

[Cite as *State v. Gum*, 2009-Ohio-6309.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92723

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JEREMY GUM

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510804

BEFORE: McMonagle, J., Gallagher, P.J., and Jones, J.

RELEASED: December 3, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Jeremy Gum, appeals the trial court's judgment denying his motion to dismiss. We affirm.

I. PROCEDURAL HISTORY

{¶ 2} The record before us demonstrates that in September 2001, the Child Support Enforcement Agency ("CSEA") ordered Gum to pay \$167.92 a month for the support of his minor child, T.O.¹ In August 2003, CSEA filed a complaint in contempt against Gum in the juvenile court based on his failure to pay. A hearing was held on the complaint, at which it was determined that Gum was some \$2,000 in arrearage under the CSEA order. The court ordered him to pay the previously imposed monthly child support plus a monthly sum for the arrearage.

{¶ 3} In October 2005, CSEA filed a motion to show cause based on Gum's nonpayment. A hearing was held on the motion; the magistrate found Gum in contempt and the trial judge approved the magistrate's decision. Gum was sentenced to a 30-day jail term, which was suspended if he met certain purge conditions including paying the arrearage amount as well as continuing with the previously ordered monthly payments.

{¶ 4} In September 2006, CSEA filed a motion to execute sentence under R.C. 2151.49 based on Gum's failure to comply with the purge

¹We use initials to protect the minor's identity.

conditions. After a hearing, the trial court ordered Gum to serve his sentence. In May 2008, Gum was charged with two counts of criminal nonsupport under R.C. 2919.21(B). He filed a motion to dismiss.

{¶ 5} The trial court denied Gum's motion to dismiss, he pleaded no contest to the indictment, and the trial court found him guilty. He was sentenced to five years of community control sanctions. Gum now appeals the denial of his motion to dismiss. In his sole assignment of error, he contends that the juvenile court did not have jurisdiction to enforce the CSEA order and that the conviction violated his double jeopardy rights.

II. LAW AND ANALYSIS

{¶ 6} We review a trial court's denial of a motion to dismiss de novo. *Whitehall v. Khoury*, Franklin App. No. 07AP-711, 2008-Ohio-1376, at ¶7, citing *Akron v. Molyneaux* (2001), 144 Ohio App.3d 421, 426, 760 N.E.2d 461. A de novo standard of review affords no deference to the trial court's decision and we independently review the record. *Gilchrist v. Gonsor*, Cuyahoga App. No. 88609, 2007-Ohio-3903, at ¶16. Crim.R. 12(C) provides that "prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. * * * Defenses and objections based on defects in the indictment * * * [must be raised before trial]."

{¶ 7} A motion to dismiss tests the sufficiency of the indictment, without regard to the quantity or quality of evidence that may be produced at trial. *State v. Patterson* (1989), 63 Ohio App.3d 91, 577 N.E.2d 1165. A pretrial motion must not involve a determination of the sufficiency of the evidence to support the indictment. If the indictment is valid on its face, a motion to dismiss should not be granted. See *State v. Eppinger*, 162 Ohio App.3d 795, 2005-Ohio-4155, 835 N.E.2d 746, citing *State v. Varner* (1991), 81 Ohio App.3d 85, 86, 610 N.E.2d 476.

A. Jurisdiction

{¶ 8} Gum argues that the juvenile court did not have jurisdiction to hold a contempt hearing because the underlying support order was an administrative order from CSEA, as opposed to a court order. We disagree.

{¶ 9} R.C. 2705.031(B)(1) provides that “[a]ny party who has a legal claim to any support ordered for a child * * * may initiate a contempt action for failure to pay the support.” (Emphasis added.) R.C. 2705.031(E) provides that in actions brought under R.C. 2705.031(B)(1), “[t]he court shall have jurisdiction to make a finding of contempt for the failure to pay support and to impose the penalties set forth in section 2705.05 of the Revised Code in all cases in which past due support is at issue even if the duty to pay support has terminated[.]” Thus, contempt proceedings are not reserved for only a

violation of court orders and the juvenile court had jurisdiction to hold Gum in contempt for noncompliance with the CSEA order.

B. Double Jeopardy

{¶ 10} Gum also contends that holding him in contempt in juvenile court for violating a court order and then later convicting him in common pleas court for violating the same order constituted double jeopardy. We disagree.

{¶ 11} This court addressed this issue in *State v. Yacovella* (Feb. 1, 1996), Cuyahoga App. No. 69487. Yacovella was found in contempt by the domestic relations court for non-support of his child under a divorce decree. He was later indicted in common pleas court for non-support of his child and filed a motion to dismiss arguing double jeopardy based on the prior contempt finding. This court held as follows:

{¶ 12} “This appeal turns on the difference between civil and criminal contempt. If the contempt found by the Domestic Relations Court was criminal in nature and merely a form of punishment, the defendant’s claim of double jeopardy would have merit. However, we find that the contempt in the divorce proceedings was remedial and the court was correct in denying defendant’s motion to dismiss.”

{¶ 13} This court cited *Morford v. Morford* (1993), 85 Ohio App.3d 50, wherein the Fourth Appellate District stated the following on contempt in child support situations:

{¶ 14} “We begin by noting that there is a difference between civil contempt and criminal contempt. Civil contempt is where the sanction is imposed to coerce the contemnor to comply with the court’s order, and is established by using the clear and convincing evidence standard. Criminal contempt is where the court imposes a sanction as punishment for a past failure, and, thus, the contemnor is entitled to all the rights afforded to a criminal defendant.” (Citations omitted.) *Id.* at 54.

{¶ 15} “[C]ontempt proceedings for failure to pay child support are generally *civil in nature* as any potential jail sentence is designed merely to encourage payment. Punishment imposed upon an adjudication of civil contempt must afford the contemnor an opportunity to purge himself of the contempt.” (Emphasis sic.) (Citations omitted.) *Id.* at 59 (Stephenson, J., concurring). See, also, *State v. Jones* (June 19, 1995), Clermont App. No. CA 94-11-094, and *State v. Rogers* (Dec. 23, 1994), Lake App. No. CA 93-L-180.

{¶ 16} In light of the above authority, Gum’s conviction in common pleas court after his civil contempt citation did not violate the constitutional proscriptions against double jeopardy.

{¶ 17} The sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, P.J., and
LARRY A. JONES, J., CONCUR