

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001583-MR

CHRISTOPHER SIZEMORE

APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE STEPHEN M. JONES, JUDGE
ACTION NO. 13-CI-00042

REBECCA JON PARROTT

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, STUMBO, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Christopher Sizemore appeals from a Knox Circuit Court order holding him in contempt of court for failing to make mortgage payments to his former spouse, Rebecca Jon Parrott, under the terms of their dissolution agreement. Sizemore argues that the trial court abused its discretion in entering the contempt order because the proof was undisputed that he could not afford to make the payments.

Sizemore and Parrott were married on July 19, 2011. They separated approximately one year later. They had no children together and neither party requested maintenance. Under the terms of their separation agreement which was subsequently incorporated into the final decree of dissolution, Sizemore agreed to make a monthly mortgage payment of \$1,500 on a house they had started building on a tract of land belonging to Parrott. The relevant portion of the agreement provides as follows:

The parties [Sizemore and Parrott] hereby agree and acknowledge there is real estate located at 491 Highway 92, Pineville, Kentucky 40977 [which] is the Wife's non-marital real property. The parties further certify and confirm that construction of a residence is presently underway and the parties herein agree that the Wife shall be awarded sole ownership, title and possession of the real estate and residence free and clear from any claim of the Husband. The Husband hereby agrees to execute a quitclaim deed to the Wife conveying any potential interest or claim to the said real property and residence

The Husband herein agrees to pay \$1,500.00 per month on the existing construction loan/mortgage on the residence and real property referenced hereinabove until the principal balance of the construction loan/mortgage is \$150,000.00. At that time parties herein agree that the Wife shall take all reasonable steps to refinance the mortgage debt to remove the Husband's name thereon and hold the Husband harmless of the said debt. Thereafter, the Wife shall assume sole financial responsibility for existing mortgage balance and shall hold the husband harmless.

The final decree of dissolution was entered on March 14, 2013. On May 8, 2014, Sizemore filed a motion for relief from the final decree pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(d) and (f), arguing the separation agreement was obtained by fraud, and the enforcement of the agreement was unconscionable. He attached an affidavit stating that Parrott told him she wanted a separation “on paper” only as it would be beneficial for tax purposes and the repayment of her student loan debt. Sizemore claimed that he would never have signed the settlement agreement had he known they were not going to remain together.

On December 30, 2014, Parrott filed a motion for contempt against Sizemore for failing to make mortgage payments for the months of November and December 2014. The trial court ordered her motion to be held in abeyance until the hearing on Sizemore’s CR 60.02 motion. The CR 60.02 hearing was held on July 15, 2015. On August 7, 2015, the trial court entered an order finding that neither party entered into the settlement agreement as a result of fraud or undue influence, that Sizemore was fully informed of the contents of the agreement, manifested his assent to the agreement, and that consequently the agreement was binding. Sizemore did not appeal from this order.

On August 14, 2015, Parrott filed another motion for contempt; Sizemore filed an objection stating that he was unemployed and did not have the ability to pay \$1500 per month.

The trial court held a hearing on the contempt motion on January 15, 2016, at which the following facts and testimony were elicited: Sizemore filed for bankruptcy in February 2014. At the end of May 2015, he lost his job as the manager of the family business, earning approximately \$55,000, when the business was shut down by the state for unpaid property and sales taxes. He had been unemployed since that time except for a brief period of Christmas employment at UPS in December 2015. He was currently seeking emergency certification as a substitute teacher to earn more money. His only source of income was unemployment insurance in the amount of \$415 per week. He lived rent-free in an apartment in a building owned by his mother. According to an affidavit submitted by Sizemore, his total monthly expenses totaled \$2219, including a \$800 monthly payment on a Denali truck he purchased for over \$50,000 in September 2014. He testified that he was still employed at the family business when he made the purchase, and that he could not currently sell the truck for what he still owed on it. He acknowledged on cross-examination that it would make sense to trade the truck in for a less expensive vehicle. Also following the bankruptcy but prior to losing his job at the family business, Sizemore purchased a Harley Davidson motorcycle

which he later sold for \$16,499. Sizemore also purchased a Polaris RZR off-road vehicle in August 2014 for \$21,000. The monthly payment of \$490 on the vehicle was made by his mother, who he testified “helped him out” when he needed money. He testified he was trying to sell the Polaris, and was also trying to sell some sports memorabilia and other items on Ebay.

The trial court entered an order directing Sizemore to file monthly income reports and any sums he received from the sale of the Polaris vehicle or the items listed on Ebay. Sizemore submitted reports showing that he continued to receive unemployment payments until the end of February. In April 2016, he began to receive income from Averitt Express where he had gained employment as an over-the-road truck driver.

On May 19, 2016, Parrott filed another motion to compel payment. Sizemore filed an objection and request for a hearing, arguing that even though he was employed as a truck driver, he did not have the ability to pay the mortgage because his reasonable living expenses still exceeded his net income.

