

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1947

Cir. Ct. No. 2006PA163PJ

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE FINDING OF CONTEMPT IN RE THE PATERNITY OF M. J. F.-S.:

MICHELLE L. STEELE AND STATE OF WISCONSIN,

PETITIONERS-RESPONDENTS,

v.

JASON G. FOSTER,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Eau Claire County:
JON M. THEISEN, Judge. *Affirmed.*

¶1 STARK, J.¹ Jason Foster appeals orders finding him in contempt of a court order. Foster argues the order to show cause and its accompanying

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

affidavit were vague, thus depriving him of due process. He also argues the circuit court erred in finding him in contempt because he reasonably believed he was in compliance with the circuit court's previous order. We disagree and affirm.

BACKGROUND

¶2 In December 2012, Foster was found in contempt of a court order for failing to pay child support as ordered. The court set purge conditions requiring Foster to pay \$574 per month in child support and an additional \$25 per month toward arrearages,² beginning in December 2012. Relevant to this appeal, a subsequent order to show cause was filed on August 13, 2013. A hearing was held September 16, 2013. The court found Foster in contempt and imposed 60 days of jail, stayed with purge conditions.

¶3 Foster unsuccessfully attempted to appeal pro se and ultimately filed a "Notice of Intent to Pursue Postdisposition Relief." Foster, now represented by counsel, moved for "Postconviction^[3] Relief" in May 2014 alleging: (1) the order to show cause and supporting affidavit were vague and did not specify reasons or time periods to find him in contempt; (2) he was denied due process when he was not permitted to present his case at the September hearing; and (3) he did not willfully violate the order because the average of his payments exceeded the ordered amounts.

² The December 2012 order noted in its findings, "As of December 1, 2012, [Foster's] arrearage exceeds \$16,000 accruing at a rate of \$574 per month."

³ Foster's briefs alternate between descriptions of his motion as one seeking "postdisposition relief" and "postconviction relief." Foster was not convicted of anything, and we believe his motion is best characterized as a motion for reconsideration. That is how we refer to it.

¶4 The circuit court held a hearing on Foster’s motion on July 24, 2014.⁴ The court granted Foster’s motion regarding his opportunity to present his case, and allowed Foster to present evidence regarding his nonwillful violation of the child support order. The court ultimately determined the order to show cause and supporting affidavit were not vague and affirmed its contempt finding from the September hearing. Foster appeals. Additional facts will be developed as necessary below.

DISCUSSION

I. The affidavit supporting the order to show cause was not vague

¶5 Foster first argues his right to due process was violated because the affidavit accompanying the order to show cause did not set forth what he needed to “answer to in order to be prepared for contempt.” The right to due process is protected by the Fourteenth Amendment to the United States Constitution and by article I, section 1, of the Wisconsin Constitution. “Due process requires at least a notice and a hearing in the contempt process[.]” *O’Connor v. O’Connor*, 48 Wis. 2d 535, 543, 180 N.W.2d 735 (1970). More specifically, a party must “be aware of what he [or she] must answer to so that he [or she] can be prepared to offer proof and explanation showing his [or her] good faith efforts to comply with the court’s orders.” *Dennis v. State*, 117 Wis. 2d 249, 261, 344 N.W.2d 128 (1984). Whether Foster was denied procedural due process by insufficient notice in the affidavit and order to show cause involves a question of constitutional fact

⁴ At the July 24 hearing, the court also heard additional motions from the parties. While some facts overlapped, those motions are not a part of this appeal and will not be discussed further.

that we review de novo. *Zimbrick v. LIRC*, 2000 WI App 106, ¶9, 235 Wis. 2d 132, 613 N.W.2d 198.

¶6 WISCONSIN STAT. § 767.78(2) provides, in relevant part:

If a person has incurred a financial obligation and has failed within a reasonable time or as ordered by the court to satisfy the obligation, ... the court may on its own initiative, and shall on the application of the receiving party, issue an order requiring the payer to show cause at a reasonable time specified in the order why he or she should not be subject to contempt of court under ch. 785.

