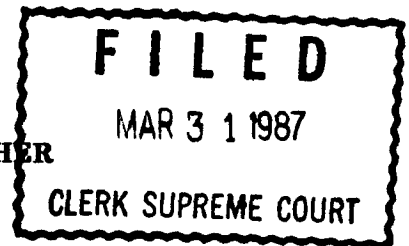


IN THE COURT OF APPEALS OF IOWA
IN RE THE MARRIAGE OF DOROTHY RUSHER
AND DELBERT C. RUSHER



Upon the Petition of	)	
DOROTHY RUSHER,	)	Filed March 31, 1987
Petitioner,	)	
And Concerning	)	
DELBERT C. RUSHER,	)	
Respondent.	)	
DELBERT C. RUSHER,	)	
Petitioner,	)	
vs.	)	<u>6-432</u>
HON. R. K. RICHARDSON, Judge,	)	86-85
Second Judicial District,	)	
Respondent.	)	

Appeal from the Iowa District Court for Webster County (No. D-3409)-
R. K. Richardson, Judge.

This is an original certiorari action in which the husband challenges the district court's order adjudicating him to be in contempt for failing to pay alimony.
WRIT ANNULLED.

Charles Harrington, Chief Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for petitioner in the certiorari action.

Thomas J. Miller, Attorney General and Stephen C. Robinson, Assistant Attorney General, for respondent in the certiorari action.

Considered by Oxberger, C.J., Snell and Hayden, JJ.

OXBERGER, C.J.

This is an original certiorari action challenging a judgment of contempt entered by the district court. On December 18, 1985, the court adjudicated plaintiff Delbert C. Rusher in contempt and ordered him to serve ten days in jail unless he purged himself of contempt by paying all overdue alimony by January 1, 1986. On January 16, 1986, Delbert filed a notice of appeal from the order holding him in contempt, and the supreme court granted a stay of the jail sentence pending the outcome of this certiorari action. In this proceeding, Delbert asserts that he could not afford to pay the alimony, and that his former wife, Dorothy, did not sustain her burden of proving that Delbert's failure to pay was willful. Finding this contention to be without merit, we annul the writ.

The principles governing our review in an action of this nature are well established. A writ of certiorari is sought when, in exercising its judicial functions, an inferior tribunal or officer is alleged to have exceeded its jurisdiction or otherwise acted illegally. Johnson v. Iowa District Court for Mahaska County, 385 N.W.2d 562, 564 (Iowa 1986); Iowa R. Civ. P. 306. Certiorari is an action at law, not in equity, and accordingly, our review is not de novo. Bever v. Kilburg, 326 N.W.2d 902, 904 (Iowa 1982). Generally, findings of fact are not reviewable in a certiorari action. Lane v. Oxberger, 224 N.W.2d 245, 247 (Iowa 1974). When a judgment of contempt is challenged, however, we examine the record to assure that the proper quantum of proof supports the finding of contempt. Id; see also Bever v. Kilburg, 326 N.W.2d at 904.

Noncompliance with a provision in a dissolution decree must be "willful" in order to provide the basis for a contempt citation. Bever v. Kilburg, 326 N.W. 2d at 904; Iowa Code § 598.23 (1985). "Willful noncompliance" is defined as conduct which is "intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or unauthorized, coupled with

an unconcern whether the contemner had the right or not." Bevers v. Kilburg, 326 N.W.2d at 904 (quoting Lutz v. Darbyshire, 297 N.W.2d 349, 353 (Iowa 1980)).

The allocation of the burdens of proof and production in a contempt proceeding was explained by the supreme court in Lamb v. Eads, 346 N.W.2d 830, 832 (Iowa 1984), as follows:

The general rule holds that an applicant for a contempt citation established 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.

The contemner's burden to establish his inability to pay is a burden of production rather than a burden of persuasion. Skinner v. Ruigh, 351 N.W.2d 182, 185 (Iowa 1984). By contrast, the burden of persuasion on the issue of willfulness does not shift from the contemnee. Id. In the present case, Delbert does not dispute that he failed to pay the alimony due under the provisions of the dissolution decree; rather, he seeks to avoid the consequences of his nonpayment by urging that because of his low income and excessive medical expenses, he was unable to make the payments.

