[Cite as *Ferritto v. Krihwan,* 2011-Ohio-4017.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

THERESA M. FERRITTO, EXECUTRIX OF THE ESTATE OF KATHLEEN B. KRIHWAN, a.k.a. KATHLEEN KRIHWAN, DECEASED,	:	**O P I N I O N**
	:	**CASE NO. 2009-L-114**
Plaintiff-Appellee,	:	8-12-11
- vs -	:	
ROBERT B. KRIHWAN,	:	
Defendant-Appellant.		

Civil Appeal from the Lake County Court of Common Pleas, Domestic Relations Division, Case No. 93 DR 000606.

Judgment: Affirmed.

William F. Chinnock, 8238 Sugarloaf Road, Boulder, CO 80302 (For Plaintiff-Appellee).

William C. Gargiulo, 2239 Pine Ridge Drive, Wickliffe, OH 44092 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Robert B. Krihwan appeals from a judgment of the Lake County Court of Common Pleas, Domestic Relations Division, which imposed upon him a 90-day jail sentence triggered by his failure to pay a property division settlement to his ex-wife, Kathleen B. Krihwan, pursuant to their divorce decree. For the following reasons, we affirm.

{¶2} The parties in this divorce case engaged in protracted litigation after their divorce was finalized in 1996. Mr. Krihwan was the majority shareholder of Bob Krihwan Pontiac-GMC Truck, Inc. Pursuant to the divorce decree, Mr. Krihwan was required to pay Mrs. Krihwan the sum of $900,000 in property division over a period of five years. Since then, frequent disputes arose as to whether Mr. Krihwan was complying with the payment requirements of the divorce decree. There were numerous motions, multiple hearings, several appeals, and several earlier contempt orders issued against Mr. Krihwan in the 15-year history of this divorce matter. The instant appeal arose from the trial court's determination that Mr. Krihwan had failed to comply with the latest order finding him in contempt of court and setting purge conditions.

{¶3} **What Led to the Contempt Finding?**

{¶4} On December 3, 2003, after a hearing, the trial court issued a judgment which determined that Mr. Krihwan owed Mrs. Krihwan a balance of $505,369, with interest, on the property division settlement, after finding Mr. Krihwan's only payments toward the settlement came by way of involuntary seizures via attachments. The trial court also found his defense of inability to pay without merit in light of the fact that, although corporate funds were restricted by an injunction in another civil matter, Mr. Krihwan was still receiving his weekly net salary of $3,300 and that prior to the issuance of the injunction he had used corporate funds to pay personal expenses on "many, many occasions."

{¶5} The court further found that Mr. Krihwan had "direct and unfettered access to 3.5 million dollars in Bob Krihwan Pontiac-GMC Truck Inc. from the execution of his agreement with Classic, Inc. in February 2002 until the issuance of the preliminary injunction on July 16, 2003 ***. [T]he corporation receives $40,000.00 per month for rent

from March 2002 through March 2007. Husband used approximately $300,000.00 of corporate funds to renovate a building in Willoughby. Husband had ample opportunity between February 2002 and July 16, 2003 to utilize said funds for full or partial payment towards the property settlement due Wife. Husband simply chose not to do so."

{¶6} At the time of the hearing Mr. Krihwan was already under a contempt purge payment order of $7,000 per month regarding his spousal support arrearage.

{¶7} The court found Mr. Krihwan in contempt of the court's 1996 divorce decree and sentenced him to a term of 90 days in jail for failing to make the required payments. The court, however, allowed him to purge his contempt by making a monthly payment of $ 2,000 to Mrs. Krihwan until the spousal support arrearage was satisfied, at which time the monthly payment would increase to $9,000 until the remaining sum of $505,369 was fully satisfied. Mr. Krihwan complied with the purge order for the next 50 months but stopped payment after February of 2008.

{¶8} On March 9, 2008, he filed a motion to terminate the property settlement payments ordered on December 3, 2003, alleging he lost all income when General Motors did not continue his franchise agreement. He also claimed he should not be required to pay interest on the amount owed under the divorce decree.

