RENDERED: MAY 13, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-002024-MR

HENRY F. SPENCER APPELLANT

APPEAL FROM BARREN CIRCUIT COURT
v. HONORABLE W. MITCHELL NANCE, JUDGE
ACTION NO. 07-J-00266-006

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; COMBS AND JONES, JUDGES.

ACREE, CHIEF JUDGE: The Barren Family Court found Appellant Henry Spencer in contempt for failing to pay child support. Spencer claims the family court erred when it ordered a term of imprisonment but failed to set an attainable purge amount. We agree. Accordingly, we reverse and remand for additional proceedings congruent with this Opinion.

Spencer and his ex-wife, Melissa, shared joint custody of their minor son, Kylin Spencer, following their divorce in 2010. In 2012, the family court removed Kylin from Spencer's care for failing to adequately supervise Kylin and creating a risk of sexual abuse. The Cabinet for Health and Family Services initiated neglect proceedings and Kylin was placed in Melissa's care and custody.[1]

The Commonwealth, by and through the Barren County Attorney, on February 19, 2013, filed a motion seeking to intervene and requesting that Spencer be ordered to pay child support as established by the statutory child support guidelines. The child support worksheet attached to the Commonwealth's motion identified Spencer's gross monthly income as $524.33. The source of this income is not disclosed in the record.

The family court, by order entered August 6, 2013, granted the Commonwealth's motion. Effective March 1, 2013, Spencer was to pay child support in the amount of $101.45 per month. However, the family court also calculated a child support arrearage of $507.25 for the period of March 1, 2013, through July 31, 2013; therefore, it ordered Spencer to pay an additional $25 per month toward the arrearage owed. Spencer's total child support obligation going forward was $126.45 per month.

In late 2013, Spencer began working at Smith Interiors earning $1,421.88 per month. The Commonwealth, on December 20, 2013, filed a motion to increase Spencer's child support obligation to $252.00 per month. Spencer

[1] On August 20, 2013, the Hart Circuit Court – where the parties' divorce action originated – ordered that Melissa have "permanent primary physical custody[.]"

failed to respond. The family court, on May 5, 2014, granted that motion. By that time, Spencer's failure to regularly pay child support had resulted in a new arrearage of $1,310.90. The family court granted the Commonwealth's motion, ordering Spencer to pay monthly child support of $252.00, plus an additional $25 to be applied to eliminate the arrearage, for a total monthly child support payment of $277.00.

Spencer failed to pay his child support.

On June 27, 2014, the Commonwealth filed a motion to show cause why Spencer should not be held in contempt for failure to pay child support previously ordered. At a hearing on September 15, 2014, the family court found Spencer to be indigent, appointed him counsel, and continued the hearing to December 3, 2014. The family court impressed upon Spencer the serious nature of the proceeding and urged him not to squander the time allowed by the continuance, but to "get busy" and, if possible, "get the matter resolved." Spencer did not heed the family court's warning and advice.

On December 3, 2014, the family court held a hearing on the Commonwealth's contempt motion. Spencer testified that he quit his job in February 2014 because he was being bullied and harassed. He has not worked since that time. He has no income. Spencer testified he made efforts to find work, applying for five jobs since February 2014, all without success. He relies on friends for transportation. Spencer receives $195 per month in food stamps. He is homeless and lives in his car. Spencer testified he has two ruptured discs in his

back and blurred vision. He desires disability benefits, but has not yet pursued a disability award. Spencer testified that he consulted with his attorney about how to handle the accumulating child support obligation. He then went to the child support office to request a modification but, upon arrival, forgot what his attorney told him to ask and instead only inquired as to the amount owed.

Melissa testified that when their marriage ended in 2010, Spencer owned a Toyota truck. She had not seen him driving the truck in the past year. Melissa also testified Spencer drove a Buick automobile to the hearing. She did not know the year of the car, but thought it worth $2,400. She expressed her belief that Spencer should be forced to sell the car to pay his child support obligation.