¶7 The order to show cause at issue informed Foster he was to appear for a pretrial conference at the Eau Claire Child Support Agency⁵ (the Agency) on Tuesday, August 27, 2013 at 4 p.m. “to attempt to settle this matter[.]” He was also ordered to appear in person before family court commissioner Nathan Novak at the Eau Claire County courthouse on Thursday, September 5, 2013 at 9:30 a.m.⁶ Further, Foster was notified he must “show cause why [he] should not be found in contempt for failure to obey the orders of the court[.]” and “show cause why the relief requested in the attached affidavit should not be granted together with such other relief as may be necessary.” The order to show cause explained Foster had the right to be represented by an attorney at the hearing, the potential sanctions the court could impose pursuant to WIS. STAT. ch. 785 if Foster were found in contempt, and what documents Foster needed to produce to the Agency prior to August 20, 2013.

⁵ On appeal, the Eau Claire County Child Support Agency filed a brief on behalf of the State of Wisconsin; Steele, the mother of Foster’s child and a named party, did not submit a brief.

⁶ The Agency’s brief asserts that this appearance was later adjourned to September 16, 2013 before the circuit court, and the hearing on the order to show cause was ultimately conducted before the circuit court on September 16, 2013.

¶8 In the attached affidavit, the Agency averred Foster had failed to comply with the court order for support and owed an arrearage based on its payment records; that Foster had an obligation to pay \$574 per month for child support, with an additional \$25 per month toward his outstanding accounts; and that the arrears as of August 12, 2013 were \$13,992.88.

¶9 Foster argues the affidavit and order are ambiguous because neither “state[s] the months or amounts that [he] should be found in contempt for[.]” He insists that “[h]aving the knowledge of which months he would need to provide a defense for was critical in determining his defense and what documentation he might need to obtain in order to prove his non-contempt.”

¶10 The Agency responds that, “[c]onsistent with the language of the cases cited by [Foster,] the purpose of the Order to Show Cause and affidavit is to give [Foster] notice of the time, date and location of the hearing, and the purpose of the hearing. [Foster] received notice of all of these items.” The Agency argues that, despite what Foster identified as “deficiencies” in the notice he received, he fails to show how the notice provided does not comply with the law, or how the “perceived ambiguity in any way caused [him] prejudice[.]”

¶11 We agree with the Agency. The affidavit submitted by the Agency informed Foster that its records indicated he had failed to comply with the court order for support. The order to show cause specified a reasonable time, as well as the place at which Foster would need to appear to show cause as to why he should not be found in contempt. It further instructed him about the documentation he needed to provide the Agency before the hearing, including a copy of his tax returns for the last two years; a wage statement from his employer for the eight weeks immediately preceding the date of the hearing; statements of unemployment

or disability he was currently receiving; a completed financial disclosure form; and a statement of any other income that he receives. Foster was therefore on notice of when and where he should appear to offer proof about his alleged failure to pay child support as required by the prior court order. In addition, Foster provides no argument about evidence he failed to produce as a result of any deficiency in the order to show cause or supporting affidavit. This notice did not violate Foster's due process rights.

II. The circuit court properly found Foster was in contempt

¶12 “A person may be held in contempt if he or she refuses to abide by an order made by a competent court having personal and subject matter jurisdiction.” *State v. Rose*, 171 Wis. 2d 617, 622, 492 N.W.2d 350 (Ct. App. 1992). A finding of contempt rests on the circuit court's factual findings regarding the person's ability to pay. See *Balaam v. Balaam*, 52 Wis. 2d 20, 29, 187 N.W.2d 867 (1971). Critical are the findings that the defendant is able to pay or should be able to pay and that he or she can work and will not, and that the refusal to pay is willful and with the intent to avoid payment. *O'Connor*, 48 Wis. 2d at 542-43.

¶13 We review a circuit court's use of its contempt power to determine whether the court properly exercised its discretion. *Krieman v. Goldberg*, 214 Wis. 2d 163, 169, 571 N.W.2d 425 (Ct. App. 1997). “A court exercises discretion when it considers the facts of record and reasons its way to a rational, legally sound conclusion.” *Gerrits v. Gerrits*, 167 Wis. 2d 429, 440, 482 N.W.2d 134 (Ct. App. 1992). Where a circuit court fails to set forth its reasoning in exercising its discretion, we independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion. See *Randall v. Randall*, 2000

WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. A circuit court's finding that a person is in contempt of court will not be reversed unless the finding is clearly erroneous. *Rose*, 171 Wis. 2d at 623. Foster has the burden to show his conduct was not contemptuous. *Balaam*, 52 Wis. 2d at 30.