{¶9} On May 12, 2008, Mrs. Krihwan filed a motion to enforce the 90-day sentence imposed in the December 3, 2003 judgment. The trial court did not rule on that motion for 17 months, however. As a result, Mrs. Krihwan filed a mandamus action in this court on July 17, 2009, alleging the trial court's failure to rule upon her May 12, 2008 motion constituted an inordinate delay that had caused her irreparable harm.

{¶10} On September 11, 2009, the trial court finally held a hearing on the May 12, 2008 motion filed by Mrs. Krihwan. On the same day, the court issued a judgment

entry ordering Mr. Krihwan to immediately report to the county jail and begin to serve the 90-day contempt sentence. The judgment entry stated:

{¶11} "Based on the evidence presented during trial, the Court finds by clear and convincing evidence the Defendant has failed to comply with this Court's purge order filed December 3, 2002 that he pay $9,000.00 per month to the Plaintiff. The Court finds by clear and convincing evidence the Defendant has failed to make the purge for the months of March 2008 through August 2009, a total of eighteen (18) months. The Plaintiff's motion to impose is well taken and the Court finds the suspended sentence of ninety (90) days in the Lake County Jail is herby imposed upon the Defendant forthwith."

{¶12} The court, however, authorized Mr. Krihwan's release from jail upon Mrs. Krihwan's filing of a notice acknowledging the receipt of $162,000 for the 18 months of nonpayment. The court also stated that if Mr. Krihwan was released due to payment, the balance of sentence not served would remain suspended upon compliance with the purge order of December 3, 2003. It is from this judgment the present appeal is taken.

{¶13} Subsequent to Mr. Krihwan's filing of the instant appeal, on September 23, 2009, the trial court granted a stay of execution of sentence pending the resolution of this appeal upon the bond terms set by this court. This court set the bond amount at $165,000. Thereafter, on September 25, 2009, Mr. Krihwan filed a petition for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Northern District of Ohio. On that day, this court authorized his release upon the posting of a supersedes bond in the amount of $165,000. On September 30, 2009, the trial court, based on the automatic stay of the bankruptcy court, released him from the jail pending the resolution

of this appeal. On September 30, 2009, Mr. Krihwan was released from jail after serving 20 days.[1]

{¶14} Mr. Krihwan raises three assignments of error in this appeal.[2] They state:

{¶15} "[1.] The trial court erred as a matter of law when it found the appellant in contempt and ordered him to serve ninety days in the Lake County Jail to be imposed forthwith.

{¶16} "[2.] The trial court erred and abused its discretion by not allowing the appellant to present evidence of impossibility to purge at the trial on September 11, 2009.

{¶17} "[3.] The trial court erred by incarcerating the appellant for debt in a civil action."

{¶18} A trial court's finding of contempt will not be disturbed on appeal absent an abuse of discretion. *Stychno v. Stychno*, 11th Dist. No. 2008-T-0117, 2009-Ohio-6858, ¶27, citing *State ex rel. Ventrone v. Birkel* (1981), 65 Ohio St.2d 10. An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev. 2004) 11.

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[1] On August 25, 2010, the bankruptcy court issued a decision which incorporated a settlement by the parties. The parties agreed that prior to the commencement of the Chapter 7 proceeding, Mr. Krihwan had paid $940,758 towards the property settlement obligation, leaving a principal balance due on the judgment in the amount of $282,552 and that amount is non-dischargeable. Based the parties' agreement, the bankruptcy court ordered that "the property settlement obligation created by the divorce decree, and owed by Robert R. Krihwan, to Kathleen B. Krihwan, in the amount of $282,552.00, plus interest at 10% per annum, from the date of this entry, is hereby declared non-dischargeable, pursuant to 11 USC 523(a)(10)."

[2] On October 25, 2010, Mrs. Krihwan died. The Executor of her estate, Theresa M. Ferritto, was substituted as plaintiff.

