

IN THE COURT OF APPEALS OF IOWA

No. 2-120 / 91-721

FILED

MAY 28 1992

CLERK SUPREME COURT

GEORGE D. HILL,

Plaintiff,

vs.

426

IOWA DISTRICT COURT FOR WEBSTER COUNTY,

Defendant.

Appeal from the Iowa District Court for Webster County,
Gary L. McMinimee, Judge.

This is a certiorari proceeding to review the order of the Webster County district court holding the plaintiff, George Hill, in contempt for failure to pay child support and for violation of a custodial order. **AFFIRMED AS MODIFIED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for plaintiff

No appearance for defendant.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

This is a certiorari proceeding to review the order of the Webster County district court holding plaintiff, George Hill, in contempt for failure to pay child support and for violation of a custodial order.

On August 9, 1988, Susan Hill filed a petition for dissolution. On March 24, 1989, the district court entered a decree awarding Susan sole custody of J.H., the couple's minor child, and granting George scheduled visitation. The court also ordered George to pay \$100 for child support. The court filed a nunc pro tunc order on March 28, 1989, modifying the visitation provision of the decree.

On May 30, 1989, the court found George in contempt for willfully violating the terms and provisions of the dissolution decree. The court ordered George to be incarcerated for two days.

On August 7, 1989, Susan filed an application for contempt, alleging, inter alia, that George had failed to pay his child support obligations for June and July 1989.

On October 9, 1989, Susan filed a second application for contempt, alleging, inter alia, that George had taken and kept J.H. from September 15, 1989, to September 25, 1989.

On March 1, 1991, the court ruled on the above matters. The court found George's failure to make the June and July child support payments a willful violation of the dissolution decree. George acknowledged he had not made any

child support payments. The court considered the evidence that George made no child support payments notwithstanding his receipt of more than \$20,000 in settlement of a workers' compensation claim. The court concluded in view of the previous contempt citation and the fact that no child support payments had been made, George should be incarcerated for thirty days.

The court also found George willfully violated the custodial provision of the dissolution decree in not returning J.H. to Susan on September 15, 1989.

On September 15, 1989, J.H. crawled out of his bedroom window at Susan's house and ran to George's house. According to George, J.H. had been struck by a babysitter at Susan's house. George took J.H. to DHS to file a child abuse report. A child abuse investigator told George to take J.H. to George's house and await his call. The investigator unsuccessfully attempted to contact George at his home. During the period J.H. and George were absent, they traveled in a minivan and, on occasion, slept on air mattresses in the back of the van.

The court concluded George's conduct could not be excused as protecting the child in light of the ongoing DHS investigation. The court found George should be incarcerated for willful violation of the dissolution decree. The court ordered George be sentenced to thirty days in jail for this violation as well. The court further ordered the sentences should be served consecutively.

On March 7, 1991, George filed a motion for enlargement and reconsideration pursuant to Iowa Rule of Civil Procedure 179(b). The court denied the motion for enlargement and reconsideration on April 8, 1991. Justice Carter filed an order granting the writ of certiorari, staying George's incarceration pending the outcome of the certiorari, and placing the case on priority status for purposes of submission.

SCOPE OF REVIEW: Although relief in certiorari actions is ordinarily limited to questions of illegality or jurisdiction, this also includes review for corrections of errors at law. State v. Iowa District Court for Jackson County, 463 N.W.2d 885, 886 (Iowa 1990).

WILLFULL VIOLATION OF CHILD SUPPORT AND CUSTODIAL ORDERS: We first consider whether the trial court erred in holding George in contempt for willfully failing to abide by the court's child support and custodial orders. George argues Susan did not meet the burden of proving he had willfully violated the child support orders. We disagree.

It is contempt of Court to illegally resist any order or process made or issued by the Court. Iowa Code §665.2(3). Contemptuous actions have to be established by proof beyond a reasonable doubt. Phillips v. Iowa District Court, 380 N.W.2d 706, 709 (Iowa 1986).

The Iowa Supreme Court has said regarding the burden of proof in a contempt proceeding:

The general rule holds that an applicant for a contempt citation establishes a prima facie case by proving the duty which is on the contemner and the contemner's failure to perform the duty. The contemner then has the burden of showing he could not perform the duty, if he relies on that ground. [citations] The principle that places the burden on the contemner to show that his default was not willful necessarily means that upon the contemner's failure to make the requisite showing the default may be found to be willful.

Skinner v. Ruigh, 351 N.W.2d 182, 185 (Iowa 1984).

In the present case, there is no dispute George was required to pay child support by court order. Likewise, George admits he did not pay child support since the dissolution. We find nothing in the record to indicate he was financially unable to make his June and July child support payments. George has failed to show he could not have performed his duty. We affirm the trial court's determination that George willfully defaulted in his duty to pay child support.

George basically asserts his concern for the best interests of his son's protection merited his violation of the custody orders. There were, however, procedures and options available to George other than his decision to keep his son from September 15, 1989 to September 25, 1989. His decision was a willful violation of a court order. We affirm the trial court determination that George was in contempt of court for both failure to pay child support and abide by custodial orders.

SENTENCING: We next consider whether the trial court abused its discretion in sentencing George to two consecutive thirty-day terms of incarceration. In order to show an abuse of discretion, one generally must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 132 Vt. 603, 326 A.2d 138, 140 (1974)).

The trial court, in the present case, sentenced George to serve two consecutive thirty day terms of incarceration in the Webster County Jail for violating two court orders.

Iowa Code section 598.23(1) provides:

If a person against whom a temporary order or final decree has been entered willfully disobeys the order or decree, the person may be cited and punished by the court for contempt and be committed to the county jail for a period of time not to exceed thirty days for each offense.

We find, under the circumstances of this case, the sentences should be concurrent rather than consecutive. There is no dispute that George should not have kept the boy. We cannot say, however, that George did not have some color of right when the child abuse investigator told him to take the child to the father's house. We, therefore, modify the sentences to provide they run concurrently.

Costs are taxed to the appellant.

AFFIRMED AS MODIFIED.

Schlegel, J., concurs; Donielson, J., dissents in part.

DONIELSON J. (dissenting in part)

I respectfully dissent to the majority's decision to modify the trial court's imposition of consecutive thirty-day sentences. I find no reason in the record to believe the trial court abused its discretion in ordering the sentences to run consecutively. I therefore do not join the majority in ordering the sentences run concurrently. I would affirm the trial court in toto.