[Cite as *Hague v. Hague*, 2009-Ohio-6509.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

BRET G. HAGUE,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2008-A-0069**
- vs -	:	
LEE ANN HAGUE,	:	
Defendant-Appellee,	:	
(ASHTABULA COUNTY CHILD SUPPORT ENFORCEMENT AGENCY,	:	
Appellee).	:	

Civil appeal from the Ashtabula County Court of Common Pleas, Case No. 98 DR 10.

Judgment: Affirmed.

Joseph A. Humpolick, Ashtabula County Public Defender, Inc., 4817 State Road, #202, Ashtabula, OH 44004-6927 (For Plaintiff-Appellant).

Lee Ann Hague, pro se, 6565 Cady Road, North Kingsville, OH 44068 (Defendant-Appellee).

Terry Churchill Weddleton, 2924 Donahoe Drive, Ashtabula, OH 44004 (For Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} The following accelerated calendar appeal arises from the November 10, 2008 judgment of the Ashtabula County Court of Common Pleas ordering appellant, Bret G. Hague, to serve 15 days in jail after he failed to purge the court's previous order

finding him in contempt for failing to make child support payments. For the reasons discussed below, we affirm.

{¶2} On November 27, 2007, the trial court held a hearing on a motion to show cause filed by the Ashtabula County Child Support Enforcement Agency (ACCSEA). During the hearing, appellant admitted to being in contempt of the trial court's order to pay child support arrearages in the amount of $7,945.56. Appellant agreed to purge himself of the contempt by paying his child support as ordered for a period of one year. After failing to make payments, the ACCSEA moved the trial court to sentence appellant on the contempt order. On February 29, 2008, the trial court sentenced appellant to 15 days in the county jail, but again gave him the opportunity to purge by making his then-existing support payments plus paying on the accumulated arrearages. The trial court set the matter for a sentence review hearing on July 24, 2008.

{¶3} Appellant failed to appear for the July 24, 2008 review hearing and a warrant was issued for his arrest. One week later, appellant appeared before the court without counsel alleging he had misplaced his hearing notice. The trial court subsequently recalled the bench warrant; set appellant's bond at $5,000.00, personal recognizance; and set the matter for a review hearing on August 28, 2008.

{¶4} Prior to the August review hearing, appellee requested Judge Yost to recuse himself. The judge obliged by disqualifying himself pursuant to Canon 3(E)(1). The Chief Justice of the Supreme Court of Ohio subsequently appointed Judge Jerry L. Hayes to hear the matter. The case proceeded to a review hearing on November 10, 2008. During the hearing, the ACCSEA informed Judge Hayes of appellant's payment history and that the arrearages, as of October 31, 2008, had increased to $9,886.50.

Although appellant had made payments in March, April, and May, appellant had failed to make payments from June through the date of the hearing. From June through October, some $2,500.00 had accrued on the arrearages.

{¶5} In his defense, appellant, through counsel, informed the court he was suffering from a hernia which required surgery. It was established that appellant had lived with the condition for four and one-half years. Appellant represented his condition did not allow him to work and, moreover, he was unable to afford surgery because he had no income. According to counsel, however, appellant's mother had recently agreed to pay for the surgery to allow appellant to return to the work force. In support of his defense, appellant submitted a letter, dated November 5, 2008, from Dr. Ashok V. Kondru, a gastroenterologist, which stated:

{¶6} "[Appellant] has been unable to work due to physical limitations from an umbilical hernia and diverticulitis. He presently has an appointment scheduled with Dr. R. Patel to have this problem corrected which will enable him to return to work in the future."

{¶7} Defense counsel moved the court to continue the matter for 60 to 90 days, which would permit appellant to have surgery, start working again, and commence payments on his arrearages.

{¶8} The court denied counsel's motion from the bench, stating:

{¶9} "Another fifteen days shouldn't hurt him. If he's had it for four years and he's been getting along for four years with it - - if his mom wants to do something, let his mom pay the $2,500 and bring it up-to-date. We'll let him out."

{¶10} Counsel then sought a "furlough" from jail so appellant could make his doctor's appointment. The court denied appellant such leave and the following exchange took place:

{¶11} "THE COURT: *** [T]alk to mom. She wants to pay for the operation, let her pay the child support. It's her grandchild for God's sake. The child likes to eat. You eat. Four years, you have not been without a meal.

{¶12} "[APPELLANT]: Neither have my kids.

{¶13} "THE COURT: Well, not because of you. Because you're $10,000 behind. You had four years to be paying or to get your hernia done, and you haven't been doing it, so I'm not going to –

{¶14} "[APPELLANT]: No, I've been working. I've been sucking it up and doing what I have to do.

