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NO. COA10-667

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA,
by and through its Pamlico County
Child Support Enforcement Agency,
ex rel., ALLAMESHIA M. TIESMAN,
Plaintiff,

v.

Pamlico County
No. 08 CVD 106

CAREY MANN,
Defendant.

Appeal by defendant from order entered 6 January 2010 by Judge Cheryl Spencer in Pamlico County District Court. Heard in the Court of Appeals 28 October 2010.

Cynthia Y. Carroll for plaintiff-appellee Pamlico County Child Support Enforcement Agency.

Janet K. Ledbetter for defendant-appellant.

THIGPEN, Judge.

At a hearing on 2 December 2009, the trial court found Carey Mann ("defendant") in contempt for willfully failing to pay child support. In its oral ruling, the trial court stated that defendant was in "criminal contempt"; and defendant needed to pay \$200.00 immediately and obtain a job by 6 January 2010, or else defendant should "be ready to go to jail on that day." The trial court continued disposition on its oral contempt ruling until 6 January 2010, and a disposition continuance order was signed by the trial

court the same day ordering defendant to perform a "job search" prior to the disposition hearing scheduled for 6 January 2010.

On 6 January 2010, a formal contempt order ("Contempt Order") was entered by the trial court regarding the hearing on 2 December 2009. In the Contempt Order, the trial court stated defendant was in arrears in the amount of \$1,288.00 with the compliance amount being \$800.00. The Contempt Order noted that defendant was an able-bodied man, with twenty-five years of experience as a mechanic, capable of working full-time. Defendant did not have a driver's license, but the trial court observed that defendant had no other financial obligations. As a result, the trial court found defendant had willfully failed to comply with its prior order entered 3 December 2008 ordering defendant to pay \$149.00 per month in child support and \$11.00 per month in payment for arrears. The Contempt Order ordered defendant to perform an "aggressive job search" and prepare to offer proof that he had applied for jobs.

The disposition hearing was held on 6 January 2010, and the trial court afterward entered an order as to disposition ("Disposition Order"). The Disposition Order was filed on 2 February 2010, and the trial court found defendant had "done nothing that was ordered by the undersigned at the last court date." The trial court ordered defendant to go to jail for thirty days, unless his contempt was purged through a payment of \$860.00. Defendant filed notice of appeal on 2 February 2010 challenging only the Contempt Order.

ANALYSIS

On appeal, defendant presents two arguments: (1) the trial court erred by stating at the 2 December 2009 hearing that defendant was in criminal contempt, because the trial court did not follow the statutory requirements for criminal contempt in N.C. Gen. Stat. § 5A-11, -13, -14, -15 (2009); and (2) the trial court erred in finding defendant in civil contempt, because no competent evidence supported the trial court's findings that defendant willfully failed to pay child support despite the present ability to pay. We do not agree.

As a preliminary matter, we must ascertain whether the Contempt Order is civil or criminal in nature. *Hodges v. Hodges*, 156 N.C. App. 404, 406, 577 S.E.2d 121, 123 (2003). In *O'Briant v. O'Briant*, our Supreme Court stated the following in distinguishing between civil and criminal contempt: "Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil." 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985). "A major factor in determining whether contempt is civil or criminal is the purpose for which the power is exercised." *Id.* In *Bishop v. Bishop*, this Court clarified the test outlined in *O'Briant* and created a bright-line rule:

Civil Relief: If the relief is imprisonment, it is coercive and thus civil if the contemnor may avoid or terminate his imprisonment by performing some act required by the court (such as agreeing to comply with the original order). If the relief is monetary, it is

likewise civil if the monies are either paid to the complainant or defendant can avoid payment to the court by performing an act required by the court;

Criminal Relief: If the relief is imprisonment, it is punitive and thus criminal if the sentence is limited to a definite period of time without possibility of avoidance by the contemnor's performance of an act required by the court. If the relief is monetary, it is punitive if payable to the court rather than to the complainant.

90 N.C. App. 499, 505, 369 S.E.2d 106, 109 (1988).

The record in this case shows that the Contempt Order was civil in nature, despite the trial court's use of the term "criminal contempt" at the hearing. In its oral ruling, the trial court ordered defendant to pay \$200.00 and perform a "job search." The court stated that defendant would be subject to sanctions for contempt at the disposition hearing on 6 January 2010 if he did not execute these tasks. Though the trial court found defendant in contempt at the 2 December 2009 hearing, the trial court continued disposition as to the contempt to allow defendant time to perform a job search and pay \$200.00. Under these circumstances, it is apparent defendant had the opportunity to "avoid or terminate his imprisonment by performing some act required by the court," and the purpose of the contempt was to coerce defendant into getting a job and paying child support. *Bishop*, 90 N.C. App. at 505, 369 S.E.2d at 109. Therefore, the contempt ordered by the trial court at the 2 December 2009 hearing was civil contempt.¹

¹This conclusion is supported by the Disposition Order not present in this appeal, where the trial court ordered defendant into the custody of the Pamlico County Sheriff's Department pending

In light of the foregoing, a discussion regarding defendant's first argument is not necessary, because the trial court was not required to follow the mandates of Chapter 5A regarding criminal contempt. With respect to defendant's second argument, our review of civil "contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997).

At the outset of its oral ruling on 6 January 2010, the trial court noted that all its prior orders were "in full force and effect, [and] have not been modified by the court." The trial court also stated that "the purpose of the orders can still be met by compliance." These orders are not challenged on appeal, and the record shows that on 21 October 2009, defendant was found in contempt for willfully failing to pay child support despite having the ability to reasonably comply with the court's order of support. At the hearing on 2 December 2009, defendant admitted he failed to pay his support obligations. Defendant also testified he had \$200.00 in his pocket, and he wanted to pay that amount following the hearing. Defendant worked on four jobs as a mechanic in the three months before the hearing, and defendant paid no money from these jobs toward his child support obligation in this case.²

defendant's ability to purge his contempt through a payment of \$860.00.

²Defendant paid part of these earnings toward another child support obligation not at issue in this appeal.

Defendant testified he had made application for "a couple of" jobs, but had been unable to find work.

In arguing that this evidence at the hearing was not competent to support the trial court's findings, defendant attempts to rely on other evidence adduced at the hearing. This other evidence includes defendant's criminal record, his revoked driver's license, and his lack of assets and cash. However, findings supported by competent evidence are binding on this Court "regardless of whether there is evidence in the record to the contrary." *State v. Key*, 182 N.C. App. 624, 627, 643 S.E.2d 444, 447 (2007). The trial court may find a defendant in willful contempt if a defendant fails to comply with the court's order *and* the trial court finds that defendant possesses the present means to comply. *Mauney v. Mauney*, 268 N.C. 254, 257, 150 S.E.2d 391, 393-94 (1966); N.C. Gen. Stat. § 5A-21(a) (2009).

In this case, the record is clear that defendant had the ability to pay \$200.00 and the ability to apply for jobs. Thus, the trial court's findings that defendant had the ability to comply with the Contempt Order requiring him to apply for jobs was supported by competent evidence. Moreover, these findings support the trial court's conclusion of law that "[defendant] is in contempt[.] . . . Because [defendant] has the present ability to comply with said Order or has the ability to take reasonable measures to comply with said Order, [defendant's] failure to do so has been willful and continuing." Thus, because the trial court's findings are supported by competent evidence and the findings

support the trial court's conclusions of law, we must affirm the Contempt Order under our standard of review.

Affirmed.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).