

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DARLENE MCKINNEY

Plaintiff-Appellee

-VS-

GREGORY MCKINNEY

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 2014CA00118

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas, Family Court Division,
Case No. 2007DR00740

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

March 23, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, P.J.

{¶1} Defendant-appellant Gregory McKinney appeals the June 11, 2014 Judgment Entry entered by the Stark County Court of Common Pleas, Family Court Division, which found him in contempt for failure to pay spousal support. Plaintiff-appellee is Darlene McKinney.

STATEMENT OF THE CASE AND FACTS

{¶2} On April 16, 2008, the trial court issued a Final Judgment Entry of Divorce which incorporated the parties' Separation Agreement. Pursuant to the terms of the Separation Agreement and Decree of Divorce, Appellant agreed and was ordered to pay spousal support in the amount of \$4,400/month for a period of 96 months, commencing April 16, 2008. In addition, the Separation Agreement provided for a series of property division payments.

{¶3} Appellee filed a pre-decree motion for contempt. Via Judgment Entry filed August 19, 2008, the trial court found Appellant guilty of contempt and sentenced him to thirty days in jail. The trial court found Appellant was in arrears on his spousal support obligation in the amount of \$10,471.13, as of July 31, 2008, had failed to pay the property division order of \$1,831.92, and had failed to transfer title of a 2005 Lexus.

{¶4} Appellee filed a post-decree motion for contempt on February 19, 2010. Therein, Appellee alleged Appellant had failed to pay spousal support and had failed to pay the agreed property division payments. Appellee indicated the trial court had previously found Appellant in contempt on the same grounds. Appellee specifically prayed for "any additional amount owed in spousal support to [Appellee] as of the date of the hearing on the motion." Plaintiff's Post-Decree Motion for Contempt. Despite

being served with notice, Appellant failed to appear at the March 30, 2010 hearing. The trial court issued a warrant for his arrest.

{¶5} Almost four years from the date of the issuance of the warrant, Appellant was arrested on March 6, 2014. The trial court conducted a show cause hearing on June 11, 2014. At the hearing, Appellant claimed he lacked the necessary funds to satisfy the obligation. Appellant explained his businesses had closed, resulting in an inability to pay.

{¶6} Via Judgment Entry filed June 11, 2014, the trial court found Appellant guilty of contempt. The trial court sentenced Appellant to 90 days in Stark County Jail, but provided him with an opportunity to purge the contempt by bringing his spousal support obligation current and paying \$1,326 in legal fees to Appellee, prior to July 2, 2014.

{¶7} It is from this judgment entry Appellant appeals, assigning as error:

{¶8} "I. THE TRIAL COURT ERRED IN HOLDING HUSBAND IN CONTEMPT FOR FAILING TO PAY HIS ENTIRE SPOUSAL SUPPORT OBLIGATION THOUGH THE UNCONTESTED EVIDENCE PROVED HE DID NOT HAVE THE MEANS TO DO.

{¶9} "II. THE TRIAL COURT'S ORDER OF CONTEMPT VIOLATED FATHER'S DUE PROCESS RIGHTS AND LOC. R. 15.05 BY REQUIRING HIM TO PURGE HIMSELF OF A POTENTIAL JAIL SENTENCE BY PAYING AN AMOUNT OF SPOUSAL SUPPORT ARREARAGE THAT GREATLY EXCEEDED THE AMOUNT OF WHICH HE'D BEEN NOTIFIED IN WIFE'S MOTION AND AFFIDAVIT."

I

{¶10} In his first assignment of error, Appellant contends the trial court erred in finding him in contempt for failing to pay his spousal support obligation as the evidence presented at the hearing established he did not have the means to pay said obligation.