{¶15} "THE COURT: I'm not going to lecture you. *** You have an obligation and you're not meeting it. You've been through the courts. You've been found in contempt. You had a chance to purge, you didn't do it. Eventually, it runs out. The idea is that you do a little jail time and maybe the next time you'll pay. If not, it's sixty days. And this will be my case."

{¶16} On November 13, 2008, appellant filed a timely notice of appeal. Appellant moved the trial court to stay execution of his sentence, which was subsequently denied. Appellant then moved this court to stay his sentence, which was granted on November 19, 2008. However, appellant's release was conditioned upon a supersedeas bond in the amount of $2,000.00. Evidently, appellant failed to post bond because, on November 25, 2008, upon motion of the Ashtabula County Sheriff, the

administrative judge of the trial court issued a judgment entry suspending the remaining balance of his sentence after appellant was purportedly hospitalized for internal bleeding. Nothing in the record indicates ACCSEA took issue with the action of the administrative judge.

{¶17} Appellant's sole assignment of error alleges:

{¶18} "Judge Jerry L. Hayes abused his discretion when he ordered plaintiff-appellant to immediately serve a previously suspended jail sentence for failure to pay child support in spite of a letter from a physician that said appellant couldn't [sic] work because of an umbilical hernia and diverticulitis."

{¶19} Before addressing the merits of appellant's appeal, we shall first discuss the actions taken by the trial court after appellant's notice of appeal was filed. Generally, filing an appeal from a final order does not deprive a trial court of all jurisdiction over the subject case. *Nemeth v. Nemeth*, 11th Dist. No. 2008-G-2831, 2008-Ohio-4675, at ¶3. Rather, a trial court retains all jurisdiction over a case which does not interfere with an appellate court's ability to reverse, modify, or affirm the subject judgment. Id., citing *Yee v. Erie Cty. Sheriff's Dept.* (1990), 51 Ohio St.3d 43, 44.

{¶20} Under the circumstances, the trial court modified appellant's sentence by suspending the remainder of the time he was ordered to serve pursuant to his failure to purge the contempt. This modification occurred *after* appellant filed his notice of appeal challenging the trial court's decision to impose sentence. Such an act was fundamentally inconsistent and stood in conflict with this court's ability to reverse,

modify, or affirm that judgment. Thus, the trial court did not have jurisdiction to modify the sentence.

{¶21} In general, a judgment entered by a court without jurisdiction is void. *State v. Simpkins*, 117 Ohio St.3d 420, 422, 2008-Ohio-1197. If a judgment is declared void, that judgment is a nullity and the parties are in the same position as if no order was ever entered. Id., at 424-425. Although appellant was released pursuant to the November 25, 2008 judgment entry, we hold that judgment void. We shall elaborate on the impact of this holding after considering the merits of appellant's assigned error.

{¶22} Appellant's sole assignment of error asserts the trial court abused its discretion in ordering him to serve a jail sentence for failing to pay child support arrearages when he was medically unable to work and earn money. We disagree.

{¶23} Contempt of court consists of two elements. The first is a finding of contempt; the second is the imposition of a penalty. A contempt order is final after both elements have been satisfied. *Moser v. Moser*, 11th Dist. No. 2008-P-0071, 2008-Ohio-5860, at ¶4. An appellate court reviews a trial court's contempt finding for an abuse of discretion. *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 75. A court abuses its discretion when its actions are unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶24} A trial court abuses its discretion in ordering purge conditions which are unreasonable or where compliance is impossible. *In re Purola* (1991), 73 Ohio App.3d 306, 313. Appellant asserts it was impossible for him to comply with the purge conditions set forth in the original contempt order due to his debilitated medical condition. A person charged with contempt "*** may defend the charge by establishing

that it is not within his power to obey the court order." Id.; see, also, *Anderson v. Cameron*, 5th Dist. No. 2008CA00042, 2009-Ohio-601, at ¶20. However, the party seeking to establish impossibility must demonstrate that his failure to obey was due to his inability to render obedience. *In re Purola*, supra, at 313-314.

{¶25} At the purge hearing, it was established that, subsequent to the contempt finding, appellant had made child support payments from February through May of 2008. Appellant failed to make payments from June through the date of the purge hearing, November 10, 2008. Appellant represented to the court he suffered from medical problems, which prevented him from maintaining employment. Appellant asserted he required surgery to correct the problem, but was unable to afford the procedure. According to appellant, his mother recently agreed to pay for the surgery so he could return to the workforce and meet his child support obligations. In support of his position, appellant submitted a letter from his physician, which stated he was unable to work due to physical limitations caused by an umbilical hernia and diverticulitis. The letter also stated appellant had an appointment with a second doctor to "have this problem corrected, which will enable him to return to work in the future."

