Granted in Part, Denied in Part, and Opinion Filed May 21, 2018

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00371-CV

IN RE JEREMIAH O'KEEFFE, Relator

Original Proceeding from the 469th Judicial District Court
Collin County, Texas
Trial Court Cause No. 469-54728-2009

MEMORANDUM OPINION

Before Justices Bridges, Brown, and Boatright
Opinion by Justice Bridges

In the underlying proceeding, the trial court found relator in criminal and civil contempt for failing to pay child support arrearages, past medical support owed, and certain uninsured medical expenses. Relator has served the six-month sentence for criminal contempt and is currently confined and serving the sentence for civil contempt. In this original proceeding, relator challenges the civil contempt order. He seeks a writ of habeas corpus releasing him from confinement and striking the provisions of the civil contempt order that include $34,665.10 in attorney's fees and court costs as a condition to purge himself of the contempt and as a condition for release. After reviewing the amended petition, the habeas record, and the real party in interest's response brief, we conclude relator is entitled to part of the relief requested. For the following reasons, we grant the writ in part and deny in part.

Background

In August 2017, the trial court found relator in contempt of court for failing to pay $26,252.67 in child support arrearages, $3,454.56 in past medical support payments, and $2,677.50 in unpaid uninsured medical expenses. The court also found that $34,665.10 were the reasonable and necessary attorney's fees and court costs incurred to enforce a court order and assessed the fees as child support. The August 23, 2017 contempt order includes criminal and civil contempt orders. Relator has served the six-month sentence for criminal contempt.

The civil contempt order requires relator to remain confined for an additional six months after serving the sentence for criminal contempt. The civil contempt order provides that relator can purge the civil contempt and be released before completing the second, six-month sentence by paying the arrearages, past medical support payments, unpaid uninsured medical expenses, and the attorney's fees and court costs awarded as enforcement costs. Relator began serving the sentence for civil contempt on February 23, 2018.

Standard of Review

A court may punish for contempt. TEX. GOV'T CODE ANN. § 21.002 (West 2004). A habeas corpus proceeding is a collateral attack on a judgment that imposes punishment for contempt. *In re Johnson*, 337 S.W.3d 486, 488 (Tex. App.—Dallas 2011, orig. proceeding). A petition for writ of habeas corpus does not inquire into the guilt or innocence of the relator, but only determines if the order of contempt was void. *See Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979) (orig. proceeding). A contempt order is void if it is beyond the power of the court to render it or if it deprives the relator of liberty without due process of law. *Ex parte Barnett*, 600 S.W.2d 252, 254 (Tex. 1980) (orig. proceeding).

Discussion

Relator raises two issues in this original proceeding. First, he argues that the civil contempt order should be vacated because he had no visible or apparent means to pay the arrearages and, therefore, confining relator until he pays those arrearages violates due process. Second, he argues that the payment of fees and costs as a condition to purge contempt is improper. We will address each complaint in turn.

A. Inability to Pay

The trial court found that relator "had the ability to pay" the arrearages and was "presently able to pay" those amounts at the time the court signed the contempt order. Relator, however, maintains that the civil contempt order is void because he is unable to pay the amounts required to purge the contempt. We conclude relator has not established that the order is void.

A contempt order imposing a coercive restraint is void and subject to collateral attack by habeas corpus if the condition for purging the contempt is impossible of performance. *In re Smith*, 354 S.W.3d 929, 930 (Tex. App.—Dallas 2012, orig. proceeding) (citing *Ex parte Dustman*, 538 S.W.2d 409, 410 (Tex. 1976) (orig. proceeding)). In other words, "a person cannot be incarcerated indefinitely for contempt if he or she does not have the ability to perform the condition required for release." *Smith*, 354 S.W.3d at 930 (quoting *In re Brownhill*, No. 14–07–00346–CV, 2007 WL 1624776, at *2 (Tex. App.—Houston [14th Dist.] June 7, 2007, orig. proceeding)). Accordingly, a person who is obligated to pay child support may plead, as an affirmative defense to an allegation of contempt, that he: (1) lacked the ability to provide support in the amount ordered; (2) lacked property that could be sold, mortgaged, or otherwise pledged to raise the needed funds; (3) attempted unsuccessfully to borrow the needed funds; and (4) knew of no source from which the money could be borrowed or legally obtained. *Ex parte Hayes*, No. 05-17-00473-CV, 2017 WL 2889047, at *3 (Tex. App.—Dallas July 7, 2017, orig. proceeding); *Smith*, 354 S.W.3d at 930; *In*

re Lausch, 177 S.W.3d 144, 155–56 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding) (citing TEX. FAM. CODE ANN. § 157.008(c)(1)-(4) (Vernon 2002)).

In the context of criminal and civil contempt, the contemnor must establish all four elements of the defense to establish a void order. *In re Mancha*, 440 S.W.3d 158, 167 (Tex. App.—Houston [14th Dist.] 2013, orig. proceeding); *see also In re Lausch*, 177 S.W.3d at 156. The obligor is required to prove this affirmative defense by a preponderance of the evidence. *Smith*, 354 S.W.3d at 930–31 (citing *Ex parte Roosth*, 881 S.W.2d 300, 301 (Tex. 1994) (orig. proceeding)).

