[Cite as *K.M.M. v. A.J.T.*, 2021-Ohio-2452.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

K.M.M.,	:	
Plaintiff-Appellee,	:	No. 109815
v.	:	
A.J.T.,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 15, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-12-344806

Appearances:

Kvale Antonelli & Raj and Manav H. Raj, *for appellant*.

LISA B. FORBES, J.:

{¶ 1} Appellant, A.J.T., appeals the trial court's denial of his motion seeking to hold appellee, K.M.M., in contempt of court. After reviewing the law and pertinent facts of the case, we affirm.

I. Facts and Procedural History

{¶ 2} A.J.T. and K.M.M. were divorced in 2014. They have three children together. The issues presented on appeal relate solely to the parties' eldest child, S.T.

{¶ 3} While the parties' shared-parenting plan was not journalized by the trial court until May 8, 2019, K.M.M. and A.J.T. testified that they had been following the terms of that plan since 2016. Under the shared-parenting plan, A.J.T. was entitled to parenting time with all three children each Wednesday starting after school until Thursday after school and every other weekend.

{¶ 4} On the same day the shared-parenting plan was journalized, A.J.T. filed a motion to show cause and a motion for attorney fees. Through his motion to show cause, A.J.T. sought to hold K.M.M. in contempt of court, arguing that since November 2018 K.M.M. failed to follow their shared-parenting plan because she did not ensure that A.J.T. had visitation with S.T.

{¶ 5} A hearing was held before a magistrate on July 16, 2019. At the hearing, the court heard testimony from both K.M.M. and A.J.T. regarding the shared-parenting plan and A.J.T.'s parenting time with S.T. The court also heard testimony from A.J.T.'s attorney regarding fees incurred in connection with his show cause motion.

{¶ 6} The magistrate issued a decision on October 15, 2019, denying A.J.T.'s motions as they relate to S.T. A.J.T. filed objections to the magistrate's

decision on October 29, 2019. The trial court overruled A.J.T.'s objections and adopted the magistrate's decision in a journal entry dated June 9, 2020.

{¶ 7} In its decision, the trial court held that A.J.T. had not established a prima facie case for contempt because he did not demonstrate by clear and convincing evidence that K.M.M. was in violation of the parties' shared-parenting plan. It is from this decision that A.J.T. appeals, bringing two assignments of error for our review, arguing that the trial court erred in finding that he had not established a prima facie case for contempt and, therefore, denying his motions. We find that the trial court did not err, and that the testimony presented at the hearing supports the court's findings.

II. Hearing Testimony

A. K.M.M.'s Testimony

{¶ 8} Through her testimony, K.M.M. acknowledged that the schedule in the shared-parenting plan had not been followed but denied that A.J.T.'s lack of parenting time with S.T. was "her fault." Rather, she explained that S.T. refused to visit his father. According to K.M.M., after A.J.T.'s parenting time in November 2018, S.T. came to her "very upset because [A.J.T.] had hit him in the head. And then stated he would not go back to [A.J.T.'s] house."

{¶ 9} K.M.M testified that she told S.T. that he must go to A.J.T.'s house for visitation. However, she stated that she does not know how to make him go being that he is 16 years old, 5'10" tall, and weighs 200 pounds. In trying to encourage S.T. to go with A.J.T., K.M.M. talked to S.T., yelled at him, and even imposed

negative consequences for not going. When she tried talking to S.T. he shut down, laid on his bed, and refused to leave his room or talk to her. K.M.M. explained the negative consequences she imposed when S.T. refused to go with his father: "he is not allowed to have any interaction with his friends, and he is not allowed to play on his Xbox, and he has to peel wallpaper in my house for me." Aside from his refusal to go to A.J.T.'s parenting time, K.M.M. has not had any behavioral issues with S.T. at home.

{¶ 10} K.M.M. recounted several instances when she tried to encourage S.T. to go to visitation with A.J.T. She suggested that the three of them go out together in an attempt for S.T. and A.J.T. to bond. She also recalled a time when S.T. considered going to A.J.T.'s house for Christmas but later became upset and then refused. In an attempt to get S.T. to go to A.J.T.'s, K.M.M. suggested S.T. visit his father's for just Christmas morning rather than not going at all. Alternatively, she suggested S.T. go to A.J.T.'s mother's house for Christmas to see her. She also encouraged S.T. to reach out to A.J.T.'s side of the family to visit and "offered to facilitate visitation with them if [S.T.] was interested." K.M.M. explained, "I suggested to him this summer if he wanted to reach out to [A.J.T.'s] family to visit them, that I would support that and work with him on that. I've suggested lots of things to [S.T.]."

{¶ 11} K.M.M. testified that she speaks to her individual therapist for guidance to ensure she has not isolated S.T. from his father. She explained that she thinks it is important for A.J.T. to be involved in S.T.'s life. She also discussed with

her therapist the consequences imposed on S.T. to ensure they are reasonable and ways to communicate with A.J.T.

{¶ 12} S.T. sees an individual therapist and participates in family therapy. K.M.M. initiated the individual therapy after the November 2018 incident so that S.T. had a "neutral third party" to speak to. In K.M.M.'s opinion, after visiting with his individual therapist, S.T. appeared to be feeling better and his attitude seemed to improve.

