FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-226 / 88-1283

284

MAURICE ICKOWITZ,

Appellant,

vs.

IOWA DISTRICT COURT FOR POLK COUNTY,

Appellee.

Appeal from the Iowa District Court for Polk County, Theodore H. Miller, Judge.

Plaintiff appeals a second contempt order for failure to pay child support directing that he be jailed. **AFFIRMED.**

William L. Wegman, State Public Defender, and Raymond E. Rogers, Assistant State Public Defender, for appellant.

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

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

SCHLEGEL, P.J.

Plaintiff appeals a second contempt order for failure to pay child support directing that he be jailed. Plaintiff challenged the second contempt order by filing the present original certiorari proceeding in the supreme court. He contends the second contempt order is erroneous because it imposes a jail term, and "converts a civil contempt order into a criminal contempt order."

The marriage of Maurice and Kathleen Ickowitz was dissolved in July 1988. The decree placed the couple's two children in Kathleen's physical care and directed Maurice to pay child support of $40 per week per child.

Maurice failed to pay child support to the Polk County Clerk of Court as required by the decree, although he asserts he has provided hundreds of dollars worth of food and clothing directly to the children.

In September 1988 the district court found Maurice in contempt of court and ordered him jailed unless he purged himself of contempt by paying all overdue support within a certain time. When Maurice failed to purge himself within the specified time, the court issued a second order. In the second order the court stated that Maurice's failure to purge himself would not give rise to a new contempt adjudication. However, the court then proceeded to implement the jail term previously ordered for the earlier contempt adjudication.

Our scope of review is for the correction of errors at law and the findings of fact of the trial court have the effect of a special verdict. Iowa R. App. P. 4.

Once a contempt order subject to certain conditions has been issued by the trial court, the defendant must be given notice and a hearing as to why those conditions were not met. Green v. District Court of Polk County, 342 N.W.2d 818, 821 (Iowa 1983). Maurice was cited for contempt and given five days to purge himself by paying the child support. He did not purge himself and the supreme court remanded his case to the district court to provide a hearing under Green. The district court at the second contempt hearing stated that Maurice was not in contempt for his failure to purge. This was based on the testimony by Maurice that he was not able to pay the child support. However, even though Maurice was not able to pay within those five days, the district court also found substantial evidence that Maurice had the ability to pay the child support up to that time and imposed the thirty days jail time anyway.

The specific holding in Green was as follows:

> Consequently, we hold 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.

Green, 342 N.W.2d at 821.

The court in Green recognized that it is unfair to give a person a chance to correct his mistake through prompt payment and then punish him because he cannot afford to pay. Id. All of the cases cited by the plaintiff support this contention and we do not argue with it either. However, this did not happen here.

The district court withheld commitment on the condition that Maurice pay the back child support, which under Green requires notice and a hearing. Maurice was given his notice and hearing after the remand. The district court specifically held that Maurice was not at fault for failing to purge himself and did not hold him in contempt for this. The order that he go to jail for thirty days was based on his prior actions of willfully failing to pay the support, of which he was found guilty beyond a reasonable doubt. The trial court clearly stated its reasons for concluding that Maurice was responsible for his failure to pay child support. The purpose of the Green hearing was served in this instance, and the trial court in its discretion determined that the proper punishment was to impose the jail sentence without the ability to purge. According to the holding in Green this action was within

the proper exercise of the trial court's discretion and did not constitute error.

AFFIRMED.