



IN THE COURT OF APPEALS OF IOWA

KEVIN KACER,	)		145
Petitioner,	)	Filed August 26, 1987	
vs.	)		
HON. L. VERN ROBINSON, Judge of	)	<u>7-317</u>	
the Sixth Judicial District	)	<u>87-324</u>	
of Iowa,	)		
Respondent.	)		

Certiorari to the Iowa District Court for Linn County (DM 13059), L.
Vern Robinson, Judge.

In this certiorari proceeding petitioner challenges the district court's
adjudication of contempt and punishment. **WRIT SUSTAINED.**

Lloyd E. Humphreys, Cedar Rapids, for petitioner.

Thomas J. Miller, Attorney General of Iowa, and Stephen C. Robinson,
Assistant Attorney General, for respondent.

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

HAYDEN, J.

Petitioner was found in contempt of court for failing to pay child support. He contends the contempt adjudication was erroneous because his failure to pay child support was not willful and contemptuous, but rather was unavoidable due to his unemployment and poverty. He also contends the punishment of thirty days in jail was too harsh under the circumstances.

In May 1985, pending a dissolution of marriage, the district court ordered Kevin Kacer to pay temporary child support of \$22.50 per week for each of two minor children. He paid \$10.00 toward the child support obligation before the contempt hearing on August 22, 1986. This is the only payment of child support Kevin has made. His wife commenced contempt of court proceedings against him. On August 25, 1986, the district court found Kevin to be in contempt of court and sentenced him to jail for 30 days.

The trial court found Kevin was terminated from employment in April 1985. He has worked and received payment for one week since then. He has done some self-employed bid jobs on car repair but claims to have made no profit on those jobs. Kevin lives in the house he and his wife purchased. His father makes the mortgage payments on it so he would have a place to stay. He borrows money from his father and uses contributions from friends to get by. The trial court also found Kevin has made no attempt to earn wages through any other employer or attempted to secure employment to help pay for the expenses of his minor children. The trial court further found Kevin had some personal property he could have sold and at least one week's wages which could have gone to at least a partial payment of child support. The court determined Kevin willfully violated the court's order for temporary child support, and it has been shown by evidence beyond a reasonable doubt. Kevin was found to be in contempt of court and sentenced to serve 30 days in jail as punishment.

A writ of certiorari may be sought when "an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded its, or his proper jurisdiction or otherwise acted illegally." Iowa R. Civ. P. 306. Certiorari is an action at law, not in equity. Consequently, our review is not de novo. Johnson v. Iowa District Court for Mahaska County, 385 N.W.2d 562, 564 (Iowa 1986) (citations omitted). Contempts are criminal in nature even when they arise from civil cases. Wilson v. Fenton, 312 N.W.2d 524, 28-29 (Iowa 1981). The Iowa Supreme Court, in the case of Greene v. District Court, 342 N.W.2d 818, 821 (1983), recognized that the jail sentence imposed for willful nonpayment of child support under Iowa Code section 598.23 makes this contempt procedure criminal in nature. The Iowa Supreme Court agrees the contempt proceeding by its very nature and effect is the equivalent of a criminal proceeding exacting punishment. See Phillips v. Iowa District for Johnson County, 380 N.W.2d 706, 709 (Iowa 1986). No person may be punished for contempt unless the allegedly contumacious actions have been established by proof beyond a reasonable doubt. Prior decisions holding to the contrary are thus no longer controlling. Id. Generally, findings of fact are not reviewable on certiorari, but when a judgment of contempt is challenged, we examine the evidence to ensure the burden of proof of contempt has been met. See Beyers v. Kilberg, 326 N.W.2d 902, 904 (Iowa 1982). Absence of willfulness in disobeying the order is a defense available in a contempt proceedings. Id.

The uncontroverted evidence and testimony in the record of the trial shows Kevin had been employed doing auto body and paint work until he was terminated in April 1985. He has received wages for one week's work and has done some auto repair work on his own but has made no profit from these repair jobs. He has looked for employment even as far away as Anamosa, Toddville, and Iowa City. He has borrowed money from his father to live on. His father

has made the monthly mortgage payments on his house for 18 months. The house is now subject to foreclosure. Kevin was arrested and pled guilty to drunk driving. A friend bought him beer at a tavern as a gesture in repayment for giving him a ride home from a junk yard. Kevin worked off \$400 of a \$500 fine through community service. He has \$100 of community service to perform to complete payment of the fine. He owns a few items of furniture and an automobile of little value.

We hold the record evidence and testimony does not support the judge's determination that "... the Respondent has taken absolutely no steps to secure employment to help pay for the expenses of his minor children." The evidence does not rise to the standard of showing beyond a reasonable doubt Kevin willfully violated the order directing him to pay child support. The burden of proof of contempt has not been met in this case.

Kevin claims the punishment of 30 days in jail is too harsh in this case. Section 598.23 of the Iowa Code authorizes the court to commit a person for contempt to the county jail for a period of time not to exceed 30 days for each offense. The court did not exceed its statutory authority by committing Kevin to 30 days in jail. We do not say the punishment was too harsh. In view of our holding the evidence does not support the court's determination of willful contempt; the court's order for punishment is not viable.

WRIT SUSTAINED.

Snell, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I respectfully dissent. The majority states "the record evidence and testimony does not support the Judge's determination that . . . the respondent has taken absolutely no steps to secure employment to help pay for the expenses of his minor children."

I agree the petitioner took some steps to find employment, but I consider his efforts to be insufficient to avoid the trial court's finding of contempt.

I would deny the writ.