[Cite as *McLellan v. McLellan*, 2011-Ohio-2418.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Patricia A. McLellan,	:	
Plaintiff-Appellee,	:	
		No. 10AP-1105
v.	:	(C.P.C. No. 07DR-02-0598)
Glenn S. McLellan,	:	(REGULAR CALENDAR)
Defendant-Appellant,	:	
	:	
(Franklin County Child Support Enforcement Agency,	:	
Appellee).	:	

D E C I S I O N

Rendered on May 19, 2011

Glenn S. McLellan, pro se.

Kyle B. Keener, for Franklin County Child Support Enforcement Agency.

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

BROWN, J.

{¶1} Glenn S. McLellan, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, in which the court found him in contempt of court.

{¶2} Glenn and Patricia A. McLellan, plaintiff-appellee, were married on June 3, 1983. They divorced on October 22, 2007. Four children were born as issue of the marriage, although there was only one minor child, Haley, born July 13, 1995, at the time of the divorce. The decree designated Patricia residential parent and legal custodian, and Glenn was ordered to pay child support in the amount of $682.27 per month, as well as spousal support. The spousal support originally was to be paid directly to Patricia, although the decree provided that the court would order payments be made though the Franklin County Child Support Enforcement Agency ("CSEA") appellee, if any payment were more than five days delinquent. Glenn was to pay $12,000 per month from October 1, 2007 through March 31, 2008; $11,000 per month from April 1, 2008, until the parties' real property sold; $10,000 per month from the sale date of the real property until September 30, 2013; and $8,500 per month from October 1, 2013, until September 31, 2025. The real property remains unsold.

{¶3} On April 7, 2009, the court entered an agreed judgment entry pursuant to Glenn's admission that he was in contempt for failure to pay spousal support. The court sentenced Glenn to 14 days in jail, suspended upon Glenn's payment of several lump sum amounts, followed by monthly payments of $2,000 in addition to his ongoing support, until the arrearages were paid in full. On February 24, 2010, the court issued a wage withholding order for spousal support to be paid through CSEA.

{¶4} On June 14, 2010, CSEA filed two contempt motions against Glenn, one related to non-payment of child support and one related to non-payment of spousal support. CSEA voluntarily dismissed the motion related to child support after Glenn came into compliance with the child support order.

{¶5} On October 20, 2010, the court held a trial on the contempt motion related to spousal support. On November 5, 2010, the magistrate issued a decision finding Glenn in contempt, finding an arrearage of $37,335.32 from February 1 to September 30, 2010; and sentencing Glenn to 30 days in jail, suspended upon the payment of $2,001 per month until the arrearages are liquidated. The trial court adopted the magistrate's decision the same day. No parties filed objections to the magistrate's decision. Glenn, pro se, appeals the judgment of the trial court. In his single assignment of error, Glenn presents one main contention with numerous sub-arguments. For purposes of restating his assignment of error herein, we revise his assignment of error as follows:

> THE TRIAL COURT ERRED IN SUSTAINING THE PLAINTIFF'S MOTION FOR CONTEMPT.

{¶6} Glenn argues in his sole assignment of error that the trial court erred when it granted the motion for contempt based upon Glenn's non-payment of spousal support. When reviewing a finding of contempt, including the imposition of penalties, we apply an abuse of discretion standard. *Fidler v. Fidler*, 10th Dist. No. 08AP-284, 2008-Ohio-4688, ¶12, citing *In re Contempt of Morris* (1996), 110 Ohio App.3d 475, 479. The prima facie elements of contempt in this context include the existence of a court order and Glenn's non-compliance with the terms of that order. See *LeuVoy v. LeuVoy* (May 25, 2000), 10th Dist. No. 99AP-737, citing *Morford v. Morford* (1993), 85 Ohio App.3d 50. The burden then shifts to Glenn to establish any defense he may have for non-payment. See *Morford* at 55, citing *Rossen v. Rossen* (1964), 2 Ohio App.2d 381. Intent is not a prerequisite to a finding of contempt, but a court may consider whether the party has attempted to comply

or attempted to flout the court order. Id. at 55, citing *Pugh v. Pugh* (1984), 15 Ohio St.3d 136.

