

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Johonna Lowery,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-313
Louis McArver,	:	(C.P.C. No. 79JU06-3932)
Defendant-Appellee,	:	(REGULAR CALENDAR)
(Franklin County Child Support	:	
Enforcement Agency,	:	
Defendant-Appellant).	:	

D E C I S I O N

Rendered on December 24, 2009

James E. Morris, for appellant Franklin County Child Support
Enforcement Agency.

Kent Mitchell, for appellee Louis McArver.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

KLATT, J.

{¶1} Appellant, Franklin County Child Support Enforcement Agency
("FCCSEA"), appeals from a judgment of the Franklin County Court of Common Pleas,

Division of Domestic Relations, Juvenile Branch, that closed the motion for contempt that FCCSEA filed on behalf of relator, Johonna Lowery, against defendant-appellee, Louis McArver. For the following reasons, we affirm.

{¶2} On June 25, 2008, FCCSEA filed a motion requesting that the trial court hold McArver in contempt for failing to liquidate a child support arrearage as ordered in the court's December 4, 2002 judgment entry. A hearing on the motion occurred before a magistrate on October 31, 2008. During that hearing, the magistrate took judicial notice of the trial court's December 4, 2002 judgment entry. In that judgment entry, the trial court had adopted FCCSEA's finding that McArver owed a child support arrearage of \$11,706.78 as of July 22, 2002. The trial court also had adopted FCCSEA's recommendation that McArver liquidate the balance of the arrearage by paying FCCSEA \$75.83 a month. McArver, the only witness to testify at the October 31, 2008 hearing, acknowledged that he had not made any of the monthly payments mandated by the December 4, 2002 judgment entry. As proffered by his attorney, McArver's defense for his disobedience was that Lowery refused to allow him to visit with his daughter, thus justifying his withholding of child support.

{¶3} In her December 8, 2008 decision, the magistrate recommended that the trial court find McArver in contempt. The magistrate also recommended that the trial court sentence McArver to 30 days in the Franklin County Correctional Facility, but suspend that sentence on the condition that McArver purge the contempt by liquidating the child support arrearage of \$11,708.76 at the rate of \$80 per month. On the same day that the magistrate issued her decision, the trial court adopted and approved that decision.

{¶4} The matter next came before the trial court on February 18, 2009, when the court conducted a hearing to review whether McArver had purged the contempt. During that hearing, FCCSEA's attorney represented that FCCSEA had not received any payments from McArver. In response, McArver stated that he did not have the money to make the payments. According to McArver, he had not had a job since 1993, and he supported himself by selling junk and aluminum cans that he collected. He lived in a house that his mother owned, and he accepted help from his mother and siblings.

{¶5} On February 26, 2009, the trial court issued a judgment entry in which the court found McArver to be indigent and closed the motion for contempt. FCCSEA now appeals from that order and assigns the following errors:

[1.] The trial court abused its discretion by closing the motion for contempt filed June 25, 2008, and by refusing to enforce the previously suspended jail sentence.

[2.] The trial court erred as a matter of law when it closed the motion for contempt filed on June 25, 2008.

{¶6} Because these two assignments of error are interrelated, we will address them together. In essence, FCCSEA makes two arguments: (1) the trial court abused its discretion when it found McArver to be indigent and, on that basis, refused to enforce the jail sentence imposed in the December 8, 2008 judgment entry, and (2) the trial court lacked any authority to close the motion for contempt. We disagree with both arguments.

{¶7} "It is rather universally acknowledged that a judicial power of the highest order of a state court is that of the inherent power of holding in contempt perpetrators of contumacious acts that affront the court." *Barnett v. Barnett* (1984), 9 Ohio St.3d 47, 53. That inherent power arises from the judiciary's need "to uphold and ensure the effective

administration of justice" and "to secure the dignity of the court and to affirm the supremacy of law." *Cramer v. Petrie*, 70 Ohio St.3d 131, 133, 1994-Ohio-404. See also *Hale v. State* (1896), 55 Ohio St. 210, 213 ("The power to maintain order, to secure the attendance of witnesses * * *, and to enforce process to the end that effect may be given to judgments, must inhere in every court, or the purpose of its creation fails. Without such power, no other could be exercised."). " '[S]ince the primary interest involved in a contempt proceeding is the authority and proper functioning of the court, great reliance should be placed upon the discretion of the trial [court].' " *State ex rel. Bitter v. Missig*, 72 Ohio St.3d 249, 252, 1995-Ohio-147 (quoting *Denovchek v. Bd. of Trumbull Cty. Commrs.* (1988), 36 Ohio St.3d 14, 16).