On September 9, 2016, the trial court held another hearing. It was undisputed that Sizemore had not made any mortgage payments for a year. Sizemore testified that that he had been working as a truck driver since March 2016 and his net income was approximately \$10,000 for the preceding four and-a-half month period. He continued to live rent-free in the building owned by his

mother. He testified that he inherited University of Kentucky basketball tickets from his father, and paid \$7,300 in order not to lose the right to claim the tickets. He later sold the tickets for a profit of “a couple of hundred” dollars. Sizemore also purchased two season tickets for University of Kentucky football for \$600. He had sold two of the tickets for their total face value of \$70. He had been unable to sell any of his items on Ebay and expressed willingness to give them to Parrott as a credit against his mortgage payments.

Sizemore’s attorney argued that the trial court could only hold Sizemore in contempt if he had acted with willful disobedience, whereas he simply did not have sufficient income to make the payments. Parrott’s attorney responded that Sizemore was now working full time, was able to make his \$800 monthly payment on his Denali, and that he should be making some form of payment to show good faith. He indicated that Parrott would accept \$750 per month to avoid losing the home.

The trial judge recalled the extensive contempt hearing he had conducted the year before, and noted that he had not actually ruled on the contempt motion at that time. He acknowledged Sizemore’s argument that he could not afford to make the payments, but also noted that although Sizemore was not living extravagantly he was “making a lot of payments to a lot of people,” including his attorney. The judge observed that a year had passed with nothing, and expressed

frustration with how to convince Sizemore to make the payments. He concluded that Parrott could accept lower payments if she wished, but that he would enter a contempt order for the full amount and it “was up to her” if she wished to enforce the order.

Accordingly, the trial court entered an order holding Sizemore in contempt of court for failing to pay \$1,500 per month on Parrott’s mortgage since May 2015. Sizemore was ordered to be incarcerated for 179 days, but could purge himself of the contempt by paying \$1500 per month on the mortgage. This appeal by Sizemore followed.

Sizemore argues that the trial court abused its discretion in entering the contempt order because the proof was undisputed that he could not afford to pay \$1,500 per month.

Contempt is defined as “the willful disobedience of or the open disrespect for the court’s orders or its rules.” *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007) (citing *Newsome v. Commonwealth*, 35 S.W.3d 836, 839 (Ky. App. 2001)). “In a civil contempt proceeding, the initial burden is on the party seeking sanctions to show by clear and convincing evidence that the alleged contemnor has violated a valid court order.” *Commonwealth, Cabinet for Health and Family Serv. v. Ivy*, 353 S.W.3d 324, 332 (Ky. 2011). “Once the moving party makes out a prima facie case, a presumption of contempt arises, and the burden of

production shifts to the alleged contemnor to show, clearly and convincingly, that he or she was unable to comply with the court's order or was, for some other reason, justified in not complying." *Id.* (citing *Clay v. Winn*, 434 S.W.2d 650 (Ky.1968)).

"When a court exercises its contempt powers, it has nearly unlimited discretion." *Meyers*, 233 S.W.3d at 215 (citing *Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky. App.1986)). A trial court's decision regarding contempt will not be disturbed absent an abuse of its discretion. *Id.* "The test for abuse of discretion is whether the trial judge's decision 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). The trial court's underlying findings of fact are reviewed for clear error. *Ivy*, 353 S.W.3d at 332.

There is no dispute that Sizemore violated the terms of the dissolution decree by failing to make the monthly payments of \$1,500 since May 2015. The question then becomes whether Sizemore was able to overcome the presumption of contempt by showing with clear and convincing evidence that he was unable to comply with the order. As the trial court found, Sizemore was able to raise money to pay for other things, but did not pay even a token sum to Parrott for over a year. The burden on the contemnor "is a heavy one and is not satisfied by mere assertions of inability. The alleged contemnor must offer evidence tending to show

clearly that he . . . made all reasonable efforts to comply.” *Ivy*, 353 S.W.3d at 332. Sizemore offered little evidence to show that he made reasonable efforts to comply with his obligation, whereas evidence was presented he was able to make \$800 monthly car payments, his mother paid over \$400 per month for his off-road-vehicle, he received a “couple of hundred” dollars for selling his University of Kentucky basketball tickets, and he purchased \$600 season football tickets.

Sizemore argues that the trial court’s findings of fact are clearly erroneous because he demonstrated that his average net monthly income of \$2,244 from his trucking job was not sufficient to cover his monthly expenses and the \$1,500 monthly payment. He points to the well-established principle of Kentucky law that “[t]he power of contempt cannot be used to compel the doing of an impossible act.” *Lewis v. Lewis*, 875 S.W.2d 862, 864 (Ky. 1993) (citing *Rudd v. Rudd*, 184 Ky. 400, 214 S.W. 791 (1919)). He contends that the trial court could have made a more appropriate order, by ordering him to continue filing monthly proof of his income and to pay on the mortgage debt some portion of the \$1,500 to the extent that his monthly net income exceeded \$2,244.

