IN THE COURT OF APPEALS OF IOWA

No. 0-096 / 99-0619
Filed April 28, 2000

FILED
APR 2 8 2000
CLERK SUPREME COURT

PATRICK A. NEPTUNE,
Plaintiff,

vs.

THE IOWA DISTRICT COURT FOR POLK COUNTY,
Defendant.

Appeal from the Iowa District Court for Polk County, Scott Rosenberg, Judge.

The supreme court granted plaintiff's writ of certiorari from the district court order finding him in contempt for willfully failing to comply with various provisions of the dissolution decree. Plaintiff contends the finding of contempt is not supported by substantial evidence. **WRIT OF CERTIORARI ANNULLED IN PART AND SUSTAINED IN PART.**

Marla Suddreth of Borseth & Genest Law Office, Pleasant Hill, for plaintiff.

Darren A. Page and Sally Frank of Drake Legal Clinic, Des Moines, for defendant.

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

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SACKETT, C.J.

In this original certiorari action Patrick Neptune challenges a contempt order finding he failed to comply some seventy-two times with the child support provision of the March 4, 1986, decree dissolving his marriage to Kathleen Nebel Shafiq. Patrick contends (1) there is not sufficient evidence to support a finding beyond a reasonable doubt that he intentionally and willfully violated a court order, and (2) the district court abused its discretion in ordering the sentence imposed. Writ of certiorari annulled in part and sustained in part.

Kathleen filed an application for rule to show cause on July 24, 1998, alleging Patrick had willfully and without good and just cause failed to pay child support and should be held in contempt.

A hearing was held on March 11, 1999. Patrick did not contend he was current with his child support. Although in the calendar year prior to the hearing he was substantially current. Rather he advanced that his actions were not intentional and willful. He claimed his failure to pay was due in large part to Kathleen's harassment and her actions in having him arrested and jailed on contempt charges. He further contended he had difficulty finding work and medical problems that prevented his paying the ordered support.

It would serve no useful purpose to lengthen this opinion with a history of the legal actions the parties instituted against each other in the past fourteen years. Except to say that we agree with the district court judge's assessment of the parties' action when he said, "The battle between these two divorced persons has caused a loss of focus on the most important person in their lives, their daughter."

On March 18, 1999, the district court filed a ruling on Kathleen's application for rule to show cause finding Patrick beyond a reasonable doubt willfully violated seventy-two counts of contempt of court for failure to pay child support and for failure to present to all future employers an August 9, 1989 order directing mandatory income withholding.

The court found, "[t]he evidence presented that Patrick has a habit of paying his child support when he finds it convenient to himself". The court found that except for January 1991, February 1991, March 1991, March 1992, June 1992, July 1992, August 1992, and March 1993, Patrick had willfully failed to comply with the court's orders directing him to pay child support. The court sentenced Patrick to two days on each count to run consecutive to each other for a total of 144 days of incarceration in the Polk County Jail. The court then suspended the sentence and placed Patrick on probation to the court for a period of two years. The court set the conditions of Patrick's probation as follows:

1) He shall maintain employment at a minimum of 40 hours per week.
2) He shall continue paying child support from this date forward based upon the adjusted child support of $239.00 per month current support and $50 per month arrearage.
3) The respondent shall make sure that all proper wage assignment orders be done in accordance with the court's order of September 13th, 1990.
4) The respondent shall from the date of this order forward until further order of this court file each month with the Polk County Clerk of Court under this file number, in writing, notification of his residential address and phone number and his work address and phone number.
5) The respondent shall further pay in full all arrearages owed in this matter on or before December 31st, 2000.
6) The respondent is further notified and informed that any missed child support payment from this date forward in any amount or any violation of this order and the conditions of probation herein shall be grounds for a revocation of his

probation upon proper notice and opportunity to be heard and represented by counsel.

Patrick first contends there was insufficient evidence to prove beyond a reasonable doubt that he willfully disobeyed a court order. He contends he made partial payments that show he attempted to comply with the order. He further contends his medical problems and actions brought by Kathleen have created obstacles to his full compliance with his child support obligations.

Our review is at law. *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998). In a certiorari action, we may examine only the jurisdiction of the district court and the legality of its actions. *Id.*; *See French v. Iowa Dist. Ct.*, 546 N.W.2d 911, 913 (Iowa 1996); Iowa R. Civ. P. 306. Illegality exists when the court's factual findings lack substantial evidentiary support, or when the court has not properly applied the law. *Christensen*, 578 N.W.2d at 678.

On review of a contempt ruling, we must determine whether substantial evidence exists that would "convince a rational trier of fact that Patrick is guilty of contempt beyond a reasonable doubt." *Ervin v. Iowa Dist. Ct.*, 495 N.W.2d 742, 744-45 (Iowa 1993). The district court's conclusions of law do not bind us and we exercise unfettered review of the court's application of the law. *State v. Lipcamon*, 483 N.W.2d 605, 606-07 (Iowa 1992).

To find Patrick guilty of contempt, a court must find beyond a reasonable doubt that he willfully violated a court order or decree. Iowa Code § 598.23; *Gimzo v. Iowa Dist. Ct.*, 561 N.W.2d 833, 835 (Iowa App. 1997). Kathleen has the burden of proving that Patrick (1) had a duty to obey a court order, and (2) willfully failed to perform that duty. *Christensen*, 578 N.W.2d at 578. Once a violation of a court order has been shown, the burden shifts to Patrick to produce

evidence suggesting that the violation was not willful. *Id.*; *Ervin*, 495 N.W.2d at 745. Yet the burden of persuasion remains on Kathleen to prove beyond a reasonable doubt that Patrick willfully acted in violation of the court order. *Gimzo*, 561 N.W.2d at 835; *Ervin*, 495 N.W.2d at 745.

