[Cite as *Lipton v. Castanias*, 2010-Ohio-4300.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

ALECIA C. CASTANIAS nka LIPTON,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-11-152
	:	O P I N I O N
- vs -		9/13/2010
	:	
CHRISTOPHER CASTANIAS,	:	
Defendant-Appellant.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 99DR23817

Alecia C. Castanias, nka Lipton, 8334 Ashmont Way, Mason, Ohio 45040, plaintiff-appellee

Rachel A. Hutzel, Warren County Prosecuting Attorney, Alaina R. Schulte-Bidlack, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Christopher Castanias, 16 Mound Street, Lebanon, Ohio 45036, defendant-appellant, pro se

POWELL, J.

{¶1} Defendant-appellant, Christopher Castanias, acting pro se, appeals from a judgment of the Warren County Court of Common Pleas, Division of Domestic Relations, finding him in contempt of court for failure to pay child support and

sentencing him to 83 days in jail. We affirm.

{¶2} Castanias and his former wife, Alecia Castanias n.k.a. Alecia Lipton, were divorced in 1999, at which time Castanias was ordered to pay child support for the parties' two minor children. The amount of Castanias' child support obligation has been modified several times since the time of the divorce. As of March 1, 2008, Castanias has been required to pay $833 in monthly child support, $166.60 toward his arrearage in such payments, and a two percent processing fee, for a total monthly payment of $1,019.59.

{¶3} In August 2009, the Warren County Child Support Enforcement Agency, for the second time in less than a year, moved to have Castanias held in contempt of court for failing to pay his child support. After holding a hearing on the matter, the magistrate recommended that Castanias be found in contempt for failing to pay his child support and that he be sentenced to serve 60 days in jail plus the 30-day jail sentence imposed on him in February 2009 for failing to pay child support, which 30-day sentence, the magistrate found, had been suspended in its entirety. The trial court overruled Castanias' objections to the magistrate's decision and adopted it as its own, except that the court found that Castanias was entitled to receive credit for having already served seven days of the re-imposed 30-day jail sentence.

{¶4} Castanias now appeals, assigning the following as error:

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY PROCEEDING WITH THE HEARING ON SEPTEMBER 28, 2009, EVEN THOUGH APPELLANT CLEARLY TOLD THE COURT HE WAS NEVER SERVED WITH A

SUMMONS."

{¶7} Castanias argues the trial court erred by holding the contempt hearing because he was not "personally served" with summons informing him of the hearing. We disagree.

{¶8} The contempt action was brought against Castanias under R.C. 2705.031. R.C. 2705.031(D) contemplates that the accused will be served "as required by the Rules of Civil Procedure or by any special statutory proceedings that are relevant to the case[.]" Civ.R. 75(J) provides that "[t]he continuing jurisdiction of the court shall be invoked by motion filed in the original action, notice of which shall be served in the manner provided for the service of process under Civ.R. 4 to 4.6."

{¶9} Civ.R. 4.1(A) provides that "service of any process shall be by certified or express mail unless otherwise permitted by these rules." Civ.R. 4.6(D) allows for service to be made by ordinary mail if the certified mail is returned unclaimed, and provides that "[s]ervice shall be deemed complete when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery." If the ordinary mail envelope is not returned, there is a rebuttable presumption that proper service has been perfected. *Hamilton v. Digonno*, Butler CA2005-03-075, 2005-Ohio-6552, ¶10.

{¶10} The record in this case indicates that a copy of the motion for contempt was sent to Castanias' address by certified mail on August 7, 2009 and was returned unclaimed on August 31, 2009. On September 3, 2009, a copy of the motion for contempt and summons to appear was sent to Castanias by ordinary mail. There is no evidence in the record showing that the ordinary mail envelope was returned by the postal authorities with an endorsement showing failure of delivery.

{¶11} Castanias asserts that he *did* present evidence of a failure of delivery when he told the magistrate several times at the contempt hearing that he never received service of summons. However, a party's self-serving statement that he did not receive service is generally insufficient to rebut the presumption of service that arises when the serving party complies with Civ.R. 4.6(D). See, e.g., *Hamilton v. Hamilton,* Butler CA2005-03-075, 2005-Ohio-6552, ¶12. Moreover, Castanias has never claimed that he did not reside or receive mail at the address to which the summons was sent. Cf. *Patterson v. Patterson,* Cuyahoga App. No. 86282, 2005-Ohio-5352, ¶23 (party's contention that he resides at different address than where summons was sent warranted hearing on whether rebuttable presumption of proper service arising when serving party complies with Civ.R. 4.6[D] had been rebutted).