¶14 A child support specialist working for the Agency testified at the September 2013 hearing about Foster's child support payments since the December 2012 contempt hearing. The specialist testified that Foster's monthly obligation was \$574 per month in child support, in addition to a \$25 per month payment toward outstanding accounts totaling \$17,653.14. She testified Foster made the following payments in 2013:

- January: \$263.45
- February: \$574.00
- March: \$0
- April: \$0
- May \$50.00
- June: \$50.00
- July: \$50.00
- August: \$50.00

The specialist also testified there had been two tax intercepts during that time period: \$588.69 in February, and \$2,717.09 in May; intercepts which would not have occurred had Foster not had arrears of "17,000-plus dollars" by that point in time.

¶15 Regarding Foster's ability to pay, when asked why he had not been making his child support payments, Foster testified: "Because I'm not making the kind of money that I did when I was a manager back in 2009." The Agency questioned him about his work as an insurance agent, how he was compensated,

and about his status as the sole provider in his family.⁷ Foster asserted his monthly payments were “impossible” and that he did not make “that much money. Sixty days in jail, I would lose my job. They would pull everything. So, yeah, this is pretty much the end of my life if this happens. I don’t know what else to do.”

¶16 The Agency argued Foster was “arguably ... shirking[,]” and noted “Foster in 2009 left his last employment where he had an earning capacity of \$4,106 per month. He represented he was going to get his MBA, which he never did. And he’s been on a continual downward slide in his income” Foster provided his 2012 income tax returns, but not his 2013 income tax returns despite the fact Foster signed his contract with the insurance company for whom he worked in mid-October of 2012. The court found Foster in contempt of the support order.

¶17 At the hearing on Foster’s motion for reconsideration in July 2014, Foster testified that he did not believe he was in contempt “[b]ecause when [he] looked at the history of [his] payments and averaged them out, they came out to what [he] was supposed to pay every month.” He also testified that he “thought that [tax intercepts] went to the current amount, not the arrears.” Foster argued he reasonably believed he was making his payments based on these averages, because the circuit court had used a similar averaging method when it found him in contempt back in December of 2012.⁸ For its part, the Agency argued Foster’s

⁷ At the time of the September 2013 hearing, Foster was married with a child or children in addition to his child with Steele.

⁸ In response to this assertion, the court stated:

(continued)

support order was “very clear that it’s a monthly order, each and every month.” Regarding the tax intercepts, the Agency pointed out that the intercepts occurred solely because of Foster’s arrearages, observing, “[Foster] testified that they were involuntary, he didn’t make them, he had nothing to do with them, they occurred because his taxes were tapped.”

¶18 Ultimately, the court concluded it could

see some degree of confusion on Mr. Foster’s part. However, I disagree that he should be able to take all the arrearages and apply them back and then average them out. From my perspective, he was in contempt of court in January of 2013 when he only paid 263 on a \$574 current support order.

...

But still in April he paid nothing, there was no child support, and for that month then he is in contempt. I don’t

I think, counsel, you’re misunderstanding a fairly generous interpretation that I have had. I know that monthly payments don’t always arrive in the month that they’re due. I know that sometimes child support payers rely on tax intercepts to get their money in. And so it has been my practice to use the average payment as one barometer of is he ... reasonably complying, okay.

In this instance, as I understand it from your motion, when you pull the string over 12 months, the most you can get to is about \$120. ... [I]t’s not what the order of the court was according to [Agency counsel], was 574 plus 25 anyway. So even if I was looking for a way to say, you know, he had paid twice in May and both had been credited towards May but nothing for June, I was going out of my way to try to be fair to Mr. Foster in understanding. But still you could argue if you want, but I don’t see how it comes up that he’s not in contempt. And for that matter, I mean, if you want me to parse out one month, and I’m sure they can give me a list of months and say there was no payment[] received, each of those is actually a contemptible action.

believe he changed any jobs at that point or I don't think there's any complaints about his having moved.