{¶ 13} K.M.M. testified that at times S.T. was reluctant to participate in family therapy when A.J.T. would also be involved. After some family therapy appointments, he seemed frustrated and agitated. She shared that at one point S.T. refused to go to family therapy appointments if A.J.T. was also going to be present. They implemented changes to make S.T. feel more comfortable, including scheduling the appointments during K.M.M.'s parenting time, so that he did not feel pressured to go with A.J.T. after the session, and keeping S.T. and A.J.T.'s first meeting separate.

B. A.J.T.'s Testimony

{¶ 14} A.J.T. testified that S.T. stopped regularly participating in visitation with him in November 2018. However, he did acknowledge that S.T. had come for visitation once, maybe twice, after that time. During one of those visits that took place in mid-January, S.T. came to A.J.T.'s house for his younger brother's birthday. S.T. left in the middle of the night.

{¶ 15} When asked whether it was his responsibility to effectuate his own parenting time, A.J.T. responded, "I don't know how I can * * * I'm waiting for [S.T.] to come over." The court asked A.J.T. "[a]ren't you supposed to pick him up at school, sir?" A.J.T. explained that S.T. is supposed to walk to his house after school because A.J.T. would be unable to pick up all three children without leaving one of them waiting for him, "so it just worked out that [S.T.] walks home, and I get the younger children." However, A.J.T. later admitted that the other two children have started walking to his house after school, making it possible for A.J.T. to pick-up S.T. On one of the days that S.T. walked to K.M.M.'s house instead of A.J.T.'s as anticipated by the visitation schedule, A.J.T. testified that he responded by telling K.M.M. to bring S.T. to his house.

{¶ 16} When asked how many times he picked S.T. up from school between November 2018 and the end of the school year, A.J.T. replied "[n]one." A.J.T. testified that he attempted one time but that "didn't go very well" because when he tried to pick S.T. up from school, S.T. was dismissive and refused to talk with him. A.J.T. did not want to repeat that situation and explained that he thought if he tried to pick-up S.T. at school "he would freak out. I think he would be embarrassed in front of his friends, and I think he may even try to fight me."

{¶ 17} A.J.T. expressed his opinion that he did not believe the consequences K.M.M. put in place were sufficient to motivate S.T. A.J.T. believed they should have been in place at all times, not just when S.T. was supposed to be at A.J.T.'s house. In regard to K.M.M. enforcing A.J.T.'s parenting time, he testified that K.M.M.

"should have command of the domicile." He further offered his opinion that she should be able to "make sure [S.T.] gets in the car and drive him to [A.J.T.'s] house." He stated that K.M.M. should have "some method of controlling [her] children * * *." When asked why he was not able to get S.T. to come for parenting time, A.J.T. responded "[w]ell, I don't want to get into a physical altercation at school * * *." When asked whether he has any responsibility for getting S.T. to come to his house for his parenting time, A.J.T. explained, "I think I have some responsibility to provide a safe and loving home for [S.T.] on my parenting time, and if need be, provide transportation."

{¶ 18} A.J.T. admitted that prior to S.T.'s refusal to engage in parenting time he hit him in the back of the head. As he described it, the incident occurred when S.T. and his younger brother, P.T., "were in a dark parking lot at night running around and fighting with each other." A.J.T. yelled at them to stop, and when they did not, he "gave them both a smack on their head" describing it as "a swift tip of the fingers to the back of the head as a corrective manifestation of my frustration." When asked if he thought that incident of "physical violence could cause [S.T.] to fear [him]," A.J.T. responded that he did not, nor would he characterize that incident as violence.

{¶ 19} A.J.T. acknowledged that after the November 2018 incident, S.T. reached out to him via email. A.J.T. did not immediately respond to that email S.T. sent him. When asked about his opposition to emailing S.T., A.J.T. responded that he believed talking face-to-face was best, that he could not guarantee the person

emailing him was actually S.T., and that he thought K.M.M. was attempting to have him "jump through hoops to talk to [his] son * * *." He elaborated that while he did eventually email S.T., he did not feel it was the "appropriate method of communication to resolve the conflict [they] were having." When asked what attempts he has made to contact S.T. over the previous few months, A.J.T. responded "Well, I called him, and I've also communicated with [K.M.M.] to instruct him to call me."

{¶ 20} A.J.T. testified that at the time of the hearing he was amenable to therapy as a way to repair his relationship with S.T. but believes S.T.'s engagement with his individual therapist is "neutral to slightly negative because I think she's not really explaining to him the detrimental effect he's having on the rest of his family." Further, that he thought she was not reinforcing to S.T. that not going to his father's parenting time was a negative behavior and was not giving him corrective suggestions. When asked his opinion of the family therapist, A.J.T. stated he believed she pointed out to S.T. that his behavior was "not right" and encouraged positive behavior from S.T.

III. Law and Argument

A. Contempt

{¶ 21} A.J.T.'s first assignment of error states that "the trial court abused its discretion by failing to find appellee in contempt of court for her failure to ensure appellant with visitation with their minor child pursuant to the terms of their shared parenting plan."

