

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000047-MR

ROBERT B. KANE

APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 97-CI-00231

CANDIE KANE

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUIDUGLI, MCANULTY AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. The appellant, Robert Kane (hereinafter "Robert"), petitions this court for review of the December 4, 2001, Greenup Circuit Court order finding him in contempt for failing to appear at a scheduled show cause hearing and adjudging that he pay child support, fees and costs for which he was in arrears. Having considered the parties arguments and the record, we affirm.

We will address two separate and distinct issues in this appeal. The first issue we will discuss is the underlying basis for this appeal, civil contempt of court. The order of the Greenup Circuit court will be reviewed under an abuse of

discretion standard. The second issue is of a frivolous nature. Robert makes arguments that have been ruled on by this court previously and are governed by the law of the case doctrine. Each of these issues will be discussed in turn.

CONTEMPT OF COURT AND JUDGMENT

The Greenup Circuit Court set a hearing for November 30, 2001, to show cause why Robert should not be held in contempt for his failure to pay court ordered child support, attorney fees and costs. In November of 1999 Robert had successfully petitioned the trial court for a reduction in child support due to a decrease in his income. Subsequently, the Appellee, Candie Kane (hereinafter "Candie"), moved to show cause why Robert had failed to pay child support and further moved that Robert produce his 2000 income tax returns for verification of his income. A hearing was set before the Domestic Relations Commissioner (hereinafter "DRC") on April 26, 2001. On Robert's motion, the hearing was continued until May 15, 2001. On May 8, 2001, Robert mailed a letter to the DRC, which was received and entered in the record, requesting that the hearing be held via telephone conference. Robert wrote that he would be unable to travel from Florida for the hearing and that he was unable to obtain legal representation for the hearing. The DRC held the hearing as scheduled without Robert being present or represented by counsel. As a result of Robert's failure to attend the hearing or provide verifiable information as to his current income, even though it had been requested, the DRC calculated Robert's income based on his educational level and previous earnings. The DRC

calculations indicated that Robert's current child support obligation should be set at \$531.00 per month and the DRC applied that amount retroactively to December 5, 2000.

On July 5, 2001, Robert filed exceptions to the DRC's report which were ultimately overruled by the trial court's order on July 12, 2001. The trial court ordered Robert to provide Candie's counsel a copy of his 2000 federal income tax return and all schedules within thirty (30) days. Several other motions were filed in the following days including a motion by Candie to re-compute child support. This issue was set for a hearing on July 26, 2001. Robert who had also filed motions to be heard on July 26th, once again failed to appear before the court resulting in a bench warrant for his arrest. Finally, on July 31, 2001, the trial court accepted the findings of fact and the conclusions of law of the DRC as well as upholding the order for Robert to produce his 2000 tax documentation. The court further ordered child support in the amount of \$634 per month, retroactive to December 5, 2000, attorney fees of \$400 to Candie's attorney, and costs to the DRC and court reporter.

Subsequently, Robert failed to pay the ordered support or fees, instead he continued to file motions seeking to alter, amend or vacate the court's decisions. When Candie sought a Motion for Rule to determine why Robert should not be held in contempt, he responded that he did not owe her any child support. In his September 17, 2001, response to Candie's Motion for Rule, Robert sets forth his position that the original January 1998 Dissolution Decree, as affirmed by this Court, incorporated by

reference his exceptions to the 1997 DRC Recommendations. As such, he believes that the decree includes the exceptions which he propounded and thus there should be a reduction in his child support obligation for the conveyance of the Cattletsburg property to Candie. The trial court set a November 30, 2001, hearing date to review all pending motions and issues. Prior to this hearing Robert filed another Motion to Vacate and two motions to continue, which were all overruled. On November 27, 2001, Robert filed a Motion for Show Cause again asserting that the trial court's orders entered on August 30 and September 26 were in error because they had failed to recognize the so called "Exceptions Settlement Agreement" from the original Dissolution Decree. Finally, on the morning of the hearing, November 30, 2001, Robert faxed a letter to the court stating that he would not be appearing at the hearing.

The trial court held the hearing and rendered its findings on December 4, 2001, holding that Robert was in Contempt of Court for failing to appear and failing to pay the previously ordered child support, fees and costs. Based on information provided in Candie's August 30, 2001, Motion for Show Cause the trial court ordered that Robert pay \$5,508 in child support arrearage, \$400 as previously ordered attorney fees and an additional \$300 in attorney fees for Candie having to bring this motion. The court also levied a six-month jail sentence on Robert unless he purged himself of the present debt. It is from this order that Robert appeals.