{¶11} We will not reverse the trial court's decision regarding contempt absent an abuse of discretion. *Beltz v. Beltz*, 5th Dist. No. 2005CA00193, 2006-Ohio-1144. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶12} “Civil contempt is defined as that which exists in failing to do something ordered to be done by the court in a civil action for the benefit of the opposing party therein.” *Beach v. Beach* (1955), 99 Ohio App. 428, 431, 130 N.E.2d 164, 134 N.E.2d 162. “It is irrelevant that the transgressing party does not intend to violate the court order.” *Pedone v. Pedone* (1983), 11 Ohio App.3d 164, 165. “If the dictates of the judicial decree are not followed, a contempt citation will result.” *Id.*

{¶13} The Ohio Supreme Court has explicitly held a party acting innocently and not in intentional disregard of a court order could not use that innocence as a defense to a charge of civil contempt. *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, 271 N.E.2d 815 [56 O.O.2d 31], paragraph three of the syllabus. “The absence of willfulness does not relieve from civil contempt. * * * An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.” *McComb v. Jacksonville Paper Co.* (1949), 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599.

{¶14} In its June 11, 2014 Judgment Entry, the trial court found Appellant “agreed and was ordered to pay spousal support in the amount of \$4400/per month for 96 months”, yet, since the commencement of the order on April 16, 2008, Appellant “has never paid his full amount of support.” The trial court noted Appellant’s “failure to comply with the court order began immediately upon the filing of the final decree and that while he now is experiencing financial difficulties, he failed to pay the required amounts when able to do so and failed to make sufficient efforts to comply thereafter.” *Id.*

{¶15} Appellant failed to pay spousal support as ordered by the trial court from the outset of the order. We find the trial court did not abuse its discretion in finding him in contempt.

{¶16} Appellant’s first assignment of error is overruled.

II

{¶17} In his second assignment of error, Appellant asserts the trial court violated his due process rights and Loc. R. 15.05 by imposing a purge order which required him to pay spousal support arrearages in an amount greatly exceeding the amount Appellee sought in her motion for contempt.

{¶18} It is axiomatic that an alleged contemnor must be afforded due process in a contempt proceeding. *Courtney v. Courtney*, 16 Ohio App.3d 329, 332 (3d Dist.1984), citing *In re Oliver*, 333 U.S. 257, 274–275, 68 S.Ct. 499 (1948). In civil proceedings, due process requires notice and a meaningful opportunity to be heard. *State v. Hayden*, 96 Ohio St.3d 211, 2002–Ohio–4169, ¶ 6. Due process requirements, together with R.C. 2705.03, require that an individual accused of indirect contempt be given “adequate

notice, time to prepare any defense and an opportunity to be heard.” *State ex rel. Miller v. Waller*, 10th Dist. Franklin No. 04AP574, 2004–Ohio–6612, ¶ 7.

{¶19} Thus, the element of notice for a finding of indirect contempt is a prerequisite for a valid contempt finding. *Waller* at ¶ 7, citing *E. Cleveland v. Reed*, 54 Ohio App.2d 147, 150 (8th Dist.1977). Notice is sufficient when it apprises an alleged contemnor of the charges against him or her so that he or she is able to prepare a defense. *Id.*, citing *Cincinnati v. Cincinnati Dist. Council 51, Am. Fedn. of State, Cty. & Mun. Emp., AFL–CIO*, 35 Ohio St.2d 197, 203 (1973).

{¶20} The function of written notice is to apprise the defendant of the charges against him so that he is able to prepare his defense. See, *Foutty v. Maxwell* (1962), 174 Ohio St. 35, 186 N.E.2d 623. Appellee’s motion for contempt apprised Appellant of both the nature of the proceeding (civil contempt) and the reason for the proceeding (failure to pay spousal support). The fact Appellee’s motion did not provide Appellant with the exact arrearage figure at the time the matter was actually heard did not work prejudice against Appellant. Appellant absconded upon receiving notice of the hearing and was not arrested until four years later. Appellant was certainly aware his continued failure to pay the spousal support order would result in an increase in the total amount of arrearages, as Appellee specifically prayed for an arrearage order as of the date of the hearing in her original motion for contempt.

{¶21} Appellant’s second assignment of error is overruled.

{¶22} The judgment of the Stark County Court of Common Pleas, Family Court Division, is affirmed.

By: Hoffman, P.J.

Wise, J. and

Delaney, J. concur