

FILED

AUG 29 1985

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**VERNE L. ROBEY,**

)

Plaintiff,

)

Filed August 29, 1985

vs.

)

**JUDGE CARL E. PETERSON and the
IOWA DISTRICT COURT FOR STORY
COUNTY,**

)

5-242
84-1576

)

Defendants.

)

Appeal from the Iowa District Court for Story County - Carl E. Peterson,
Judge.

In certiorari action father challenged the order of the Story County District
Court committing him to jail for failure to pay child support. **WRIT ANNULLED.**

Charles L. Harrington, Appellate Defender, and Raymond E. Rogers, Assis-
tant Appellate Defender, for plaintiff.

Thomas J. Miller, Attorney General, and Stephen C. Robinson, Assistant
Attorney General, for defendants.

Considered by Donielson, P.J., and Snell and Hayden, JJ.

PER CURIAM

On July 14, 1983, plaintiff was found in contempt for failure to pay child support as ordered by the decree dissolving his marriage. He was sentenced to thirty days in jail conditioned, however, that mittimus would not issue if plaintiff paid \$250 by August 15, and paid the same sum on the fifteenth day of each month thereafter through December of 1983. He had served six days in jail when he was released on September 6, 1983 upon payment of \$500. The remaining 24 days of his confinement were suspended. Release was conditioned upon making the future \$250 payments required by the July 14 order.

On April 25, 1984, plaintiff's ex-wife filed an application for contempt alleging a failure to comply with the order of September 6, 1983. A hearing was held at which plaintiff acknowledged failure to pay as required but offered testimony that his income was insufficient to allow him to pay. The court found that plaintiff had failed to comply with the order of September 6 and ordered him to serve the balance of the jail sentence previously imposed. The court stated that the evidence failed to show impossibility of compliance with the order of September 6, 1983.

On October 11, 1984, plaintiff filed a petition for writ of certiorari to the Story County District Court. The petition was granted.

Certiorari is a procedure to test whether a lower court exceeded its proper jurisdiction or otherwise acted illegally. Iowa R. Civ. P. 306. Generally it is an action at law so findings of fact are not reviewable. However, "when a judgment of contempt is challenged, the rule is that we examine the evidence, not de novo, but to assure ourselves that proof of contempt is clear and satisfactory." Gibb v. Hansen, 286 N.W.2d 180, 184 (Iowa 1979).

I. Due Process Challenge. In Greene v. District Court of Polk County, 342 N.W.2d 818 (Iowa 1983), the Iowa 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. This holding in no way affects the district court's power to immediately confine an individual upon an adjudication of contempt for failure to make child support payments. We further hold that where commitment is withheld in contempt proceedings under section 598.23, 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.

Id. at 821.

Plaintiff contends that the district court failed to make the proper findings required by Greene in its September 13, 1983 order. Therefore, plaintiff argues he was deprived of his due process rights. Defendant argues that Judge Peterson did in fact make the requisite findings, although admittedly not in the precise language of Greene. We agree with defendant.

The overriding concern in Greene was the fact that Greene was jailed without notice and an opportunity to explain why he had never satisfied the conditional order. The district court ordered Greene's original commitment carried out in an ex parte proceeding. Id. at 820. The Greene court explained its position in the following terms:

We believe notice and hearing in these circumstances is vital. Greene should have been given the opportunity to show either that the prescribed conditions had been fulfilled or that he had made a bona fide effort to pay but through no fault of his own was unable to comply with the conditional orders.

Id. at 821.

Clearly, plaintiff in the present case was afforded the due process Greene found vital. Plaintiff had the opportunity to show in the September 10, 1984 hearing that he had made a bona fide effort to pay and/or his inability to make child support payments at all. Plaintiff simply failed in his burden of proof. Judge Peterson concluded the September 10 hearing:

In October, November and December not only did you not make those payments, you haven't made a payment since, not one payment. I grant you haven't made a great deal of money during this period of time, but you haven't come before this Court to ask for a modification. You haven't made any efforts to make a partial payment. . . . When you fail to comply totally and deliberately, when you fail to show the kind of interest in responding to Orders of this court that is expected when you are brought before this Court and directed to jail, and then given a break to try to get something worked out, and you still ignore the Orders of this Court, and you can sit there and tell me that, well, I couldn't pay, I couldn't pay, but you didn't show any effort, I feel little sympathy. . . .

These findings were reiterated in somewhat milder terms in Judge Peterson's written order:

Evidence is presented. The Respondent acknowledged he had not made the payments as required by the Contempt Order and, in fact, has made no payments since the hearing in September 1983.

Respondent has had income during that period of time, although not substantial amounts of income.

The issue before this Court is whether the Respondent has complied with the Order of September 6, 1983. The evidence clearly indicates he has not complied with the Order. Respondent has not shown impossibility of compliance.

We conclude that Greene's due process requirements were satisfied by the hearing afforded plaintiff on September 10, 1984. There can be no question that Judge Peterson found that plaintiff had made no bona fide effort to pay and so was responsible for his failure to comply with the order of September 6, 1983.

II. Sufficiency of Evidence. In Iowa, contempt has to be proved by clear and satisfactory evidence. Skinner v. Ruigh, 351 N.W.2d 182, 185 (Iowa 1984).

The Iowa Supreme Court has explained the burden of proof in contempt cases.

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), citing Lamb v. Eads, 346 N.W.2d 830, 832 (Iowa 1984).

Plaintiff made no child support payments from September 6, 1983 up to September of 1984. The evidence he presented in defense simply did not satisfactorily identify the amounts which he had earned each month during this period nor the amounts of his other obligations. Furthermore, he gave no justification for giving his other obligations complete priority over his child support obligation. See Skinner, 351 N.W.2d at 186.

We find willfulness established by clear and satisfactory evidence which supports the district court's finding plaintiff in contempt for failure to make child support payments.

WRIT ANNULLED.