But the trial court did try that approach. Following the lengthy July 15, 2015 hearing, the trial court ordered Sizemore on January 28, 2016, to file monthly income reports, including any sums he received from the sale of the Polaris or the items he had listed on Ebay. He was directed to pay such sums

towards the mortgage debt. The parties were also directed to tender whatever order they believed to be appropriate within fourteen days. Neither party appears to have tendered an order. In the following seven months, Sizemore did not make a single payment of any kind to defray the mortgage debt, even though he began his trucking job in April. Thus, the record indicates that Sizemore was provided with several months in which to make a good faith attempt to pay at least part of the mortgage. Sizemore ignored this opportunity. The onus was not on the trial court at that point to fashion another remedy or to rewrite the settlement agreement.

Sizemore likens his situation to that of the appellant in *Crosby v. Mehling*, 2010-CA-000236-MR, 2011 WL 2162560 (Ky. App. June 3, 2011), an unpublished opinion of this Court. In that case, Crosby failed to pay child support, in the amount of \$55 per week, for several years. His arrears stood at \$25,000. The trial court found him in contempt and ordered him to pay \$3,000 to purge the contempt. Crosby did not dispute the arrearage amount, but indicated that he was unemployed, essentially homeless and suffered from several mental and physical ailments. He had earned a total of about \$5,200 in the previous three years. The opinion held that the trial court erred by failing to make findings of fact concerning Crosby's actual ability to pay his support obligation. *Crosby v. Mehling*, No. 2010-CA-000236-MR, 2011 WL 2162560, at *3 (Ky. App. June 3,

2011). Unlike the appellant in *Crosby*, Sizemore is not homeless, does not suffer from any debilitating ailments, and was able to secure full-time employment. The trial court expressly found that he did have money to spend on non-essentials. The purge amount imposed by the court was simply the amount specified by the settlement agreement, unlike *Crosby* in which the purge amount was equivalent to a year's worth of child support payments.

Sizemore also relies on several opinions from other state courts addressing the imposition of civil contempt. These opinions are not binding authority, and in any event are distinguishable.

In *Ellis v. Ellis*, 2008 ME 191, 962 A.2d 328 (Me. 2008), the ex-husband agreed to pay spousal support in the amount of \$600 per week as well as child support, but ceased paying the spousal support after approximately two years when his income dropped dramatically. The evidence showed he initially worked four different jobs for between sixty to eighty hours per week, then reduced his hours to spend more time with the children. He tried to lower his expenses by keeping the heat turned down and canceling his land-line phone. He lived in a home owned by his parents and was sometimes unable to pay them rent. After his ex-wife filed a motion to hold him in contempt, he agreed to pay \$300 per week in spousal support, and did so for about six months. Ultimately, the trial court entered an order modifying the amount of his support and refused to hold him in

contempt, finding that his ability to pay diminished over time, and that at the point that he ceased paying spousal support, he lacked the ability to do otherwise. The appellate court affirmed the order because the trial court's findings were supported by competent evidence of "extreme financial strain." ¶ 25, 962 A.2d at 335.

Although Sizemore experienced unemployment and a reduced income, he did not offer any evidence of "extreme financial strain." Furthermore, the appellee in *Ellis* did not show the same disregard for the trial court's orders; he made a good faith effort to make reduced spousal support payments and never stopped making his child support payments.

In *Zimmerman v. Zimmerman*, No. A07-0448, 2008 WL 1971650 (Minn. Ct. App. May 6, 2008), the ex-husband filed a motion for contempt after his ex-wife failed to comply with several provisions of their property settlement. The trial court found that she did not have the financial ability to comply with the order in part because of the decline in the residential real estate market, and refused to hold her in contempt. The ex-husband argued that complete compliance with prior orders is required to avoid a finding of contempt.

The appellate court stressed that a trial court in civil contempt proceedings has a measure of authority and discretion which far exceeds that in criminal cases, and affirmed because the trial court properly considered the ex-wife's ability to pay, her earning capacity, financial status and earnings history. In

Sizemore's case, the trial court similarly considered Sizemore's financial history and exercised its discretion to find that the imposition of contempt was necessary to encourage Sizemore to exert some effort to make the payments.

Finally, in *In re Marriage of Yonker*, 423 S.W.3d 848 (Mo. Ct. App. 2014), the ex-wife appealed a judgment of contempt after failing to pay her ex-husband \$250,000 as required by their dissolution judgment. She claimed she did not have the financial ability to comply. The appeals court upheld the finding of contempt, but reversed the order of commitment after she failed to pay the purge amount. The appeals court reasoned that the coercive purpose of civil contempt is frustrated when the contemnor has no ability to pay, and that the past ability to pay does not equate to a present ability to do so. *Yonker*, 423 S.W.3d at 859.

A similar principle exists in Kentucky law which states that "[t]he purpose of civil contempt is to coerce rather than punish. Ultimately, then, the defining characteristic of civil contempt is the fact that contemnors 'carry the keys of their prison in their own pockets.'" *Blakeman v. Schneider*, 864 S.W.2d 903, 906 (Ky. 1993). Sizemore did not pay even a fraction of the amounts due under the dissolution decree. The trial court found that he was able to pay for a variety of other things, a finding that is supported by substantial evidence in the record. It was well within the trial court's discretion to decide that a purge amount of the

monthly payment would carry sufficient coercive effect to persuade Sizemore to fulfill his obligations.

For the foregoing reasons, the order of the Knox Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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