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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001943-MR

JIMMY D. HIGHTOWER — APPELLANT

v.

APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
CIVIL ACTION NO. 00-CI-00231

COMMONWEALTH OF KENTUCKY ex rel.
LISA D. HIGHTOWER — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, HUDDLESTON and MILLER, Judges.

HUDDLESTON, Judge: Jimmy D. Hightower and Lisa D. Hightower are the parents of a minor child, Katherine R. Hightower, who was born on February 10, 1996. On August 22, 2000, the Commonwealth of Kentucky, acting on behalf of Lisa, sued Jimmy demanding child support for Katherine. At the time suit was filed, Jimmy was incarcerated in the Simpson County jail as a result of having been charged in an indictment with three counts of first-degree assault, three counts of first-degree wanton endangerment and one count of first-degree burglary in connection with a June 2000 incident.

On June 16, 2000, Jimmy and Lisa engaged in an argument at their Simpson County home. During the argument, Jimmy kicked, beat, choked and threw hot grease on Lisa. Jimmy also threatened to kill Lisa and attempted to ignite a gas stove so that the house would explode. Lisa and Katherine escaped from the house and ran to the nearby home of Lisa's grandmother, Earldean Allen. Jimmy immediately arrived at Allen's home brandishing two rifles. He forcibly entered the house and pointed one of the rifles at Allen while threatening to kill her. At this point, a struggle ensued between Jimmy, Lisa and Allen, during which one bullet was fired. Lisa finally managed to wrestle one of the rifles away from Jimmy and struck him over the back with it. Thereafter, Jimmy returned to his house where he was arrested while attempting to ignite the gas stove with a lighter. After being indicted, Jimmy failed to post bond and remained incarcerated.

By agreement with the Commonwealth, Jimmy entered an Alford[1] plea to one count of assault in the second degree, two counts of assault in the fourth degree, three counts of wanton endangerment in the first degree and one count of burglary in the second degree, and was sentenced to a total of twenty years' imprisonment.

While the criminal charges against Jimmy were pending, the Simpson County Attorney brought suit seeking to hold Jimmy liable for child support. Despite the fact that he was

[1] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). A defendant entering an Alford plea declines to acknowledge guilt, but admits that the Commonwealth can present evidence of guilt sufficient to support a conviction.

incarcerated, Jimmy was found liable for child support in the amount of $75.00 per week based upon his income prior to his June 2000 incarceration. After he had entered a plea to the charges described above, Jimmy moved the circuit court to reduce his child support obligation to $60.00 per month. The court's domestic relations commissioner recommended, pursuant to Kentucky Revised Statutes (KRS) 403.212(2)(d) and Commonwealth ex rel. Marshall v. Marshall,[2] that Jimmy's motion be denied. The circuit court concurred with the DRC's recommendation leaving Jimmy obligated to pay child support in the sum of $75.00 per week. This appeal followed.

On appeal, Jimmy asserts that Simpson Circuit Court committed reversible error when it refused to reduce his child support obligation. First, Jimmy argues that Marshall should not apply to those individuals who, because of an inability to post bail, remain incarcerated after being accused, but not yet convicted, of criminal charges. He contends that, in some circumstances, Marshall creates an overly broad rule concerning a trial court's determination of an incarcerated person's child support obligation.

In Marshall, this Court equated incarceration with voluntary unemployment.[3] Incarceration, we said, cannot be

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[2] Ky. App., 15 S.W.3d 396 (2000).

[3] Id. at 401.

construed as a change in circumstances which would allow a trial court to modify a child support order.[4] Our rationale was that:

> . . . KRS 403.212(d), was amended in 1994, to eliminate the need of the trial court before imputing income to find that the parent acted in bad faith. This statutory change, coupled with the statute's exception for imputing income to two specific groups (that is, incapacitated parents and those caring for children three years of age and under) convince us that the Legislature did not intend to exempt incarcerated parents from those whom income should be imputed for purposes of child support. Certainly, the Legislature is aware that incapacitated parents are no more able to obtain employment than parents of young children or mentally or physically disabled parents. Thus, the Legislature's refusal to include incarcerated parents among those identified as being excepted from imputed income convinces us that incarcerated parents are to be treated no differently than other voluntary unemployed, or underemployed parents owing support.[5]

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[4] Id.