{¶19} For ease of discussion, we will address Mr. Krihwan's assignments out of order. We consider first the claim raised in the third assignment of error concerning whether non-payment of property division settlement is subject to contempt proceedings.

{¶20} **Whether Property Division Settlement is "Debt" Precluding Imprisonment**

{¶21} Under the third assignment of error, Mr. Krihwan contends the sum of money ($900,000) he was ordered to pay Mrs. Krihwan in the December 3, 2003 judgment is a "debt" subject to Section 15, Article I of the Ohio Constitution. That constitutional provision states: "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud." Mr. Krihwan alleges the property division settlement here had been "reduced to a lump sum payment," and, as such, the judgment became a "debt in a civil action" and imprisonment for the debt is precluded by Section 15, Article I of the Ohio Constitution. He maintains that a contempt proceeding is an improper vehicle for collection of the debt owed to Mrs. Krihwan, and she can only collect through garnishment, attachment, or execution.

{¶22} The issue of whether a property settlement provision in a divorce decree is enforceable by contempt proceedings is long settled in Ohio. In *Harris v. Harris* (1979), 58 Ohio St.2d 303, 311, the Supreme Court of Ohio held that "for purposes of enforcing a decree entered in a domestic relations proceeding, provisions relating to the division of property as contained within a separation agreement do not constitute a 'debt' within the meaning of that term as used in constitutional inhibition against imprisonment for debt). The court explained that "[t]he public has a strong interest in ensuring that the termination of the marital relationship results in an equitable settlement between the

parties. *** For purposes of enforcement, both the alimony and property settlement provisions of the decree are orders of the court, and represent more than a debt of one spouse to the other." Id.

{¶23} To begin with, the December 3, 2003 judgment entry clearly and specifically notes that Mrs. Krihwan "has not reduced the property settlement amount due her to a lump sum judgment." Any distinction between a lump sum property division award and a lump sum judgment for the amount due and owing on such an award is a distinction without a difference because of the well-settled law in this area.

{¶24} To support his claim that the property division had been "reduced to a lump sum judgment" and therefore morphed into a debt within the meaning of Section 15, Article I of the Ohio Constitution, Mr. Krihwan cites two decisions by the Tenth Appellate District, *Bauer v. Bauer* (1987), 39 Ohio App.3d 39, and *Martin v. Martin* (1992), 76 Ohio App.3d 638. Both decisions involved arrearage of child support obligations which were reduced to a lump sum judgment after the children reached the age of majority. In *Bauer*, the Tenth District reasoned that "when the amount of arrearages owed was reduced to a lump-sum money judgment, even though the judgment originated with the child-support order, the obligation became a debt that defendant owed to plaintiff." *Bauer* at 41. "[A]fter the children have attained the age of majority and the support money yet unpaid is reduced to a lump-sum judgment during a civil proceeding, the judgment becomes a debt, and imprisonment for that debt is precluded under Section 15, Article I of the Ohio Constitution." Id. Based on this line of reasoning, in both *Bauer* and *Martin*, the Tenth District found the contempt proceedings inappropriate to enforce the child support arrearages reduced to a lump sum judgment after the children reached the age of majority. In such instances, the only proper

vehicles for collecting on the judgment are by garnishment, attachment, or execution on the judgment. *Bauer* at 41; *Martin* at 642.

{¶25} Mr. Krihwan's citation to *Bauer* and *Martin* reflects a lack of effort in researching the case law on the part of his appellate counsel. As this court noted in *Stychno*, supra, these Tenth District decisions directly conflicted with a decision by the Third Appellate District, *In re Cramer* (Apr. 13, 1993), 3d Dist. No. 5-92-47, 1993 Ohio App. LEXIS 2246. Consequently, this issue was certified to the Supreme Court of Ohio for review and final determination. The Supreme Court of Ohio, in *Cramer v. Petrie* (1994), 70 Ohio St.3d 131, considered the exact issue of whether child support arrearages after emancipation of a child is considered a "debt" within Section 15, Article I of the Ohio Constitution, thus precluding the use of contempt proceedings for its collection. The Supreme Court of Ohio answered the question in the negative, holding:

{¶26} "We do not view an obligation to pay child support as such a debt. An obligation to pay child support arises by operation of law and is a personal duty owed to the former spouse, the child, and society in general. *** It does not arise out of any business transaction or contractual agreement, as does an ordinary debt. Thus, we have consistently held that support obligations are not debts in the ordinary sense of that word." Id. at 135 (footnote omitted). In the same decision, the Supreme Court of Ohio also affirmed its prior determination that an alimony decree is also not a debt within the meaning of Section 15, Article I of the Ohio Constitution, citing *State ex rel. Cook v. Cook* (1902), 66 Ohio St. 566. Therefore, the Supreme Court of Ohio has made it clear that a child support or alimony arrearage, even if reduced to a lump sum judgment, is not a debt within the meaning of Section 15, Article I of the Ohio Constitution precluding contempt proceedings.

{¶27} Indeed, this court, in *Brandenburg v. Brandenburg*, 11th Dist. No. 2004-L-085, 2005-Ohio-6417, ¶7-8, stressed that contempt proceedings and imprisonment are proper vehicles to enforce a property settlement provision. In that case, appellant alleged the trial court erred by holding him in contempt and sentenced him to jail for failure to pay attorney fees in a child support dispute. He contended it was illegal to imprison a person for a civil debt, citing Section 15, Article 1, of the Ohio Constitution. This court rejected that argument and pointed out several exceptions to the general prohibition against imprisonment for a civil debt. We reminded the appellant that the Supreme Court of Ohio permitted imprisonment for (1) failure to pay child support, citing *Cramer*, supra; (2) failure to pay spousal support, citing *Cook*, supra, paragraph two of the syllabus; and (3) failure to comply with property settlement provisions, citing *Harris,* supra.

{¶28} "The purpose of contempt proceedings is to secure the dignity of the courts and the uninterrupted and unimpeded administration of justice." *Stychno* at ¶34, citing *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55. This case represents a perfect example for the use of contempt proceedings, as Mr. Krihwan had repeatedly defied the trial court's directives regarding his property division obligation over the course of the last 15 years.

{¶29} **Propriety of a 90-day Jail Term Pursuant to R.C. 2705.05(A)**

{¶30} Under the first assignment of error, Mr. Krihwan claims the trial court could not sentence him on September 11, 2009 to 90 days in jail for contempt. He argues R.C. 2705.05(A) permits the imposition of a 90-day jail term only for a third offense of contempt, and his contempt found by the court on that day was not a third offense.

{¶31} R.C. 2705.05(A) permits the trial court to impose a term of imprisonment of not more than 30 days in jail for the first offense of contempt; a term of not more than sixty days for the second offense; and a term of not more than 90 days for the third offense.

{¶32} Mr. Krihwan alleges the trial court did not impose sentences on its previous contempt findings, and therefore those contempt findings do not constitute "previous offenses" for the purpose of penalty enhancement permitted by the statute. In support of this claim, he cites *Pingue v. Pingue* (Nov. 6, 1995), 5th Dist. No. 95CAF02006, 1995 Ohio App. LEXIS 5904.

{¶33} In that case, although finding the husband in contempt, the trial court did not sentence him to jail. The trial court stated in its judgment entry "the Defendant is in contempt of the prior orders of this Court and the Court *will hold in abeyance imposition of sentence* for the contempt herein pending further orders ***." (Emphasis added.) Id. at *2. The Fifth District explained that the trial court's failure to impose a sentence relative to its finding of contempt was not without legal effect. Because the trial court did not impose sentence as to its contempt finding, the contempt finding did not constitute "previous offenses" within the meaning of R.C. 2705.05.

