IN THE COURT OF APPEALS OF IOWA

No. 7-861 / 07-0408
Filed December 28, 2007

JOSEPH BORLAND,
Plaintiff,

vs.

IOWA DISTRICT COURT FOR POLK COUNTY,
Defendant.

Certiorari to the Iowa District Court for Polk County, Robert B. Hanson, Judge.

Joseph Borland filed a petition for writ of certiorari holding him in contempt of court for willfully violating the provisions of his modified divorce degree. **WRIT ANNULLED.**

Scott L. Bandstra of the Bandstra Law Firm, P.C., Des Moines, for appellant.

Stacey N. Warren and Kodi A. Petersen of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Baker, JJ.

BAKER, J.

The district court held Joseph Borland in contempt on several counts of Nichole Honeycutt's application of rule to show cause. Borland challenges the court's findings of fact, conclusions of law, and ruling through a writ of certiorari. Based on our review, we annul the writ of certiorari.

I. Background and Facts

Joseph Borland and Nichole Honeycutt were married in August 1988 and had two children, Jacob in April 1990, and Tyler in July 1992. The marriage was dissolved by decree on November 22, 1995. The parties were granted joint legal custody, and Honeycutt was granted physical care of the children. The decree has been modified and amended on several occasions, primarily with respect to the custody, visitation, and child support provisions. On October 31, 2001, the court entered an order regarding Borland's contempt for failure to appear at a prior hearing. On November 3, 2003, the district court entered its third modification decree, pursuant to which Borland was required to provide Honeycutt two weeks prior written notice of his intent to exercise weekend visitation.

A May 2, 2006 hearing was scheduled on Borland's petition to again modify the decree. On April 26, 2006, Borland had subpoenas personally served on Jacob and Tyler, requiring them to personally appear at the hearing. On April 28, 2006, Honeycutt discovered that her oldest son, Jacob, had secretly flown from his home in North Carolina to Iowa, where Borland lives. Once safely in Iowa, Jacob phoned Honeycutt and told her that he planned to testify at the May 2, 2006 modification hearing. On April 28, 2006, Honeycutt filed an application for

writ of habeas corpus, which was granted that same day, and Borland was ordered to turn Jacob over to law enforcement officials and to reimburse Honeycutt for Jacob's airplane ticket back to North Carolina. On May 1, 2006, Honeycutt filed a motion to quash the subpoenas that had been served on the boys, which was granted. After the court denied Borland's motion to continue the modification hearing, Borland made an oral motion to withdraw his petition, which was granted.

Early in the afternoon of June 9, 2006, Borland arrived at Honeycutt's house to pick up the boys to begin their five-week summer visitation, although he was not scheduled to be there until 6:00 p.m. On July 16, 2006, at the conclusion of the summer visitation, Honeycutt's mother, Joyce Keen, arrived to pick up the children. Tyler refused to leave with Keen. On July 20, 2006, Honeycutt filed another application for writ of habeas corpus, which was granted that same day. When the Ankeny policy arrived with Keen at Borland's home, Tyler called Borland, who told him he needed to go with his grandmother. Tyler complied.

On November 27, 2006, Honeycutt filed an application for rule to show cause, asking the court hold Borland in contempt for violating the terms of the court's orders by (1) removing Jacob from his mother's home on April 28, 2006; (2) failing to reimburse Honeycutt for the cost of the airplane ticket returning Jacob to North Carolina; (3) picking the children up early on June 9, 2006; (4) failing to return Tyler on July 16, 2006; (5) denying Honeycutt all opportunities to speak with the children from June 28 through July 16, 2006; and (6) failing to pay Honeycutt's attorney fees, as ordered by the court, dating back to their 1995 dissolution decree. The application asked that sole legal custody be placed with

Honeycutt, the terms of Borland's contact with the children be modified, Borland be required to post a cash bond in an amount that would deter him from further violations of the court's custodial and visitation orders, and Borland be assessed attorney fees and court costs.