{¶26} Notwithstanding the foregoing evidence, it was also established that appellant had suffered from the underlying medical condition, which was currently preventing him from working, for four and one-half years. Appellant also told the judge he had been working, "*** sucking it up and doing what I have to do." Appellant's position that he is unable to work essentially contradicts his representation to the court. This alone is sufficient to undermine appellant's assertion of impossibility.

{¶27} Appellant conceded he was in contempt of court for failing to pay his child support during the November 27, 2007 review hearing. At the same hearing, he then agreed to purge himself of the contempt by paying his support obligation as ordered for a period of one year. Appellant was aware of his medical condition at the time he agreed to purge his contempt, but did nothing to resolve or improve the same.

{¶28} Our review of a trial court's decision in a domestic proceeding is very limited. If the judgment is not arbitrary, unreasonable, or unconscionable, we are *constrained* to affirm. Viewing the record as a whole, appellant failed to establish he was unable to obey the purge order due to an inability to render obedience. The trial court, therefore, did not abuse its discretion in sentencing appellant to 15 days in jail for failing to purge his civil contempt order. Appellant's sole assignment of error lacks merit.

{¶29} As a postscript to our disposition, we believe it necessary to comment on the dissenting opinion. The dissent maintains the judgment suspending appellant's sentence entered by the administrative judge was not void because Sup.R. 4 permits the administrative judge to "stand in the shoes" of an assigned judge in order to rule on preliminary matters if the assigned judge is unavailable and delay in ruling on the issue would be prejudicial. There are several problems with this analysis.

{¶30} First, current Sup.R. 4 does not specifically grant an administrative judge the power to "stand in the shoes" of a judge assigned to a case, whether unavailable or not. The dissent extrapolates such authority from a 1976 case interpreting a former version of Sup.R. 4. Moreover, even assuming the administrative judge implicitly possesses the power the dissent ascribes to that office, the matter the administrative

judge ruled upon in this case cannot be reasonably construed as a "preliminary matter." As discussed above, the administrative judge's ruling occurred after the assigned judge issued his final order and the matter was committed to this court through appellant's perfection of a timely appeal.

{¶31} In addition to these difficulties, the dissent makes certain factual assumptions to support its conclusion that are not supported by the record. According to the dissent, unavailability is a necessary precondition to invoke an administrative judge's authority to act in an assigned judge's stead. There is nothing in our record indicating the assigned judge in this case was unavailable. Further, the dissent presumes appellant would have been prejudiced by delay in this case had the administrative judge not acted. The only way to draw this conclusion is through the unfounded assumption that the administrative judge's actions were occasioned by a real medical emergency. There is nothing in the record to support this inference.

{¶32} We know of no authority, and the dissent does not offer any, that would give any trial court judge the power to intercept a case and suspend a sentence, emergency or not, when that sentence is the substantive issue of a properly-filed appeal. Once the issue of appellant's contempt was properly committed to this court for review, the trial court was precluded from exercising authority over the issue by the well-established, if not rudimentary, restraints of subject matter jurisdiction.

{¶33} Of course, we are not suggesting a civil contemnor must remain in jail despite a legitimate medical emergency. To the contrary, there are likely various ways an individual may obtain treatment under such circumstances (e.g., moving *this* court to lift the conditional bond placed upon the stay we previously granted). Our point is the

path taken in this case was procedurally improper. Put simply, the trial court was without authority to suspend appellant's sentence when that sentence was at the heart of an open appeal.

{¶34} As discussed above, the trial court did not have jurisdiction over the subject matter of appellant's case when it suspended appellant's jail sentence via its November 25, 2008 judgment entry. That judgment is void and thus appellant stands in the same position as if it were never rendered. Pursuant to this opinion, the judgment of the Ashtabula County Court of Common Pleas is accordingly affirmed.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶35} I respectfully dissent.

{¶36} The majority contends that the trial court did not have jurisdiction over the subject matter of appellant's case when it suspended his jail sentence via its November 25, 2008 judgment entry. They maintain that the judgment suspending his sentence is void. I disagree.

{¶37} A void judgment is defined as: "[a] judgment that has no legal force or effect, the invalidity of which may be asserted by any party whose rights are affected at any time and any place, whether directly or collaterally." Black's Law Dictionary (8 Ed.2004) 861.

