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**STATE OF MINNESOTA
IN COURT OF APPEALS**

A11-685

A11-820

In re the Marriage of:
Teri Joan Reed, petitioner,
Respondent,

vs.

Dean Essam Baaj,
Appellant.

Filed April 16, 2011
Affirmed in part and reversed in part
Randall, Judge*

Polk County District Court
File No. 60-F4-04-001725

Teri J. Reed, Alvarado, Minnesota (pro se respondent)

Dean E. Baaj, East Grand Forks, Minnesota (pro se appellant)

Considered and decided by Stauber, Presiding Judge; Connolly, Judge; and
Randall, Judge.

UNPUBLISHED OPINION

RANDALL, Judge

In this consolidated appeal from post-dissolution orders, appellant argues that the district court abused its discretion by refusing to hold respondent in contempt, by finding

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

him in constructive contempt for failing to pay child support, and by ordering appellant to serve jail time for violating a prior contempt order.

We conclude the district court did not abuse its discretion by refusing to find respondent in contempt, based on its conclusions that she had not violated its constructive contempt order, and by finding appellant in contempt for failing to remain current on his child support obligations. We affirm these parts of the district court's orders. But because the district court failed to provide appellant with the proper procedural safeguards on criminal contempt, we reverse the district court's order directing him to serve 10 days in jail.

FACTS

Appellant Dean Essam Baaj and respondent Teri J. Reed were divorced in 2005. The parties are the parents of two minor children, and have engaged in a protracted battle over issues of custody, parenting time, and child support. This appeal is another round in that battle.

In 2008, the district court issued an amended parenting time order, listing in exhaustive detail the parties' rights to parenting time. At the time this order was issued, the district court chose not to appoint a parenting time expeditor because of the parties' limited financial resources. Since that time, the parties have filed at least five motions for contempt. On April 22, 2010, the district court issued two separate orders, one on a motion filed by appellant to have respondent held in contempt for violating the 2008 parenting time order, and the other on a motion by respondent to have appellant held in contempt for violating the 2008 parenting time order. The district court found both parties

in contempt and sentenced each to 30 days' confinement, but added that both parties could purge themselves of contempt and serve no time so long as they obeyed the purge conditions, which are identical: "Strict adherence of the parenting time format established in this Court's order of November 14, 2008."

In November 2010, appellant asked that respondent be incarcerated for failing to comply with the April 2010 purge condition. Appellant asserted that respondent was (1) denying him liberal parenting time; (2) denying his right to participate in medical appointments; (3) denying his right to joint legal custody by refusing to pay for their son's driver's education course; (4) violating the court's order regarding transporting property back and forth between the parties' homes; this related to \$150 he gave to the children, which respondent took to pay for necessities; and (5) denying him access to the children during vacation time by limiting their use of cell phones. On February 18, 2011, the district court concluded that respondent had acted in accordance with the strict terms of the November 2008 order, and the court refused to find her in contempt.

Respondent asked the district court to incarcerate appellant for failing to comply with the April 2010 purge condition, arguing that appellant (1) denied her parenting time on Christmas Day 2010; (2) caused her to incur \$128.25 in transportation costs; (3) denied her cell phone access to the children during vacation time; (4) denied her a right to first refusal of parenting time as set forth in the November 2008 order; (5) was late returning the children from parenting time; and (6) failed to pay his court-ordered child support. On April 13, 2011, the district court concluded that (1) appellant was obligated to pay \$128.25 for shared transportation costs; (2) appellant was in constructive

civil contempt of the April 2010 order for failing to notify respondent of her right to first refusal of parenting time;¹ and (3) appellant had violated the child support magistrate's (CSM's) order for support and therefore was in constructive civil contempt of the CSM's order. For violation of the CSM's order, the district court imposed a sanction of 60 days confinement, but set as a purge condition that appellant strictly comply with the support order. The district court found appellant failed to comply with the April 2010 purge condition, because he did not strictly adhere to the November 2008 parenting time order by denying respondent her right of first refusal, and imposed 10 days of confinement, with no purge conditions. The district court stayed the remaining 20 days, on condition that appellant comply with the April 2010 and November 2008 orders and pay respondent \$128.25. Appellant filed a notice of appeal from both the February 18 and April 13 orders, and this court consolidated these appeals.

D E C I S I O N

We review the district court's contempt decisions for an abuse of discretion and its factual findings for clear error. *In re Welfare of J.B.*, 782 N.W.2d 535, 538 (Minn. 2010). A district court abuses its discretion when its decision is not supported by facts in the record, when it misapplies the law, or when its determination is against logic and facts in the record. *Foster v. Foster*, 802 N.W.2d 755, 757 (Minn. App. 2011).

¹ The November 2008 order provided that if either parent was unable to care for the children for more than four hours during a scheduled parenting time, the other parent must be contacted and offered the right of first refusal to provide care before other arrangements could be made.

February 18, 2011 Order

Appellant challenges the district court's order refusing to hold respondent in contempt, by asserting that five of the district court's factual determinations are clearly erroneous because they are not supported by record evidence. We have carefully reviewed the record and the district court's factual findings and agree that the district court properly concluded that there was no basis for finding respondent was in violation of its constructive contempt order. *See Wilson v. Moline*, 234 Minn. 174, 182, 47 N.W.2d 865, 870 (1951) (stating that an appellate court need not "discuss and review in detail the evidence for the purpose of demonstrating that it supports the trial court's findings" and that its "duty is performed when [it] consider[s] all the evidence . . . and determine[s] that it reasonably supports the findings"); *Vangsness v. Vangsness*, 607 N.W.2d 468, 474-75 n.1 (Minn. App. 2000) (applying *Wilson* in dissolution case).