[5] Id. at 401-402.

As Jimmy points out in his brief,[6] the Marshall holding applies to all incarcerated individuals. In other words, a trial court, when fixing an individual's child support obligation, is required to equate an incarcerated person with one who is voluntarily unemployed or underemployed regardless of the reason for his incarceration. This approach, he says, is overly broad. The rigid rule propounded in Marshall, Jimmy says, should not apply to those persons incarcerated involuntarily.

There are at least two situations in which incarceration is not "voluntarily undertaken." First, an individual may be accused of committing a criminal offense, but incarcerated because of his inability to post bail or by the court for good cause. In this situation, the incarcerated person is not necessarily in jail of his own volition. Needless to say, an accused is presumed innocent until guilt is established in a proper judicial proceeding.

The second situation in which involuntary incarceration may occur is when a material witness to criminal activity is ordered incarcerated by the court pursuant to Kentucky Revised Statutes (KRS) 421.250(1). This type of incarceration ordinarily occurs when the court feels that the safety of the witness is at issue or when it is feared that the witness might depart the

[6] We commend Jimmy Hightower's counsel, J. Richard Downey, for representing his client pro bono. Mr. Downey's efforts in formulating an interesting and compelling argument before this Court highlight how members of the bar uphold the highest tradition of the profession by providing public interest legal services without compensation.

jurisdiction to avoid testifying. In this circumstance, it cannot be said that the material witness is voluntarily incarcerated.

We agree with the fundamental premise behind Marshall - that parents cannot voluntarily impoverish themselves in order to avoid the obligation to pay child support. This rule includes the voluntary commission of a criminal offense that ultimately leads to imprisonment since such conduct wilfully impairs the ability of the offending parent to support his children. Although we are impressed with Jimmy's argument that in some limited circumstances an individual in jail may be there involuntarily, the argument is of little help to Jimmy.

This case illustrates how a parent with a child support obligation can willfully impoverish himself by committing criminal acts that lead to incarceration. While Jimmy was entitled to the presumption of innocence after he was arrested and indicted, he eventually pled guilty to amended charges in connection with his conduct on the night of June 16, 2000. His Alford plea was a plea of guilty, regardless of any denial of underlying facts and any defense that he might have raised had he elected to have gone to trial. As such, it clearly constituted a conviction.[7] By entering guilty pleas to the amended charges and accepting a twenty-year prison sentence, with a credit for one hundred eighty-six (186) days served in the Simpson County Jail while awaiting trial, Jimmy voluntarily incarcerated himself for the criminal acts with which he was accused. Thus, the circuit court correctly imputed pre-incarceration income to Jimmy.

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[7] Pettiway v. Commonwealth, Ky., 860 S.W.2d 766 (1993).

Jimmy insists that Marshall cannot be applied to him because, since he entered an Alford plea, the Commonwealth never proved, nor did he admit, that he voluntarily engaged in conduct that he knew or should have known would impair his obligation to pay child support.

In North Carolina v. Alford, the United States Supreme Court held that an individual accused of a crime may voluntarily, knowingly and understandably consent to the imposition of a prison sentence even if that individual is unwilling or unable to admit his participation in the acts constituting a crime.[8] Usually, this type of guilty plea is entered when a defendant, faced with overwhelming evidence that the prosecution could prove his guilt beyond a reasonable doubt, has "absolutely nothing to gain by a trial and much to gain by pleading."[9] Even though a defendant may decline to acknowledge that he committed the acts of which he is accused, an Alford plea has the same effect as any other guilty plea.

The order fixing the amount of child support that Jimmy is obligated to pay is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Richard Downey
Franklin, Kentucky

BRIEF FOR APPELLEE:

G. Sidnor Broderson
Simpson County Attorney
Franklin, Kentucky

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[8] Supra, n. 1, 400 U.S. at 28, 91 S. Ct. at 196, 27 L. Ed. 2d at 171.

[9] Id.