{¶12} Castanias also argues that in order for service of summons to be effective, he had to be *personally served* with the summons. However, the cases on which he relies in support of this argument, *Wolford v. Wolford,* 184 Ohio App.3d 363, 2009-Ohio-5459, and *Hansen v. Hansen* (1985), 21 Ohio App.3d 216, are clearly distinguishable from this one. *Wolford* and *Hansen* merely held that in order for service of summons to be perfected, the service must be made on the party himself rather than the party's *attorney*. See *Wolford* at ¶9–16 and *Hansen* at 218-219. In this case, service of summons was properly sent by ordinary mail to Castanias himself pursuant to Civ.R. 4.6(D).

{¶13} In light of the foregoing, Castanias' first assignment of error is overruled.

{¶14} Assignment of Error No. 2:

{¶15} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY

IMPROPERLY DENYING APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO COURT APPOINTED COUNSEL AND SUBSEQUENTLY PROCEEDING WITH THE HEARING OF SEPTEMBER 28, 2009."

{¶16} Castanias argues the trial court erred by denying him his due process right to court-appointed counsel for the contempt hearing since he was subject to a term of imprisonment. We disagree.

{¶17} In *In re Calhoun* (1976), 47 Ohio St.2d 15, 17-18, the court held that an alleged, indigent contemnor did not have a due process right to court-appointed counsel in a civil contempt proceeding. However, five years later in *Lassiter v. Dept. of Social Services* (1981), 452 U.S. 18, 101 S.Ct. 2153, the United States Supreme Court stated:

{¶18} "In sum, the Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."

{¶19} Several appellate districts in this state have found that *Lassiter* effectively overruled or at least modified *Calhoun*. See, e.g., *Schock v. Sheppard* (1982), 7 Ohio App.3d 45, 47; and *Renshaw v. Renshaw* (Oct. 12, 2000), Guernsey App. No. 00 CA 05. But, see, *Courtney v. Courtney* (1984), 16 Ohio App.3d 329, 335 (*Lassiter* did not overrule *Calhoun* as *Lassiter* did not find that an indigent litigant had a conclusive right to counsel and did not involve a contempt case).

{¶20} In this case, the trial court denied Castanias' request for court-appointed counsel on the ground that he failed to request one within three business

days of the date he received summons regarding the contempt action. R.C. 2705.031(C) states in pertinent part:

{¶21} "(C) In any contempt action initiated pursuant to division (B) of this section, the accused shall appear upon the summons and order to appear that is issued by the court. The summons shall include all of the following:

{¶22} "* * *

{¶23} "(2) Notice that the accused has a right to counsel, and that if indigent, the accused must apply for a public defender or court appointed counsel within three business days after receipt of the summons[.]" Id.

{¶24} The trial court found that Castanias "had obviously received notice [of the September 28, 2009 contempt hearing] by September 18, 2009 due to his filing for a continuance on the matter, [and therefore] he failed to meet the three-day time limit provided by [R.C.] 2705.031(C)(2) to apply for court-appointed counsel."

{¶25} Castanias contends that he moved for a continuance of the contempt hearing on September 18, 2009, *not* because he received service of summons of the contempt hearing by that date, but because he had learned about the contempt hearing while reviewing the court's website with regards to another pending case. Castanias states that he did not learn of his right to court-appointed counsel until September 21, 2009 when attorneys representing the CSEA informed him of that right and that he requested a court-appointed attorney within three days of learning of that right on September 24, 2009. However, the magistrate was in the best position to determine whether Castanias was being truthful on this matter, see *Hartkemeyer v. Ventling,* Butler App. No. CA2007-03-074, 2009-Ohio-93, ¶16, and it is obvious the magistrate did not believe him.

{¶26} Furthermore, the trial court's decision not to appoint Castanias counsel in light of his failure to timely request such counsel did not amount to reversible error under the facts of this case. This was the second contempt action brought by the CSEA against Castanias in less than a year. In the first contempt proceeding commenced in September 2008, the magistrate overruled Castanias' late request for court-appointed counsel after noting that Castanias already had requested a continuance to obtain counsel and then chose not to obtain one. Prior to the September 2008 contempt action, another contempt action had been brought against Castanias, and at a hearing held on June 24, 2008, the following exchange took place between the magistrate and Castanias:

{¶27} "THE COURT: The other matter is that since this a Motion for Contempt it has with it a sanction of a fine of not more than two hundred and fifty dollars and a definite term of imprisonment of not more than thirty days in jail or both. Do you understand that?

{¶28} "MR. CASTANIAS: I do.

{¶29} "THE COURT: As such you are entitled to have an attorney present and if you're unable to afford one the Court will appoint one for you. So how do you wish to proceed, with or without an attorney?

{¶30} "MR. CASTANIAS: Without."

{¶31} This was not the first contempt action brought against Castanias. The record clearly shows that despite his protestations to the contrary, Castanias knew of his right to counsel and failed to exercise that right in a timely manner. Under the circumstances of this case, we conclude that the trial court did not err by refusing Castanias' untimely request for court-appointed counsel.

{¶32} Accordingly, Castanias' second assignment of error is overruled.

{¶33} Judgment affirmed.

YOUNG, P.J., and BRESSLER, J., concur.