IN THE COURT OF APPEALS OF IOWA

No. 3-542 / 93-49

FILED
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CLERK SUPREME COURT
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BERNARD ZIEGENHORN,

Plaintiff,

vs.

IOWA DISTRICT COURT FOR MUSCATINE COUNTY,

Defendant.

Appeal from the Iowa District Court for Muscatine County, Bobbi M. Alpers, Judge.

Plaintiff petitions for writ of certiorari challenging the district court's decision finding him in contempt of court for failing to pay child support pursuant to a court order. **JUDGMENT OF DISTRICT COURT AFFIRMED AND WRIT OF CERTIORARI DENIED.**

William F. Creasey of Goedken & Creasey, Muscatine, for plaintiff.

William J. Hargrafen, Muscatine, for defendant.

Considered by Oxberger, C.J., and Hayden and Habhab, JJ. Donielson, J., takes no part.

HAYDEN, J.

Plaintiff husband brings this certiorari proceeding in which he seeks reversal of the district court's decision finding him in contempt of court for failure to pay child support. The husband, Bernard Ziegenhorn, claims there was insufficient evidence to show his failure to pay child support was willful.

On October 24, 1991, the district court dissolved the marriage of Bernard and Vicki Ziegenhorn. The court's decree was filed on December 10, 1991. The district court awarded joint legal custody of the parties' minor child and awarded primary physical care to Vicki. The court ordered Bernard to pay $62 per week in child support.

Since January 1992 Bernard's child support obligation has been satisfied through a mandatory wage assignment. The weekly child support payments of $62, plus $15 for arrearages, were automatically deducted from Bernard's paycheck each week by his employer, Riley Ambulance. Bernard continued to make those payments through October 9, 1992, at which time he was fired by his employer. Bernard was discharged for insubordination stemming from his failure to purchase and wear a hearing aid. Bernard then sought unemployment benefits. Such benefits, however, were denied because it was determined Bernard had been fired for misconduct.

On October 29, 1992, Vicki filed an application for contempt asserting that Bernard had failed to make the

child support payment due. At the time of the contempt proceeding Bernard testified he was earning no income and receiving no unemployment compensation. The court determined Bernard's decision not to replace his hearing aid was willful. The court found his willful decision led to his failure to pay child support pursuant to the court order. The district court found Bernard in contempt and ordered him to serve a period of thirty days in the county jail.

On January 13, 1993, Bernard filed a petition for writ of certiorari challenging the contempt determination. On January 29, 1993, the Iowa Supreme Court granted the petition for writ of certiorari. The issue is whether the district court erred in finding Bernard's failure to pay child support was willful.

Certiorari is a procedure to test whether a lower court exceeded its proper jurisdiction or otherwise acted illegally. Webb v. Iowa Dist. Court, 416 N.W.2d 95, 97 (Iowa App. 1987) (citing Iowa R. Civ. P. 306). Our review is not de novo nor is the decision of the district court lightly reversed. In re Marriage of Wegner, 461 N.W.2d 351, 353 (Iowa App. 1990) (citation omitted). This is an action at law so fact findings of the district court are not reviewable. Webb, 416 N.W.2d at 97.

The Iowa Supreme Court has explained the burden of proof:

> [A]n 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 upon that ground. [Citations omitted.] 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.

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

Iowa Code section 598.23(1) provides if a person against whom a decreed order has been entered willfully disobeys that order, the person may be cited and punished by the court for contempt. Iowa Code § 598.23(1) (1991). No person may be punished for contempt unless the allegedly contumacious actions have been established by proof beyond a reasonable doubt. Phillips v Iowa Dist. Court, 380 N.W.2d 706, 709 (Iowa 1986); Wegner, 461 N.W.2d at 353 (citation omitted). Contempt is sufficiently shown if some of the default was willful. Wegner, 461 N.W.2d at 353. The Iowa Supreme Court has defined willful noncompliance as conduct which 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.

Skinner v. Ruigh, 351 N.W.2d 182, 186 (Iowa 1984) (citation omitted).

One defense available in a contempt proceeding is an absence of willfulness in disobeying the order because of an inability to pay. Webb, 416 N.W.2d at 97 (citing Bevers v. Kilburg, 326 N.W.2d 902, 904 (Iowa 1982)).

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Bernard contends he is unable to pay support because he lost his job. He claims his failure to pay is not willful because his termination from Riley Ambulance was not his fault. Bernard's employer, after issuing several verbal and written warnings to him, discharged Bernard for failing to wear a hearing aid. The district court found a house fire in November 1991 had destroyed Bernard's original hearing aid. Although Bernard received $25,000 of insurance, he failed to purchase another hearing aid. The district court found Bernard's decision not to replace the hearing aid was willful.

Bernard knew of his obligation to pay child support to Vicki. His actions were "contrary to a known duty." Although he had received several warnings from his employer, Bernard failed to obtain and wear a hearing aid. He acted in disregard of the rights of his children and against his known duty to pay support.

We have noted one defense to contempt is an inability to pay. A noncustodial parent's inability to pay support, however, may not be brought about by his or her own fault. 2 Homer H. Clark, Jr., The Law of Domestic Relations in the United States, § 18.3, at 392-93 (2d ed. 1987). "[T]he defense of inability to comply with a court order is not available when the contemner has voluntarily created the incapacity." 17 Am. Jur. 2d Contempt § 161 (1990). In dissolution cases our courts do not allow for a reduction of a child support obligation when the noncustodial parent

voluntarily reduces his or her income. See Ellis v. Ellis, 262 N.W.2d 265, 268 (Iowa 1978).

The State established a prima facie case showing Bernard had not paid the child support. Lamb, 346 N.W.2d at 832. We hold Bernard's failure to pay child support was established by proof beyond a reasonable doubt and his failure was willful. We agree with the district court's finding Bernard's reason for not paying support constituted willfulness.

The challenged order of the district court is valid. We affirm the district court decision finding Bernard in contempt of court. The writ of certiorari is denied.

JUDGMENT OF DISTRICT COURT AFFIRMED AND WRIT OF CERTIORARI DENIED.