

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

JENNIFER DIMITRIOU,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-11-119
- vs -	:	<u>OPINION</u>
	:	10/15/2012
DAVID DIMITRIOU,	:	
Defendant-Appellant.	:	

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 07DR30923

Jennifer Dimitriou, 3734 Wilmington Road, Lebanon, Ohio 45036, plaintiff-appellee, pro se
David Dimitriou, 1937 Heritage Run Drive, Lebanon, Ohio 45036, defendant-appellant, pro se
David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive,
Lebanon, Ohio 45036, for appellee, Warren County Child Support Enforcement Agency

HENDRICKSON, P.J.

{¶ 1} Defendant-appellant, David Dimitriou (Father), appeals a decision of the Warren County Court of Common Pleas, Domestic Relations Division, finding him in contempt for failing to pay child support and spousal support. For the reasons discussed below, we reverse the trial court's contempt finding and remand the matter for further

proceedings consistent with this opinion.

I. Facts and Procedural History

{¶ 2} Father and plaintiff-appellee, Jennifer Dimitriou (Mother), were married in May 1993 in Cincinnati, Ohio, and have three minor children. Mother filed for divorce on March 5, 2007, and the trial court entered a Final Judgment and Decree of Divorce and a Final Decree of Shared Parenting on October 15, 2008. The Final Judgment and Decree of Divorce ordered Father to pay spousal support in the amount of \$1,500 per month for four years and child support in the amount of \$608.90 per month, plus a 2 percent processing charge for each support obligation. Father's combined support order was \$2,151.08 per month.

{¶ 3} Father has failed to consistently pay his monthly support obligations, and has been found in contempt of court on numerous occasions. On April 15, 2010, the trial court sentenced Father to 73 days in the Warren County Jail for his failure to pay his child support and spousal support obligations. This sentence was suspended on the condition that Father timely and fully pay his support obligations. On September 21, 2010, the trial court reviewed the status of the case and determined that Father's 73-day jail sentence would remain suspended on the condition that he pay "at least \$1,200.00/month toward his support obligations."

{¶ 4} On July 1, 2011, Mother filed a Motion for Contempt with the trial court, asserting that Father had failed to pay "the reduced amount of support that was agreed on in [September] 2010." She also filed a motion asking the court "to remove spousal support from the court order." A hearing was held on the two motions on September 15, 2011, where both Mother and Father chose to represent themselves. At that time, Mother withdrew her motion asking the court to remove the spousal support order. Father made an oral request that the hearing be continued as his certified public accountant (CPA), who he planned to call as a witness, was unavailable. Father indicated his CPA's presence was necessary because

he "had some information" from his CPA and his tax returns that he wished to present as evidence. However, the magistrate told Father that the information he sought to present as evidence was not needed as Mother had withdrawn her spousal support motion.¹ The

1. The following conversation took place at the September 15, 2011 hearing:

THE COURT: Any other issues or questions before we begin Mr. Dimitriou?

[APPELLANT]: I do have one . . . well uh two um one would be that uh um I would . . . I will be needing to file motions . . .

THE COURT: Well, you can certainly do that after today's hearing . . .

[APPELLANT]: Ok.

THE COURT: . . . but we're not going to deal with them today.

[APPELLANT]: Ok, that's fine. Um to reflect her motion um being eliminated . . . also uh on the list of things you had us bring . . .

THE COURT: Well, that's now moot because she withdrew that motion.

[APPELLANT]: Oh.

THE COURT: So the only thing that we're proceeding on is the Motion for Contempt.

[APPELLANT]: Ok. Ok, well I . . . I had some information from my CPA and my tax returns.

THE COURT: I can appreciate that but now we don't need it. Ok?

[APPELLANT]: All righty.

* * *

[APPELLANT]: * * * I was prepared to bring in um my CPA, Candace Clark . . . DeClark and uh . . .

THE COURT: But what's your question sir?

[APPELLANT]: Well uh I . . . I would need a continuance to bring Candace in because she is in the 15th deadline. Today is a corporate . . .

THE COURT: Well a continuance asked for the day of trial is not going to be granted under those circumstances. * * *

* * *

THE COURT: [Mother] dismissed the motion so now you don't need to have that testimony.

[APPELLANT]: Yeah . . . um well that was very important to my financial situation because um I . . .

magistrate then denied Father's continuance request and proceeded on Mother's Motion for Contempt.