Before addressing the merits of Delbert's contention, we must resolve a preliminary question concerning the proper quantum of proof required to sustain the finding of contempt. Prior to the supreme court's decision in Phillips v. Iowa District Court for Johnson County, 380 N.W.2d 706 (Iowa 1986), the courts of this state consistently upheld the use of the clear and satisfactory evidence standard for proof of contempt. Phillips, 380 N.W.2d at 707. In Phillips, however, the court rejected the use of this standard and held that "no person may be punished for contempt unless the allegedly contumacious actions have been established by proof beyond a reasonable doubt." Phillips, 380 N.W.2d at 709. Phillips was

decided January 15, 1986; the trial court returned its decision finding Delbert in contempt December 18, 1985. In this certiorari proceeding, Delbert argues that Phillips should be applied, and that the writ of certiorari should be sustained unless the evidence establishes the elements of contempt beyond a reasonable doubt. Our review of precedential caselaw governing the effect of a change in the law upon a pending appeal persuades us that this assertion is correct. See State v. Thrasher, 175 N.W.2d 397, 399-402 (Iowa 1970). Accordingly, the quantum of evidence which we require in reviewing the finding of contempt is the "beyond a reasonable doubt" standard.¹

Upon our review of the record, we are persuaded that the trial court's finding of contempt was premised upon evidence establishing beyond a reasonable doubt that Delbert willfully disobeyed his obligations under the dissolution decree. Pursuant to the decree, Delbert was required to pay Dorothy alimony of \$100 per month; he never made any of the \$100 payments. The record discloses that the first month after the dissolution, Delbert paid Dorothy \$50. The following month, he sent her a \$50 check which never cleared the bank. Thereafter, no further payments were attempted.

Delbert argues that he was unable to make the payments because of his low income and his high medical expenses. In examining this contention, however, we note with significance that Delbert's income has increased slightly since the entry of the dissolution decree, and that his itemized medical expenses total

¹Delbert does not argue that the trial court applied the now overruled standard, or that its decision must be reversed because of the change in the law. As such, we conclude that error was not preserved with respect to this contention, and that we are not required to reverse automatically the trial court's decision. See Hubby v. State, 331 N.W.2d 690, 694 (Iowa 1983) (allegations not presented upon appeal are not preserved for appellate consideration). Moreover, we think that, in the circumstances of this case, any error resulting from the trial court's application of the lesser standard is harmless. See State v. Holland, 389 N.W.2d 375, 379 (Iowa 1986) (error that is harmless does not require reversal).

only \$55 per month. After hearing this evidence, the trial court concluded that:

[T]he respondent [Delbert] is in contempt for failure to make the alimony payments as ordered by the Court. The current income of the respondent is equal to or slightly in excess of the income which the respondent had at the time of the decree. The respondent filed no appeal from that decision and therefore the decree of the Court would be binding upon him. Respondent has refused to make that payment and as such is in contempt.

We agree. We do not think that the record establishes that Delbert is unable to meet his alimony obligations. Moreover, Delbert's mere refusal to pay without any attempt to appeal or modify the terms of the decree evidences a wanton disregard for the rights of Dorothy "coupled with an unconcern whether the contemner had the right or not". Bevers v. Kilburg, 326 N.W.2d at 904. Accordingly, we conclude that Dorothy has met her burden of proving, beyond a reasonable doubt, that Delbert's failure to pay was willful, and that the trial court committed no error in finding Delbert in contempt.

Finally, Delbert argues at length that the district court cannot legally require him to serve the ten-day jail term. He maintains that if the court imprisons him for his indigency, a violation of his due process rights will necessarily result. We cannot agree.

We have repeatedly upheld the imposition of a jail term as a method of "punishing" contumacious acts. See Greene v. District Court of Polk County, 342 N.W.2d 818, 820-21 (Iowa 1983); In re Marriage of Lenger, 336 N.W.2d 191, 193 (Iowa 1983). A necessary prerequisite to the imposition of a sentence are the usual due process requirements of notice and an opportunity for a hearing. See generally Bearden v. Georgia, 461 U.S. 600, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). In addition, in Greene, the supreme court held that "whenever the district court withholds commitment on an adjudication of contempt subject to certain conditions, due process requires notice and hearing before commitment can be

ordered for failure to comply with these conditions." 342 N.W.2d at 821. Accordingly, before Delbert may be confined, he is entitled to notice and a hearing concerning his failure to meet the court's January 1, 1986 deadline. Moreover, the court in Greene further held that "a subsequent issue of commitment is not proper absent findings that the offending person is responsible for his failure to comply or that alternative procedures or dispositions are inadequate to meet the court's interest in punishment and deterrence." Greene, 342 N.W.2d at 821. We presume that the district court will observe Delbert's constitutional rights before placing him in jail. Lamb v. Eads, 346 N.W.2d at 833.

WRIT ANNULED.