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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001475-MR

GREGORY J. SCHNABEL, JR. APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DAWN M. GENTRY, JUDGE
ACTION NO. 12-J-01045

COMMONWEALTH OF KENTUCKY, EX REL.
JESSICA DEAN APPELLEE

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; GOODWINE AND KRAMER, JUDGES.

GOODWINE, JUDGE: Schnabel appeals from an order of contempt entered by the Kenton Family Court. The family court found he failed to timely pay $40 per

month toward his child support arrearage owed to the Commonwealth of Kentucky. After a thorough review of the record and applicable legal authority, we dismiss this appeal as moot.

BACKGROUND

Schnabel is the biological father of B.S. who was born November 25, 2010. The family court entered a judgment of paternity and uniform child support order on December 7, 2012. The family court ordered Schnabel to pay (1) $206.00 per month current child support; and (2) $40.00 per month toward his arrearage. An arrearage accrued because the child support was retroactive back to November 25, 2010. B.S. was placed in foster care and received state benefits. Schnabel regained custody shortly thereafter.

On September 15, 2016, the Commonwealth filed an affidavit alleging Schnabel was in arrears $3,164.30. The record did not contain a payment ledger to verify that amount; however, Schnabel did not contest it. The family court held a hearing on September 28, 2016, and Schnabel testified B.S. was in foster care for some time but currently he had custody.[1] At that time, the Commonwealth requested Schnabel pay $100.00 each month toward the arrearage. Schnabel said that amount was "too steep," especially given that he now had custody of B.S. In

[1] The family court never entered an order modifying the child support to correspond with Schnabel's custody of the minor child. The Commonwealth clarified that it was only seeking to collect of the arrearage of $40.00 per month.

addition to said minor child, Schnabel was caring for his 18-month-old child, his girlfriend, and her three children. The family court inquired of Schnabel what amount he could pay but he did not offer an amount. The family court then ordered Schnabel to pay $60.00 per month and said that was the "end of the negotiations." The family court, however, failed to state a basis for the increased monthly payment amount and failed to find that Schnabel was able to pay $60.00 a month. Schnabel was unemployed.

The record contains a docket order entered on September 29, 2016, which states, "$60/month. Set Review for Comp 1/25 @1:30 5B" and "$81 DNA test 30 days." The family court set a review in January to see if Schnabel understood and complied with the order to do two things: (1) pay $81.00 for the DNA test; and (2) pay $60.00 per month toward the arrearage. The family court warned Schnabel that if he failed to comply, he would be sentenced to jail time for contempt. There was no oral or written finding of Schnabel's ability to pay either amount.

The January 25 review was rescheduled for February 24, 2017. Another family court judge presided over that hearing.[2] The Commonwealth stated

[2] The initial ruling from the Kenton Family Court that Schnabel pay $60.00 per month was entered by Judge J. Michael Foellger not Judge Gentry. However, Judge Gentry presided over the contempt hearing and all subsequent hearings. Though, the docket sheet reflected the $60.00 per month amount, the child support officer testified that their records still reflected the $40.00 per month toward the arrearage.

that Schnabel had not made monthly child support arrearage payments. Schnabel testified he made payments and produced a receipt to the Commonwealth. Schnabel also testified that he was not working and was supporting the minor child and did not have the money to pay toward the arrearage, especially since he just paid for Christmas and birthday presents for B.S.

Based upon Schnabel's admission that he did not timely pay the $40.00 per month ordered at the previous hearing, the Commonwealth asked for 30 days' jail time if he did not pay the monthly amount previously ordered. Schnabel said that he did not understand why he would have 30 days of jail time because he started making payments. The family court continued the hearing to May 24, 2017.

At that time, the Commonwealth agreed that Schnabel made payments in March, but that was the last time he paid toward the arrearage. Schnabel produced a receipt dated May 19, 2018, showing that he paid $200.00 toward the arrearage. Despite this evidence, the family court indicated the record was unclear if Schnabel previously entered an admission of contempt and offered an evaluation to see if he qualified for the services of a public defender.

Schnabel completed the affidavit of indigency showing: (1) unemployment; (2) there were two adults and five children in his household; (3) the total household income was $1,600 per month; (4) rent was $550 per month;

and (5) the family received $700 in food stamps and WIC benefits. The family court found Schnabel to be indigent and appointed a public defender to represent him. He entered a plea of not guilty to the charge of contempt, and the family court set a review hearing for July 26, 2017.