{¶ 5} At the hearing, Mother testified that Father paid approximately \$1200 a month for five months before he stopped making full payments in December 2010. She further stated that from December 2010 to August 2011, Father either failed to pay any child support or spousal support or only paid \$300 to \$500 per month. Mother explained that in August 2011 she received approximately \$1300 from Father after the Warren County Child Support Enforcement Agency seized his bank account. Mother testified that she sought to have Father found in contempt, incarcerated, and placed on work release so that he could contribute to his monthly child support and spousal support obligations.

{¶ 6} Father testified that he knew he had not timely and fully paid his support obligations, but his failure to pay was "not a willful situation." Father explained that he had been contributing 50 to 60 percent of everything he earned towards his support obligation, and he had "not spent money on [himself] at all." Father also explained that he was unable to borrow any more cash and his "personal loan situation is at its fullest." Father attempted to introduce into evidence a letter from his CPA explaining his financial situation, but the magistrate found the letter inadmissible. The magistrate explained, "a letter from anybody is

THE COURT: Well sir, you haven't filed a motion so . . .

* * *

[APPELLANT]: How much information would be pertinent to the remaining motion that I would um um as far as my ability to pay would be considered?

THE COURT: I can't give you legal advice or pre-judge the case sir.

[APPELLANT]: No, no . . . I (inaudible) understand. Am I, am I going to have the opportunity to present . . .

THE COURT: You're going to have the opportunity to defend yourself . . .

[APPELLANT]: Ok.

not admissible to the Court and this is not a motion to reduce your support."

{¶ 7} On September 16, 2011, the magistrate issued a decision finding Father in contempt. The magistrate found that, "[n]ot only did Father fail to comply with the specific orders of this Court, but Father also failed to comply with the \$1,200.00 per month contained in the September 21, 2010 Entry." The magistrate sentenced Father to 30 days in jail for the current contempt finding and revoked the previously suspended 73-day sentence, thereby ordering Father to serve a total of 103 days in the Warren County Jail. Father was given the opportunity to purge his contempt and avoid the imposition of the jail sentence by (1) timely and fully paying his child support and spousal support obligations and (2) contributing the sum of \$1,500 toward his outstanding child support and spousal support arrearages on or before the final sentencing date of November 18, 2011.

{¶ 8} Father timely objected to the magistrate's decision, arguing that the magistrate's decision was contrary to law. Father argued that the United States Supreme Court case *Turner v. Rogers*, ___ U.S. ___, 131 S.Ct. 2507 (2011), requires a court to make a finding of one's "present ability to pay" before incarcerating a defendant for the willful non-payment of support. Father further objected to the magistrate's decision on the basis that he was denied the opportunity to present information about his finances and present ability to pay as the trial court would not continue the matter so that his CPA could attend the hearing and refused to consider the financial documentation that he had in his possession at the September 15th hearing.

{¶ 9} On November 2, 2011, the trial court overruled Father's objections to the magistrate's decision, finding that "it had not yet been clearly established whether or not Father was unable to comply with the terms of his order" as Father still had the opportunity to purge his sentence. The trial court stated, "Father will have the opportunity to explain his circumstances to the Judge" at the Final Sentencing and Purge Hearing. The trial court

agreed with the magistrate's decision to deny Father's request for a continuance, finding that Father should have made his request in writing before the day of the hearing. The trial court adopted the magistrate's decision finding Father in contempt.

{¶ 10} On November 18, 2011, the trial court held its Final Sentencing and Purge Hearing. The trial court found that Father had only paid \$260 since the September 15 hearing and that Father was "voluntarily underemployed." The trial court sentenced Father to 103 days in the Warren County Jail with work release privileges.

{¶ 11} Father timely appealed the trial court's decision, arguing in his sole assignment of error that the trial court's decision was erroneous in three respects: (1) the magistrate found Father in contempt for his failure to pay the court-ordered support obligations even though the magistrate did not make an explicit finding that Father's non-payment was willful; (2) the magistrate ignored Father's attempt to present his financial information, and refused to consider the same in her findings; and (3) during the final sentencing hearing, the trial court found Father to be voluntarily underemployed yet failed to cite to any of the eleven factors required by R.C. 3113.215(5)(a) in making such a finding.

II. Analysis

{¶ 12} As an initial matter, we note that Father was found to be in civil contempt for his failure to pay his support obligations. "The distinction between civil and criminal contempt depends upon the character and purpose of the sanctions imposed." *Mackowiak v. Mackowiak*, 12th Dist. No. CA2010-04-009, 2011-Ohio-3013, ¶ 38. Where the sanctions imposed are primarily for reasons benefiting the complainant and are remedial and coercive in nature, the contempt is civil in nature. *Id.* at ¶ 39. "Prison sentences imposed as punishment for civil contempt are conditional, and the contemnor is said to carry the keys of his prison in his own pocket due to the fact that his compliance with the court order secures

his freedom." *Whittington v. Whittington*, 12th Dist. No. CA2011-06-065, 2012-Ohio-1682, ¶ 23.