A hearing was held on the application, and on January 18, 2007, the district court entered an order finding Borland in contempt on all counts, except for denying Honeycutt an opportunity to speak with the children from June 28 through July 16, 2006. The court sentenced Borland to two thirty-day jail sentences, to run consecutively, and taxed him $2119.85 in costs and Honeycutt's attorney fees. The court suspended all visitations between Borland and the children until he purged himself of the contempt or completed the jail sentences. The court also modified the third modification decree with respect to Borland's visitation rights. The modification, among other things, prohibited Borland from discussing the court proceedings with the children, or engaging the children in the proceedings, or encouraging the children's disobedience as to the court's order. Borland could purge himself of the contempt charges by paying the outstanding attorney fee judgments and interest owed to Honeycutt, by reimbursing Honeycutt for the plane ticket to return Jacob to North Carolina, and paying Honeycutt's fees and the court costs.

Both parties filed a motion to reconsider, pursuant to Iowa Rule of Civil Procedure 1.094. In its February 7, 2007 ruling on reconsideration, the district court modified its decision so Borland was sentenced to jail on counts other than those for which visitation was modified. On March 1, 2007, Borland filed a petition for writ of certiorari, which Honeycutt resisted. The district court entered

an order granting Borland's motion to stay execution of judgment until his writ of certiorari has been ruled upon. On April 20, 2007, the Iowa Supreme Court granted Borland's writ and stayed the execution of the district court's February 7, 2007 order until further review.

II. Merits

Borland asserts that, because this action was tried in equity, our review should be de novo. This is the incorrect standard of review. Because certiorari is an action at law, our review is at law. *Ary v. Iowa Dist. Court*, 735 N.W.2d 621, 624 (Iowa 2007).

> In our review of a certiorari action, we can only examine the jurisdiction of the district court and the legality of its actions. When the court's findings of fact are not supported by substantial evidence, or when the court has not applied the law properly, an illegality exists. A contemner's sentence is reviewed for an abuse of discretion.

Id. (internal citations and quotations omitted). The district court's award of attorney fees is reviewed for an abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

A. Sufficiency of the Evidence

A person may be found in contempt if there is evidence beyond a reasonable doubt the person willfully violated a court order or decree. Iowa Code § 598.23 (Supp. 2005); *Phillips v. Iowa Dist. Court*, 380 N.W.2d 706, 709 (Iowa 1986). "'Willful disobedience' requires evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty." *McKinley v. Iowa Dist. Court*, 542 N.W.2d 822, 824 (Iowa 1996) (citations omitted). "Contempt is sufficiently shown if some

of the default was willful." *Rater v. Iowa Dist. Court*, 548 N.W.2d 588, 590 (Iowa Ct. App. 1996).

> A party alleging contempt has the burden to prove the contemner had a duty to obey a court order and willfully failed to perform that duty. If the party alleging contempt can show a violation of a court order, the burden shifts to the alleged contemner to produce evidence suggesting the violation was not willful.

Ary, 735 N.W.2d at 624 (citations omitted).

"Because of the quasi-criminal nature of the proceedings, a finding of contempt must be established by proof beyond a reasonable doubt." *Rater*, 548 N.W.2d at 590. "[S]ubstantial evidence sufficient to support a finding of contempt is evidence that could convince a rational trier of fact that the alleged contemner is guilty of contempt beyond a reasonable doubt." *Ary*, 735 N.W.2d at 624-25 (citations omitted).

Borland contends the district court erred in finding him in contempt because there was insufficient evidence to establish beyond a reasonable doubt that he violated the third modification order. We hold that the record contains substantial evidence from which a rational trier of fact could find beyond a reasonable doubt that Borland violated the order in numerous respects.

Borland claims he sent written notice to Honeycutt regarding his intent to exercise his visitation rights on April 28, 2006. Honeycutt denies having received such notice. The record supports the district court's conclusion that Jacob and Borland had formulated a plan to secure Jacob's presence at the modification hearing, and not for visitation. Even if Borland had given Honeycutt proper notice, we agree with the district court that Jacob's trip to Iowa was not for visitation but was "an abuse of the court's orders for purposes of gaining an

advantage over [Honeycutt] so far as custody of Jacob was concerned."