Our standard of review in this case is whether the trial court's findings of fact were clearly erroneous and whether it abused its discretion in applying the law to the factual findings. Cochran v. Cochran, Ky. App., 746 S.W.2d 569, 570 (1988). In evaluating the trial court's action we are mindful that the purpose of civil contempt is to coerce rather than punish -- to compel obedience to and respect for an order of the court. The primary characteristic of civil contempt is the fact that the contemnors "carry the keys of their prison in their own pocket." Blakeman v. Schneider, Ky., 864 S.W.2d 903 (1993). This Court is also aware that the use of contempt proceedings as a means to enforce child support payments has long been judicially approved in this state. Goodman v. Goodman, Ky. App., 695 S.W.2d 865 (1985); Commonwealth v. O'Harrah, Ky., 262 S.W.2d 385 (1953).

In Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982), our Supreme Court set forth guidance for reviewing a trial court's decisions. The test is not whether the reviewing court would have decided it differently, but whether the findings of a trial judge were clearly erroneous or that he abused his discretion. Contempt is the willful disobedience of--or open disrespect for--the rules or orders of a court. Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1996). In reviewing the trial court's decision to levy contempt this Court must therefore consider if the decision was clearly erroneous or an abuse of discretion. To do this we note the standard set fourth in The Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575 (2000).

If the legitimacy of the challenged action presents only a question of law, the reviewing court may of course determine the law without necessary deference to the lower court or hearing officer. Where the challenge involves matters of fact, or application of law to facts, however, an abuse of discretion should be found only where the factual underpinning for application of an articulated legal rule is so wanting as to equal, in reality, a distortion of the legal rule.

...

Abuse of discretion is the proper standard of review of a trial court's evidentiary rulings.

...

The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Id. at 575, 577. 581. (Emphasis added).

The contempt order in the instant case involves the trial court's application of the law to the facts. The trial court is in the best position to evaluate the parties' conduct and the particular facts of a case. In this case the record clearly indicates that the civil contempt charge levied against Robert was done after eleven months of Robert's refusal to pay court ordered child support and failure to appear before the court to show cause. In this same time Robert continually filed motions with the court seeking to alter, amend or vacate the orders of the court based on arguments that have been ruled on by the trial court and affirmed by this court. It is abundantly clear that the civil contempt was not levied arbitrarily, it was reasonable, it was fair, and it was supported by sound legal

principles. The civil contempt and judgment in this case also served its purpose as it coerced Robert into making payments in order to avoid a jail sentence. As such there was not an abuse of discretion by the trial court.

FRIVOLOUS APPEAL

In bringing this appeal, Robert grounds his arguments on the right to appeal the contempt charge. However, as counsel for the appellee points out in his brief, the arguments set forth in Robert's briefs are the same arguments that have previously been addressed by this Court. While the initial partial settlement agreement and dissolution of marriage decree have already been addressed on appeal in Kane v. Kane, (an unpublished opinion rendered February 2, 2001, and finalized December 18, 2001, Case No. 1999-CA-002825-MR, discretionary review denied on December 12, 2001, 2001-SC-0314-D), Robert continues to assert those issues in this appeal and are thus precluded as res judicata.

The history of this case was set out in the first opinion of this Court. Briefly, some eighteen months after the Dissolution Decree was entered Robert began to file CR 60.02 motions before the trial court. When the second motion was overruled, he appealed to this Court. His motions and appeal were based on the unconscionability of the decree and a belief he held that certain exceptions filed should have been incorporated into the decree. A review of the record from the first appeal to the present reveals that Robert continues his attempt to litigate issues that have been decided and are thus governed by the law of

the case doctrine. In his November 27, 2001, show cause motion, Robert sets forth his position as such:

The parties exercised their 14th Amendment rights and settled this case by a Settlement Agreement that contains the contract terms that obligated the Court and both parties per the provisions of KRS 403.180(4)(a)(5) to reduce child support from the property conveyance in order to comply with the terms of the parties December 17, 1997 Exceptions Agreement, incorporated by reference in the January 22 Decree. Therefore, the Respondent's (sic) in full compliance with all said laws and court orders.

Contrary to Robert's assertions, he was not in compliance with all said laws and court orders. As noted above, he continually refused to follow the Court's order to pay child support and to appear to show cause why he had failed to pay the ordered child support, attorney's fees, and costs. On November 30, 2001, at the scheduled hearing, the appellant failed to appear to show cause and as such, was held in contempt for failing to pay the court ordered support. In his current appeal, Robert asserts that his November 27, 2001, pro se show cause motion was erroneously overruled by the trial court. Robert continues to claim that his child support obligations have been determined by the "precedential" findings of this Court concerning the Dissolution Decree of January 22, 1997, and that following that order he is due a reduction in child support. Robert is correct in his assertion that this Court did rule on this matter and affirmed the trial court, however, his characterization in this appeal of our previous ruling is clearly erroneous.

