IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-718

Filed: 5 April 2015

Alamance County, No. 09-CVD-2886

BRANDON ARMSTRONG, Plaintiff,

v.

AMANDA SUE PENTZ, Defendant.

Appeal by defendant from order entered 26 September by Judge D. Thomas Lambeth, Jr., in Alamance County District Court. Heard in the Court of Appeals 1 December 2015.

The Vernon Law Firm, P.A., by Benjamin D. Overby, and Miller & Horn, PLLC, by Carol Vincent Miller, for plaintiff-appellee.

Appeals Law Group, by Patrick Michael Megaro, Esq., for defendant-appellant.

BRYANT, Judge.

Where defendant failed to preserve her issues for appeal and because we determine invocation of Rule 2 of the North Caroline Rules of Appellate Procedure is inappropriate in this case, we dismiss.

Plaintiff-appellee Brandon Armstrong ("plaintiff") and defendant-appellant Amanda Pentz ("defendant") moved in together at the age of eighteen in Dubois, Pennsylvania. They relocated to Alamance County, North Carolina and were in a

romantic relationship at the time their son, Ben,[1] was born on 26 November 2008. On 16 August 2009, defendant took Ben and moved to Pennsylvania. On 14 September 2009, plaintiff filed a Complaint in the Alamance County District Court for Temporary and Permanent Custody, Child Support, Temporary Restraining Order, and Preliminary Injunction. A permanent Child Custody Order was entered on 14 April 2011, whereby defendant retained primary custody of the child and plaintiff was granted eight overnights per month, in addition to an allotment of holidays. In June 2012, defendant filed a motion to move jurisdiction to Pennsylvania, which motion was denied.

On 17 September 2012, plaintiff moved the court to modify custody based on the substantial change of circumstances from the court's prior order. Subsequently, plaintiff sought a change in custody through motions filed on 9 October 2013 and 4 November 2013. Beginning in April 2013 and continuing until after the 31 July 2014 hearing, defendant filed repeated frivolous motions seeking to delay any change in custody. The trial court considered each motion and, except motions to continue, denied them all.[2] In the court's order granting defendant's motion to continue the trial to 29 July 2014, the court ordered that both parties were to be prepared for trial

[1] A pseudonym will be used throughout as the juvenile was a minor child during the pendency of this litigation. N.C. R. App. P. 3.1(b) (2015).

[2] A prior opinion of this Court, filed 15 March 2016, holding the trial court did not err in denying defendant's motion to transfer jurisdiction to Pennsylvania, contains a chart of many of the motions filed, mainly by defendant. *See Armstrong v. Pentz*, No. COA15-216, 2016 WL 969389, *2 (N.C. Ct. App. Mar. 15, 2016) (unpublished).

on all pending matters and specifically ordered that defendant's counsel, or substitute counsel, was to be prepared for trial, or that defendant should be prepared to represent herself.

All pending matters came for trial on 29 July 2014. Plaintiff, his counsel, and his witnesses were present. Neither defendant nor her counsel was present in court. Due to the absence of defendant and her counsel, Judge Lambeth proceeded to call defendant's counsel at his office to inquire about his and his client's absence. Judge Lambeth made three telephone calls to defendant's counsel before leaving a voicemail.

When defendant's counsel returned Judge Lambeth's call, Judge Lambeth was on another line. Judge Lambeth finally reached defendant's counsel by telephone around 11:00 AM, at which time he notified defendant's counsel, on the record, that he would give him and his client one additional day to present themselves to the Court for trial on the remaining matters. Defendant's counsel expressed his understanding of the trial court's accommodation and acknowledged that he would inform his client of the same.

At 9:09 AM on 30 July 2014, defendant's counsel informed the trial court via email that he had conferred with defendant regarding the additional day to appear, and that her position remained unchanged; she would not be present in court for trial.

The trial court proceeded to trial and heard evidence on all issues that remained pending.

On 31 July 2014, the trial court entered an order in open court which provided that custody should be granted to plaintiff. In addition, the trial court on 12 September 2014 entered a written order for supervised visitation for defendant. On 26 September 2014, the trial court entered an order outlining its unchallenged findings from the 30 July 2014 hearing. Based on eighty-seven unchallenged findings of fact, the trial court concluded that there had been a substantial change in circumstances. The trial court ordered that it was in the best interest of the child to award joint legal custody with primary placement to plaintiff.

Defendant refused to comply with the court's order. Instead, she stated that the order was invalid and remained with the child in Pennsylvania. Defendant's action resulted in other orders from the trial court suspending defendant's visitation rights.

On 22 October 2014, defendant filed a Notice of Appeal of the trial court's orders of 21 September 2014 and 26 September 2014.

On appeal, defendant makes two arguments: (1) that defendant's due process rights were violated where her trial attorney labored under an unwaivable conflict of interest, and (2) that plaintiff failed to establish a change in circumstances to justify

awarding primary custody to plaintiff. However, where defendant failed to preserve any of the above issues for appeal and because we determine invocation of Rule 2 of the North Caroline Rules of Appellate Procedure is inappropriate in this case, we dismiss defendant's appeal.

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure makes clear that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . ." N.C. R. App. P. 10(a)(1) (2015). Where a litigant fails to preserve an issue for appellate review, she is held to have waived review of the issue. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194–95, 657 S.E.2d 361, 363 (2008).

