

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TIONIE STEWART

Plaintiff-Appellee

And

STARK COUNTY CHILD SUPPORT
ENFORCEMENT AGENCY

Intervenor

-vs-

NAPOLEON PORTER

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.
Hon. William B. Hoffman, J.
Hon. Patricia A. Delaney, J.

Case No. 2009CA00008

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas, Juvenile Division Case No.
2005 JCV 139115

JUDGMENT:

REVERSED AND REMANDED

DATE OF JUDGMENT ENTRY:

December 7, 2009

APPEARANCES:

For Plaintiff-Appellee (Intervenor):

NIKKI REED
Stark County Child Support
Enforcement Agency
P.O. Box 21337
Canton, OH 44701-1337

For Defendant-Appellant:

KIMBERLY L. STOUT
Stark County Public Defender's Office
200 W. Tuscarawas St., Suite 200
Canton, OH 44702

Delaney, J.

{¶1} Defendant-Appellant Napoleon Porter appeals the December 22, 2008 judgment entry of the Stark County Court of Common Pleas, Juvenile Division. Intervenor is the Stark County Child Enforcement Agency. Neither Plaintiff-Appellee Tionie Stewart nor Intervenor filed a brief in this matter.

STATEMENT OF THE CASE¹

{¶2} On May 20, 1999, in case number JU-107222, Appellant and Tionie Stewart submitted an Agreed Judgment Entry in the Stark County Court of Common Pleas, ordering Appellant to pay Plaintiff child support for one child.

{¶3} On February 28, 2006, in case number JU-139115, the Stark County Court of Common Pleas, Juvenile Division, ordered Appellant to pay Tionie Stewart child support for a second child.

{¶4} On March 30, 2007, the Stark County Child Support Enforcement Agency (“CSEA”) filed a motion for an order to show cause relative to Appellant’s failure to pay the ordered child support under case number JU-107222. The trial court set the matter for a hearing on May 17, 2007. On April 6, 2007, the CSEA filed a motion to show cause relative to Appellant’s failure to pay child support as ordered in case number JU-139115. On May 14, 2007, the trial court continued the show cause hearing in case number JU-107222 to July 5, 2007. The trial court further ordered that case numbers JU-107222 and JU-139115 be consolidated for show cause hearing purposes only.

¹ A statement of the underlying facts is unnecessary for the disposition of this appeal.

{¶5} Appellant failed to appear at the July 5, 2007 hearing and the trial court issued a bench warrant. Appellant was apprehended on November 20, 2008. The trial court set the show cause hearing for case numbers JU-107222 and JU-139115 for December 22, 2008.

{¶6} At the evidentiary hearing, Appellant stipulated to contempt in both cases. The trial court found Appellant guilty of contempt in each case, and proceeded to sentencing.

{¶7} By judgment entry filed on December 22, 2008, the trial court sentenced Appellant to thirty days in prison on case number JU-107222 and a \$250 fine plus costs. The trial court also sentenced Appellant to sixty days in prison and a \$500 fine plus costs relative to case number JU-139115. The trial court ordered that the sentences be served consecutively, with credit for time served. The trial court finally suspended fifty-six days of the sentence on the condition that Appellant commit no similar offenses and abide by all court rules.

{¶8} It is from this decision Appellant now appeals.

{¶9} On May 13, 2009, Appellant and the CSEA filed an Agreed Motion to Supplement the Record with a Statement pursuant to App.R. 9. The parties agreed portions of the audio recording of the hearing were inaudible and the transcript was incorrect.

ASSIGNMENTS OF ERROR

{¶10} Appellant raises two Assignments of Error:

{¶11} “I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY SENTENCING THE DEFENDANT-APPELLANT TO 30 DAYS AT THE STARK COUNTY JAIL IN CASE JU-107222 AND 60 DAYS IN THE STARK COUNTY JAIL IN CASE JU-139115.

{¶12} “II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN THE APPLICATION OF THE SENTENCING ENHANCEMENT SCHEME FOUND IN OHIO REVISED CODE 2705.05.”

I., II.

{¶13} Appellant’s first and second Assignments of Error raise common and interrelated issues; therefore, we will address the arguments together. In his Assignments of Error, Appellant argues the trial court violated R.C. 2705.05 by sentencing him to thirty days in case number JU-107222 and sixty days in prison on case number JU-139115. We agree.