A worker from the Barren County Attorney's child support division testified that the IRS database indicated, in May 2014, that Smith Interiors reported wages earned by Spencer; the worker admitted the report did not indicate what month or months the wages had been earned. The worker testified Spencer's last child support payment of $29.00 occurred in February 2014. Before that, Spencer paid $78.00 in January 2014. Spencer had not asked to modify his child support obligation. The worker claimed Spencer was not receiving food stamps.

The family court, by order entered December 3, 2014, found Spencer guilty of civil contempt for failure to pay child support. It reasoned Spencer had an obligation to comply with the court's child-support orders; that Spencer had failed to make sufficient attempts to comply therewith; and that Spencer possessed the financial ability – from income or from loan proceeds – to pay the outstanding

obligation and to purge himself of contempt. The family court sentenced Spencer to thirty days in jail. It concluded Spencer could purge himself by making a payment of $2,973.45, the full child support arrearage owed as of November 2014.

Spencer objected to the purge amount, arguing the family court failed to base it on Spencer's present ability to pay. The family court overruled the objection. This appeal followed.

This Court will only reverse a finding of contempt if the trial court abused its discretion in imposing the sentence. *Lanham v. Lanham*, 336 S.W.3d 123, 128 (Ky. App. 2011). "The test for abuse of discretion is whether the trial court's ruling was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). However, "we apply the clear error standard to the underlying findings of fact." *Blakeman v. Schneider*, 864 S.W.2d 903, 905 (Ky. 1993).

Spencer's sole argument on appeal is that the family court erred by ordering a term of imprisonment for contempt without establishing an attainable purge amount. By failing to consider his present ability to pay, Spencer argues the family court offered him no reasonable opportunity to satisfy his obligation and, instead, put the keys to his prison door out of his reach. We are persuaded.

Contempt is "the willful disobedience of or the open disrespect for the court's orders or its rules." *Meyers v. Petrie,* 233 S.W.3d 212 (Ky. App. 2007) (citation omitted). A court may incarcerate a party for non-compliance with its orders. *Crowder v. Rearden*, 296 S.W.3d 445, 450 (Ky. App. 2009). This Court is

not unmindful of the broad contempt powers enjoyed by the courts. *Meyers*, 233 S.W.3d at 215. In reviewing the imposition of sanctions for contempt, we turn to well-defined and well-settled case law concerning a court's exercise of its broad authority.

Notably, "[c]ivil contempt, the focus of this appeal, is 'the failure . . . to do something under order of court, generally for the benefit of a party litigant.'" *Crowder*, 296 S.W.3d at 450. Civil contempt is designed "to coerce rather than punish." *Blakeman*, 864 S.W.2d at 906. The civil contempt process is composed of the following separate yet interrelated steps.

First, the party seeking a contempt citation must establish by clear and convincing evidence that the alleged contemnor has violated a court order and, if also seeking compensation, the amount must be proven. If the court is persuaded, a presumption of contempt is created and the burden of production shifts to the alleged contemnor. *Commonwealth, Cabinet for Health and Family Serv. v. Ivy*, 353 S.W.3d 324, 332 (Ky. 2011).

Second, the alleged contemnor then has the opportunity to present clear and convincing evidence that he or she "was unable to comply with the court's order or was, for some other reason, justified in not complying. This burden is a heavy one and is not satisfied by mere assertions of inability." *Id.* If such evidence fails to convince the trial court, as it failed here, the presumption of contempt becomes a finding of contempt and the court moves on the final step established in *Ivy* – fashioning a remedy.

Spencer makes no argument regarding the first step. Numerous court orders clearly directed him to pay child support which he failed to do, resulting in a child support arrearage of $2,973.45. He does present something of an argument regarding the second prong; he claims his failure to comply with the court's order by paying the designated amount of child support was neither willful nor fraudulent. We see, however, that this argument relates more directly to the third prong as he cites *Commonwealth ex rel. Bailey v. Bailey* for the proposition that "[t]he power of contempt cannot be involved to compel to doing of an impossible act." 970 S.W.2d 818, 820 (Ky. App. 1998). Therefore, we move on to consider the third prong of *Ivy* – setting a purge amount.