{¶ 22} "The purpose of contempt proceedings is to secure the dignity of the courts and the uninterrupted and unimpeded administration of justice." *Windham Bank v. Tomaszczyk*, 27 Ohio St.2d 55, 271 N.E.2d 815 (1971), paragraph two of the syllabus. "Therefore, since the primary interest involved in a contempt proceeding is the authority and proper functioning of the court, great reliance should be placed upon the discretion of the trial judge." *Denovchek v. Bd. of Trumbull Cty. Commrs.*, 36 Ohio St.3d 14, 16, 520 N.E.2d 1362 (1988).

{¶ 23} Accordingly, an appellate court will not disturb the trial court's decision in contempt proceedings absent an abuse of discretion. *State ex rel. Celebrezze v. Gibbs*, 60 Ohio St.3d 69, 75, 573 N.E.2d 62 (1991). "An abuse of discretion implies the court's attitude is unreasonable, arbitrary, or unconscionable." *In re E.M.D.*, 8th Dist. Cuyahoga No. 108164, 2019-Ohio-4680, ¶ 6, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 24} To establish a prima facie case of contempt of court, the moving party must establish by clear and convincing evidence: the existence of a court order, the nonmoving party's knowledge of that order, and that the nonmoving a party violated it. *In re K.B.*, 8th Dist. Cuyahoga No. 97991, 2012-Ohio-5507, ¶ 11. "Clear and convincing evidence is that measure or degree of proof * * * [that] produce[s] in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. Once the moving party establishes a prima facie case, the burden shifts to the nonmoving party by a preponderance of the evidence to either

establish a valid defense or to rebut the demonstration of contempt. *Rife v. Rife*, 10th Dist. Franklin No. 11AP-427, 2012-Ohio-949, ¶ 10.

{¶ 25} A.J.T.'s arguments center around his belief that K.M.M. failed to effectuate his parenting time with S.T., in accordance with their shared-parenting plan. According to A.J.T., because he demonstrated both the existence of the court order, and noncompliance with that order, he has demonstrated a prima facie case for contempt. We disagree.

{¶ 26} A similar fact pattern was presented to this court in *Cherwin v. Cherwin* where this court affirmed the trial court's decision not to hold a mother in contempt of court when her 16-year-old son refused to go to parenting time with his father. The *Cherwin* Court relied on a decision from the Tenth District quoting: "'[a]ge must be a central consideration in determining when a minor's reluctance in visiting with the noncustodial parent is enough to prevent visitation.'" *Cherwin v. Cherwin*, 8th Dist. Cuyahoga No. 84875, 2005-Ohio-1999, ¶ 31-32, quoting *Smith v. Smith*, 70 Ohio App.2d 87, 89, 434 N.E.2d 749 (10th Dist.1980). In *Cherwin*, this court found that mother had encouraged her son to go to his father's house, offered to drive him, and wanted her son to have a relationship with his father. *Cherwin* at ¶ 32. The facts of this case are strikingly similar.

{¶ 27} The evidence presented at the hearing supports the trial court's finding that A.J.T. did not establish a prima facie case for contempt. Specifically, A.J.T. did not prove that K.M.M. violated the parties' shared-parenting plan. While it was undisputed that A.J.T. had not had consistent parenting time with S.T. since

November 2018, he did not establish that K.M.M. was at fault. Instead, the evidence showed that A.J.T. "contributed to or caused" S.T.'s refusal to participate in parenting time with A.J.T. The evidence presented at the hearing also established K.M.M.'s efforts to encourage and even coerce S.T. to visit with his father. Notwithstanding K.M.M.'s efforts, S.T., who was 16 years old, refused to go to his father's house. A.J.T. himself acknowledged that S.T. did not want to go with him.

{¶ 28} In light of the testimony and evidence presented at the hearing, we do not find that the trial court acted unreasonably or arbitrarily in finding that K.M.M. was not in contempt of the court's order. This conclusion is in keeping with this court's precedent in *Cherwin*: "We do not find any error in the trial court's refusal to find the mother in contempt, where the child is sixteen years old and appears to have independently made a decision not to visit with his father." *Cherwin* at ¶ 32. A.J.T.'s first assignment of error is overruled.

B. Attorney Fees

{¶ 29} In A.J.T.'s second assignment of error, he argues the trial court erred when it did not award him attorney fees for the part of his contempt claim as it relates to parenting time with S.T.

{¶ 30} R.C. 3109.051(K) states that a court "shall assess all court costs arising out of the contempt proceeding against the person and require the person to pay any reasonable attorney's fees of any adverse party, as determined by the court, that arose in relation to the act of contempt * * *" if there is a finding of contempt against that person.

{¶ 31} As set forth above, we find that the trial court did not abuse its discretion when it did not find K.M.M. in contempt of court. Accordingly, it was not error for the court to deny A.J.T.'s motion for attorney fees in relation to that part of his claim and, therefore, his second assignment of error is meritless.

{¶ 32} The decision of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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LISA B. FORBES, JUDGE

MARY J. BOYLE, A.J., and
EILEEN A. GALLAGHER, J., CONCUR