

[Cite as *Davis-Wright v. Wright*, 2010-Ohio-3984.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

AMY NICOLE DAVIS-WRIGHT

Plaintiff-Appellee,

vs.

DAVID WRIGHT,

Defendant-Appellant.

:

Case No. 09CA1

:

:

DECISION AND JUDGMENT ENTRY

:

APPEARANCES:

COUNSEL FOR APPELLANT: Susan M. Zurface Daniels, P.O. Box 589, Hillsboro,
Ohio 45133¹

CIVIL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED: 8-20-10

ABELE, J.

{¶ 1} This is an appeal from a Highland County Common Pleas Court judgment that ordered David Wright, defendant below and appellant herein, to serve the remaining seventy-nine (79) days of a ninety (90) day jail sentence for his failure to pay child support. Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING EXECUTION OF A REMAINING JAIL SENTENCE FOR A CONTEMPT FINDING UNDER O.R.C. §2705.031 AFTER THE DEFENDANT HAD PURGED HIMSELF OF THE CIVIL CONTEMPT BY PAYING THE PORTION OF ARREARAGE AGREED UPON AND

¹ The Highland County Child Support Enforcement Agency initiated and prosecuted these proceedings. The agency did not, however, file a brief in this matter.

ORDERED BY ENTRY DATED JULY 25, 2008.”

SECOND ASSIGNMENT OF ERROR:

“THE TRIAL COURT’S ORDER OF JANUARY 5, 2009, MODIFIED BY A NUNC PRO TUNC ENTRY JOURNALIZED FEBRUARY 5, 2009, WHICH MODIFIED THE TERMS OF DEFENDANT’S ORIGINAL NEGOTIATED AGREEMENT VIOLATED THE DEFENDANT’S DUE PROCESS RIGHTS UNDER [THE] OHIO CONSTITUTION AND [THE] U.S. CONSTITUTION BECAUSE [THE] COURT’S UNILATERAL MODIFICATION OF THE TERMS OF THE DEFENDANT’S NEGOTIATED AGREEMENT, AFTER IT HAD BEEN ACCEPTED AND APPROVED BY THE COURT AND WHEN THERE WAS NO NEW CONTEMPT ALLEGATION BEFORE THE COURT[,] WAS DONE WITHOUT PROPER MOTION, SUMMONS, OR ANY OTHER NOTICE GIVEN TO MR. WRIGHT.”

{¶ 2} The procedural history of this case is somewhat convoluted and confusing. The Highland County Child Support Enforcement Agency (CSEA), movant below, commenced this action and sought an order to require appellant to show cause why he should not be held in contempt for his failure to pay child support. After an April 10, 2008 hearing, a magistrate recommended that appellant be held in contempt and serve ninety (90) days in jail. Appellant, however, was afforded the opportunity to purge that contempt by, inter alia, “continu[ing] to pay his current child support” and make a \$3,000 lump sum payment toward his arrearage on or before July 10, 2008.² The trial court adopted that recommendation on May 15, 2008.

{¶ 3} Later, the magistrate recommended that appellant's request for an

² Appellant refers to this recommendation as a negotiated “agreement.” We, however, find nothing in the decision to corroborate that statement, nor do we find a

extension of time to make the lump sum payment be granted. The trial adopted that recommendation, but ordered that if appellant did not make the payment, he must report to jail on July 18, 2008, to serve his jail time. Appellant, however, failed to make the required payment on time and did not report to the jail.

{¶ 4} Consequently, on September 18, 2008 the trial court issued a *capias* for appellant's arrest. Soon after appellant's incarceration he tendered the lump sum payment. On November 21, 2008, the trial court filed an entry that noted that appellant complied with the terms of the contempt citation and ordered his release eight days later, on November 29, 2008. A subsequent entry (November 26, 2008) signed by a different judge ordered appellant's immediate release that day "as he appear[ed] to have complied with this Court's prior orders."

