediately in a lump sum or, alternatively, via a series of partial payments over a "relatively brief" period of time, a second pre-incarceration hearing would be unnecessary. Though the trial court concluded that the former husband "had and continues to have the ability to pay the amounts owed," it required the payment of $250 monthly over almost 24 months, which exceeds what would ordinarily be deemed a "relatively brief purge period." Much can happen in two years.

More importantly, the trial court's order put in the former wife's hands the ability to trigger the former husband's incarceration without due process. As

discussed in Hipschman, holding a second pre-incarceration hearing is "indispensable" such as where a judicial contempt order:

> specifies compliance extra-judicially, i.e., by performance outside the auspices of the court or its adjuncts. Here, the court ordered the husband to make his purge payment directly to the wife. We believe that in this instance the court must allow an additional, pre-incarceration hearing on whether the contemnor has actually complied during the purge period. This is necessary to avoid the situation where the moving party misrepresents whether performance has been sufficient to comply, an occasion might arise in a hotly contested case where the temptation is great to use the court's coercive powers for the movant's own ends.

Id. at 212-13 (footnotes omitted). Because the trial court's order placed its enforcement solely in the former wife's control (she need only file an affidavit of non-compliance and contact the case manager), and explicitly dispensed with any judicial review via a hearing, it is defective. Though the file in this case reflects that many judges have expended much time, effort, and patience on the ongoing post-dissolution disputes between the former spouses, the requirement of a pre-incarceration hearing cannot be put aside except under narrow and carefully delineated circumstances, such as those discussed in Hipschman.

Finally, the former husband claims that the trial judge's "compulsion" to assist the dual pro se litigants went astray to his disadvantage, for instance, "by not only seizing [former husband's] pleading and 'redrafting' it into an impossible absurdity that even Lewis Carrol would find amusing, but then seizing and truncating the presentation of the case and any evidence to support it." Using golf

parlance, he ruminates whether the trial judge has "wander[ed] hopeless into the rough along the fairway" by perhaps "nudg[ing] the ball back onto the fairway to speed play for the judge's own preference." Oddly, he does not mention the characterization of his non-payment of alimony as "evil," focusing instead on perceived slights (that the record shows the trial judge did not make) for which he claims entitlement to a do-over. In golf lingo, this claim is a whiff (swinging at and entirely missing the ball) for which no mulligan (a second chance) is allowed.