¶19 The circuit court's findings of fact to support its determination that Foster was in contempt of a court order were lacking. Accordingly, we have searched the record to determine if the record supports the court's discretionary decision. We conclude it does.

¶20 During the eight-month period from January 2013 to August 2013, Foster met his required child support payment only once, in February. Foster's arrearage obligation was met only in the two months in which the government intercepted his taxes. While Foster claims he reasonably believed he could average the total of several months to determine whether he was in contempt, we observe that the tax intercepts, which are clearly applied only to past-due payments rather than current support,⁹ occurred in February and May. Therefore,

⁹ See WIS. STAT. § 49.855(1), (3), (4)(a), (4)(b), in relevant part:

(1) If a person obligated to pay child support ... is delinquent in making any of those payments, or owes an outstanding amount that has been ordered by the court for past support ... upon application ... the department of children and families shall certify the delinquent payment or outstanding amount to the department of revenue and, at least annually, shall provide to the department of revenue any certifications of delinquencies or outstanding amounts that it receives from another state because the obligor resides in this state.

(3) Receipt of a certification by the department of revenue shall constitute a lien, equal to the amount certified, on any state tax refunds or credits owed to the obligor. The lien shall be foreclosed by the department of revenue as a setoff under s. 71.93(3), (6), and (7). When the department of revenue determines that the obligor is otherwise entitled to a state tax refund or credit, it shall notify the obligor that the state intends to reduce any state tax refund or credit due the obligor by the amount the obligor is delinquent under the support ... order or obligation, by the outstanding amount for past support, ... or by the amount due under s. 46.10(4), 49.345(4), or 301.12(4).

(continued)

even if the circuit court accepted Foster's reasoning, he was undeniably in contempt for failing to make his monthly obligation in January and April, at the very least, when no surplus from the tax intercept would have satisfied Foster's child support obligation. In addition, Foster's January 2013 payment of \$263.45 was made less than one month after he was found in contempt in December 2012, at which time his support obligations were explicitly clarified. This is sufficient to show clear, willful noncompliance with a court order.¹⁰

(4) (a) The department of revenue shall send the portion of any state tax refunds or credits withheld for delinquent child ... support

(b) The department of administration shall send the portion of any federal tax refunds or credits received from the internal revenue service that was withheld for delinquent child ... support

¹⁰ The circuit court, though deficient in other respects, managed to convey that it reached this same conclusion when it observed Foster was in contempt in January:

The Court: Okay. All right. You knew in or about December of 2012 that you were in arrears several thousand dollars; isn't that a fair statement?

Foster: Yes, Your Honor.

....

The Court: Okay. You understood throughout those same months that your obligation was close to 600. I think it was 599 exactly.

Foster: Yes. I was just unaware I could come to court to ask to have it modified because, you know, my job didn't produce as much as it did back in 2008.

The Court: So it wasn't the case where you thought you were actually making your payments that were acceptable, it's that you were unaware of being able to motion to modify the payments?

(continued)

¶21 Foster testified he was not able to make his payments because of his compensation scheme in his new employment. However, the circuit court heard a great deal of testimony regarding Foster's employment and earnings history. The circuit court has the superior opportunity to evaluate testimony and witness credibility, and to determine whether Foster's conduct was contemptuous. *See Schroeder v. Schroeder*, 100 Wis.2d 625, 640, 302 N.W.2d 475 (1981). It concluded Foster knew what he was ordered to pay, willfully failed to make the required payments, and it ordered him to continue to make future payments in the same amounts. Our review of the record indicates the court's finding that Foster was in contempt of a court order was not clearly erroneous.

Foster: Well, with the job that I had held, I tried making as much as I possibly could and be able to still survive.

The Court: Well, you understand what child support goes to pay?

Foster: Yes, Your Honor.

The Court: That somebody had to pay for your children [sic] in March of 201[3] when you paid nothing. ...

Foster. Yes, Your Honor.

The Court: In April of 2013, when you paid nothing, somebody had to pay for them [sic].

Foster: Yes, Your Honor.

The Court: You knew that you had arrearages far exceeding the two arrearage payments you've made which were about \$3,200 in that period of time, and without those arrearage payments, which would have been payments merely to the debt that someone had already incurred on behalf of the children [sic], you were paying about \$153 for that period of, I have it as nine months, \$153 per month.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)4.

