[Cite as *Whittington v. Whittington*, 2012-Ohio-1682.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

MARILYN J. WHITTINGTON n.k.a. SALZER,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-06-065
	:	O P I N I O N
- vs -	:	4/16/2012
	:	
THOMAS W. WHITTINGTON,	:	
Defendant-Appellant.		

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DR12330

Marilyn Whittington n.k.a. Salzer, 1919 Woodland Avenue, Middletown, Ohio 45044, plaintiff-appellee, pro se

Thomas W. Whittington, P.O. Box 309, Lebanon, Ohio 45036, defendant-appellant, pro se

POWELL, P.J.

{¶ 1} A parent held in contempt and sentenced to jail for failure to pay his child support obligation argues the decision should be overturned because a knee injury kept him from working and he recently started a full-time job to pay the support. We affirm the decision of the domestic relations court finding the parent failed to avoid the sentence when he did not abide by the court's order.

{¶ 2} The record before this court indicates that appellant, Thomas W. Whittington, and Marilyn Whittington n.k.a. Salzer divorced in 1987. The Warren County Domestic Relations Court ordered Whittington to pay child support for the couple's two minor children. The file is replete with contempt filings, purge opportunities, and the occasional issuance of a capias to secure Whittington's attendance. After the current order of support was terminated when the youngest child turned 18 in August 2001, Whittington was ordered to pay a total of $301.05 a month on the significant amount of child support arrearage.

{¶ 3} It appears that the contempt motion directly tied to this appeal originated in December 2009, when a domestic relations court magistrate found Whittington in contempt for failing to pay the child support arrearage. The domestic relations court found that Whittington had previously been "held in contempt on 7 prior occasions, with a sentence of 317 days suspended." The magistrate imposed an additional 60 days and re-imposed the suspended term for a total jail sentence of 377 days.

{¶ 4} At this 2009 hearing, Whittington was given the opportunity to purge the contempt by obtaining and maintaining full-time employment, making support payments in full and on time, and making an additional $500 payment toward the arrearage by March 4, 2010, which was the date of the next purge hearing. Whittington was also ordered to obtain full-time employment within 30 days and notify the child support agency every two weeks of six different places where he tried to obtain employment. This decision was adopted by the domestic relations court.

{¶ 5} An entry filed from a March 4, 2010 hearing indicated Whittington was to provide updated and detailed information from Veterans Affairs "as to his ability or inability to work, and any disability status." At the June 10, 2010 hearing, the sentence of 377 days in jail was suspended and another hearing scheduled. Whittington was ordered to obey the prior orders of the court and further ordered to pay his support obligation in full and on time.

The entry stated that "[i]f he is unable to work, he is to provide updated medical information as to his inability to work. If Mr. Whittington is paying in full [and] on time, he is to contact the CSEA [and] the court will consider not requiring him to appear at the hearing."

{¶ 6} According to the record, the next hearing was held February 4, 2011. At this hearing, the 377-day jail sentence was again suspended provided Whittington complied with prior orders and was furthered ordered to "pay on a consistent basis. He is to pay in full [and] on time *each month*. This is Thomas Whittington's *last chance*. If he does not pay at least $301.05 each [and] every month, he will go to jail. No more lump sums." (Emphasis sic.) The matter was set for June 9, 2011.

{¶ 7} The June 9 hearing resulted in the imposition of the 377-day jail term for contempt. Whittington, pro se, appeals that finding, raising three assignments of error for review.

{¶ 8} First, we note that no appellee's brief was filed in this case, and according to App.R. 18(C), when an appellee fails to file a brief, this court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action.

{¶ 9} This court will combine our discussion of Whittington's first and third assignments of error because the two assignments of error are very similar in content.