{¶ 13} A trial court's finding of civil contempt will not be disturbed on appeal absent an abuse of discretion. *Mackowiak* at ¶ 45. An abuse of discretion constitutes more than an error of law or judgment; it requires a finding that the trial court acted unreasonably, arbitrarily, or unconscionably. *Miller v. Miller*, 12th Dist. No. CA2001-06-138, 2002-Ohio-3870, ¶ 8.

A. Willful Non-Support

{¶ 14} Father initially argues that the trial court erred by finding him in contempt without first finding his non-payment of child support and spousal support to be willful. We find Father's argument to be without merit. The Supreme Court has held that "[p]roof of purposeful, willing or intentional violation of a court order is not a prerequisite to a finding of contempt." *Pugh v. Pugh*, 15 Ohio St.3d 136 (1984), paragraph one of the syllabus. We therefore find that the trial court was not required to determine that Father "willfully" violated the trial court's order to pay child support or spousal support before finding him in contempt.

B. Financial Information and Inability to Pay

{¶ 15} Father also argues that the trial court erred when it refused to allow him to present information about his financial situation at the contempt hearing. Father specifically contends that this information was relevant in determining his "present ability to pay" his support obligations. Father argues that before he could be incarcerated for the non-payment of his spousal and child support obligations, the trial court was required to make a finding of his "present ability to pay."

{¶ 16} "Any party who has a legal claim to any support ordered for a child, spouse, or former spouse may initiate a contempt action for failure to pay the support." R.C. 2705.031(B)(1). "In a civil contempt proceeding for failure to pay court-ordered * * * support,

the moving party must prove by clear and convincing evidence that the obligor violated the court order." *Dressler v. Dressler*, 12th Dist. Nos. CA2002-08-085, CA2002-11-128, 2003-Ohio-5115, ¶ 14, citing *Pugh* at 140. Once the moving party has established the obligor's failure to pay the support obligation as ordered, the obligor then bears the burden of alleging and proving his inability to comply with the court's order. *Dressler* at ¶ 14. The inability to pay the support obligation is a valid defense in a contempt proceeding. *Bean v. Bean*, 14 Ohio App.3d 358, 363 (12th Dist.1983); *DeMarco v. DeMarco*, 10th Dist. No. 09AP-405, 2010-Ohio-445, ¶ 25.

{¶ 17} Having reviewed the transcript from the September 15, 2011 hearing on Mother's motion for contempt, we find that the magistrate denied Father the opportunity to present evidence in support of a defense of his inability to pay the support obligations. It appears that the magistrate misconstrued Father's reason for wanting to introduce evidence of his financial situation. When Father sought to introduce evidence of his financial situation, including his tax returns, the magistrate told Father that the information was no longer needed. The magistrate then told Father, "this is not a motion to reduce your support."

{¶ 18} We find that the magistrate's refusal to allow Father to present evidence of his financial situation, as it related to his inability to pay his support obligation, to be unreasonable and arbitrary. Accordingly, we find that the trial court abused its discretion in adopting the magistrate's decision finding Father in contempt without first allowing Father the opportunity to present a defense of his inability to comply with the court's support order.

{¶ 19} The trial court's decision finding Father in contempt of court for failure to pay child support and spousal support is hereby reversed. The matter is remanded to the trial court for a hearing on Mother's Motion for Contempt. At that hearing, the trial court shall permit Father to introduce evidence of his alleged inability to pay his support obligations before making its determination on the alleged contempt.

C. Voluntarily Underemployed

{¶ 20} Father also argues that the trial court erred in finding him "voluntarily underemployed" in its November 18, 2011 entry as it "failed to cite to a single one of the eleven factors required under O.R.C. 3113.215(5)(a), to make such a finding." We agree with Father that the trial court erred in finding him voluntarily underemployed in its November 18, 2011 entry, albeit for a different reason. The issue of whether Father was voluntarily underemployed was not raised by the parties, nor litigated, at the contempt hearing before the magistrate. It appears that the trial court sua sponte considered the issue of Father's employment without providing notice to Father and without accepting evidence on the issue. We therefore reverse and vacate the trial court's finding that Father was "voluntarily underemployed."

III. Conclusion

{¶ 21} The trial court's decision finding Father in contempt is hereby reversed and the matter remanded to the trial court for further proceedings consistent with this opinion.

PIPER and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.