FILED
SEP 24 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

368

**STATE OF IOWA ex rel. FATIMA BARNES,**

Petitioner-Appellee,

vs.

**MARION L. BARNES,**

Respondent-Appellant.

Filed September 24, 1985

**MARION L. BARNES,**

Petitioner,

vs.

**IOWA DISTRICT COURT FOR WASHINGTON COUNTY,**

Respondent.

5-329
84-1448

Appeal from the Iowa District Court for Washington County - Robert Bates, Judge.

Respondent appeals trial court's contempt order alleging he was unable to make support payments. **WRIT ANNULLED.**

Richard S. Bordwell of Bordwell Law Office, Washington, for respondent-appellant.

Thomas J. Miller, Attorney General, and E. Dean Metz, Assistant Attorney General, Barbara A. Edmondson, Assistant Washington County Attorney, and Douglas L. Tindal of Stewart, Shearer, Owen & Tindal, Washington, for petitioner-appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

**DONIELSON, P.J.**

The trial court found the respondent in contempt of court for failing to pay a court-ordered child support obligation. The respondent appealed, contending the trial court erred by finding him in contempt where the record shows he is unable to make the support payments.

Although the respondent filed a notice of appeal, he acknowledges in his brief that the contempt order should be challenged in a certiorari proceeding rather than in an appeal. Iowa Code § 665.11. He asks that this appeal be treated as a certiorari proceeding pursuant to Iowa R. App. P. 304.

On April 8, 1983, the State, acting on behalf of a mother who receives public assistance, filed a petition pursuant to Iowa Code chapter 252A, the Uniform Support of Dependents Law, seeking child support from Marion Barnes, the woman's former husband and the father of her two children. The court ordered Barnes to pay $50 per week in child support. A contempt action was brought against Barnes in November of 1983, but the trial court held Barnes did not wilfully violate the contempt order and did not find him in contempt. Barnes, however, was still required to make child support payments.

Once again, Barnes did not make the required support payments and in May 1984 the State filed an application asking that Barnes be found in contempt of court. A second contempt hearing was held on June 22, 1984. The trial court held Barnes in contempt on August 10, 1984, as of June 22. The trial court entered an order finding Barnes in contempt for violation of the April 8, 1983 order and for failure to make payments as of June 22, 1984. Barnes was sentenced to jail for ten days but was allowed to purge himself by making a minimum payment of $15 per month commencing on September 15, 1984. Barnes filed a notice of appeal from the contempt order.

Barnes contends the trial court erred by finding him in contempt where the record showed he was unable to make the support payments. He points

to evidence that he had no assets, no steady employment, and no income other than food stamps and about $15 per month from odd jobs. The State responds by pointing to evidence that Barnes was able to work and had refused or neglected to pursue employment opportunities.

While this appeal was pending, the State filed a motion to dismiss the appeal. The State asserted that following the trial court's contempt order, Marion Barnes secured full-time employment and began making child support payments. The State argued that the issue of Barnes' ability to pay is therefore moot. The State also relied on the fact that a notice of appeal had been filed rather than a petition for writ of certiorari. Barnes resisted the motion to dismiss, arguing that the appeal may be treated as a certiorari proceeding under Iowa R. App. P. 304 and that the issue of his ability to pay is not moot so long as he is to be punished for past child support arrearages. The supreme court denied the State's motion to dismiss.

Pursuant to Rule of Appellate Procedure 304, we treat this appeal as an application for a writ of certiorari. Barnes' sole claim on appeal is that he has been unemployed for a long period of time and has an income of $15 per month from various jobs. He submits he is unable to pay $15 per week in child support and that the trial court erred in finding him in contempt on June 22, 1984, for failing to pay child support.

The record indicates substantial evidence exists to support the trial court's findings. Therefore, a writ of certiorari will not be issued. For Barnes to be incarcerated on the contempt charge, he must have failed to make the payments to purge himself. It is worth noting that prior to issuance of commitment, notice and a hearing are required before commitment can result. See Greene v. District Court of Polk County, 342 N.W.2d 818, 819 (Iowa 1983).

**WRIT ANNULLED.**