> Evidence establishes willful disobedience if it demonstrates:
>
> [C]onduct that 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.

Ervin, 495 N.W.2d at 744 (quoting *Amro v. Iowa Dist. Ct.*, 429 N.W.2d 135, 140 (Iowa 1988)).

Kathleen established a prima facie case of contempt by showing Patrick owed a duty to pay child support and failed to perform this duty. Patrick argued the defense of inability to pay child support due to circumstances beyond his control. *See Wilson v. Fenton*, 312 N.W.2d 524, 527 (Iowa 1981) (inability to comply bears on the issue of willfulness and allows alleged contemnor to avoid adjudication of contempt by proving a good faith effort was made to comply). Although Patrick presented evidence of inability to pay due to some medical problems and service to his country during Desert Storm, we find substantial evidence apart from the evidence presented by Patrick to support the trial court's finding that Patrick willfully failed to make child support payments. Substantial evidence on the record exists that Patrick has a sporadic record of making his child support payments. We conclude the evidence of willfulness was substantial and supports the district court's finding of contempt.

Patrick next contends that the district court abused its discretion in the sentence imposed. An Iowa court's contempt power is inherent, but the power to

punishment may be validly limited by statute. *See Wilson v. Fenton*, 312 N.W.2d 524, 528 (Iowa 1981). A statute regulating the court's contempt power constructively repeals all common law on the subject. *See id.* Thus, where a statute prescribes the punishment for contempt, the court may give only a sentence provided for in the governing statute. *See French*, 546 N.W.2d at 915.

Iowa Code section 665.4(2) allows the district court to impose a fine and/or imprisonment in a county jail not exceeding six months. Section 665.5 provides for an indeterminate term of incarceration where imprisonment is used to coerce compliance with a court order. These statutes are available to punish violations of a dissolution decree, with the caveat that Iowa's dissolution statute, chapter 598, reduces the maximum duration of any term of punitive incarceration to only thirty days. *Christensen*, 578 N.W.2d at 680.

Where a finding of contempt is based on disobedience of a court's order, our cases recognize that a court may impose punitive sanctions under Iowa Code section 665.4 for past disobedience, impose coercive remedial sanctions under Iowa Code section 665.5 to encourage performance of affirmative acts required by the order, or impose both punitive and coercive remedial sanctions. *Ickowitz v. Iowa Dist. Ct.*, 452 N.W.2d 446, 449 (Iowa 1990); *Amro v. Iowa Dist. Ct.*, 429 N.W.2d 135, 139 (Iowa 1988). "[A] court which has found that imprisonment is a proper sanction for past acts of contempt may withhold commitment conditioned on . . . compliance with prescribed conditions." *Christensen*, 578 N.W.2d at 680 (quoting *Ickowitz*, 452 N.W.2d at 450); see also Iowa Code § 907.3(3) (allowing suspended sentences). In *Christensen*, the Iowa court held the district court was empowered by section 598.23(1) to sentence a

man held in contempt for failure to pay child support to thirty days in the Polk County [illegible] *See Christensen*, 578 N.W.2d at 680. Furthermore, the Iowa Supreme Court held the district court had the authority to suspend all or part of this sentence. *See id.*

Patrick contends Iowa Code section 598.23 provides he can be sentenced to jail or ordered to assign his wages of 598.23, but not both. We agree that the district court under the plain language does not have the authority to both impose a jail sentence and order a wage assignment. *See Philips v. Iowa Dist. Ct.*, 380 N.W.2d 706, 609-10 (Iowa 1986). However that is not what happened here. Patrick's sentence was suspended conditioned on his compliance with specified conditions including the wage assignment. He was not ordered both to go to jail and assign his wages.

The Supreme Court observed in *Hicks v. Feiock*, 485 U.S. 624, 635, 108 S. Ct. 1423, 1431, 99 L. Ed. 2d 721, 734 (1988):

> In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order.

The Iowa Supreme Court has also recognized that coercive remedial motives may underlie otherwise punitive sentences imposed under section 598.23(1). In *Ickowitz*, the Iowa Supreme Court stated:

> One of the purposes of contempt is to compel obedience to an order of the court. It is therefore proper for the court to provide for purgation of contempt by imposing conditions designed to procure compliance with the court order.

Ickowitz, 452 N.W.2d at 450.

The district court did not abuse its discretion in sentencing Patrick to a suspended sentence conditioned on Patrick's compliance with several requirements imposed by the district court.

Patrick also contends the district court lacked the authority to require him to "pay in full the entire arrearages owed on or before December 31st, 2000." The record does not support a finding that Patrick has the ability to pay $21,365 by December 31st, 2000. Patrick earned less than $14,000 in 1998. We cannot find on this record that he has the ability to increase his earning to the extent necessary to pay current support and the arrearages by the given date.

Courts enjoy wide discretion in determining and punishing contemptuous behavior. *In re S.D.L.*, 568 N.W.2d 41, 42 (Iowa 1997). We interfere in such judgments only when discretion has been clearly abused, that is, when the court's decision rests on unreasonable or untenable grounds, or erroneous legal conclusions. *Shedlock v. Iowa Dist. Ct.*, 534 N.W.2d 656, 660 (Iowa 1995). The district court order requiring Patrick to pay in full all arrearages owed in this matter on or before December 31st, 2000 was unreasonable and unrealistic based upon Patrick's employment history and current earning capacity. We strike that portion of the condition of probation that requires Patrick to pay in full all arrearages owed in this matter on or before December 31st, 2000 and affirm the remaining conditions of probation ordered by the district court.

WRIT OF CERTIORARI ANNULLED IN PART AND SUSTAINED IN PART.