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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-916

No. COA22-309

Filed 29 December 2022

Forsyth County, Nos. 16 CVD 4920, 18 CVD 2726

TAYLOR L. BOYLES (now GAS), Plaintiff,

v.

BINNY RALPH ORRELL, III, Defendant.

Appeal by Defendant from orders entered 11 May 2021 and 4 October 2021 by Judge David E. Sipprell in Forsyth County District Court. Heard in the Court of Appeals 4 October 2022.

No brief filed on behalf of Plaintiff-Appellee.

Earnest N. Bailey for Defendant-Appellant.

INMAN, Judge.

¶ 1 Defendant-Appellant, Binny Ralph Orrell, III, (“Father”) appeals from an order holding him in civil contempt and an order awarding Plaintiff-Appellee Taylor Gas (“Mother”) attorney’s fees. After careful review, we vacate both orders.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 2 Mother and Father married on 1 October 2014 and separated just over four months later. They have one daughter, now eight years old. Mother filed a complaint

for absolute divorce and custody of the child in May 2016 and Mother and Father entered into a consent order providing Mother with primary legal and physical custody and secondary physical custody to Father. The parties divorced in July 2016.

¶ 3 In March 2020, the trial court entered a child custody order with the consent of both parties. The order included the following provision:

That neither party shall abuse alcohol, use, or ingest illegal drugs or abuse prescription medications or over the counter drugs or be under the influence of the same while the minor child [is] in their presence, custody, and/or control. Neither party shall permit any other person to abuse alcohol or ingest illegal drugs or abuse prescription medication or over the counter drugs while the minor child is in their presence, custody, and/or control.

It further provided that either parent could request the other to undergo drug testing up to four times a year, and that each parent must comply with such a request within 24 hours.

¶ 4 Mother requested Father undergo such a drug test on 4 August 2020. Father did not comply until 10 August 2020, and the test returned a positive result for cannabis. Mother then filed a verified motion to show cause on 4 September 2020, asserting:

10. That, upon information and belief, [Father] smokes marijuana in the presence of or while the minor child is in the custody of [Father].

11. That [Father] has admitted to [Mother] that he smokes marijuana despite the restriction on the same in the

parties' Consent Order.

.....

14. That [Father] has the means and ability to comply with the terms of said Order or to take reasonable measures, which would enable him to comply with the Order. That [Father's] failure to abide by the terms and provisions of said Order has been willful and in direct disobedience of the Order of this Court.

15. That [Mother] brings this Motion in good faith and due to the willful misconduct of [Father]. [Mother] is without sufficient means with which to pay [her] necessary legal expenses for the prosecution of this Motion and is informed, believes and so alleges that an Order should be issued directing [Father] to pay [Mother's] reasonable and necessary attorney's fees for the prosecution of this Motion.

¶ 5 The trial court issued a show cause order to Father that same day and later heard the matter on 17 August 2021. At the outset of the hearing, Mother requested that Father be held in criminal contempt for his failure to conduct a drug test within 24 hours of her request and civil contempt for his alleged drug use in the presence of his daughter. The trial court then bifurcated the hearing with the consent of the parties, addressing Father's alleged criminal contempt before proceeding to civil contempt.

¶ 6 After hearing testimony from Mother's counsel, Mother, and Father regarding his failure to comply with the drug test request within 24 hours, the trial court announced that it was holding Father in criminal contempt for that violation. The trial court then proceeded to the civil contempt phase of the hearing, at which time

Father moved to dismiss the motion on the basis that it was not adequately supported by a sworn statement as required by N.C. Gen. Stat. § 5A-23(a1) (2021). The trial court denied that motion, took additional testimony from the parties concerning Father's drug usage around their daughter, and held Father in civil contempt for that conduct at the time Mother filed her show cause motion. However, the trial court expressly found that Father had stopped using marijuana prior to the hearing and was not in violation of the custody order at the time of the hearing. The trial court reserved judgment on Mother's request for attorney's fees.

¶ 7

The trial court entered written orders holding Father in criminal and civil contempt on 3 May and 11 May 2021, respectively. The civil contempt order found that Father used marijuana while the parties' minor daughter was in his custody, though it contains no finding that Father was doing so at the time of the order. Instead, the findings state that:

13. The Court finds that [Father] testified that he stopped smoking marijuana. However, the Court finds that if he did stop smoking marijuana it was because [Mother] was enforcing the Consent Order by filing a Motion to Show Cause and the entry of an Order to Show Cause and because his attorney told him it would be a bad idea to continue smoking marijuana.

The order's conclusions of law provide that Father may purge himself of his contempt by "remain[ing] drug-free and not us[ing] any illegal drugs while the minor child is in his care, custody and control."

¶ 8 On 4 October 2021, the trial court entered a written order awarding Mother attorney’s fees because Father “was found in civil contempt of the parties’ Consent Order for child custody.” Father filed a notice of appeal from both the civil contempt order and the attorney’s fee order on 21 November 2021.