At the review hearing, a Kenton County Child Support officer testified that Schnabel was ordered to pay $40.00 toward his child support arrearage, totaling $2,648.30. A cursory review of the record shows that since the motion to show cause and accompanying affidavit were filed by the Commonwealth, Schnabel paid a total of $435.00 toward the arrearage, in addition to $81.00 for the DNA test. Over the course of 10 months, from October of 2016 through July 27, 2017, Schnabel paid more than $40.00 a month, albeit, not in regular monthly payments.

Schnabel argued that he was behind in his arrearage payments because he was caring for five minor children in his household and his income was not sufficient to make ***timely*** arrearage payments. But, he did, in fact, pay more than the total required over time. No evidence was presented to refute his testimony. Schnabel did not argue that he was unable to pay, only that he could not timely pay. In fact, he produced receipts of sporadic payments, which over time, totaled more than his 10-month required amount.

The Commonwealth argued that because the lump sum payments were sporadic and not monthly, he should be held in contempt. The family court found Schnabel in contempt for failing to pay $40.00 monthly, again, without specific findings as to Schnabel's ability to pay the $40.00 per month and without an acknowledgement that he had, in fact, paid over ten months what was due.

The family court sentenced Schnabel to serve two days in jail, suspend 28 days, conditionally discharged for two years, if Schnabel paid $300.00 in a lump sum payment to purge on or before August 25, 2017. Schnabel argued that if he paid the purge amount, there should be no future jail time. He argued that once the purge is paid, there is no contempt. The family court ruled it would purge him of his active jail time only. The family court entered its contempt order stating if the $300.00 was not paid, Schnabel was to report to jail on August 26, 2017 to serve two days. This appeal followed.

On November 7, 2017, while this appeal was pending, the Commonwealth filed a motion to revoke Schnabel's conditional discharge. On March 28, 2018, with counsel present, Schnabel "admitted"[3] he violated the July 27, 2017 order finding him in contempt. By admitting the violation, Schnabel acknowledged he had the ability to pay his child support arrearage obligation but failed to do so.

[3] A notation written on the docket sheet.

On April 20, 2018, the family court entered an order revoking Schnabel's conditional discharge stating:

> [Schnabel] being present in court and represented by [counsel] on 03/28/18, and [t]hat upon [Schnabel's] admission to being in violation of the terms of the Court's Order of Contempt entered on 07/26/2017, by failing to pay child support, the conditional discharge of [his] sentence of 30 days incarceration is hereby revoked and [Schnabel] shall be required to serve 30 days of that sentence OR pay $150.00 plus his obligation by 04/27/2018.

Schnabel did not pay the $150.00, plus his obligation, by April 27, 2018. Rather, he served the 30 days.

This Court entered a show cause order on February 14, 2019 ordering Schnabel to show cause why this appeal should not be dismissed as moot based on Kentucky case law. "The general rule is, and has long been, that 'where, pending an appeal, an event occurs which makes a determination of the question unnecessary or which would render the judgment that might be pronounced ineffectual, the appeal should be dismissed.'" *Morgan v. Getter*, 441 S.W.3d 94, 99 (Ky. 2014) (quoting *Louisville Transit Co. v. Dep't of Motor Transp.*, 286 S.W.2d 536, 538 (Ky.1956)).

Schnabel responded arguing that his appeal should not be dismissed as moot because it falls under the exceptions to mootness under *Turner v. Rogers*, 564 U.S. 431, 439-40, 131 S.Ct. 2507, 2514-15, 180 L.Ed.2d 452 (2011), which held:

> The short, conclusive answer to respondents' mootness claim, however, is that this case is not moot because it falls within a special category of disputes that are "capable of repetition" while "evading review." A dispute falls into that category, and a case based on that dispute remains live, if " . . . there [is] a reasonable expectation that the complaining party [will] be subjected to the same action again."

(Internal citations omitted). We disagree for two reasons.