In support of his petition, relator argues that an affidavit of inability to pay costs filed as part of this original proceeding, an affidavit of indigency filed in the trial court, and the trial court's indigency finding and appointment of counsel establishes that relator cannot cure the contempt because he cannot pay the arrearages or costs. We disagree. The affidavit of inability to pay filed in this Court was not before the trial court at the time of the contempt order and is, therefore, irrelevant to the discussion here. The affidavit of indigency filed in the trial court, the trial court's indigency finding, and the trial court's appointment of counsel are also insufficient to show the order is void.

The standard for establishing indigency for appointment of counsel is different from the standard for establishing an inability to pay arrears. *Cf.* TEX. FAM. CODE ANN. § 157.163 (West Supp. 2017) (no test for determining indigency), *with* TEX. FAM. CODE ANN. § 157.008(c) (West 2014) (providing criteria for proving defense of inability to pay). Moreover, a finding of indigency does not create a constructive determination of an inability to pay under section 157.008(c) and does not shift the burden to the other party. *In re Mancha*, 440 S.W.3d at 166–67 (holding mother retained burden under section 157.008(c) to plead and prove inability to pay as an affirmative defense even though trial court found her indigent for purposes of appointing counsel under section

157.163). "Because section 157.008(c) specifically requires a showing that the child-support obligor is unable to borrow the funds to meet his or her obligations, the inability-to-pay threshold is necessarily higher than the indigence threshold." *Id.* As such, the indigency finding alone does not support relator's arguments here.

Relator has not provided a record of the contempt hearing and has not shown that he met his burden of pleading and proving an inability to pay the arrearages. *See Ex parte Johns*, 807 S.W.2d 768, 773 (Tex. App.—Dallas 1991, orig. proceeding) (contemnor has the burden of establishing in trial court that he was unable to pay the arrearages); *see also Ex parte Linder*, 783 S.W.2d 754, 760 (Tex. App.—Dallas 1990, orig. proceeding) ("In the absence of a statement of facts of the contempt hearing, the reviewing court must presume that there was evidence to support the court's contempt judgment."); *see also Ex parte Ramzy*, 424 S.W.2d 220, 224 (Tex. 1968) (contempt order void if the evidence offered at the hearing conclusively established that at the time of the contempt hearing it was not within the power of the relator to perform the act or acts which would release him from the punishment authorized by the court's judgment). Further, the excerpts from other hearings included in the habeas record show that relator was able to successfully borrow money from his landlord and his mother in the past to buy a truck and pay the monthly note on the truck, to buy gas each week, to pay for car insurance and a cell phone, to pay a bankruptcy attorney, to buy airplane tickets, and to pay an appellate attorney a flat fee. Relator did not, however, show that he could not seek additional funds from the landlord, his mother, or someone else to pay the child support and medical arrearages or even that he had asked anyone for funds to pay those arrearages. Under this record, relator has not established that the civil contempt order is void in its entirety.

B. Payment of fees and costs included in amount necessary to purge contempt

The civil contempt order also provides that relator will be released from confinement the earlier of when he either (1) pays the child support and medical support arrearages plus $34,665.10 in fees and costs incurred in obtaining the contempt order or (2) serves the additional six-month sentence. Relator argues that the $34,665.10 of costs incurred to obtain the contempt order should not be included in the amount required to purge the contempt because he has not been held in contempt for failing to pay those costs. Relator is correct. The portion of the order including the fees and costs award as part of the amount required to be paid to purge the contempt is void because relator was not held in contempt for failing to pay those fees and costs. *See In re Patillo*, 32 S.W.3d 907, 910 (Tex. App.—Corpus Christi 2000, orig. proceeding) (striking portions of contempt order requiring relator to remain incarcerated until he pays costs that relator was not actually held in contempt for failing to pay). In fact, the order requires relator to pay the $34,665.10 in fees and costs on or before September 23, 2018. Yet, relator's confinement for civil contempt ends August 22, 2018, a month before the fees and costs are due to be paid. A party may not be confined for failure to pay a judgment that is not yet due. *In re Newby*, 370 S.W.3d 463, 470 (Tex. App.—Fort Worth 2012, orig. proceeding) ("relator cannot be held in contempt indefinitely for failing to make future payments as they come due, and those payment orders are therefore void"); *In re Patillo*, 32 S.W.3d at 910 (party may not be confined for amounts he was not held in contempt for failing to pay); *see also Ex parte Davila*, 718 S.W.2d 281, 282 (Tex. 1986) (orig. proceeding) (party cannot be held in contempt for failure to pay bills that were not past due at the time of the contempt hearing). We conclude that the provisions of the August 23, 2017 contempt order making payment of $34,665.10 in enforcement costs a condition to purge the contempt and a condition for release are void.

Conclusion

Accordingly, we grant the writ of habeas corpus in part and deny it in part. We strike from the body of the August 23, 2017 contempt order all provisions that make payment of $34,665.10 in enforcement costs a condition to purge the civil contempt and a condition for release before completing the six-month sentence for civil contempt. We deny the petition for writ of habeas corpus in all other respects and leave the remainder of the August 23, 2017 contempt order intact.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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