"Having found a party in contempt, the court's next task is to fashion a remedy." *Ivy*, 353 S.W.3d at 334. That remedy may include coercive sanctions, "such as daily fines or incarceration." *Id.* The punishment may not, however, be imposed indefinitely. "For the punishment to retain its civil character, the contemnor must, at the time the sanction is imposed, have the ability to purge," *id.*, for "the defining characteristic of civil contempt is the fact that contemnors 'carry the keys of their prison in their own pocket.'" *Blakeman*, 864 S.W.2d at 906. Significantly, "the purge condition of a coercive order must be something presently [meaning currently] within the contemnor's ability to perform." *Ivy*, 353 S.W.3d at 335. It is logically unsound to use the power of civil contempt "to compel the doing of an impossible act." *Lewis v. Lewis*, 875 S.W.2d 862, 864 (Ky. 1993).

Upon finding Spencer in contempt, family court had the authority to order his imprisonment for past-noncompliance and to order him to make payments toward his arrears in an amount he could afford. *Ivy*, 353 S.W.3d at 335. But fixing the purge amount at the full arrearage amount owed did not provide Spencer with a true opportunity for purging. At the time of the hearing, Spencer was incontrovertibly jobless, otherwise without income, and homeless. Melissa's suggestion that Spencer solve his arrearage problem by selling his vehicle – an asset aiding his employability and in which he was living at the time – strikes this Court as short-sighted and impractical.

We must reverse the trial court's finding of contempt. Setting a purge amount of $2,973.45 carried with it the implicit conclusion that Spencer was presently capable of purging that sum. When it comes to that ultimate conclusion, the trial court failed to make even a single supporting factual finding, "as it should have done, and indeed made no reference to any evidence at all." *Id.* at 334. We cannot conclude otherwise than that the family court abused its discretion when it set an unattainable purge amount.

We are aware "that child support questions are vexing and difficult." *Lewis*, 875 S.W.2d at 864. The family court in this case afforded Spencer considerable time to get his life together before imposing a civil contempt sentence. Spencer utterly ignored the family court's warning and its prior child-support orders. The family court's frustration with Spencer is palpable and certainly understandable. In *Ivy*, our Supreme Court, quoting from an opinion of

the Maryland Court of Appeals, offered viable solutions to address situations like the one before us:

> If the court desires to proceed with the civil contempt but, due to the defendant's current inability to meet any meaningful purge, is precluded from imposing a sanction of incarceration, it should explore the reasons why the defendant is impecunious and attempt to deal with that situation. Usually, as here, the problem is lack of steady employment, which may, in turn, be occasioned by a variety of circumstances: mere indolence or willful defiance (voluntary impoverishment), physical, mental, or emotional disability, lack of general or specialized education, lack of a diploma, degree, certificate, or license of some kind that the defendant, with some reasonable effort and time, may be capable of obtaining, or a disabling addiction. If unemployment is the problem, the court, upon determining the cause, may . . . enter reasonable and specific directives to deal with it. The court may order the defendant to pursue employment opportunities in a specific manner. It may order the defendant to pursue necessary education or a diploma, degree, certificate, or license that may be necessary or helpful in making the defendant eligible for meaningful employment. It may direct the defendant to seek a form of treatment for health or addiction problems that has a reasonable chance of dealing with the problem sufficiently to qualify the defendant for meaningful employment. In all instances, the directives must be specific and they must be reasonable. The programs must be available and affordable to the defendant, and they must be relevant to the objective. The court may order the defendant to report periodically, and it may monitor compliance. It may modify the requirements as circumstances warrant. If it appears that the defendant is willfully not complying with the directives, the court may cause criminal contempt proceeding to be filed, aimed at punishing defiance of the directives. If, as a result of that defiance, the underlying support order remains in arrears, the State's Attorney, if so inclined, may pursue a criminal action.

Ivy, 353 S.W.3d at 336-37 (quoting *Arrington v. Dep't of Human Resources*, 402 Md. 79, 935 A.2d 432, 448–49 (2007)).

For the foregoing reasons, we reverse the Barren Circuit Court's December 3, 2014 Judgment and Order, and remand so that the circuit court may determine an attainable purge amount and findings to support that determination.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Julia k. Pearson Frankfort, Kentucky	Dennis Wilcutt Glasgow, Kentucky