First, *Turner* is distinguishable on multiple fronts: (1) Turner was the subject of several civil contempt proceedings and had been jailed multiple times; (2) Turner was not represented by counsel at the contempt proceedings; (3) Turner did not receive the benefit of alternative procedural safeguards; (4) a court did not find Turner able to pay his arrearage; and (5) Turner did not admit he violated any of the civil contempt orders. Unlike Turner, Schnabel (1) was subjected to ***one*** civil contempt hearing; (2) was represented by counsel; (3) received notice of the contempt proceedings and the basis therefore; and (4) received the benefit of a purge amount.

Second, Schnabel's "exception to the general mootness argument" is flawed. The exception to general mootness rule for cases capable of repetition, yet evading review, has two elements: (1) challenged action must be too short in duration to be fully litigated prior to its cessation or expiration, and (2) there must be reasonable expectation that same complaining party will be subjected to same

action again. Admittedly, both these elements are present here but Schnabel admitted to the violation, having the ability to pay but failing to do so.

The Commonwealth filed a response reiterating the holding in *Morgan v. Getter*, 441 S.W.3d 94, 99 (Ky. 2014), that "a moot case is one which seeks a judgment . . . upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a ***then*** existing controversy." *Benton v. Clay*, 192 Ky. 497, 233 S.W. 1041, 1042 (1921) (emphasis added). We agree.

When Schnabel admitted contempt, he waived the right to present defenses. *B.H. v. Commonwealth*, 494 S.W.3d 467, 473 (Ky. 2016) ("The effect of the [admission] is to waive those other defenses [defenses other than that no offense has been charged] and any appeal that seeks to raise them."). Specifically, he waived the right to present the defense that he was unable to pay through no fault of his own. *See Commonwealth v. Marshall*, 345 S.W.3d 822, 829 (Ky. 2011) ("a defendant pleading guilty to flagrant nonsupport admits not making payments despite ability to do so[.]").

At the March 28, 2018 hearing, Schnabel offered no evidence regarding his inability to pay. Rather, he simply admitted to violating the order of contempt, did not pay the purge amount nor the monthly obligation, and served the 30 days which were the subject of the July 27, 2017 order.

The sole issue Schnabel raises on appeal is whether the family court abused its discretion in finding Schnabel in contempt for failing to pay arrearage-only child support consistently month to month.

STANDARD OF REVIEW

Generally, a trial court has broad discretion to enter a contempt order when one willfully disobeys a court order. *Crowder s. Rearden*, 296 S.W.3d 445, 450 (Ky. App. 2009). Consequently, we will not disturb a court's decision regarding contempt absent an abuse of its discretion. "The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007) (internal citations omitted).

ANALYSIS

Schnabel argues on appeal that he was unable to pay child support, which precluded the trial court from holding him in contempt for failing to do so. However, Schnabel never argued before the family court an inability to pay his child support. He provided receipts of having made sporadic payments, which more than equaled the amount due for the 10-month period.

Contempt is the "willful disobedience of—or open disrespect for—the rules or orders of a court." *Crowder*, 296 S.W.3d at 450 (internal citations omitted). Contempt is a measure of last resort, not first resort. *Gascho vs. Global*

Fitness Holdings, LLC, 875 F.3d 795 (6th Cir. 2017); *Young v. United States*, 481 U.S. 787, 801, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987).

Schnabel essentially cites the defense of impossibility, maintaining that he did not willfully disobey a court order. He simply could not make the payment. Yet, on March 28, 2018, he admitted he violated the contempt order and served the 30 days which were the subject of that order. Nothing is left to be accomplished by this appeal. Admittedly, there were no written findings of Schnabel's ability to pay. However, Schnabel negated that requirement by admitting that he could pay but failed to do so.

Certainly, if Schnabel is brought back before the family court for failing to pay his monthly arrearage, the family court must make a finding that he has the ability to pay under the circumstances presented to the family court at that time. *Lewis v. Lewis*, 875 S.W.2d 862, 864 (Ky. 1993). There must be a specific finding of fact on the contemptor's ability to pay. *Id*. (internal citations omitted). "[A]ny further contempt proceedings should be narrowly focused on the amount that the delinquent person is found able to pay." *Id.*

As of this writing, Schnabel is no longer subject to 30 days of jail time pursuant to the July 27, 2017 order.

ORDER

For the foregoing reasons, we hereby DISMISS this appeal.

ALL CONCUR.

March 29, 2019
ENTERED

/s/ Pamela R. Goodwine
JUDGE, COURT OF APPEALS

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