{¶7} Before addressing Glenn's arguments, we must address two issues. Initially, Glenn failed to file objections to the magistrate's decision. Pursuant to Civ.R. 53(D)(3)(b)(iv), "[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." The doctrine of plain error is limited to exceptionally rare cases in which the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself. See *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122, 1997-Ohio-401.

{¶8} The Supreme Court of Ohio has firmly adhered to this procedural mandate. In *State ex rel. Findlay Industries v. Indus. Comm.*, 121 Ohio St.3d 517, 2009-Ohio-1674, the court dismissed an appeal from a magistrate's decision and affirmed the lower court's judgment, finding "[a]ppellant's arguments derive directly from the conclusions of law provided in the magistrate's decision. Appellant, however, did not object to those conclusions as Civ.R. 53(D)(3)(b) requires. Thus, * * * we can proceed no further." Id. at ¶3. Because, here, Glenn failed to object to the magistrate's decision, he has waived all but plain error on appeal with respect to this matter.

{¶9} The second issue is even more problematic for Glenn. Glenn has failed to file a transcript of the proceedings before the magistrate. "Upon appeal of an adverse judgment, it is the duty of the appellant to ensure that the record, or whatever portions

thereof are necessary for the determination of the appeal, are filed with the court in which he seeks review." *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19. (Citations omitted.) This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, citing *State v. Skaggs* (1978), 53 Ohio St.2d 162. When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and, thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm. Id. This principle is recognized in App.R. 9(B), which requires the appellant to include in the appellate record a transcript of all evidence relevant to the findings or conclusion if the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence.

{¶10} The lack of a transcript of the hearing before the magistrate precludes our addressing several of Glenn's arguments on appeal. Although some arguments do not require review of the hearing transcript, our review of those arguments is limited to plain error because Glenn did not object to the magistrate's decision. With these limitations in mind, we will attempt to address Glenn's arguments as fully as possible.

{¶11} Glenn first argues that several procedural errors by CSEA legal department confused him and compromised his ability to prepare a defense to the contempt motion. He first claims that there was a delay in mailing the order and notice to withhold income for child support, which was prepared on January 14, 2010 and filed with the court on February 24, 2010, but was not received by his bank until April 5, 2010. Because this notice and order shifted payment of spousal support from direct payment to payment

through CSEA, Glenn contends, CSEA's accounting is incorrect by $18,500. There is no evidence regarding this issue in the record before us, and we do not have a transcript of the hearing to enable us to review any testimony or discussions relating thereto. However, the magistrate explicitly stated in his decision that both parties agreed that, in February and March 2010, Glenn made three payments to Patricia totaling $18,500. Therefore, even if we could review this argument, it appears that it would not be well-taken, as there was no dispute as to this amount.

{¶12} Glenn next argues that a letter from CSEA indicated he was required to attend a hearing on October 8, 2010 in the matter of "Phasllan vs. McLellan." Similarly, Glenn argues that the summons and order to appear on October 8, 2010 indicated "Phasllan" as the plaintiff. Glenn contends he was confused by this error, and it affected his ability to prepare for the hearing, and he questions whether case files were confused. However, from what we can glean from the record before us, "Phasllan" is indicated on the notice pleadings only parenthetically in the case styles after "Patricia A. McLellan." The remaining portion of the case style in the pleadings mentioned is correct, the trial judge is correct, and the case number is correct. A review of these documents would lead a reasonable person to relate them to the current pending action. Therefore, we find this argument without merit.

{¶13} Glenn next argues that he was also confused by the fact that, along with a summons and order to appear for an October 8, 2010 hearing related to spousal support, he also received a summons and order to appear for an October 8, 2010 hearing related to child support, despite the fact that non-payment of child support was not at issue in his case. Although the summons and order related to child support was sent to Glenn in

error, we fail to see how this error prejudiced Glenn in his defense of the contempt motion relating to spousal support, and Glenn does not explain how he was prejudiced. Therefore, this argument is not well-taken.

