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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2016-CA-000879-ME

EZEKIEL JOHN BURNETT — APPELLANT

v.

APPEAL FROM KENTON FAMILY COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 11-J-00396

COMMONWEALTH OF KENTUCKY
OBO AMANDA GERDING — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellant, Ezekiel Burnett, appeals from an order of the Kenton Family Court finding him in contempt for failure to pay child support and sentencing him to 180 days, 170 of which were conditionally discharged on the condition that he make monthly payments as ordered. Appellee, the Commonwealth of Kentucky on behalf of Amanda Gerding, has not filed a

response in this Court. For the reasons set forth herein, we reverse and remand for further proceedings.

In July 2004, the Campbell Family Court entered a default judgment of paternity declaring Appellant to be the natural father of A.M.B., born to Amanda Gerding in August of 2000. The family court ordered that Appellant pay $180 per month in child support in addition to $20 per month towards an arrearage amount of $8,460, representing the support of the minor child from September 2000 until July 2004. In June 2007, the family court entered an order finding Appellant in contempt for failure to pay his support obligation.

In 2011, venue was transferred to the Kenton Family Court as neither party resided in Campbell County. Subsequently in April 2013, an agreed order signed by the Commonwealth and Appellant's attorney was entered dismissing a criminal action against Appellant for flagrant nonsupport after he submitted documentation that he was totally and permanently disabled. Gerding thereafter retained private counsel and, on February 18, 2016, filed a motion requesting that Appellant be ordered to show cause why he should not be held in contempt for failing to comply with the child support order, as well as motions to increase child support, increase Appellant's payment towards the arrearage, and for the payment of Gerding's attorney's fees.

For reasons that are unclear from the record, Appellant did not appear for the scheduled hearing on April 13, 2016. Therein, the family court found him in arrears in the amount of $34,326.05. The family court ordered Appellant,

effective February 18, 2016, to pay the sum of $100 per month towards the arrearage in addition to his current monthly obligation of $180. The family court scheduled a hearing for June 1, 2016, to address the remaining issues. The record does indicate that shortly after the April 13th hearing concluded, Appellant appeared at the courthouse. A notation on the docket sheet shows that the family court advised Appellant of the June hearing date and appointed a public defender to represent him.

Appellant appeared at the June 1, 2016 hearing without counsel. He informed the family court that he had contacted the Department of Public Advocacy (DPA) and was told that his appointed attorney was out of town. The family court chastised Appellant, commenting that he was instructed in April to contact DPA. The family court stated that Appellant was not entitled to counsel with respect to the non-contempt issues and then directed someone in the courtroom to contact DPA and have it send over an attorney for the contempt portion of the hearing.

With respect to the non-contempt issues, Appellant testified that he had been working 28-30 hours per week at a Direct TV call center for approximately six months and was earning $9.50 an hour. He testified that prior to that, he had not been employed since 2006 due to medical issues. Appellant explained that although his doctor had declared him totally disabled and instructed him not to work, he was told by the social security administration that he was capable of a "sit down job." Ms. Gerding also testified that she worked

approximately 35 hours per week at a rate of $13.00 per hour. She explained that she did not have health care coverage through her employer but did have coverage through the state and that a portion of Appellant's arrearage was owed to the state for that coverage.

The family court then proceeded to the civil contempt portion of the hearing. The family court informed the public defender that had been sent over that he and Appellant had five minutes to prepare. After speaking with Appellant, the public defender requested a continuance, explaining that Appellant was not in DPA's system and thus, he had no ability to obtain any information. The family court denied the request, noting that it had appointed counsel on April 1, 2016, and had informed Appellant that he needed to contact the DPA office.

During the contempt portion of the hearing, Appellant again testified that he had not been employed until approximately six months prior to the hearing due to medical conditions. He testified that since taking the current job, child support payments were being taken out of his check. The public defender again requested additional time to obtain Appellant's medical records in light of the fact that the Commonwealth had previously dismissed the flagrant non-support case due to "authenticated evidence" that Appellant was permanently disabled and unable to work. At the close of Appellant's testimony, the family court denied Gerding's motion to modify child support, leaving Appellant's current obligation at $180 per month, but granted the motion as to the arrearage and ordered Appellant to pay $100 per month towards the arrears. The family court further

ordered the arrearage payment to increase to $150 per month on January 1, 2017. The family court held Appellant in contempt for his failure to pay his support obligation and sentenced him to 180 days imprisonment, with 170 being conditionally discharged so long as Appellant remained current on his monthly payment obligations. The remaining ten days were set aside on the condition that Appellant pay $500. Finally, the family court ordered that Appellant pay $300 of Gerding's attorney's fees. Appellant now appeals to this Court as a matter of right.