{¶ 10} Assignment of Error No. 1:

{¶ 11} THE IMPOSING COURT ERRED BY NOT GATHERING ALL OF THE FACTS AND EVIDENCE THAT HAD BEEN PROVIDED TO THE COURT PRIOR TO JUNE 9,2011 HEARING.. [sic]

{¶ 12} Assignment of Error No. 3:

{¶ 13} THE IMPOSING COURT ERRED TO PREJUDICE AGAINST DEFENDANT APPELLANT IN THE MANNER THAT HE HAS ABIDED BY COURT RULES AND

PROVIDED SUPPORT THAT WAS WITHIN HIS ABILITY AND MEANS. [sic]

{¶ 14} Whittington argues under his first assignment of error that the domestic relations court did not count the total amount of child support he paid between January 25, 2011 and the June 9 hearing. He indicated that he made a lump sum payment of $1000 in January before the trial court told him he could not make lump sum payments and he paid $175 later, when he realized no payment was withheld from his paycheck on the new job. He also argues the domestic relations court stated it did not have medical documentation of his knee injury and inability to work, but he previously provided such information.

{¶ 15} Under the third assignment of error, Whittington argues that the domestic relations court erred when it failed to consider the "affirmative defense" under the criminal statute, R.C. 2919.21(D), wherein an "accused was unable to provide adequate support or the established support but did provide the support that was within the accused's ability and means." Specifically, Whittington argues that he did his best to fulfill his obligation given his knee problem, and he was eventually able to obtain employment and make one payment on his own.

{¶ 16} We note that the June 9, 2011 hearing is the only hearing transcript in the record. At the June hearing, the domestic relations court told Whittington that he paid $188 since the February 2011 hearing, but he was ordered at the February hearing to pay at least $301 each month.

{¶ 17} Whittington told the domestic relations court he obtained full-time employment one month before this hearing. He said he had a letter from his employer verifying his employment and indicating they would begin withholding child support from his paycheck. He said he "was making an effort working at a temporary service until I hurt my knee," which he told the court occurred "last June."

{¶ 18} The domestic relations court noted that it suspended the 377 days in jail in

February to give Whittington his last chance. The court said it told Whittington that if he didn't pay at least $300 a month, he was going to jail. The court said Whittington was roughly $1,000 short by adding the amount owed each month since the last hearing and subtracting the $188 he paid.

{¶ 19} Whittington told the court that earlier in 2011 he brought in something from the doctor indicating he could not work because of his knee injury and he had surgery on the knee in December 2010. Whittington stated he had a letter from "VA Outpatient from my doctor there stating I wasn't able to work at the time." Letters from the Veterans Affairs Medical Center were among the documents attached to Whittington's brief, but the letters were not located in the file.

{¶ 20} The domestic relations court imposed the prison term, telling Whittington the court made "it very clear you had to pay and you had to pay in full and the court was not gonna tolerate any more of your excuses." While the total amount of the arrearage was not specifically discussed, the domestic relations court made the comment that Whittington was $33,000 "in the hole," which presumably approximates the outstanding arrearage amount. The court told Whittington that he had been "given every chance and you have avoided every possible chance you had."

{¶ 21} The domestic relations court reconvened on the record so that a woman who identified herself as Whittington's fiancé could reinforce the argument that Whittington would lose his job and not pay his support obligation if he went to jail. The court told her that the mother of Whittington's children had been waiting for years, "contempt after contempt after contempt * * * [he's] been saying well I'll pay next time or he just doesn't show up or he doesn't pay and he's now….what did I say…thirty-three thousand dollars behind?"

{¶ 22} The court said that Whittington "has been warned and warned and warned. He did too little too late. He knows he did too little too late. * * * I gave him all the breaks I

could possibly give him. He's used them all up and then some. There's nothing more I can do for him."