The first time that this Court reviewed this divorce action the Dissolution Decree of January 22, 1998, was affirmed. In that decree, the trial court included the parties' agreements as to the terms of the dissolution. Item 8 of the partial settlement agreement sets forth that:

8. The Petitioner [Candie Kane] and Respondent [Robert Kane] entered into a Settlement Agreement which was dictated into the record before the Domestic Relations Commissioner and the Court has approved the same and further, some issues were heard by the Domestic Relations Commissioner and Exceptions were filed by the Respondent and the parties reached an agreement concerning such Exceptions, all set forth hereinafter.

The hereinafter referred to by the trial court, and as affirmed by this Court as conscionable, was the Decree Of Dissolution Of Marriage. As this Court noted in our first review of this dissolution:

In the decree the trial court incorporated the agreement of the parties previously entered as well as the agreement reach [ed] between the parties and counsel on the day of the court hearing on the exceptions previously filed. The decree as relevant to this appeal sets forth that the parties would share joint custody of the children **that Robert would pay \$859.95 per month in child support, and that Candie would be awarded the Catlettsburg real estate with Robert executing a quitclaim deed to the property.**

In the current appeal, Robert fundamentally mischaracterizes the above section of this Court's opinion by claiming that there was an "Exceptions Settlement Agreement" reached on December 17, 1997. Robert claims that this was incorporated by reference into the trial court's Dissolution Decree and this Court's opinion affirming. There is no basis in

the record or in this Court's opinion meriting this claim. The trial court clearly set forth the final terms of the parties' settlement agreement in the Dissolution Decree. As noted above, this Court expressly affirmed the Decree and in our opinion set forth the basic terms of that agreement. If Robert's assertions, that the "Exceptions Settlement Agreement" included only his December 12, 1997 exceptions filed in response to the DRC's recommendations, are correct then his position could have merit. However, those exceptions, propounded by Robert, who was represented by counsel, were not included in the Dissolution Decree. Rather, it was the agreement which the parties reached after the exceptions were filed that became part of the Decree and are the law of the case.

This Court previously held that the decree of the Greenup Circuit Court was conscionable and it was not in derogation of state or federal law. As such, the decree and decision of the courts are the law of the case and must be adhered to. Robert chose not to follow the law of this case and pay his court ordered child support. As his November 27, 2001, Show Cause Motion indicates Robert believes that his exceptions to the DRC's original recommendations should be binding, not the orders and decisions of the trial court and this Court.

After years of litigation and a voluminous record in which Robert continues to perpetuate the same claim, a claim that was settled by the original decree in 1998, affirmed by this Court and denied review by the Supreme Court of Kentucky, we are again presented with his same arguments. Arguments which have no

basis in the record and which Robert continues to make in hopes of bootstrapping his old arguments into a valid legal issue. We believe that Robert's appeal is frivolous. Kentucky Rule of Civil Procedure (CR) 73.02(4) provides that:

If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith.

By appealing this contempt order, Robert has forced Candie to defend herself before this Court and incur additional legal expenses. Robert's appeal lacks merit and appears to have been taken in bad faith. Other than the mentioning that he is bringing this appeal on the basis of the trial court's contempt order, Robert fails to set forth or present any issues that have not been previously decided and are governed by the law of the case. We believe it is appropriate to impose sanctions pursuant to CR 73.02. This Court has often determined that the appropriate sanction for a violation of CR 73.02 is the imposition of attorneys' fees against the party who filed the frivolous appeal. Angel v. Harlan County Bd. of Education, Ky. App., 14 S.W.3d 559 (2000).

Therefore, we impose as sanctions against Robert the legal costs incurred by Candie associated with this appeal including the cost of preparing her brief and reasonable attorney's fees. We direct the appellee to submit within fifteen days following the rendition of this decision an affidavit detailing the costs she incurred in defending against this

appeal. Robert will have ten days thereafter to respond before we fix the amount of the sanctions. The order of the Greenup Circuit Court is affirmed. This action shall remain on the Court's active docket pending imposition of sanctions.

ALL CONCUR.

BRIEF FOR APPELLANT, PRO SE:

Robert B. Kane
Saint Petersburg, FL

BRIEF FOR APPELLEE:

Bruce W. MacDonald
Greenup, KY