IN THE COURT OF APPEALS OF IOWA

No. 6-203 / 95-1310

FILED
MAY 31 1996
CLERK SUPREME COURT

LARRY KEMPERS,

Plaintiff,

vs.

IOWA DISTRICT COURT FOR SIOUX COUNTY,

Defendant.

Appeal from the Iowa District Court for Sioux County, James D. Scott, Judge.

Plaintiff sought certiorari review of the district court's order finding him in contempt. **WRIT SUSTAINED; REMANDED FOR RESENTENCING.**

Randall G. Sease, Hartley, for plaintiff.

Tom Miller, Attorney General, Diane Stahle, Deputy Attorney General, and Robert Huibregtse, Assistant Attorney General, for defendant.

Heard by Sackett, P.J., and Cady and Streit, JJ. Vogel, J., takes no part.

STREIT, J.

Larry Kempers sought certiorari review of a district court order finding him in contempt. He argues: 1) the court erred in finding a willful violation of the dissolution decree; 2) the court erred in imposing excessive punishment; and 3) the court erred in denying his application for court-appointed counsel.

Certiorari is an action at law. *Zimmermann v. Iowa Dist. Court for Benton County*, 480 N.W.2d 70, 74 (Iowa 1992). Certiorari tests the legality of an action taken by a lower court. *Id.* Our review is at law and not de novo. The factual findings of the district court are binding upon us if supported by substantial evidence, but its conclusions of law are not. *Id.* We find the district court's findings were supported by substantial evidence and its ruling was in compliance with the law and within its jurisdiction except for sentencing. The writ is sustained.

Larry and Judy were divorced in June 1982. At that time they had three minor children and Larry was ordered to pay $100 per month in child support for each child. Larry did not pay child support, and Judy obtained public assistance until June 30, 1986. The State commenced URESA[1] proceedings in Indiana. A 1991 order was filed in the Indiana court requiring Larry to pay $450 per month in support, $100 of which would be paid through Larry's Veterans Administration benefits.

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[1] Uniform Reciprocal Enforcement of Support Act.

With the exception of four payments totaling $1050 in 1991, Larry continued to fail to make support payments.[2] Contempt of court proceeding were initiated in April 1995. The district court found Larry in contempt for failing to pay child support and sentenced him to sixty days of incarceration. The judgment of contempt provided Larry could purge himself of his contempt and receive a suspension of thirty days of the incarceration by paying the sum of $3500 for past due support within thirty days of the judgment. Thereafter, Larry was to pay the current child support obligation and the sum of $350 per month for past due child support as a condition necessary to purge himself of his contempt.

I. Willful Violation of Dissolution Decree. Section 598.23(1) provides if a person against whom a final decree has been entered willfully disobeys the decree, the person may be cited and punished by the court for contempt. Iowa Code § 598.23(1) (1995). A trial court has broad discretion and unless such discretion is grossly abused, its decision must stand *In re Marriage of Swan*, 526 N.W.2d 320, 327 (Iowa 1995). A finding of contempt must be established by proof beyond a reasonable doubt. *In re Marriage of Spears*, 529 N W 2d 299, 304 (Iowa App. 1994). Proof of contempt in violating a court order requires a showing of a willful violation. *Id.*

A review of the record reveals considerable evidence to support the finding of contempt With the exception of four payments made in 1991 following the Indiana

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[2] Judy did receive some Veterans Administration benefits on behalf of the children, but those payments did not satisfy Larry's support obligations.

court proceedings, Larry failed to make any child support payments from the entry of the 1982 decree through the 1995 contempt hearing.

It was undisputed Larry had been employed as recently as 1994 and had not used any of his earnings to pay his support obligations. *See Lamb v. Eads,* 346 N.W.2d 830, 832 (Iowa 1984) (party may be held in contempt for past conduct even though presently unable to pay support). Instead, Larry alleges he chose to use his 1994 earnings to make gifts of clothing to his adult children. Such conduct exemplifies direct defiance of the court orders to pay current and accrued child support. Despite Larry's physical and emotional problems, the State proved beyond a reasonable doubt Larry had been employed in 1994 and willfully disobeyed the court orders by not applying any of his income toward his support obligations The district court was correct in holding him in contempt.