Here, defendant admits in her own brief that she failed to preserve any issue for appellate review. Her failure to preserve any issue for appellate review is a direct result of defendant and her counsel's failure to be present at trial. Defendant had three months' notice of the 29 July 2014 hearing in which she failed to attend, despite the fact that she was granted a hearing for every motion she made to the court over the five-year span of litigation. Pursuant to defendant's own motions to continue, the hearing was continued from 4 March 2014 to 1 April 2014, continued again to 29 April 2014, and continued yet again to 29 July 2014. In granting defendant's motion to continue on 29 April 2014, the trial court informed defendant and her counsel that

defendant was to be prepared for trial on 29 July 2014 with her present counsel, with other counsel, or be prepared to proceed *pro se*. Meanwhile, on 22 July 2014, defendant's counsel informed the trial court via email that he would not be able to represent defendant at the 29 July 2014 hearing.

Nevertheless, defendant's absence is inexcusable, especially where the trial court contacted defendant's counsel via courtroom telephone, on the record, and subsequently agreed to delay the beginning of the trial to the following morning, 30 July 2014, in an effort to give defendant yet another opportunity to be present for trial:

> THE COURT: . . . she's aware of the order from May 7th and aware that we were gonna be in court today. Would that be correct?
>
> [DEFENSE COUNSEL] ON SPEAKER PHONE: That would be correct.
>
> . . .
>
> THE COURT: But y'all have had -- she's well aware that we're ready, that the other side --
>
> [DEFENSE COUNSEL]: Yes. She's --
>
> THE COURT: -- was gonna be here, expecting to try the case today?
>
> [DEFENSE COUNSEL]: Yes, she's well aware of that.
>
> THE COURT: And -- she chose not to come, regardless?
>
> [DEFENSE COUNSEL]: Yes, sir, based on the reasons in

> my July 22 e-mail.
>
> THE COURT. All right. Well, I'm gonna ask you to call -- try -- attempt to call her and – and call her back to this courtroom as soon as you either reach her or don't reach her. . . .
>
> [DEFENSE COUNSEL]: Yes. I'm -- I'm gonna try to call her, but like I said, she -- she works at a place where she doesn't have use of her cell phone so --
>
> THE COURT: Okay. You know what I'm gonna do? I'm sitting here. I've never had to deal with a situation like this, I'll just tell you. And I'm trying to do everything I can to accommodate her and your side of the case, not to prejudice the other side any more than I already have potentially by delaying it to try to accommodate your side of the case.
>
> I'm gonna go ahead and just order that you communicate with her, make every effort to communicate with her today and let her know that I'm gonna begin this trial tomorrow morning at 9:30 whether she's here or not.
>
> [DEFENSE COUNSEL]: All right. I -- I will call her and I will communicate that by e-mail.
>
> THE COURT: All right. So this case will - - I'm gonna start it at 9:30 tomorrow. I hope you and she will be here. I will not call again. I will just -- we will start the trial. If you're here -- I hope you are. If not, then that's certainly whatever legal decision y'all make. That's up to y'all. . . .
>
> We'll begin this case tomorrow morning at 9:30.

Defendant's failure to preserve her issues for appeal is a result of her own willful failure to be present at trial, regardless of whether or not her counsel was

present. Nevertheless, defendant asks that we apply Rule 2 and review her issues on appeal. We decline to do so.

Rule 2 of the North Carolina Rules of Appellate Procedure, "permits the appellate courts to excuse a party's default in both civil and criminal appeals when necessary to 'prevent manifest injustice to a party' or to expedite decision in the public interest.' " *Id.* at 196, 657 S.E.2d at 364 (quoting N.C. R. App. P. 2). But, Rule 2 may only be invoked "on 'rare occasions' and under 'exceptional circumstances.' " *Id.* at 201, 657 S.E.2d at 367 (citation omitted). Further, "[t]his Court's discretionary exercise to invoke Rule 2 is 'intended to be limited to occasions in which a "fundamental purpose" of the appellate rules is at stake, which will necessarily be "rare occasions." ' " *State v. Ledbetter*, ___ N.C. App. ___, ___, 779 S.E.2d 164, 170 (2015) (quoting *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007)); *see State v. Rawlings*, ___ N.C. App. ___, ___, 762 S.E.2d 909, 915 (2014) (refusing to apply Rule 2 even where prohibition against double jeopardy was potentially violated); *In re A.D.N.*, 231 N.C. App. 54, 65–66, 752 S.E.2d 201, 209 (2013) (refusing to apply Rule 2 in appeal regarding the trial court's failure to appoint a guardian ad litem for a child, even where prior decisions from this Court invoked Rule 2 on the same issue).

Defendant and her counsel's voluntary defiance of court orders and refusal to participate in trial is not the appropriate situation for this Court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure. Defendant was given every

opportunity to present and defend her case, but determined not to be present at the custody hearing after multiple continuances at her request, and voluntary efforts of the trial court to accommodate her case. To invoke Rule 2 and allow this appeal would be to permit defendant to run amok of the good faith findings and conclusions reached by a trial court that did everything within the bounds of justice to accommodate defendant's case and render a proper ruling. Accordingly, defendant's appeal is dismissed.

DISMISSED.

Judges GEER and MCCULLOUGH concur.

Report per Rule 30(e).