Appellant argues in this Court that the family court erred by denying his request for a continuance and proceeding with the contempt hearing without permitting his appointed counsel to adequately prepare. Furthermore, Appellant argues that even if this Court concludes that a continuance was not warranted, the family court's imposition of a 170-day sentence of incarceration if Appellant fails to remain current on his payment obligation must be vacated. We agree.

It is well established that a trial court has inherent power to enforce its judgments by means of the incarceration of a person who is found in contempt of a lawful order of the court. *Lewis v. Lewis*, 875 S.W.2d 862, 864 (Ky. 1993). The failure to pay court-ordered child support is an example of civil contempt. The purpose of civil contempt is to coerce rather than punish. Ultimately, then, the defining characteristic of civil contempt is the fact that contemnors "carry the keys of their prison in their own pockets." *Blakeman v. Schneider*, 864 S.W.2d 903, 906 (Ky. 1993). If the contemnor absolutely has no opportunity to purge himself

of contempt, however, then such imprisonment can be deemed punitive in nature and in the nature of a proceeding for criminal contempt.

Furthermore, contempt power is an extraordinary use of a court's authority and carefully circumscribed. *Lewis,* 875 S.W.2d at 864. The power of contempt cannot be used to compel the doing of an impossible act. *Rudd v. Rudd*, 184 Ky. 400, 214 S.W. 791, 796 (1919). The court can find a defendant in civil contempt only where the defendant is found to have a present ability to pay the obligation. The question of the ability of a debtor to satisfy a judgment is a question of fact to be determined by the trial judge. *Clay v. Winn*, 434 S.W.2d 650, 652 (Ky. 1968). To avoid civil contempt, "[a]n inability to comply must be shown clearly and categorically by the defendant, and the defendant must prove that he took all reasonable steps within his power to insure compliance with the order." *Blakeman*, 864 S.W.2d at 906 (citing *Campbell County v. Kentucky Corrections Cabinet*, 732 S.W.2d 6 (Ky. 1989)). As noted by Kentucky's then-highest Court in *Clay*, if the defendant is "unable to satisfy the judgment at the time he was adjudged in contempt this would constitute a valid defense." *Id.* at 652. The *Clay* Court further indicated that the trial judge should make a finding of fact on the question of the ability to pay and any further contempt proceedings should be limited to those amounts which the delinquent defendant is found to be able to pay. *Id.*

In *Shillitani v. U.S.*, 384 U.S. 364, 371, 86 S.Ct. 1531, 1536, 16 L.Ed.2d 622 (1966), the United States Supreme Court held that "[t]he conditional nature of the imprisonment—based entirely upon the contemnor's continued

defiance—justifies holding civil contempt proceedings absent the safeguards of indictment and jury, provided that the usual due process requirements are met." (citation omitted). Accordingly, a contemnor is entitled to representation by counsel and an opportunity to terminate one's incarceration. *See generally Campbell v. Schroering*, 763 S.W.2d 145 (Ky. App. 1988).

Appellant does not dispute that the family court acted within its authority in holding a civil contempt hearing. Rather, he contends that the family court abused its discretion in denying his motion for continuance to allow his appointed counsel further time to investigate his case and prepare a defense.

The trial court has broad discretion in granting or denying a continuance. *Pelfrey v. Commonwealth*, 842 S.W.2d 524, 525 (Ky. 1993). This Court will not reverse for failure to grant a continuance absent a showing that the trial court abused its discretion. *Abbott v. Commonwealth*, 822 S.W.2d 417, 418 (Ky. 1992). In *Snodgrass v. Commonwealth*, 814 S.W.2d 579 (Ky. 1991), *overruled on other grounds in Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001), our Supreme Court set forth several factors to be considered before deciding whether to grant a request for a continuance:

> Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

*Id.* at 581. Notably, the language itself highlights the discretion of the court in determining whether to grant a continuance. Further, the language does not mandate that all factors must be delineated in the court's decision as to whether to grant a continuance.

After reviewing the video of the June 1, 2016 hearing, we are compelled to find that the family court failed to properly consider Appellant's request for a continuance. The sole reason for the denial was that the family court stated it had informed Appellant in April 2016 that counsel would be appointed and that he was to appear at the June 1, 2016 hearing. We would point out that there is no evidence pertaining to the family court's conversation with Appellant other than a notation on the docket that such occurred. Consequently, we are unable to discern whether Appellant understood the process of obtaining a public defender or what was expected of him. To be sure, DPA did not have Appellant in their system as of the June 1, 2016 hearing.