II. Punishment for Contempt. Chapter 665 of the Iowa Code provides the procedural framework for a contempt action arising out of a dissolution decree. *Ickowitz v. Iowa Dist. Court for Polk County,* 452 N.W.2d 446, 449 (Iowa 1990). The punishments which may be imposed are set forth in Iowa Code sections 598.23 and 598 23A. In determining what punishment to impose, a trial court may utilize the imprisonment, income assignment, bond or community service measures set forth in those statutes. Punishment by incarceration may not exceed thirty days for each offense. Iowa Code § 598.23(1) (1995).

Larry argues the district court's oral findings fail to specify the number of contumacious acts it found he had committed. Judy requested the court find Larry in contempt for fifty-one separate violations. *See In re Marriage of Bruns*, 535 N.W.2d 157, 164 (Iowa App. 1995). The court did not make separate findings of contempt. As a result, Larry contends the court improperly ordered him to serve a sixty-day term of incarceration. In its oral findings the court said it was convinced

> [D]efendant's failure to pay child support has been deliberate *at times* over the 14 year period in question and that it's not necessary to go through each and every month to decide whether or not that month's particular violation was wilful.

(Emphasis added). Judy contends the court's use of "at times" is a finding of multiple contempt. However, these proceedings are quasi-criminal in their nature. *Id.* As important as the need to allege separate acts of contempt, findings in this regard must be made. The court should specify the contemptuous conduct being punished, and Respondent should be resentenced accordingly

Larry also argues the court erred in ordering him to pay his current support obligation and $350 per month for accrued support as a continuing condition necessary to purge the contempt Our statutes recognize a defendant's obligation to pay future support may be part of a court's punishment for contempt, and we find no merit in this argument *See e.g.*, Iowa Code § 598.23A.(1) (1995) (contemner can be required to post cash bond equivalent to twelve months of future support obligations). To the extent Larry is unable to make the future payments, he will be entitled to an opportunity

to demonstrate he made a bona fide effort to do so and the district court will be required to consider alternative dispositions to imprisonment. *See Lamb v. Eads*, 346 N.W.2d 830, 833 (Iowa 1984).

III. Denial of Application for Court-Appointed Counsel. An indigent defendant in a contempt proceeding is entitled to court-appointed counsel if there is a possibility of incarceration. *Kula v. Iowa Dist. Court for Linn County*, 462 N.W.2d 721, 722 (Iowa App. 1990). The April 4, 1995, order to show cause notified Larry of his right to request court-appointed counsel and directed him to make such a request prior to the contempt hearing.

Attorney Randall Sease filed an appearance on Larry's behalf on June 21, 1995. He proceeded to represent him by filing a notice of serving interrogatories, and motions to quash, for change of venue and for a continuance. He represented Larry at the July 21 contempt hearing. Larry did not submit an application for court-appointed counsel until the day of the hearing

The court's obligation to appoint counsel for an indigent defendant under section 815 10 is conditioned upon a finding the defendant desires legal assistance. *See State v. Hindman*, 441 N W 2d 770, 772 (Iowa 1989). Larry did not communicate a desire for court-appointed counsel until the day the contempt hearing was held. He waived his right to court-appointed counsel until the request at hearing. The court erred

in denying his application for court-appointed counsel thereafter. On remand the trial court should have allowed court-appointed counsel fees for the trial.

Larry's brief contains a request for the appointment and payment of appellate counsel in this action. A determination of Larry's status as an indigent and his entitlement to court-appointed counsel is generally a matter for the district court's determination. *See Lunde v. Ruigh*, 356 N.W.2d 566, 568 (Iowa 1984) (as general rule appointments of counsel, including appellate counsel, should be made by district court). We decline to address the application on appeal and reserve it for consideration by the district court at sentencing.

The writ of certiorari is sustained. Larry's sentence for contempt is vacated. Larry may not be imprisoned for contempt unless the contemptuous conduct is specified. This case is remanded for the court to specify its findings of contempt, sentencing, awarding of fees for services at trial, and for the consideration of appellate attorney fees.

WRIT SUSTAINED; REMANDED FOR SENTENCING.