{¶ 5} On December 22, 2008, the case came on for another hearing after which the trial court found that since appellant's incarceration, he has made no further payments on his support obligation. Thus, the court ordered appellant to serve an additional three days in jail, as well as the remaining seventy-nine (79) days of his previously imposed ninety (90) day jail term. Concerning those remaining seventy-nine days, the court provided appellant the opportunity to purge that contempt by satisfying the remainder of the arrearage by February 1, 2009. This appeal followed.³

I

transcript of that hearing in the record.

³ The trial court's original entry specified that appellant could purge his contempt by paying arrearages due as of July 18, 2005. A nunc pro tunc entry corrected that date.

{¶ 6} Before we address appellant's assignments of error, we must first resolve a threshold jurisdictional issue. Ohio courts of appeals have appellate jurisdiction over final, appealable orders. Section 3(B)(2), Article IV of the Ohio Constitution. If a judgment is not a final order, an appellate court has no jurisdiction to consider the matter and the appeal must be dismissed. Davison v. Reni (1996), 115 Ohio App.3d 688, 692, 686 N.E.2d 278; Prod. Credit Assn. v. Hedges (1993), 87 Ohio App.3d 207, 210, 87 Ohio App. 3d 207, 621 N.E.2d 1360.

{¶ 7} Several issues concern us here. The first is appellant's December 11, 2008 unresolved motion to modify support. Although an unresolved motion to modify support may affect a judgment's finality, see e.g. Cundiff v. Cundiff (Aug. 31, 2000), Pickaway App. No. 00CA8, a judgment of contempt is considered final and appealable if it contains the imposition of a sanction. Check v. Rossetti, Stark App. No. 2004-CA-332, 2005-Ohio-3463, at ¶3; Noll v. Noll, Lorain App. No. 03CA8216, 2003-Ohio-5358, at ¶¶9-11. Because appellant's potential incarceration affects a substantial right, we conclude that the judgment is appealable, notwithstanding the unresolved motion.

{¶ 8} The second issue is that the trial court provided appellant the opportunity to again purge the contempt by complying with certain requirements. At least one Ohio appellate district has concluded that contempt citations are not appealable if the contemnor is given an opportunity to purge that contempt. See Kimani v. Nganga, Lake App. No. 2009-L-60, 2009-Ohio-3796, at ¶4; Welch v. Welch, Lake App. No. 2004-L-178, 2005-Ohio-560, at ¶5. We do not apply that principle here, however, because the court expects its contempt citations to be self-executing. In other words, if

appellant does not purge himself of the contempt, he is, pursuant to the trial court's order, expected to appear at the county jail for incarceration.⁴ No further proceedings are necessary or contemplated before the jail sentence is to be imposed. Therefore, for these reasons, we conclude that the January 5, 2009 judgment, as amended by the February 5, 2009 nunc pro tunc entry, constitutes a final appealable order and provides us with jurisdiction to review the matter.

II

{¶ 9} We now turn to appellant's first assignment of error wherein he argues that the trial court's January 5, 2009 contempt citation is in error because it is based, ostensibly, on appellant's alleged failure to comply with the previous May 15, 2008 contempt citation. We agree.⁵

{¶ 10} Our review of the record in this matter reveals that the Highland County Court of Common Pleas ruled not once, but twice, that appellant "complied" with the terms of the May 15, 2008 contempt citation.⁶ Barring a scrivener's error or other extraordinary circumstance, fundamental fairness would appear to dictate that a court be bound by its own rulings. We find nothing in the record of this case to suggest that

⁴ This is apparently the basis for the trial court imposing a separate three day sentence in the final judgment – because appellant had not presented himself to the jail on July 18, 2008 after he failed to purge himself of contempt.