II. ANALYSIS

¶ 9 Father presents four arguments on appeal: (1) the trial court lacked probable cause to issue a show cause order because Mother’s verified motion alleged Father smoked marijuana around their daughter “upon information and belief” rather than personal knowledge; (2) the civil contempt order lacks sufficient findings of fact, as neither the evidence nor any finding shows Father was in contempt at the time of the hearing; (3) the civil contempt order’s purge provision is invalid; and (4) the award of attorney’s fees on the basis of Father’s civil contempt must be set aside because the underlying civil contempt order is invalid. We agree with Father’s second argument that the trial court erred in holding him in civil contempt, and we likewise agree that the trial court erred in awarding Mother attorney’s fees. We therefore vacate both orders without addressing Father’s remaining arguments. Defendant did not appeal the trial court’s criminal contempt order and it remains undisturbed.

A. Standards of Review

¶ 10 On review of a civil contempt order, we are “limited to whether there is competent evidence to support the findings of fact and whether the findings support

the conclusions of law.” *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220, 222 (1986) (citation omitted). We review an award of attorney’s fees pursuant to statute *de novo*. *Batson v. Coastal Resources Commission*, 282 N.C. App. 1, 2022-NCCOA-122, ¶ 10.

1. The Civil Contempt Order

¶ 11 Father argues that the civil contempt order must be set aside because the evidence and findings do not show he was in violation of the custody order at the time of the civil contempt hearing. We agree with Father and vacate the civil contempt order on that basis.

¶ 12 Criminal and civil contempt differ in their purposes and timing:

In essence, criminal contempt is administered as punishment for acts already committed that have impeded the administration of justice in some way. . . . Civil contempt, on the other hand, is employed to coerce disobedient defendants into complying with orders of court, and the length of time that a defendant can be imprisoned in a *proper* case is not limited by law, since the defendant can obtain his release immediately upon complying with the court’s order.

Brower v. Brower, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984) (citations omitted) (emphasis in original).

¶ 13 In keeping with this distinction, a party who is no longer in violation of an order at the time of a civil contempt hearing may not be held in civil contempt for that past violation. *Ruth v. Ruth*, 158 N.C. App. 123, 126, 579 S.E.2d 909, 912 (2003).

Stated differently:

[A] district court[] does not have the authority to impose civil contempt after an individual has complied with a court order, even if the compliance occurs after the party is served with a motion to show cause why he should not be held in contempt of court.

Id. (citations omitted).

¶ 14 Here, the trial court concluded that Father was in willful contempt of the custody order by using marijuana around his daughter *in the past*, but it made no finding that Father was still doing so at the time of the hearing. No evidence in the record supports such a finding; as the trial court recognized at the hearing, “I don’t have any evidence to the contrary at this point that he was still using marijuana after the date of the [show cause] motion. . . . I think the Court’s finding is that he stopped [using marijuana] upon the [Mother’s] filing of the motion.”

¶ 15 Because the evidence and findings fail to show a present willful disobedience and instead show compliance with the custody order at the time of the hearing, the trial court erred in holding Father in civil contempt. *See Ruth*, 158 N.C. App. at 126, 579 S.E.2d at 912 (holding a finding that the non-movant was in compliance at the time of the hearing did not support a conclusion of willful civil contempt and the trial court erred as a matter of law “because there was no longer any purpose to be served by holding plaintiff in civil contempt”). As a result of compliance, we vacate the civil contempt order. *Id.* *See also Walter v. Walter*, 279 N.C. App. 61, 2021-NCCOA-428,

¶¶ 19, 23 (vacating a civil contempt order where the trial court erred in concluding the non-movant willfully violated a consent custody order).

2. Attorney's Fees

¶ 16 The trial court awarded Mother attorney's fees under N.C. Gen. Stat. § 50-13.6 because "Defendant was found in civil contempt of the parties' Consent Order for child custody." Our holding that the trial court erred in holding Father in civil contempt obviates that basis for the award, but "this holding does not automatically eliminate the issue of attorney's fees. In some limited circumstances, a party who has filed a contempt motion may recover attorney's fees even where the alleged contemnor cannot be held in contempt at the time of the hearing." *Walter*, ¶ 22. This exception applies "where contempt fails because the alleged contemnor complies with the previous orders after the motion to show cause is issued and prior to the contempt hearing." *Ruth*, 158 N.C. App. at 127, 579 S.E.2d at 912 (citation omitted).

¶ 17 Father asserts that the exception set forth above does not apply because the uncontroverted evidence shows he ceased smoking marijuana prior to Mother filing her motion to show cause. We agree.

¶ 18 Mother's counsel acknowledged at the hearing that the allegations in her motion to show cause were not relevant to Father's conduct occurring on or after 14 August 2020, and all the evidence introduced at the hearing shows that Father had ceased smoking marijuana entirely by that date. Mother filed her motion to show

cause several weeks later, on 4 September 2020, placing this case outside the “limited situation” allowing for attorney’s fees when “the alleged contemnor complies with previous orders *after* the motion to show cause is issued and prior to the contempt hearing.” *Id.* (emphasis added). *See also Walter*, ¶ 22 (vacating an attorney fee award and holding the limited exception in *Ruth* did not apply when the violation giving rise to the alleged civil contempt “occurred before Mother filed her motion for contempt [and] [t]here is no legal basis for an award of attorney’s fees to Mother in this situation”).

III. CONCLUSION

¶ 19 For the foregoing reasons, we vacate the civil contempt order and attorney’s fee award based thereon.

VACATED.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).