{¶38} In the instant matter, appellant was sentenced to 15 days for contempt. Appellant sought, and was denied, a stay of execution of sentence from the trial court. Appellant then sought a stay of execution of sentence from this court, which was granted with the conditional $2,000 supersedeas bond. Appellant apparently failed to post bond because on November 25, 2008, upon motion of the Ashtabula County Sheriff, the administrative judge issued the judgment entry suspending the remaining balance of his sentence after appellant was hospitalized for internal bleeding. Appellant had been unable to work due to physical limitations from an umbilical hernia and diverticulitis, requiring him to have surgery. The issue of subject matter jurisdiction on a 15 day sentence for contempt wherein 3 days were suspended has long expired. The trial court chose to shorten appellant's sentence by 3 days. Even if the trial court had not shortened his sentence, it would have been long served. Appellant was not able to make the bond we established. The trial court chose not to enforce the remainder of the sentence. This appeal is moot and should not be decided by this court. Based on the facts presented, the administrative judge properly suspended appellant's jail sentence due to the medical emergency asserted by the sheriff.

{¶39} Pursuant to Superintendence Rule 4, the administrative judge in a multi-judge division of a Court of Common Pleas has authority and responsibility for control over the administration, docket, and calendar of the division which he serves. He does not have authority to determine issues and proceedings in cases assigned to a trial judge, unless the issues and proceedings involve preliminary matters and the record before him affirmatively demonstrates that the judge to whom the case is assigned is unavailable, and that a delay in ruling on the matters until the trial judge is available

would be prejudicial (decided under former analogous section). *Rosenberg v. Gattarello* (1976), 49 Ohio App.2d 87, 91-94.

{¶40} The administrative judge stood in the shoes of the trial court in this instance due to the unavailability of the trial court as the sitting judge was not duly elected to sit in Ashtabula County but was a retired judge sitting by special assignment of the Supreme Court from Portage County. The administrative judge properly ruled on the sheriff's motion as an administrative proceeding to issues concerning jail. His ruling did not in any way effect the merits of the appeal. Also, his ruling in no way effected the key issue of civil contempt pending before our court. As a general proposition, once an appeal has been taken from a judgment of a trial court, that court only retains the authority to take actions which are not inconsistent with the jurisdiction of the appellate court. In other words, the trial court is divested of all jurisdiction except to act in aid of the appeal. *Willoughby-Eastlake City School Dist. v. Lake Cty. Court of Common Pleas* (Apr. 21, 2000), 11th Dist. No. 99-L-130, 2000 Ohio App. LEXIS 1758, at 9, citing *McAuley v. Smith* (1998), 82 Ohio St.3d 393, 395; See, also, *Bd. of Trustees. v. Baumgardner*, 11th Dist. No. 2003-G-2492, 2004-Ohio-3683, at ¶12.

{¶41} The majority asserts that the trial court, by suspending the sentence, somehow interfered with our ability to affirm, reverse, and remand. I humbly disagree. This appeal was filed many months ago. It was our inability to process the appeal within the 15 days required of appellant's sentence and appellant's inability to make bond that interferes with our jurisdiction to rule on this appeal, not the judge's ruling. In fact, assuming the majority's position of voidness, if appellant's sentence is void, this

appeal would have been moot, as the 15 days have expired, rendering the majority's argument superfluous to the final outcome.

{¶42} This court has repeatedly stated in *Green v. Green*, 11th Dist. No. 2007-P-0092, 2008-Ohio-3064, at ¶24:

{¶43} "'An appeal from a civil contempt finding and sentence becomes moot when a party purges herself of the contempt or serves the sentence imposed by the court.' *Kimbler v. Kimbler*, 4th Dist. No. 05CA2994, 2006-Ohio-2695, ¶27. See, also, *Bartkowiak v. Bartkowiak*, 4th Dist. No. 04CA596, 2005-Ohio-5017, ¶10 (completion of sentence renders civil contempt moot); *Wesley v. Wesley*, 10th Dist. No. 07AP-206, 2007-Ohio-7006 (completion of sentence renders civil contempt moot); *Carroll Cty. Bureau of Support v. Brill*, 7th Dist. No. 05 CA 818, 2005-Ohio-6788. See, also, *State v. Hayes* (July 14, 2000), 11th Dist. No. 99-A-0023, 2000 Ohio App. LEXIS 3196 (where we dismissed the appellant's appeal of his sentence for failure to pay child support, finding it to be moot, because the appellant had already completed his sentence)."

{¶44} The majority's assertion that the order to vacate is void is a distinction without a difference as we must now assume, based on the majority's position, that the sentence was never suspended; they just released appellant and he served his sentence at home, and as such the timed sentence of 15 days has expired. This writer believes that the order of the administrative judge is not void, and appellant has voluntarily served his sentence due to his medical release, whether valid or invalid and therefore, his appeal of the trial court's contempt finding and sentence is moot. See *Wesley*, supra, at ¶14. Accordingly, we should not rule on this appeal.

{¶45} For the foregoing reasons, I dissent.