April 13, 2011 Order – Child Support

The district court found appellant in constructive contempt of the CSM's January 5, 2009 child support order for failing to fully pay child support during calendar year 2010. The district court found that appellant was able-bodied and capable of earning sufficient income and noted that appellant admitted that he was not current with support. The district court imposed a sanction of 60 days' confinement but stayed the confinement on condition that appellant remain current on support. Although appellant contends that he has provided other financial assistance, he does not contest that he had not strictly adhered to the child support order.

A civil contempt order is an appropriate means of enforcing a child support order. *Hopp v. Hopp*, 279 Minn. 170, 173, 156 N.W.2d 212, 216 (1968). The ordering court must make certain findings before imposing a constructive civil contempt order: (1) the court must have subject matter and personal jurisdiction; (2) the required acts must be clearly defined; (3) the contemnor must have notice of the order and reasonable time in which to perform; (4) the party affected by the failure to perform must apply to the court for relief on specific grounds; (5) the contemnor must have notice and an opportunity to either show compliance or explain the failure to comply; (6) the court must make a formal determination; (7) the contemnor cannot be directed to do an impossible task, but it is the contemnor's burden to prove inability; and (8) if confinement is ordered, the contemnor must have the ability to secure release by performance. *Id.* at 174-75, 156 N.W.2d at 216-17.

Appellant argues that he did not have adequate notice of the acts required of him and that it was impossible to perform because he was unemployed part of the time. But the CSM's January 2009 order is clear and contains language directing appellant to apply for modification in the event his employment changed. The district court found that the 2009 order set forth the amount appellant needed to pay; that appellant had clearly not complied with the terms of the order; and that appellant was "in good physical health and able bodied and capable of earning sufficient income" to make the ordered payments. The court also found that appellant had been employed from May to September, had received unemployment benefits and had "several side jobs." There is sufficient record evidence to

support the district court's findings; therefore, the district court did not abuse its discretion by finding appellant in constructive civil contempt.

April 13, 2011 Order-Violation of Prior Contempt Order

Appellant argues that the district court abused its discretion by finding that he violated the purge conditions of its prior constructive contempt order, which stated that appellant must strictly adhere to the terms of the November 2008 parenting time order. The district court found that appellant failed to notify respondent of times when she could exercise her right of first refusal under the order. The district court ordered appellant to serve 10 of the 30 days imposed in April 2010 when it found appellant in constructive contempt.

Contemptuous conduct can be either direct in nature, occurring in the immediate presence of the court, or constructive, occurring outside of the presence of the court. *State v. Tatum*, 556 N.W.2d 541, 544-45 (Minn. 1996). Disobedience of a valid court order outside of the court, as here, is constructive contempt. *See* Minn. Stat. § 588.01, subd. 3(3) (2010). Direct contemptuous conduct can be punished summarily; a hearing must be held before constructive contemptuous conduct can be sanctioned. *Tatum*, 556 N.W.2d at 545. Because the conduct occurred outside of the court, this is a case of constructive contempt; appellant was afforded a hearing.

The doctrine of contempt is further divided by the purpose for the court's contempt order. *Id.* at 544. Civil contempt proceedings are remedial in nature and are designed to "induce future performance of a valid court order, not to punish for past failure to perform." *Mahady v. Mahady*, 448 N.W.2d 888, 890 (Minn. App. 1989). A

civil contempt order allows the contemnor to obtain relief from the sanction through compliance with the court's order. *Id.* The district court's April 2010 order is a classic civil contempt sentence: it found appellant in constructive civil contempt, imposed a 30-day sentence, and added a "purge" condition that the sentence need not be served so long as appellant complied with the parenting time order. In the case of civil contempt, a court may impose a previously ordered sanction if the contemnor fails to comply with its order, but the court "still must set a purge condition that provides the contemnor the opportunity to obtain release by compliance." *Schubel v. Schubel*, 584 N.W.2d 434, 436 (Minn. App. 1998).

Criminal contempt proceedings, on the other hand, are intended "to preserve the authority of the court by punishing past misconduct. Usually this is done through an unconditional and fixed sentence." *In re Welfare of A.W.*, 399 N.W.2d 223, 225 (Minn. App. 1987) (citation omitted). Certain procedural safeguards are required when a contemnor is charged with constructive *criminal contempt*. As in any criminal case, the contemnor is entitled to a written complaint, counsel, a jury trial, and a finding of guilt beyond a reasonable doubt. *Id.*; see *Tatum*, 556 N.W.2d at 545 n.3; see also Hon. D.D. Wozniak & Cynthia L. Lehr, *Dealing with a Double-edged Sword: A Practical Guide to Contempt Law in Minnesota*, 18 Wm. Mitchell L. Rev. 7, 22 (1992). Here, the district court imposed an unconditional sentence of 10 days to punish appellant for past misconduct, a classic example of criminal contempt. If the district court intended to impose a civil contempt sentence, it abused its discretion by failing to include a purge condition.

When a district court imposes a criminal contempt sanction without affording the contemnor all of the necessary procedural safeguards, the court improperly exercises its contempt power and the contempt order must be reversed. *Meyer v. Meyer*, 492 N.W.2d 272, 274 (Minn. App. 1992). Appellant was not afforded the required procedural safeguards for criminal contempt, and the district court's order imposing a 10-day sentence is reversed.

Affirmed in part and reversed in part.