{¶14} R.C. Section 2705.05(A) reads:

{¶15} “**2705.05 Hearing on contempt; penalties; support orders; failure to withhold or deduct money pursuant to support order**

{¶16} “(A) In all contempt proceedings, the court shall conduct a hearing. At the hearing, the court shall investigate the charge and hear any answer or testimony that the accused makes or offers and shall determine whether the accused is guilty of the

contempt charge. If the accused is found guilty, the court may impose any of the following penalties:

{¶17} “(1) For a first offense, a fine of not more than two hundred fifty dollars, a definite term of imprisonment of not more than thirty days in jail, or both;

{¶18} “(2) For a second offense, a fine of not more than five hundred dollars, a definite term of imprisonment of not more than sixty days in jail, or both;

{¶19} “(3) For a third or subsequent offense, a fine of not more than one thousand dollars, a definite term of imprisonment of not more than ninety days in jail, or both.”

{¶20} At the evidentiary hearing held on December 22, 2008, Appellant stipulated to contempt in both cases. (T. 6). According to the Agreed Motion to Supplement the Record under App.R. 9, counsel for both parties identified each contempt as a first offense. The trial court and counsel for the CSEA further discussed the appropriate sentence:

{¶21} “THE COURT: And I guess these are two contempt’s [sic] right number one and number two?

{¶22} “ATTY REED: Number one is (inaudible). So two total but I’m asking for 30 on each.

{¶23} “THE COURT: You’re asking for what?

{¶24} “ATTY REED: I’m only asking for 30 on each contempt Your Honor.

{¶25} “THE COURT: Well the first one is 30 but the second one would be 60 potentially. So that being the case I don’t know what sentencing is going to be at I

haven't decided but what could happen to you with two contempt convictions is that you could get 30 on one and 60 on another. That's 90 possible outcome. * * *

{¶26} “* * *

{¶27} “ATTY REED: Your Honor I am just asking for 30 days on each. So 30 on the one that you're assigned to 22 and 30 days on 139115. * * *.” (T. 5-6, App.R. 9 statement).

{¶28} The trial court went on to sentence Appellant to thirty days on case number JU-107222 plus sixty days on case number JU-139115. (T. 7).

{¶29} This Court has been presented with this issue in *Benson v. Porco*, Stark App. No. 2006CA00366, 2007-Ohio-4586. In *Benson*, the appellant was before the Stark County Court of Common Pleas, Juvenile Division, for a hearing on a motion to show cause in case number JU-127038 and a motion to show cause in case number JU-134610. Id. at ¶4. The appellant stipulated to the finding of contempt in both cases. Id. The trial court found the appellant guilty of contempt in each case and proceeded to sentence the appellant. Id. “Via Judgment Entry of November 9, 2006, the court sentenced Appellant to thirty days in prison on case number JU-127038, and sixty days in prison relative to case number JU-134610. The court ordered the terms be served consecutively, with credit for time served. The court further ordered Appellant pay a fine of \$250.00 plus costs on the first contempt, and \$500.00 plus costs on the second contempt.” Id. at ¶5.

{¶30} In his appeal, the appellant in *Benson* argued that the trial court violated R.C. 2705.05(A) in sentencing him to thirty days in case number JU-127038 and sixty days in case number JU-134610. Id. at ¶10. This Court agreed.

{¶31} Upon the authority of *Benson*, we likewise find the trial court erred in the present case in not sentencing Appellant on each offense as a first offense, not subject to the enhancement provisions of R.C. 2705.05(A). Accordingly, the trial court erred in not sentencing Appellant to thirty days as to each charge of contempt as they were both to be considered first offenses.

{¶32} Appellant's first and second Assignments of Error are sustained.

{¶33} The December 22, 2008 judgment entry of the Stark County Court of Common Pleas, Juvenile Division, is reversed, and the matter remanded for resentencing in accordance with the law and this opinion.

By: Delaney, J.

Farmer, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. WILLIAM B. HOFFMAN

PAD:kgb

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TIONIE STEWART	:	
	:	
	:	
Plaintiff-Appellee	:	
And		
STARK COUNTY CHILD SUPPORT ENFORCEMENT AGENCY	:	
Intervenor	:	
-vs-	:	JUDGMENT ENTRY
	:	
NAPOLEON PORTER	:	
	:	
	:	Case No. 2009CA00008
Defendant-Appellant	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the December 22, 2008 judgment entry of the Stark County Court of Common Pleas, Juvenile Division is reversed, and the matter remanded for resentencing in accordance with the law and this opinion. Costs assessed to Appellee.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. WILLIAM B. HOFFMAN