Borland also claims that he has not paid for Jacob's airline ticket because he did not know the amount and has not received a bill. The record supports the court's conclusion that Borland "cannot seriously suggest that he did not know at least approximately how much Jacob's transportation back to North Carolina would cost" and that Honeycutt "has proven beyond a reasonable doubt that [Borland] willfully disobeyed this court's order in this respect as well." Further, Borland had access to the invoice as part of the exhibits given to him for the May 2, 2006 hearing. *See, e.g.*, *Ary*, 735 N.W.2d at 625. Our review of the record supports that he received this bill.

Borland further contends the district court erred in finding him in contempt because there was insufficient evidence to establish beyond a reasonable doubt that he violated the modification order by picking up the children early for their 2006 summer visitation because Honeycutt allowed the children to leave early. While Honeycutt admits she allowed the boys to leave early, she testified that she had been given no notice, did not want to cause a scene, and because she was alone with her children when Borland arrived, was concerned for her safety. Further, Borland admitted that he did not advise Honeycutt that he was arriving early. There was sufficient evidence to support the court's conclusion that Honeycutt proved Borland willfully violated the modification order. We also agree with the court's statement that, "[w]hile this may seem trivial, the court is beginning to see a pattern in [Borland's] behavior and believes it is important to correct same without further delay."

Borland also contends that, because he did nothing to restrict Tyler from leaving, the court erred in finding him in contempt when Tyler refused to leave after the summer visitation. In approving the court's holding we cannot improve on the language of the district court, which we quote and adopt as our own:

> [Borland] testified he told his kids that he couldn't be involved in their decision . . . . In effect, [he] has washed his hands of all responsibility for ensuring that this court's orders were complied with . . . . The very thing that this court has every right, at a minimum, to expect—that [he] do everything within his power short of committing a crime to ensure that this court's orders are complied with and to obtain the children's cooperation in that regard—is the very thing that [he] has made it abundantly clear he does not do. A parent does not have the right, at the first sign a child balks, to throw up his hands and say, "What can I do?" . . . . [Honeycutt] has proven, beyond a reasonable doubt and largely through [Borland's] own words, that [he] has intentionally refused to even try to obtain his children's cooperation until forced to do so via a writ of habeas corpus, and, in this court's view, that is contempt.

We conclude the record amply supports the district court's finding that, under the reasonable doubt standard, Borland failed to abide by the terms of the third modification order, and that he "acted with willful disobedience, satisfying the required proof for contempt." *Sulma v. Iowa Dist. Court*, 574 N.W.2d 320, 322 (Iowa 1998); *see also Wells v. Wells*, 168 N.W.2d 54, 64 (Iowa 1969) (upholding finding of contempt against mother for refusing to return children to father as required by the decree).

B. Jail Sentence and Modification

Borland contends the district court erred in imposing a jail sentence without inquiring whether he has the financial ability to satisfy the amounts due in the time frame imposed by the court. He cites *Christensen v. Iowa Dist. Court*, 578 N.W.2d 675 (Iowa 1998), to support his argument that the district court was

required to make a ruling on whether he had the financial ability to satisfy the court order, and that the court made no determination on whether his failure to pay was willful.

Pursuant to *Christensen*, the burden is upon Borland to show his failure to comply with the court order was not willful by showing "(1) the order was indefinite; or (2) [he] was unable to perform the act ordered." 578 N.W.2d at 678. Here, Borland does not dispute he owes Honeycutt for attorney's fees dating back to the 1995 dissolution decree, or that he has made no payments on the obligations. Because Borland does not claim that the court's order was indefinite, the only issue is whether he was unable to pay the court-ordered attorney fees. *See id.* Borland did not testify that he did not have the ability to pay his obligation, but rather sought to have the ability to pay his obligation over time. The court found that, if Borland has sufficient income to purchase airline tickets, pay for annual camping trips with the boys, and purchase them cell phones and electric guitars, "and if he basically just wants to be permitted to pay over time, he should have been doing so long before now." The record contains more than sufficient evidence to show Borland had the ability to pay the court-ordered attorney fees. We find substantial evidence supports the district court's finding that Borland willfully failed to pay the fees. The court did not abuse its discretion in imposing the jail sentence.

