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NO. COA10-429

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA,
ON BEHALF OF FRANKIE N.
DUNKLE,
Plaintiff,

v.

Carteret County
No. 06 CVD 1210

RODRECKUS A. UTLEY,
Defendant.

Appeal by defendant from order entered 15 October 2009 by Judge Karen Alexander in Carteret County District Court. Heard in the Court of Appeals 16 November 2010.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Bradley Dawson, for the State.

Joyce L. Terres for defendant-appellant.

BRYANT, Judge.

Because the trial court failed to make any findings of fact regarding defendant's willfulness or present ability to comply with the court's order, we must reverse the order of the trial court holding defendant in contempt of court.

On 26 October 2006, the Carteret County Child Support Enforcement Agency ("plaintiff"), on behalf of Melinda D. Dunkle¹,

¹ The complaint cites plaintiff as being Melinda D. Dunkle, and plaintiff continued to be referred to as Melinda D. Dunkle until 24 April 2008, when plaintiff was thereafter referred to as

filed a complaint against defendant seeking support and maintenance, medical insurance coverage or medical support, and reimbursement for public assistance provided for his two children. On 28 June 2007, with an effective date of 1 August 2007, the trial court ordered defendant to pay \$103.00 per month for temporary child support. On 1 April 2009, an order to appear and show cause for failure to comply with the support order was issued. The order cited a total of \$1,236.00 in past-due child support. Continuances were entered in the matter on 30 April 2009, 11 June 2009, 16 July 2009, 30 July 2009, and 10 September 2009. In the continuance order entered on 10 September 2009, the court stated the reason for the continuance was "the need for defendant to produce records from the NC Department of Correction." Defendant was also ordered to pay \$109.00 on or before 15 October 2009.

On 15 October 2009, following a hearing on the order to show cause, the trial court found that defendant had presented records of incarceration from the Wake County jail and was given a credit of \$412.00 towards his child support arrearage. Nevertheless, the court found defendant in willful contempt and stated that defendant could "purge himself by paying \$500.00, otherwise shall serve 30 days." On 22 October 2009, defendant purged himself of contempt by paying \$500.00. On the same day, defendant gave notice of appeal.

Frankie N. Dunkle. No explanation is given in the record for the change in name. The order appealed from cites Frankie N. Dunkle as plaintiff.

On appeal, defendant argues that the trial court erred in determining he was in contempt of court. Defendant contends that the evidence and findings of fact were insufficient to demonstrate that he willfully failed to comply with the trial court's order, or that he had the present ability to comply with the court's order. After careful review of the record, briefs and contentions of the parties, we agree and reverse.

This Court's review in civil contempt proceedings is "limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Blazer v. Blazer*, 109 N.C. App. 390, 392, 427 S.E.2d 139, 140 (1993) (citing *Koufman v. Koufman*, 97 N.C. App. 227, 230, 388 S.E.2d 207, 209 (1990), *rev'd on other grounds*, 330 N.C. 93, 408 S.E.2d 729 (1991)).

Civil contempt is based upon acts or neglect constituting a *willful* violation of a lawful order of the court. A failure to obey an order of the court cannot be punished by attachment for civil contempt unless the disobedience is willful. It is well settled that one does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered. See G.S. § 5A-21. The trial court must find as a fact that the defendant presently possesses the means to comply." *Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966).

Henderson v. Henderson, 307 N.C. 401, 408, 298 S.E.2d 345, 350 (1983) (original emphasis). Moreover, "the court must find that the party acted willfully in failing to comply with the order at issue. 'Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do

so.'" *Clark v. Gragg*, 171 N.C. App. 120, 122, 614 S.E.2d 356, 358 (2005) (quoting *Sowers v. Toliver*, 150 N.C. App. 114, 118, 562 S.E.2d 593, 596 (2002)); see also N.C. Gen. Stat. § 5A-21(a) (2009); *Tucker v. Tucker*, 197 N.C. App. 592, 595, 679 S.E.2d 141, 143 (2009) ("[i]f a trial court orders imprisonment for civil contempt, the court must also state how the defendant may purge himself of contempt and find that the defendant has the ability to do so.").

Here, the trial court wholly failed to make any findings of fact regarding defendant's willfulness or present ability to comply. Accordingly, we reverse the trial court's order.

Reversed and remanded.

Judges STROUD and BEASLEY concur.

Report per Rule 30(e).