

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002615-MR

KEVIN HUDSPETH

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG CLYMER, JUDGE
ACTION NO. 97-CR-00052

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

BARBER, JUDGE: Appellant, Kevin Hudspeth ("Hudspeth"), entered an alford plea to charges of flagrant non-support. In December 1997, Hudspeth was sentenced to three years probation. The judgment required Hudspeth to pay \$100 per month on his child support arrearage and remain current on his monthly child support obligation of \$262.

On March 31, 2000, an agreed order was entered holding that Hudspeth would pay the sum of \$2900 on the arrearage by September 30, 2000, in exchange for the Commonwealth's agreement not to revoke his probation for failure to timely pay the arrearage. This agreement also required Hudspeth to remain

current on his regular monthly child support obligations. On August 28, 2000, the Commonwealth filed a motion for a warrant claiming that Hudspeth had failed to make the current child support payments. Hudspeth argues that this warrant was in violation of the agreed order, which gave him a deadline of September 30, 2000, to bring the debt up to date. Hudspeth filed an affidavit with the trial court showing that his expenses exceeded his income and averring that he had been hired to start a second job. Hudspeth also entered a motion to reduce his monthly child support obligation showing that at the time the child support was set he was earning \$3000 a month, but since that time he had only earned \$1300 a month. He argued that he was unable to pay the arrearage and monthly child support on his income. No ruling was made on this motion by the trial court.

On September 12, 2000, two weeks before the deadline imposed by the agreed order, Hudspeth was incarcerated. At the time of incarceration, Hudspeth was current on his child support except for the month of October and had paid the majority of the arrearage. The trial court revoked Hudspeth's probation and ruled that Hudspeth would have to serve one year in jail.

Hudspeth argues that the trial court was in error when it found that he had not paid his child support since March 2000. Although Hudspeth testified during the hearing that he was behind in his child support payments, the record showed that these obligations were paid while he was in custody. The Friend of the Court testimony at the hearing showed that Hudspeth was current in his child support obligations at the time of the hearing, with

the exception of the month of October, and he had paid a substantial portion of the arrearage at the time he was arrested.

Hudspeth argues that the trial court erred in incarcerating him and revoking his probation prior to the deadline agreed upon by the parties pursuant to the agreed order.

Hudspeth argues that the plea agreement and agreed order were a "pledge of public faith", pursuant to Shanklin v. Commonwealth, Ky. App., 730 S.W.2d 535, 537 (1987) and should be enforced as written. Hudspeth claims that he should not have been arrested unless he failed to pay off the arrearage by September 30, 2000. The Commonwealth asserts on appeal that the revocation of probation had nothing to do with the payment of the arrearage but was based solely on Hudspeth's failure to remain current on his child support payments. This argument is supported by the record. The record shows that Hudspeth was timely paying off the arrearage and could have met the deadline imposed in the agreed order. However, his failure to remain current on the monthly child support obligations made the warrant legally valid.

The record shows that Hudspeth was clearly unable to pay off both the arrearage and continue monthly child support payments. Hudspeth filed documents with the trial court showing his attempts to borrow the money and to obtain a second job to help fulfill his obligations. He argues that the trial court's revocation of probation based on a debt he could not pay off was in error, and he asserts that jailing him only served to further impair his ability to pay the debt. Hudspeth made a post arrest

motion to have his child support obligation reduced based on the drastic decline in his monthly salary. This motion as well as Hudspeth's ability to pay the past due amount was not addressed by the trial court.

Kentucky law holds that inability to pay is a defense to a charge of flagrant non-support. Lewis v. Lewis, Ky., 875 S.W.2d 862 (1993). The trial court must make a finding that the defendant is able to pay the amount before imposing any sanctions for failure to make child support payments. No such finding was made in the present case. The trial court stated that it was "not necessary to show that Hudspeth was able to pay" the amount and declined to review Hudspeth's financial records showing that he could not pay the sums ordered by the court. The commentary to the flagrant non-support statute, KRS 530.050, states, in pertinent part, "[t]he accused must possess ability to provide this support" The trial court is required to find that the defendant can "reasonably provide" the support demanded. In the present case, the trial court did not make such a finding. For this reason, the probation revocation must be reversed.

For the foregoing reasons, the judgment of the McCracken Circuit Court is reversed, and this case is remanded for further proceedings consistent with this opinion.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

SCHRODER, JUDGE, CONCURS.

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