⁵ The January 5, 2009 entry appealed in this case actually cites the trial court's prior entry of July 25, 2008. For the most part, all that entry did was grant an extension of time for appellant to pay the lump sum amount on his arrearages. The terms for purging his prior contempt citation were set forth in the court's May 15, 2008, order. Consequently, most of our references will be to that entry.

⁶ The word "complied" can be found in the November 21, 2008 entry and the November 26, 2008 entry.

either situation is applicable here. Thus, we see no reason why the terms of the two prior judgment entries should not stand. Because the Highland County Common Pleas Court has twice determined that appellant “complied” with the terms set out to purge his contempt in the May 15, 2008 order, he cannot be held in contempt of court again, eight months later, for not fulfilling those same terms. Furthermore, the primary reason set forth in the January 5, 2009 entry that found appellant in contempt is his failure to stay current on child support obligations as ordered in the May 15, 2008 judgment entry. A contempt order, however, cannot regulate future conduct. If it attempts to do so, that order is void and has no effect. See e.g. Tucker v. Tucker ((1983) 10 Ohio App.3d 251, 252, 461 N.E.2d 1337; Patel v. Patel (Mar. 23, 1999), Athens App. Nos. 98CA29 & 09CA30; Slone v. Slone (Mar. 31, 1998) Pike App. No. 96CA586.

{¶ 11} The secondary reason set forth in the January 5, 2009 judgment for finding appellant in contempt is that he failed to report to jail on July 18, 2008 as ordered to do in the July 25, 2009 judgment (which granted him an extension to July 18th so he could pay a lump sum amount on support arrearages). Here again, we believe that fundamental fairness should protect appellant from being jailed for failing to do an act that the trial court did not order him to do until a week after the date set for that act had already expired. In other words, appellant cannot be held to answer for failing to report to jail on July 18th when he was not even ordered to report there until July 25th.

{¶ 12} For these reasons, appellant's first assignment of error is well taken and is hereby sustained. We hereby disregard appellant's second assignment of error pursuant to App.R. 12(A)(1)(c). Before closing, we wish to express that we are not

without sympathy for the trial court's position. It appears the only way that appellant will comply with his support obligations is to force the threat of incarceration. We share the court's frustration with appellant's dilatory and cavalier attitude toward his support obligations. At the same time, we caution appellant and serve notice that he continues to ignore the trial court's orders at his peril. If found in future contempt, appellant may find himself subject to "the entire panoply of coercive remedies and sanctions allowed" for such finding. State v. Richard, Cuyahoga App. No. 85918, 2005-Ohio-6969, at ¶125 (McMonagle, J. Concurring). So far, the trial court has only imposed civil contempt citations. Continued disregard of the trial court's orders may well lead to a criminal contempt citation which allows for, inter alia, a fine of \$1,000 and a definite term of ninety days imprisonment under R.C. 2705.05(A)(3). See e.g. Whitman v. Whitman-Norton (Nov. 20, 2000), Hancock App. No. 5-2000-10. We also point out to appellant that R.C. 2705.05 does not limit possible sanctions that may be imposed on contemnors. See Byron v. Byron, Franklin App. No. 03AP-819, 2004-Ohio-2143, at ¶14.

A court may, for instance, also direct a contemnor to pay costs as well as the complaining party's attorneys fees. See Fry v. Fry (1989), 64 Ohio App.3d 519, 523, 582 N.E.2d 11; Spickler v. Spickler, Columbiana App. No. 01CO52, 2003-Ohio-3553. Our ruling here should not be viewed as vindication or approval of appellant's behavior, but rather a warning that he may encounter stringent penal and monetary sanctions if he continues to defy the trial court's orders and ignore his support obligation.

{¶ 13} Accordingly, based upon the aforementioned reasons, we hereby reverse the trial court's contempt judgment.

JUDGMENT REVERSED AND

CAUSE REMANDED FOR
PROCEEDINGS CONSISTENT
WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and cause remanded for proceedings consistent with this opinion. Appellant shall recover of appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