{¶ 23} While Whittington introduced a criminal statute when arguing for the defense of inability to pay support, the appeal herein is based on the contempt finding against him. A person who disobeys an order or command of judicial authority may be punished for contempt. *Henneke v. Glisson*, 12th Dist. No. CA2008-03-034, 2008-Ohio-6759, ¶ 26; R.C. 2705.02; *see Zakany v. Zakany*, 9 Ohio St.3d 192, 194 (1984). The penalties imposed for civil contempt are designed to coerce compliance with a court order for the benefit of the complainant. *Henneke.* Prison sentences imposed as punishment for civil contempt are conditional, and the contemnor is said to carry the keys of his prison in his own pocket due to the fact that his compliance with the court order secures his freedom. *Id*. A trial court's factual and discretionary determinations in a civil contempt action are reviewed on appeal under an abuse of discretion standard. *Castanias v. Castanias*, 12th Dist. No. CA2009-04-036, 2009-Ohio-6171, ¶ 11.

{¶ 24} The record indicates the domestic relations court told Whittington that it made it very clear at the February hearing that Whittington had to make full payments and the court would not "tolerate any more of your excuses."

{¶ 25} It does not appear from the record that the domestic relations court made its decision without the information Whittington presented or that such information about his injury or new employment was ignored. It appears from the record that the domestic relations court found that Whittington was not providing the support that was within his ability and means to provide.

{¶ 26} Whittington's argument that he made a lump sum payment of $1000 in January ignores the fact that the domestic relations court told him a month later he would be given one more opportunity to make consistent monthly payments of $301 for the next few

months, and he failed to do so.

{¶ 27} In addition, Whittington argues that the mother of his children has failed to appear for court hearings and to keep her address current with the child support agency. We see no reason to overturn the sentence based on this argument. *See generally* App.R. 16.

{¶ 28} While it is difficult to decide where to draw the line on chances to purge contempt, the domestic relations court felt Whittington had offered too little, too late. After reviewing the record before this court, we cannot say the domestic relations court erred and abused its discretion when it subsequently imposed a jail sentence on the contempt finding. Whittington's first and third assignments of error are overruled.

{¶ 29} Assignment of Error No. 2:

{¶ 30} THE IMPOSING COURT ERRED BY DENYING APPELLANT'S PLEA TO MAINTAIN EMPLOYMENT.

{¶ 31} Whittington argues under this assignment of error that the decision to send him to jail kept him from fulfilling his child support obligation because his present employer, located in northeast Ohio, fired him when he missed work.

{¶ 32} We note that Whittington references a June 14, 2011 letter from his employer terminating his employment. We will not consider evidence or materials offered after the June 9, 2011 entry, which is the subject of this appeal. In other words, we will not consider evidence offered for the first time on appeal. *Anderson v. Holskey*, 7th Dist. No. 08 BE 37, 2009-Ohio-3053, ¶ 19.

{¶ 33} While we acknowledge the logic of the argument that a person sent to jail in Warren County is not usually able to work in northeast Ohio at the same time, Whittington has failed to allege how the domestic relations court legally erred in this regard and cites to no authority for his assertions. *See* App.R. 16(A). Whittington failed to sustain his burden of affirmatively demonstrating error on appeal. *See* App.R. 16; *Sparks v. Sparks*, 12th Dist.

CA2010-10-096, 2011-Ohio-5746, ¶ 17. Whittington's second assignment of error is overruled.

{¶ 34} Judgment affirmed.

HENDRICKSON, J., concurs.

RINGLAND, J. concurs with separate opinion.

RINGLAND, J., concurring separately.

{¶ 35} I concur with the majority's analysis and resolution of appellant's three assignments of error. I write separately, however, to recognize that appellant was finally on the path to complying with the court's orders. Appellant indicated that he had gained full-time employment and verified that his child support payments were to be withheld from his paychecks. Appellant's efforts in this regard appeared to be the best opportunity to date for appellee to begin regularly receiving the arrearages she is due. While I may have reached a different conclusion based on the circumstances of the case, I cannot find that the trial court abused its discretion in finding appellant in contempt for failing to pay child support arrearage**.**