{¶8} In the case at bar, the trial court exercised its discretion to consider whether McArver had the ability to pay \$80 per month to FCCSEA as the December 8, 2008 judgment entry required. FCCSEA maintains that the doctrine of res judicata precluded the trial court from considering that issue because McArver failed to raise it at the October 31, 2008 hearing. We find this argument unavailing.

{¶9} The doctrine of res judicata consists of two related concepts—claim preclusion and issue preclusion. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 1995-Ohio-331. Pursuant to the doctrine of claim preclusion, a valid, final judgment rendered on the merits bars all subsequent actions based on any claim arising out of the transaction or occurrence that was the subject matter of the previous action. *Id.* The doctrine of issue preclusion, also known as collateral estoppel, holds that "a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a

subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different." *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 1998-Ohio-435.

{¶10} In the case at bar, FCCSEA invokes the doctrine of res judicata to bar the litigation of a fact, and thus, it seeks the application of issue preclusion. A prerequisite to the application of issue preclusion " 'is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action.' " *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, ¶28 (quoting *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193, 201). Here, FCCSEA cannot point to any "prior action," only a prior hearing and judgment in the same action. But even more importantly, the parties never "actually litigated" the question of McArver's indigency in the prior hearing and the trial court never "directly determined" that question in its prior judgment. Accordingly, the doctrine of issue preclusion is inapplicable to this case.

{¶11} Turning to the trial court's determination that McArver is indigent, we find sufficient evidence in the record to support that determination. McArver receives minimal income through collecting and selling junk and cans, relies largely on the support of his family, and suffers from health problems. Although McArver is raising another child, his 13-year-old son, he does so only with the financial support of his mother. Accordingly, we conclude that the trial court did not abuse its discretion in finding McArver to be indigent.

{¶12} Moreover, we conclude that the trial court did not abuse its discretion in refusing to enforce the jail sentence imposed in the December 8, 2008 judgment entry. A court that issues a contempt order has the power to modify, relieve, or suspend the fine or

imprisonment that the court imposed as a sanction for the contemptuous behavior. *Tippie v. Patnik*, 11th Dist. No. 2007-G-2787, 2008-Ohio-1653, ¶132 (citing *Juvenile Protective Assn. v. Roebling* (1916), 26 Ohio Dec. 219, 221). Cf. *In the Matter of Mapley*, 7th Dist. No. 07 MA 36, 2008-Ohio-1180, ¶10 (recognizing that the trial court could defer a sanction if the contemnor proved at a review hearing "that he was indigent or otherwise unable to" purge his contempt by making the ordered payments). Consequently, in the case at bar, the trial court did not abuse its discretion in declining to imprison McArver.

{¶13} Finally, we conclude that the trial court did not err in closing the motion for contempt. FCCSEA's argument to the contrary hinges upon its assertion that by closing the motion, the trial court sua sponte vacated the December 8, 2008 judgment entry. FCCSEA contends that the trial court lacked the authority to vacate a previously decided, final order. The closing of the motion, however, did not vacate the December 8, 2008 judgment entry. That judgment entry remains a valid and enforceable order. If FCCSEA discovers that McArver is no longer indigent, it can petition the trial court to reopen the matter and impose the jail sentence. Rather than vacate the underlying contempt order, the trial court has only suspended imposition of the sanction until FCCSEA presents the court with evidence that McArver has obtained the funds to make monthly payments, yet he does not remit those funds to FCCSEA.

{¶14} For the foregoing reasons, we overrule FCCSEA's two assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

Judgment affirmed.

McGRATH and CONNOR, JJ., concur.