{¶34} Mr. Krihwan misrepresented the record in claiming the trial court did not impose sentences on its previous contempt findings in the court's June 1, 2001, November 8, 2001, and August 5, 2003 judgment entries. The record before us reflects that the trial court, on each of these three occasions, found Mr. Krihwan in contempt for failing to comply with the court's April 5, 1996 judgment and *sentenced him to a 30-day jail term*, but allowed him to purge the contempt order by making scheduled payments.

{¶35} Therefore, on December 3, 2003, when the court found him yet again in contempt of the court's April 5, 1996 order, the court properly sentenced him to 90 days in prison, pursuant to the penalty enhancement provision of R.C. 2705.05(A)(3). The court again allowed him to purge the contempt order by making scheduled payments to Mrs. Krihwan until the amount owed is fully paid.

{¶36} Mr. Krihwan complied with that purge order until February 2008, but has refused to make any further payments since then. On this record, the trial court acted within its discretion in enforcing the December 3, 2003 judgment and ordering his immediate imprisonment on September 11, 2009.

{¶37} Although Mr. Krihwan claims otherwise, the judgment entries contained in the record reflect that the trial court imposed a 30-day jail term upon finding him in contempt of the April 5, 1996 divorce decree on three prior occasions, and therefore, the 90-day imprisonment was properly imposed on December 3, 2003 pursuant to the statute. The first assignment of error is without merit.

{¶38} **Presentation of Evidence of Inability to Pay**

{¶39} Mr. Krihwan claims the trial court erred by not allowing him to present, at the hearing on the motion to impose sentence, evidence of his inability to pay after February 15, 2008. In his brief, Mr. Krihwan alleges he lost his source of income in 2008. He further asserts that he was paralyzed and was ordered by the trial judge to "get out of his wheel chair and climb Mt. Everest." He asserts he could not comply with the terms of the purge order because the only income he receives is his social security income of $1,722 per month. He also claims the trial court "refused" to consider his plea of inability to pay. Mr. Krihwan, however, fails to submit a transcript of the September 11, 2009 hearing for our review of his claim.

{¶40} App.R. 9 requires that an appellant arrange for the transmission of the trial court record and transcript to the appellate court. "An appellant is required to provide a transcript for appellate review." *Warren v. Clay*, 11th Dist. No. 2003-T-0134, 2004-Ohio-4386, ¶4, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. "Such is necessary because an appellant shoulders the burden of demonstrating error by reference to matters within the record." Id. This principle is embodied in App.R. 9(B), which states, in relevant part:

{¶41} "At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk." Where a transcript is necessary for the resolution of assigned errors is omitted from the record, an appellate court has nothing to pass upon. Clay at ¶7.

{¶42} We further note that a statement of evidence is permissible under App.R. 9(C), if no report or transcript of the proceedings is available. However, "it is the duty of the appellant to ensure that the record, or whatever portions thereof are necessary for the determination of the appeal, are filed with the court in which he seeks review." *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19. In the absence of such a record, "[a]n appellate court reviewing a lower court's judgment indulges in a presumption of regularity of the proceedings below." *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 7; see, also, *Knapp*, supra. "[A]n appellant 'bears the burden of affirmatively demonstrating error on appeal.'" *Village of S. Russell v. Upchurch*, 11th Dist. Nos. 2001-G-2395 and 2001-G-2396, 2003-Ohio-2099, ¶10, quoting *Concord Twp. Trustees v. Hazelwood Builders* (Mar. 23, 2001), 11th Dist. No. 2000-L-040, 2001 Ohio App. LEXIS 1383.

{¶43} Mr. Krihwan has failed to file with the court a complete trial record for our review of his claim of error. He has provided no transcript or statement of evidence. The nature of his appeal makes crucial the review of a transcript or a statement of evidence and, without it, we must presume the regularity of the proceedings and afford the trial court substantial deference in its finding of contempt. The second assignment of error is without merit.

{¶44} For the foregoing reasons, judgment of the Lake County Court of Common Pleas, Domestic Relations Division, is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.