IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

ERIC WATTS,

Plaintiff,

vs.

IOWA DISTRICT COURT FOR WEBSTER COUNTY,

Defendant.

Filed November 30, 1987

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7-460
87-564

Appeal from the Iowa District Court for Webster County (No. 48845) - James C. Smith, Judge.

Plaintiff brings action for writ of certiorari contending he should not have been held in contempt of court. **WRIT ANNULLED.**

Keven Fors of Parker & Fors, Fort Dodge, for plaintiff.

Thomas J. Miller, Attorney General; Gordon E. Allen, Deputy Attorney General; and Stephen C. Robinson, Assistant Attorney General, for defendant.

Heard by Schlegel, P.J., and Hayden, and Sackett, JJ.

SACKETT, J.

Plaintiff seeks a writ of certiorari contending the trial court acted illegally in finding him in contempt of court for failure to pay child support. We annul the writ.

On May 29, 1981, in a chapter 252A action filed in Webster County, plaintiff was found to be the father of a male child born October 29, 1977. Plaintiff was also ordered to pay child support of $100 per month. Plaintiff did not pay the support. The mother assigned her right to support to the State of Iowa so she could obtain welfare. On August 26, 1985, plaintiff was served with an order to show cause as to why he should not be found in contempt of court for failure to pay child support.

After a continuance the matter was set for hearing on July 17, 1986. On that date the trial court entered an order finding plaintiff in contempt and continuing the matter pending plaintiff's failure to comply with the order. The court determined the matter could be reopened on a finding of failure to comply by serving plaintiff with ten days' notice by ordinary mail. Plaintiff was ordered to purge himself of contempt by paying $40 per month beginning July 1, 1986 and $40 on the first day of each month thereafter as long as he remained unemployed.

Plaintiff was notified of a trial set for April 1, 1987. He appeared on said date and, after the State offered proof he was not current and had total earnings of $72 in the past two years, plaintiff offered proof of his alleged inability to comply with the order. The trial court sentenced plaintiff to thirty days.

Plaintiff petitioned for a writ of certiorari contending as follows:

(1) The trial court acted illegally by finding him in contempt when he was unable to comply. Said finding was against the weight of the evidence,

(2) He was denied due process by the trial court's failure to provide him opportunity to provide written statement or explanation prior to incarceration, and
(3) The trial court acted in excess of its power by confining plaintiff without first finding he was responsible for his failure to comply or that alternate procedures or dispositions were inadequate to meet the court's interest in punishment or deterrence.

When a judgment of contempt is challenged by certiorari we examine the evidence to ascertain contempt is proven beyond a reasonable doubt. See Phillips v. Iowa Dist. Court, 380 N.W.2d 706, 709 (Iowa 1986).

The State established a prima facie case showing plaintiff had not paid. Lamb v. Eads, 346 N.W.2d 830, 832 (Iowa 1984). Plaintiff had the burden of showing he could not perform the duty. Id.

I.

The first issue is whether the State proved contempt. Plaintiff contends there is insufficient evidence to support a finding of contempt. The State argues this is not an original finding of contempt as urged by plaintiff. We find it unnecessary to determine whether the proceedings were an original finding of contempt or a determination of failure to purge from an earlier finding of contempt. Plaintiff argues because he has no job and no income he cannot pay. Plaintiff claims two years ago a doctor found he had a hernia. He claims to have worked for two days in 1985, but he had to quit because of his hernia. He claimed he made application but was not able to find any work. He was twenty-eight years old at the time he was sentenced and other than the alleged hernia claims no health problems. We find evidence beyond a reasonable doubt defendant was in contempt. See Phillips, 380 N.W.2d at 709.

II.

Plaintiff claims he was denied due process by the judge's failure to give him the opportunity to provide a written statement. Iowa Code section 665.7 (1985) provides:

> Before punishing for contempt, unless the offender is already in the presence of the court, the offender must be served personally with a rule to show cause against the punishment, and a reasonable time given the offender therefore; or the offender may be brought before the court forthwith, or on a given day, by warrant, if necessary. In either case the offender may, at the offender's option, make a written explanation of the offender's conduct under oath, which must be filed and preserved.

Plaintiff appeared before the court. He testified. He was represented by counsel. He called a witness on his behalf. Plaintiff's attorney made a closing argument. Plaintiff did not ask the court for the opportunity to make a written explanation. Assuming, without having to decide, that plaintiff had the right to make a written explanation of his conduct under oath, we find he waived any such right at the contempt proceeding. See Gibb v. Hansen, 286 N.W.2d 180, 185 (Iowa 1979).

III.

Plaintiff contends the trial court should have considered alternate dispositions. In cases where those accused of contempt have made a bona fide effort to comply with a conditional order, but have been unable to do so through no fault of their own, the court must consider alternate procedures or dispositions other than imprisonment. Green v. District Court, 342 N.W.2d 818, 821 (Iowa 1983). Fundamental fairness bars imprisonment of a person who has made sufficient bona fide efforts to comply with the conditions of release. Id. at 822. An individual's efforts in light of his peculiar situation are more important than the percentage of the total payments made. Id. Plaintiff has not made even one payment.

The court found plaintiff claimed he had a hernia, but the trial court noted and we agree there is no evidence other than plaintiff's own testimony that he has one. The court found he has an old car and his parents give him $20

a month to run the car. The court found and we agree plaintiff has done nothing toward paying child support. It was established beyond a reasonable doubt plaintiff made no effort. The court was not bound to consider alternate procedures.

WRIT ANNULLED.