FILED
JUN 25 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

598

KENNETH EUGENE WARNER,	)	
Plaintiff-Appellant,	)	Filed June 25, 1985
vs.	)	5-263 84-699
THE HONORABLE M. C. HERRICK, Judge, Fifth Judicial District of Iowa,	)	
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Dallas County, M. C. Herrick, Judge.

Plaintiff challenges an adjudication of contempt via certiorari, asserting that he was improperly found in violation of an order not filed at the time of the adjudication. WRIT SUSTAINED.

Joseph A. Nugent, Des Moines, for plaintiff-appellant.

Thomas J. Miller, Attorney General, and Stephen C. Robinson, Assistant Attorney General, for defendant-appellee.

Heard by Oxberger, C.J., Schlegel, and Sackett, JJ.

The plaintiff was found in contempt for failure to pay child support and has filed a writ of certiorari challenging the order. We sustain the writ.

The plaintiff here, Kenneth Warner, was found to be the father of Dustin Gregory Shelton, and child support of $50 per week was included in the order of February 25, 1983. In a calendar entry dated December 16, 1983, Warner was found in contempt for failure to pay court-ordered support. In its finding the court gave Warner a chance to purge himself "by wage assignment and attorney fee granted per order to be prepared" by counsel for the mother of the child. The counsel for the mother obtained an order to show cause on April 12, 1984, and hearing was set for May 11, 1984. The counsel had not filed the order requiring the wage assignment. At the May 11 hearing the court, after listening to Warner's statements, found as follows:

> Hearing on contempt at 3:10 p.m. Respondent appearing in person and by Joseph A. Nugent, his atty. Respondent is again found to be in contempt for failure to pay support and for his failure to execute the wage assignment as ordered by Judge Levine on 12-16-83, and as punishment he is ordered to be committed to the Dallas County Jail for 15 days commencing 5-11-84.

It was not until 3:52 p.m. on May 11, after the order for contempt was made, that the counsel for the mother's attorney filed with the clerk of court the order originally demanding Warner make a wage assignment. He appeals, saying that it was error for the court to make the second contempt order when the first contempt citation requiring the wage assignment was not filed prior to the final hearing.

Our review is limited. We are to determine if the lower court exceeded its jurisdiction or acted illegally. DeKlotz v. Ford, 332 N.W.2d 110, 111 (Iowa Ct. Ap. 1982). In a contempt action we are to assure evidence of contempt is clear and satisfactory. Id.

Warner contends that our cases indicate until an order is recorded it has no effect as a final decree, citing King v. Dickson, 114 Iowa 160, 86 N.W. 263, (1901).

Rule of Civil Procedure 227 also indicates that a judgment must be on the record to have effect. As pertains to this specific situation, the contempt Chapter at section 665.8 of the Code states: "Where the action of the court is founded upon evidence given by others, such evidence must be in writing, and be filed and preserved." Since the second contempt order was founded on a prior order that was not reduced to writing and recorded, Warner says the jail sentence is invalid and his writ must be sustained.

The State responds by referring to the court to the statement made in Burke v. Burke, 142 Iowa 206, 210, 119 N.W. 129, 130 (1909) that in the absence of a statute, entry in the official records of the clerk of court is not necessary. However, we note the limiting words of Burke are that the rule applies only "save for some statute" to the contrary. Id. Here, section 665.8 requires that a writing be on record when evidence outside of court is used for the basis of a contempt order.

A number of cases have come before the supreme court in which the pertinent statute was analyzed and they are consistent with the finding that the prior evidence on which the court relies must be on record before the contempt order is made.

In Lutz v. Darbyshire, 297 N.W.2d 349, 354 (Iowa 1980) the court noted the difference between direct contempt, where the improper act occurs in the presence of the court, and indirect contempt, where the court must rely on some act outside its presence, and which is governed by the requirements of section 665.8. Id. The court stated, "In the case of an indirect contempt, we have stated the court has no authority to render a judgment for contempt on evidence that was not of record at the time of such entry." Id. (citations omitted). The requirement was also reviewed in Jones v. Levis, 240 Iowa 602, 604, 35 N.W.2d 891, 892 (Iowa 1949) in which the court stated:

> In construing this statute (section 665.8), it has been established that such evidence in writing must be filed in the clerk's office, as part of the record, prior to the pronouncement of judgment. Petitioner also cites five Iowa cases in which the above construction is recognized. In Leonetti v. Utterback, 202 Iowa 923, 211 N.W. 403, we said, ' *** Under the settled rule the court had no authority to render a judgment for contempt on evidence that was not of record at the time of such entry.'

