

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000267-MR

RANDOLPH SCOTT

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE ELISE GIVHAN SPAINHOUR, JUDGE
ACTION NO. 99-CI-00714

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Randolph Scott has appealed from the Bullitt Circuit Court's January 24, 2013, order holding him in contempt for failing to pay his court ordered child support arrearage. We affirm.

Scott was married to Angela Bryant for several years and the marriage produced four children. Pursuant to their divorce decree entered in 1999, which

incorporated the parties Separation Agreement, Bryant received custody of the children and Scott was ordered to pay \$154.00 per week in child support.

According to Scott, he and Bryant subsequently orally agreed to modify his child support obligation on at least two different occasions when two of the children left Bryant's home and came to live with Scott. However, no modification of the original child support order was ever sought.

In early 2012, Bryant claimed Scott had a substantial child support arrearage and sought to have that amount set by the trial court. On March 14, 2012, the Commonwealth intervened and asked the trial court to set the arrearage amount and establish a payment plan. A hearing was convened on July 17, 2012, on the Commonwealth's motion. Although the record reveals he was well-aware of the pending hearing date, Scott did not attend the hearing. In an order entered on July 30, 2012, the trial court determined Scott was in arrears in the amount of \$22,188.89 and required him to pay that amount at the rate of \$700.00 per month. Because all of the children had reached the age of majority, no current support was ordered. No challenge was levied against the trial court's July 30, 2012, order.

On December 26, 2012, the Commonwealth moved to have Scott held in contempt for his failure to pay his child support arrearage as ordered. A hearing on the motion was convened on January 24, 2013, wherein the Commonwealth produced testimony showing Scott was in arrears in the amount of \$21,984.81 after accounting for two small payments made in November of 2012. Scott presented two witnesses: Brandy Scott, his eldest daughter, and Rebecca Scott, his most

recent ex-wife. Both testified they were aware of the oral agreements between Scott and Bryant to reduce Scott's child support obligation during the time his minor children were residing with him. Neither was questioned nor testified regarding the specific details of the alleged agreements. At the conclusion of the hearing, the trial court found Scott in contempt, sentenced him to serve 179 days in jail, and set a purge amount of \$700.00. The trial court ruled Scott would be permitted to have job search release and would be entitled to work release upon obtaining employment. Scott paid the purge amount the same day and was released from custody. He then appealed from the trial court's decision finding him in contempt.

Scott now contends the trial court erred in failing to take into account that he was solely providing for his children while they resided with him; he and Bryant had privately agreed to reduce the amount of support due based on the change in circumstances; and strict adherence to the child support guidelines would result in an unjust and inappropriate result. He contends these failures resulted in an infirm finding by the trial court that he was in contempt and now seeks reversal of that ruling. The Commonwealth argues the matter is now moot because Scott has purged himself of his contempt and requests dismissal. Alternatively, the Commonwealth alleges the trial court's ruling was factually and legally correct. We disagree that the issue presented has become moot, but agree that the trial court's ruling was correct.

Scott argues the trial court should have modified his child support obligation based on the change in circumstances resulting from his children's change of residence and his support of those children during the times they resided in his home rather than with Bryant. He contends that when coupled with his private agreement with Bryant to reduce his child support obligation, deviation from the child support guidelines was mandated.

We have reviewed the entire record and find no indication Scott ever raised this issue below although he had ample opportunity to do so. It is axiomatic that a party may not "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321, 327 (Ky. 2010) (citations omitted). As the trial court was not presented with this argument, nor given the opportunity to rule thereon, we shall not consider it for the first time on appeal. Therefore, we conclude the question is not properly before us and requires no further discussion.

The sole issue before the trial court at the January 24, 2013, hearing was whether Scott should be held in contempt for his failure to comply with previous orders requiring him to make monthly payments toward his child support arrearage. A party's noncompliance with a support or custody decree "shall constitute contempt of court." KRS¹ 403.240. Pertinent to this appeal, accrued child support cannot be retroactively modified, KRS 403.213, and a father's

¹ Kentucky Revised Statutes.

agreement to take custody of his children does not terminate his obligation to pay support until legal custody is changed. *Price v. Price*, 912 S.W.2d 44 (Ky. 1995). We review a trial court's exercise of its contempt powers for an abuse of discretion. *Lewis v. Lewis*, 875 S.W.2d 862 (Ky. 1993).

Here, the Commonwealth presented undisputed testimony that Scott had been ordered to pay \$700.00 per month, but in the five months since entry of the order, had made only two payments totaling just over \$200.00. This unequivocal evidence of Scott's violation of the trial court's order was sufficient to satisfy the Commonwealth's burden of proof and it became incumbent on Scott to produce evidence justifying his noncompliance.

Once the moving party makes out a *prima facie* case, a presumption of contempt arises, and the burden of production shifts to the alleged contemnor to show, clearly and convincingly, that he or she was unable to comply with the court's order or was, for some other reason, justified in not complying. *Clay v. Winn*, 434 S.W.2d 650 (Ky. 1968). This burden is a heavy one and is not satisfied by mere assertions of inability. *Dalton v. Dalton*, 367 S.W.2d 840 (Ky. 1963). The alleged contemnor must offer evidence tending to show clearly that he or she has made all reasonable efforts to comply. *Id.*

Commonwealth, Cabinet for Health and Family Services v. Ivy, 353 S.W.3d 324, 332 (Ky. 2011). Scott failed to meet his burden of production.

During the contempt hearing, Scott's counsel informed the trial court that Scott had been unable to work in his profession as a truck driver due to his operator's license being suspended in November of 2012 for his failure to pay his

child support obligation. One of Scott's own witnesses contradicted this statement by testifying Scott had been terminated from his last employment for excessive absenteeism. The trial court was unpersuaded that Scott had exhausted all available options to obtain gainful employment or that the loss of his operator's license constituted a sufficient mitigating circumstance for his failure to comply. As to Scott's arguments related to the alleged private agreement with Bryant, the trial court noted accrued child support obligations could not be retroactively modified.

We discern no abuse of the trial court's substantial discretion in holding Scott in contempt under the factual circumstances presented. As noted previously, the Commonwealth clearly satisfied its burden of proving Scott's failure to comply with a lawful court order and Scott failed to produce contrary evidence. Further, Scott did not introduce evidence tending to absolve him of responsibility to comply with the trial court's order nor that his noncompliance was unwilling or otherwise justified. Thus, we are convinced the trial court's decision was justified.

For the foregoing reasons, the judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

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