

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000317-MR

JAMES RICHARD COX, SR.

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 96-CI-00278

JUDY CAROL COX

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: DIXON, HOWARD, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: James Richard Cox, Sr., appeals from an order of the Bullitt Circuit Court reducing his monthly maintenance payment to Judy Carol Cox but which did not terminate his obligation or give him requested credits on his maintenance arrearages. We find no abuse of discretion by the circuit court and affirm.

In 1996, after twenty-eight years of marriage, Judy filed a dissolution of marriage action. During the marriage, Judy had not worked outside the home. James worked for CSX Transportation with an annual income of over \$50,000 per year. After

the parties separated, Judy lived with her mother and James agreed to pay \$605.40 as temporary maintenance. On July 24, 1998, the Bullitt Circuit Court confirmed the Commissioner's report awarding Judy \$1,200 monthly maintenance until her death, remarriage, or further order of the court.

Immediately after the entry of the maintenance order, James habitually failed to pay his maintenance causing Judy to file numerous motions for contempt. To detail each motion would serve no purpose in the resolution of the present case; we, therefore, merely highlight those as necessary for the resolution of the present appeal.

By September 1, 1998, James had accumulated an arrearage of \$2,722.50. Therefore, in an effort to provide support for herself, in late 1998, Judy began working as a resident manager at an apartment building. Her net earnings were \$681.57 per month and, in addition, she received a rent free apartment with a value of \$529 per month. Because of Judy's employment, James filed a motion to terminate his maintenance obligation. Since James was then earning \$4,534 per month, the court denied the motion and awarded a judgment against James in the amount of the maintenance owed.

In the two years that followed, the parties appeared in court on many occasions in an effort to finalize the distribution of the marital property. The record reveals that James was less than fully cooperative in the sale of the marital residence, division of the marital property, and the payment of automobile taxes. Additionally, by April 1, 1999, the date on which the order dispensing the funds was entered, James' maintenance arrearage had ballooned to \$25,297.10, and he owed \$1,000 for Judy's

attorney fees, and \$16, 892.87 for bonds and other property ordered to be divided. To the extent the debt could be satisfied from James' share of the marital residence, it was paid to Judy.

Following the disbursement of the marital assets, James continued to ignore his maintenance obligation and, as a result, Judy filed a series of contempt motions. In August 2000, the court found that James had willfully disregarded the court maintenance order and had shown flagrant contempt for the court. As a result, James was ordered to be incarcerated for a period of 179 days or, alternatively, he could purge himself by the payment of the total owed to Judy and the entry of a wage assignment. The order and a bench warrant were served on November 8, 2000.

James tendered a check to the court in the amount of \$45,997.58, representing: the arrearage owed until September 12, 2000; attorney's fees; compensation for property not restored to Judy; court costs; and interest. James was then released from jail.

Immediately after James' release, his arrearage again compiled monthly. After Judy submitted computations demonstrating that James owed \$27,493.43 on July 24, 2002, James was ordered to serve the balance of his previous incarceration and pay the arrearage and attorney's fees. A bench warrant was issued and James was again incarcerated on August 14, 2002. He was released on September 9, 2002, pending his motion to terminate or reduce the maintenance award. That motion was eventually denied.

On March 17, 2004, the court issued yet another bench warrant. James had amassed a new arrearage of \$20,718.62 and had not paid the previous arrearage of \$27,493. James moved to set aside the warrant and for a hearing to terminate or reduce maintenance. At the hearing held on June 3, 2004, he sought to modify or set aside the previous orders of July 24, 2002, and March 17, 2004, on the basis that he was not properly given credit for payments made. The refusal of the court to terminate maintenance and the denial of James' alleged credits are the basis for this appeal.

At the hearing, James testified that as result of a disabling automobile accident, in April 2003, he was forced to leave his employment with CSX and receives a monthly disability check from the Railroad Retirement Board in the amount of \$2,836. He testified that his monthly living expenses are approximately \$2,600. Judy still maintains her employment and living arrangement at the apartment complex. She has health problems, including that she has suffered three heart attacks and has a seizure disorder. She testified that her monthly living expenses are \$1,800.76 per month.

James testified to certain credits which he believes were not given to him in the arrearage orders of July 24, 2002, and March 17, 2004. The alleged credits, he believes, are owed include: the payment of Judy's car taxes; the value of bonds Judy cashed; the value of equipment Judy received; and payments made to Judy as maintenance. However, he was unable to document the alleged payments or otherwise demonstrate that he was not given proper credits for payments made.

Matters relating to maintenance, including modification, are questions delegated to the sound and broad discretion of the trial court. An appellate court will not disturb the trial court's order unless the decision is unsupported by substantial evidence. *Bickel v. Bickel*, 95 S.W.3d 925 (Ky.App. 2002).

A modification of a maintenance award is governed by KRS 403.250 which states: “[T]he provisions of any decree respecting maintenance may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable.” KRS 403.250(1). “Implicit in this requirement is the understanding that the circumstances of the parties at the time of the entry of the divorce decree and maintenance obligation cannot serve as the basis of the changed circumstances required by the statute.” *Rayborn v. Rayborn*, 185 S.W.3d 641, 644 (Ky. 2006), (internal quotations omitted). Thus, the initial award of maintenance and property division, even if it enhances a parties' standard of living, cannot serve as the basis for a “change of circumstances.”

We recognize that since the dissolution, James has been in a constant cycle of debt; his financial predicament, however, is attributable partially to his flagrant disregard of the court's orders. Nevertheless, the court ruled that his decreased income was a substantial change of circumstances and reduced his monthly obligation to \$1,000 retroactive to April 1, 2003, the date of the onset of his disability.¹

¹ Judy did not file a cross-appeal challenging the effective date of the reduced maintenance award.

The trial court's decision to reduce James' obligation to \$1,000, but to deny his motion to terminate his obligation, based on the current needs of the parties and their economic circumstances, was not an abuse of discretion.

Finally, James contends that he was not given certain credits for money paid to Judy and, as a consequence, the arrearages must be recalculated. He contends that credit should be given against the July 24, 2002 judgment and against the March 17, 2004 judgment. No appeal was taken from either of these judgments. Thus relief, if available, must be pursuant to CR 60.02.

James did not frame his argument below in terms of an CR 60.02 motion, thus, it is unclear on which specific provision of that rule upon which he relies. However, even if we were to find that the rule was properly invoked, no provision supports his request to modify the prior judgments entered. James failed to offer any documentation to support his argument that he was denied the credits he alleges and offered no explanation of why he could not have presented evidence at the prior hearings. We can find no provision of CR 60.02 which justifies the relief requested.

The judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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