Appellant relies on a panel of this Court's decision in *Grant v. Dortch*, 993 S.W.2d 506 (Ky. App. 1999). Therein, the trial court appointed the defendant counsel at the beginning of a hearing and then subsequently denied counsel's request for a continuance. On appeal, this court reversed, noting that "permitting the accused to speak with an attorney for the first time for a few minutes prior to the hearing does not constitute a fair opportunity to present a defense. Accordingly, we hold that the trial court abused its discretion in denying the motion for a continuance." *Id.* 508.

*Grant* is unquestionably distinguishable from the instant case in that it concerned a criminal rather than civil contempt proceeding. However, we believe that its reasoning is equally applicable to the circumstances herein. As previously noted, to avoid civil contempt, "[a]n inability to comply must be shown clearly and categorically by the defendant." Certainly, no one can dispute that Appellant's arrearage is substantial and Gerding has been denied support essentially since the birth of their child. However, the record establishes that the Commonwealth had previously dismissed its non-support case against Appellant based upon "authenticated evidence" of his permanent disability and inability to work. Had counsel been given the opportunity to investigate the matter and obtain evidence from Appellant's doctors, he may have been able to again prove that Appellant's failure to comply with the support order was through no fault of his own.

Furthermore, because a continuance was not granted, the trial court was not presented with evidence concerning Appellant's other expenses and life necessities, and thus could not have made accurate findings of fact as to Appellant's ability to pay. Accordingly, we cannot determine whether the amounts Appellant was ordered to pay towards his monthly obligation, arrearage, and Gerding's attorney fees were reasonable. Particularly in light of the prior finding of his inability to pay, we must agree with Appellant that he was prejudiced by the inability of his counsel to present any medical evidence of his condition or even his other financial obligations at the time of the hearing. Accordingly, the family

court's refusal to grant a continuance was an abuse of discretion and denied Appellant a fair opportunity to be heard and present a defense.

Appellant next argues that even if the family court acted within its discretion in denying the continuance and proceeding with the contempt hearing, the family court erred in imposing a conditional 170-day incarceration period if Appellant failed to remain current on his payment obligations. The family court actually imposed a 180-day conditional sentence. Although the family court set a purge amount of $500 for ten days of the sentence, it refused to so for the other 170 days despite a request from counsel. Appellant contends that such was erroneous because he had no present ability to perform future obligations and that a purge condition must be something presently within the contemnor's ability to perform. We agree.

In *Commonwealth, Cabinet for Health and Family Services v. Ivy*, 353 S.W.3d 324 (Ky. 2011), our Supreme Court addressed a virtually identical situation:

> Here, in addition to modifying the amount of Ivy's support obligation, the family court found Ivy in contempt for having violated the support order, sentenced her to serve thirty days in the McCracken County jail, but stayed execution of that sentence on condition that Ivy "pay her monthly child support obligation of $60.00, as it becomes due, plus pay her arrears as follows: pay $5.00 per month until the arrears are paid in full." Had the court properly found Ivy in contempt, it could, as a compensatory remedy, have ordered her to make payments toward her arrears in an amount she could afford. The court also could have ordered her imprisonment for past non-compliance. *Lewis*, 875

> S.W.2d at 864. The court's attempt to fashion a coercive remedy, however, by threatening Ivy with fixture incarceration for future violations of her support order, did not provide her with a true opportunity for purging, and thus was invalid. As noted above, the purge condition of a coercive order must be something presently within the contemnor's ability to perform. Ivy had no present ability to perform future obligations. By itself, moreover, a future failure to pay would not, in and of itself, the court's order notwithstanding, justify Ivy's incarceration. That future conduct was not, and could not be, the subject of the pending contempt motion because it had yet to occur. If Ivy did fail to pay, she would be entitled to notice, a new hearing, and a finding that at that future point in time she had the ability to comply. *See, e.g., Tucker v. Tucker*, 10 Ohio App.3d 251, 461 N.E.2d 1337 (1983). Even were it valid, therefore, the court's order would amount to little more than a reaffirmation of the support order.

*Id.* at 335. For the same reasons set forth in *Ivy*, we conclude that the family court's imposition of the conditionally-discharged sentence based upon Appellant's future compliance with the support order was erroneous.

For the reasons set forth herein, we reverse the order of the Kenton Family Court and remand this matter for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPLELLANT:

Kathleen K. Schmidt
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