IN THE COURT OF APPEALS OF IOWA

No. 6-284 / 94-736

RONALD J. ERICKSON,

Plaintiff,

vs.

IOWA DISTRICT COURT FOR POLK COUNTY,

Defendant.

FILED
JUN 27 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Petition for writ of certiorari in contempt action. **WRIT ANNULLED.**

James H. Waters, Des Moines, for plaintiff.

Thomas J. Miller, Attorney General, and Bridget Chambers, Assistant Attorney General, by special appearance, for appellee.

Considered by Sackett, C.J., and Habhab and Streit, JJ.

HABHAB, J.

Ronald Erickson has filed a petition for writ of certiorari in an action sentencing him for contempt for failing to pay child support. We find the district court's order is supported by the record, and the writ is annulled.

Ronald and Audrey Erickson's marriage was dissolved August 2, 1988. The decree required Ronald to pay $25 per week in child support for the parties' child.

On November 20, 1992, Audrey filed an application for order to show cause requesting Ronald be held in contempt of court for failure to make child support payments. On January 27, 1993, the district court found Ronald in contempt for failing to pay court ordered support payments in a timely fashion. It found the amount of support due as of December 18, 1992, was $2150.

Pursuant to an agreement of the parties, the district court's order delayed sentencing and made future sentencing contingent upon Ronald's failure to make his weekly support payments and weekly payments toward the arrearage. To accommodate Ronald's fluctuating and irregular income, the court's order required the existence of a sixty-day arrearage before a sentence would be entered.[1]

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[1] The order provided, in relevant part:

> IT IS THE FURTHER ORDER OF THE COURT that sentencing in this matter not be set at this time, but that if the Respondent fails to make child support payments in the sum of $25 per week which is his current child support obligation plus an additional $10 per week to apply towards the delinquency then this matter shall, upon application by the Petitioner be set down for sentencing before this court.

On March 10, 1994, Audrey filed an application for a sentencing hearing. The application alleged Ronald was in arrears on his 1993 and 1994 support payments. At the April 1 sentencing hearing, the court was informed Ronald's attorney had $650 in cashier's checks to be applied toward Ronald's support obligations. It was disputed whether a $135 or $205 arrearage remained on Ronald's support obligation after application of the $650 in cashier's checks.

The district court concluded Ronald had not complied with the terms of the contempt order. It found, "Respondent has failed to abide by his agreement. He has made substantial payments only after the application for sentencing was filed. It is apparent that, despite an ability to pay, respondent does not appreciate the seriousness of his obligation or of the prior contempt proceedings."

The court ordered Ronald to serve fourteen days in jail with all but two days suspended. Ronald's sentence was stayed while he filed a petition for writ of certiorari. The State argues Ronald's petition was untimely, but Ronald has filed a certificate of filing which adequately disposes of this issue and we proceed to address the merits of Ronald's petition.

IT IS THE FURTHER ORDER OF THE COURT that due to the nature of the Respondent's employment, that he not be found delinquent in his support agreement of $35 per week until he is 60 days delinquent. This provision is due to the lump sum payments that he receives in commissions from his insurance sales business. It is contemplated by the court that with the obligation increasing to $35 per week as of January 1, 1993, no application seeking sentencing would be filed until after February 28, 1993.

Ronald contends he should not be jailed for delinquent support payments because Audrey agreed to defer his obligation to reduce his delinquency while he repaired his home. He also argues he was in compliance with the contempt order because he was less than sixty days in arrears at the time of the sentencing hearing.

Our review on certiorari is limited to determining whether the district court acted illegally or without jurisdiction. *Madyun* v. *Iowa District Court for Linn County,* 544 N.W.2d 441,443 (Iowa 1996). Review is not de novo but at law. *Id.* The factual findings of the district court are binding upon us if supported by substantial evidence. *Zimmermann v. Iowa District Court for Benton County,* 480 N.W.2d 70, 74 (Iowa 1992).

Ronald testified Audrey agreed to defer his obligation to reduce his delinquency in order to allow him to repair his bathroom, and, as a result, she should not have been allowed to proceed to have him sentenced.

> Q. Can you describe to the Court what factors affected your payment or your compliance with that court order? A. Lack of income to begin with, especially in the beginning of the year.
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> Q. In '93? A. Yes.
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> Q. Was there ever a time when your income would have provided you with a -- I'll call it a larger or a lump sum that would have allowed you to apply that or reduce further the delinquency that you had on your child support? A. Yes, there was.
>
> Q. Did you discuss that with your ex-wife? A. Yes, I did.
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> Q. What was the purpose or what was the circumstances at that time and what happened? A. My bathroom was held together with putty and I needed to replace the fixtures and I needed to replace them in order to have a safe environment for my daughter, and I talked with her about using the money for that instead of catching up with her and she agreed that that was the thing to do.

Robert did not testify as to when this purported agreement occurred or to what extent such payments were to be deferred.

A child support obligor's reliance on an agreement with the support obligee may negate the element of willfulness necessary to prove contempt. *See Huyser v. Iowa District Court for Marion County*, 499 N.W.2d 1, 3 (Iowa 1993). However, while Ronald testified about some type of agreement with Audrey to defer the use of one lump-sum payment to reduce his delinquency, there was no evidence to indicate she agreed to let him defer all or most of such payments and accrue a substantial arrearage on his 1993 and 1994 child support payments. Ronald makes no persuasive argument Audrey should be estopped from seeking sentencing on his noncompliance with the contempt order.

Ronald also argues he should not have been sentenced because he was not sixty days delinquent in payments as of the April 1, 1994, sentencing hearing. He reasons the sixty-day period encompasses $280 in support payments (8 weeks x $35) and, at most, he was only $205 in arrears at the time of the sentencing hearing. He does not dispute he was more than sixty days in default when Audrey filed her March 10 application for sentencing.

Ronald's argument is without merit. We look to see if he was sixty days delinquent at the time the application for sentencing was filed, not whether he was in compliance at the time of the hearing. Contumacious conduct is not rendered nonpunishable merely because default payments are made prior to a contempt

hearing. *In re Marriage of Wegner*, 461 N.W.2d 351, 354 (Iowa App. 1990); *see also* Iowa Code § 598.22 (1993) (contempt proceedings may be held regardless of whether amounts in default are paid prior to contempt hearing).

We similarly conclude Ronald cannot avoid sentencing by paying delinquent support, and bringing himself within the contempt order's sixty-day grace period, prior to the sentencing hearing. He was in default of the provisions of the January 27, 1993, contempt order when Audrey filed her application for sentencing on March 10, 1994, and the court properly proceeded to sentence him.

The record reveals Ronald had income and minimal rent payments. He used his funds to repair his residence rather than pay his child support obligation. He was over sixty days in arrears when Audrey filed her application for sentencing, and his noncompliance with the conditions of the contempt order was willful. The district court's findings are supported by substantial evidence and its ruling was in compliance with the law. The writ is annulled.

WRIT ANNULLED.