Borland further asserts the court acted illegally by imposing both a jail sentence and modifying the dissolution decree. Pursuant to Iowa Code section 598.23, a person who willfully disobeys a court order or decree may be punished by the court for contempt and sentenced to jail for up to thirty days for *each*

offense, or visitation may be modified. "The plain language of section 598.23 provides that the court can modify visitation to compensate for lost visitation time, or impose a jail sentence, but not both" for one instance of contempt. *Phillips*, 380 N.W.2d at 709-10. Where, however, there are multiple instances of contempt, each may be separately punished. *Kirk v. Iowa Dist. Court*, 508 N.W.2d 105, 109 (Iowa Ct. App. 1993) (distinguishing between punishing "one instance of contempt with both jail and a modification" and several instances of contempt, where each instance is separately punishable). In its ruling on reconsideration, the district court modified its decision so Borland was sentenced to jail on counts for which visitation was not modified. The district court found Borland in contempt on numerous counts, and each instance of contempt was separately punishable. The court sentenced Borland to jail on different counts than those for which visitation was modified. The court, therefore, did not abuse its discretion in imposing both a jail sentence and modifying visitation.

C. Calculation of Costs

Borland also contends the court erred in its calculation of prior costs and fees. Because Borland did not raise this issue until his petition for judicial review, error was not preserved and we need not consider the issue on appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

D. Attorney Fees

Borland next contends that, because Honeycutt did not prove her allegations of contempt, her present attorney fees should not have been

assessed to Borland. An award of attorney fees is discretionary with the district court. *McKinley*, 542 N.W.2d at 827. Given the length of time Borland refused to pay court-ordered attorney fees and the severity of the conduct which was found to violate the third modification order, we find it was well within the court's considerable discretion to award Honeycutt attorney fees.

Honeycutt requests an award of appellate attorney fees "in an amount to be shown by a statement of fees to be filed by her upon submission of this case." No such statement has been filed with this court. "While this court's task is thus made more difficult, apparently, failure to file such a schedule is not fatal to [Honeycutt's] request." *In re Marriage of Winegard*, 257 N.W.2d 609, 618 (Iowa 1977) (citations omitted). Because Honeycutt was required to defend the district court's decision on appeal and prevailed on all of the issues, we award appellate attorney fees of $1000 to Honeycutt. *See In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005) (noting "the relative merits of the appeal" is a factor to consider in awarding appellate attorney fees); *In re Marriage of Bornstein*, 359 N.W.2d 500, 504-05 (Iowa Ct. App. 1984) (awarding attorney fees to the party "obligated to defend the trial court's decision on appeal").

III. Conclusion

We annul Borland's writ of certiorari. The record contains substantial evidence for a rational trier of fact to find beyond a reasonable doubt that Borland willfully violated a court order or decree. The district court, therefore, did not err in finding Borland in contempt. Because substantial evidence supports the district court's finding that Borland willfully failed to pay court-ordered attorney fees, the court did not abuse its discretion in sentencing him to jail. Because the

court sentenced Borland to jail on different counts than those for which visitation was modified, the court did not abuse its discretion in imposing both a jail sentence and modifying the dissolution decree. Error was not preserved on the issue of the court's calculation of prior costs and fees; therefore, we need not consider the issue on appeal. It was well within the court's discretion to award Honeycutt attorney fees. We also award Honeycutt appellate attorney fees in the amount of $1000.

WRIT ANULLED.

Vaitheswaran and Baker, JJ concur. Sackett, C.J. concurs in part and dissents in part.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur with the majority in all respects except I would not affirm the finding of contempt based on Borland's arriving early to pick up the children where Honeycutt allowed the children to leave with him. I recognize Borland has been difficult with Honeycutt with reference to the children. Honeycutt's seeking contempt charges on a matter which the majority and the district court finds "may be trivial" is in fact trivial and should not be sanctioned. To do so only encourages other divorced parents to seek contempt for trivial matters when parents, for the benefit of their children, should work to resolve these matters themselves.