(emphasis original). Section 665.8 has been largely unchanged over the years and its predecessor, found at section 4466 of the Code, has been interpreted in the same manner. Seidlitz v. Benham, 132 N.W. 370 (Iowa 1911); Sawyer v. Hutchison, 126 N.W. 798 (Iowa 1910). In Sawyer, the court indicated that if the evidence or order is not of record when the contempt is found, then the court should postpone the action. Id. at 799.

In this case it is clear that the court based its decision to find contempt on Warner's violation of the prior order requiring him to make a wage assignment. The order was not filed until after the contempt was found and was in violation of section 665.8 of the Code and the above authorities.

The State argues in the alternative that the calendar entry made by the court was sufficient to make the prior judgment "of record." However, it has been stated, "Of course, the notation on the judge's calendar does not constitute the judgment or decree, but is, ordinarily, a mere reminder or direction to the clerk of the court to enter the same. (citations omitted). Here, it indicated only that a decree to be signed was to be entered. It is not a part of the record. (citations omitted)." Cooley v. Ayers, 180 Iowa 740, 743, 163 N.W. 625, 626 (1917). This proposition was also stated in Wolfe v. Murphy, 133 F.2d 775, 777 (8th Cir. 1940).

The State argues that McCubbin Seed Farm, Inc. v. Tri-Mor Sales, 257 N.W.2d 55 (Iowa 1977) and Moreno v. Vietor, 156 N.W.2d 305 (Iowa 1968) supports its contention. In McCubbin the court stated it is the substance and not the form of the writing that determines when it is sufficient. McCubbin, at 57. However, in that case the court issued a written judgment filed after a calendar entry made

by the court earlier. Id. The only issue decided in McCubbin was that the later written judgment filed with the clerk reflected the date the judge considered the judgment to have been made. Id.

We also disagree that Moreno is opposite Cooley or Wolfe. The court there decided that entry of a jury verdict in the Miscellaneous Law Record by the clerk was sufficient for a judgment to be rendered, for the purpose of deciding timeliness of appeal. Moreno, at 309. The court also noted that, "An entry in either or both the judgment index or combination docket which refers to a judgment is not sufficient to comply with the requirement that a judgment be entered of record." Id. at 308. Looking past the form of the writing, and instead concentrating on the substance, the court found that there was a judgment entered since the clerk intended his acts to be the entry of a judgment. Id. at 309. Here, we have no order entered, by the clerk or another. The only indication of any order is the judge's calendar entry. Even looking to the substance of the writing, the calendar entry can be no more than a reminder, as stated in Cooley, and not intended to substitute for the filing of the order.

Finally, the State argues that there is evidence of the plaintiff's contempt of court independent of the finding he violated the order to make a wage assignment. The State points to the fact the court found he had not made the assignment and had never made any child support payments whatsoever. We have stated that a contempt order involves quasi-criminal power of the court. Bevers v. Kilburg, In and For Linn County, Sixth Judicial District, 326 N.W.2d 902, 904 (Iowa 1982). The application of criminal law principles to contempt is reflected in Wilson v. Fenton, 312 N.W.2d 524, 529 (Iowa 1981), where the court noted that because of the criminal nature of contempt, a void sentence could not be upheld even though the issue is not raised by the party. This is especially evident in situations like the one before us where the plaintiff faces a jail term.

We believe such actions are governed by the principles set out in State v. Messer, 306 N.W.2d 731 (Iowa 1981). There the court dealt with sentencing procedures, and indicated that when an error is made by the court during sentencing, the court will not attempt to delve into the judge's reasoning and distinguish whether the sentence was based on the properly or improperly considered factors. See id. at 733. Contempt was found by the court here in the initial proceeding, and the second contempt was based at least in part on the finding Warner had violated the wage assignment order. We cannot guess what part of the two factors involved played the major role in the judge's determination that Warner should spend fifteen days in jail. Instead, we believe the error must be corrected by sustaining the writ and providing that the mother seek her relief through the proper procedure for contempt.

WRIT SUSTAINED.

All judges concur except Sackett, J., who dissents.

SACKETT, J. (dissenting)

I dissent. A decree was entered ordering plaintiff to pay child support. Plaintiff paid no child support. He appeared and was found in contempt. He paid no support. He was again cited for contempt, appeared and participated in the hearing. See Criswell v. Hendrickson, 344 N.W.2d 255 (Iowa Ct. App. 1983).

I fail to find the wage assignment relevant to the issue of his failure to pay support.

I would annul the writ.