IN THE COURT OF APPEALS OF IOWA

No. 7-783 / 97-796

000347

JON B. SCRIVEN,

Plaintiff,

vs.

IOWA DISTRICT COURT FOR BUTLER COUNTY,

Defendant.

FILED
MAR 27 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Butler County, John S. Mackey, Judge.

The supreme court granted plaintiff's writ of certiorari from the district court order finding him in contempt for willfully failing to comply with the court's order for payment of child support. **AFFIRMED AND WRIT ANNULLED.**

Gary Papenheim, Parkersburg, for plaintiff.

Thomas J. Miller, Attorney General, and Patricia A. McGivern, Assistant Attorney General, for defendant.

Considered by Cady, C.J., and Sackett, and Mahan, JJ.

CADY, C. J.

Jon Scriven contests the district court order finding him in contempt for failure to pay child support. We affirm the trial court and annul the writ of certiorari.

Jon and Rachel Scriven divorced in March 1995. The trial court ordered Jon to pay child support for his son, Alex, in the amount of $190 per month. Jon also pays child support for a daughter.

After Jon became delinquent in his child support payments, his wages were garnished. Prior to and following the dissolution, Jon suffered injuries to both of his hands and had several surgeries for the injuries. He received workers' compensation benefits for the injuries. Jon notified the workers' compensation carrier of his child support obligations for Alex and his daughter. Child support was then withheld from his benefits. The workers' compensation carrier, however, inadvertently sent the weekly child support payments intended for Alex to his daughter.

A hearing was held in April 1997, upon Rachel's application for contempt. Jon testified he worked as a cook for his father's restaurant, but had been unable to work from January 21, 1997, until the time of the contempt hearing due to his injuries. He further testified as a result of his inability to work, he had no income. Rachel testified that on several occasions during the time Jon claims he could not work, he requested scheduling preferences for visitation to accomodate his work. A witness also testified she observed Jon in the restaurant's kitchen opening a cupboard door a week prior to the contempt hearing.

At the time of the hearing, Jon owed $1672.45 in child support. The trial court found Jon in contempt and sentenced him to serve a term of thirty days in jail, but directed mittimus not issue as long as he resumed the current child support payments and paid an additional $100 per month until the delinquency was paid.

Following the district court's finding of contempt, Jon filed a petition for writ of certiorari, contending the district court erred by finding him in contempt. He maintains his failure to pay child support resulted from a temporary physical disability rather than a willful violation of the court order.

Certiorari is a procedure to test whether a lower court exceeded its proper jurisdiction or otherwise acted illegally. *See* Iowa R. Civ. P. 306; *French v. Iowa Dist. Court*, 546 N.W.2d 911, 913 (Iowa 1996). When we review a ruling of contempt by certiorari, we determine whether substantial evidence supports the district court's judgment. *Gimzo v. Iowa Dist. Court*, 561 N.W.2d 833, 834-35 (Iowa App. 1997). Substantial evidence sufficient to support such a finding exists when the evidence could convince a rational trier the person is guilty of contempt beyond a reasonable doubt. *Id.* at 835.

Rachel had the burden of demonstrating Jon had a duty to obey the court order and failed to perform that duty. *See In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995). Once met, the burden shifts to Jon to show he did not willfully violate the order or decree. *Id.* The burden is one of production and not of persuasion. *See Rater v. Iowa Dist. Court*, 548 N.W.2d 588, 591 (Iowa App. 1996).

The burden of persuasion remains upon Rachel to prove beyond a reasonable doubt that Jon willfully disobeyed the court's order. *See Jacobo*, 526 N.W.2d at 866.

Evidence establishes willful disobedience if it demonstrates:

> [C]onduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not.

See Gimzo, 561 N.W.2d at 835 (quoting *Amro v. Iowa Dist. Court,* 429 N.W.2d 135, 140 (Iowa 1988)). Rachel must only prove some of the violation was willful in order to establish contempt. *Id.* Jon has two defenses available in this action: (1) the indefiniteness of the court order; and (2) the absence of willful disobedience caused by an inability to pay. *McKinley v. Iowa Dist. Court,* 542 N.W.2d 822, 824 (Iowa 1996).

The failure to pay each installment of child support as it becomes due can constitute a separate contempt for each missed payment which may be punished in a single proceeding. *See Johnson v. Iowa Dist. Court*, 385 N.W.2d 562, 564 (Iowa 1986). In this case, Jon was cited for a single act of contempt for his failure to pay his aggregate child support obligation. *Id.*

Rachel established a prima facie case of contempt by showing Jon had a duty to pay child support and failed to perform that duty. Jon claims the defense of inability to pay in the absence of willful disobedience.

Jon has the burden to produce evidence to support his defense. Jon maintains he could not meet his child support obligation due to his inability to work following

his injuries. He further claims he did not willfully disobey the district court's order while he was receiving workers' compensation benefits because the workers' compensation carrier erroneously made the payments to his daughter rather than to Alex. He also contends part of his delinquency resulted from an inability to work full time due to his injuries.

The record indicates Jon's failure to pay child support to be willful beyond a reasonable doubt. Jon had a history of failing to timely pay his child support obligation. He failed to meet all of his monthly support obligations in 1995, 1996, and in 1997 at the time of the contempt hearing. We note in order to procure support payments, his wages were garnished shortly after the decree was entered. Moreover, Jon was working during some of the missed payments.

The inability to currently pay does not prevent punishment for past failures to pay. *Lamb v. Eads*, 346 N.W.2d 830, 833 (Iowa 1984). Further, we can find contempt if some of the default relied upon was willful. *See Skinner v. Ruigh*, 351 N.W.2d 182, 186 (Iowa 1984). At the time of the contempt hearing, a report from a physician indicated Jon could return to work at his own speed, although he had limited use of his left hand. Moreover, in addition to Rachel's testimony indicating Jon needed to schedule visitation around his work schedule, a witness observed Jon at his place of employment. The record therefore indicates Jon was working to some extent. Consequently, we find ample evidence to support the finding of contempt beyond a reasonable doubt. We also place weight on the credibility assessment of the

testimony implicit in the district court ruling. We affirm the district court's contempt finding and annul the writ of certiorari.

AFFIRMED AND WRIT ANNULLED.