{¶14} Glenn next argues that both of the summonses to appear on October 8, 2010 failed to indicate that the hearing would be before a magistrate instead of the trial judge, thereby prejudicing him because the trial judge knew the history of the case and had previously ruled in his favor on similar issues. We fail to find any prejudice from these circumstances. Glenn admits that he met with the magistrate only briefly on October 8, 2010, and the matter had to be set for a full hearing. Thus, the merits of the contempt motion were not addressed at the October 8, 2010 hearing. The full hearing on the motion for contempt was not held until October 20, 2010, and Glenn received a hearing notice that specifically indicated this hearing would be held before a magistrate. Therefore, we find this argument not well-taken.

{¶15} Glenn's last argument regarding CSEA's alleged procedural errors is that, despite that the hearing before the magistrate was held on October 20, 2010, and despite that the magistrate advised the parties that a decision would be issued in approximately two weeks, CSEA completed an updated order and notice to withhold income for spousal support to Glenn's bank on the same day of the hearing. Glenn complains it was unusual that paperwork carrying out the magistrate's decision was completed prior to the decision. The record does not reveal the circumstances surrounding this issue. However, the order and notice to withhold was attached to the trial court's final judgment entry adopting the magistrate's decision, and it was signed by the trial judge. It would appear that CSEA completed the order and notice to withhold at the time of the magistrate's hearing so that

the trial court would not have to do so if it ruled in Patricia's favor. Regardless, Glenn does not complain that the order and notice to withhold went into effect prior to the date of the magistrate's decision, and we can find no prejudice in CSEA's preparing the forms in advance. Therefore, this argument is without merit, and we find CSEA committed no prejudicial "procedural errors," as Glenn claims.

{¶16} Glenn next argues that the magistrate told him during the parties' appearance at the October 8, 2010 conference that he was not interested in Glenn's business or schedule. Glenn contends that, at the final hearing on the contempt motion, the magistrate also indicated he was not interested in any of the background information regarding Glenn's business, which Glenn says was necessary in order to understand that he was, in fact, making a reasonable effort to pay the spousal support order. In his appellate brief, Glenn sets forth an explanation of his business, including many financial details. However, because we do not have the transcript of the hearing before the magistrate, and we cannot consider Glenn's unsupported statements in his appellate brief, we are unable to address this argument. Therefore, we must find it without merit.

{¶17} Glenn next argues that it is unclear if the trial judge signed the November 5, 2010 judgment entry, as her signature seems to indicate that someone may have signed on her behalf. We have no evidence that the trial judge did not sign the judgment entry adopting the magistrate's decision, and, regardless, Glenn fails to cite any authority indicating that such a circumstance would constitute error. Therefore, this argument is without merit.

{¶18} Glenn next argues that the magistrate improperly allowed Patricia to testify with regard to her bills, mortgage, and financial difficulties, and referred to her as "mother"

throughout the decision, which shows that the magistrate may have been prejudiced by Patricia's stated concern for her daughter and her foreclosure situation. Glenn contends that using the term "mother" in a proceeding unrelated to child support or custody shows bias. We fail to see any bias in the trial court's use of the term "mother." Notwithstanding, the determination of a claim that a common pleas judge is biased or prejudiced is within the exclusive jurisdiction of the Chief Justice of the Supreme Court of Ohio or his designee. See *Jones v. Billingham* (1995), 105 Ohio App.3d 8, 11, citing Section 5(C), Article IV of the Ohio Constitution. Thus, it is not within the jurisdiction of this court to determine whether the trial judge was biased. We also note that Glenn presents several arguments detailing Patricia's imprudent spending, relying upon testimony presented at the hearing. However, because we have no transcript of the hearing, we cannot address these contentions. Therefore, these arguments are without merit.

{¶19} Glenn's final argument is that CSEA's calculations of arrearages are incorrect and misleading. However, Glenn's argument is brief and somewhat unclear, and, regardless, we have no evidence that he raised this issue or presented evidence regarding such at the magistrate's hearing. Therefore, this argument is without merit. For all the foregoing reasons, we overrule Glenn's assignment of error.

{¶20} Accordingly, Glenn's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is affirmed.

Judgment affirmed.

FRENCH and DORRIAN, JJ., concur.

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