COURT OF APPEALS
DECISION
DATED AND RELEASED

November 8, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1526

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

In re the Marriage of:

ANNE C. PUCHNER,

Petitioner-Respondent,

v.

JOHN D. PUCHNER,

Respondent-Appellant.

APPEAL from an order of the circuit court for Waukesha County: WILLIS J. ZICK, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. John D. Puchner appeals from an order finding him in contempt for failure to pay child support. He argues that the entire proceeding from which the order arose was conducted improperly and that the order is not supported by credible evidence. We conclude that the contempt order is valid and affirm the order.

John and Anne C. Puchner were divorced in Minnesota in 1992. John was ordered to pay $480 per month as child support for the parties' then infant son. Upon Anne's and the child's continued residence in Wisconsin, venue of the case was transferred to Waukesha County. In January 1994, Anne filed a motion for an order finding John in contempt for failing to pay child support. The motion was heard February 11, 1994, with John appearing pro se telephonically.

John was found in contempt for failing to pay one-half the cost of a placement study by the Waukesha County Family Court Counseling Services and for failing to pay child support. The child support arrearage was determined to be $2920. As a sanction, John was sentenced to sixty days in jail. The order provided that John could purge himself of contempt by paying $340 bi-monthly as child support and payment on the arrearage.

This appeal was commenced on June 10, 1994.[1] On September 2, 1994, Anne secured an order for John's arrest because he had not made the required payments. John, who resides in Michigan, was arrested that day when he came to Wisconsin to visit his son. On September 6, the arrest order was stayed pending disposition of this appeal.

John's principal contention is that he was subjected to punitive contempt rather than remedial contempt. Thus, John argues that the entire proceeding was improper and not conducted according to the procedures outlined for imposing punitive sanctions. *See* § 785.03(1)(b), STATS.

We reject John's theory that a punitive sanction was imposed. The subtle distinction between remedial and punitive contempt is that the former is imposed to ensure compliance with court orders and serves only to enforce the rights of a litigant, while the later is geared towards preserving the general authority of the court and is used to discipline a party for its contemptuous

[1] Commencing in March 1994, John filed successive petitions with this court for a supervisory writ. Four petitions were filed; each was substantially the same pleading and each sought relief from the contempt order. Each writ was denied on the ground that an adequate remedy by appeal existed.

conduct. ***Diane K. J. v. James L. J.***, No. 94-3375, slip op. at 4-5 (Wis. Ct. App. Sept. 20, 1995, ordered published Oct. 31, 1995).

The contempt proceeding was commenced by Anne to enforce a child support order. Had it been punitive contempt, the matter would have been referred to the district attorney. Further, the contempt order provided a purge condition—timely payment of child support and an additional payment of the arrearage. Only remedial contempt requires that the sanction be purgeable through compliance with the original court order or the satisfaction of some other purge condition. ***Id.*** at 4.

In ***Diane K. J.***, we concluded that the court's remedial contempt order which called for a mandatory six-month confinement was in fact a punitive contempt sanction because the order did not provide for any way to purge the contempt. ***Id.*** at 6. The order was declared void because the contemnor had not been afforded the appropriate due process required when a party is cited for punitive contempt. ***Id.*** This case does not present those facts. John's inability to pay the purge condition does not transmute the contempt proceeding to punitive contempt.[2]

Having clarified that this was remedial contempt, we turn to John's contention that the manner in which the proceeding was conducted offends the concept of fair play and due process. He claims that Anne's motion was not sufficient notice that his liberty was at stake. He also argues that his due process rights were not protected because the hearing was conducted in an informal manner and sworn testimony was not taken. John did not object to the notice provided by the motion or the manner in which the hearing was conducted. He has waived his right of review of those contentions. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 10, 456 N.W.2d 797, 801 (1990) (citing the rule that in the absence of an objection which brings into focus the nature of the alleged error, a party has not preserved its objection for review).

[2] John makes a veiled argument that the sanction and purge condition were defective because no provision was made for work release. However, work release has nothing to do with John's ability to make the payments called for by the purge condition. The court imposed a purge condition which was fair and reasonable.

Despite waiver, we note that Anne's motion stated several times that she sought an order finding John in contempt for his failure to comply with court orders. The trial court's order of appearance was not required to warn John of the possible contempt sanctions. We reject John's contention that § 767.305, STATS., required anything more. John was afforded sufficient notice that the hearing was for the purpose of determining whether he was in contempt for failure to pay child support. *See* ***Dennis v. State***, 117 Wis.2d 249, 262, 344 N.W.2d 128, 134 (1984).

As to the manner in which the hearing was presented, we conclude that John invited any potential error. At his request, John was allowed to appear at the hearing telephonically. That, coupled with John's attempt to obscure the issue, created an atmosphere which resulted in a somewhat disruptive and disorganized proceeding. It is well established that where a party has induced certain action by the trial court, he or she cannot later complain on appeal. ***Zindell v. Central Mut. Ins. Co.***, 222 Wis. 575, 582, 269 N.W. 327, 330 (1936).

We next address John's claim that the finding of contempt is not supported by sufficient competent evidence. In a remedial contempt proceeding, the movant must make a prima facie showing of a violation of a court order. ***Noack v. Noack***, 149 Wis.2d 567, 575, 439 N.W.2d 600, 602 (Ct. App. 1989). It is then the alleged contemnor's burden to demonstrate that his or her conduct was not contemptuous. ***Id.*** The trial court's findings of fact in a contempt proceeding are conclusive unless clearly erroneous. *See* ***Town of Seymour v. City of Eau Claire***, 112 Wis.2d 313, 318, 332 N.W.2d 821, 823 (Ct. App. 1983). "Whether the thing ordered is within the capability of the person to do is a question of fact for the trial court ...." ***Id.***

Attached to Anne's motion was an affidavit of her attorney stating that John had failed to pay child support for specific periods. It established a prima facie case that John violated the child support order. The representations Anne's attorney made at the hearing, which John claims constituted unsworn and incompetent testimony, merely expanded on the statements in the affidavit. Further, we have already noted how the informality of the hearing was precipitated by the trial court honoring John's request to appear telephonically.

The burden shifted to John to prove that his failure to pay was not contemptuous. John was afforded the opportunity to speak to the allegations and present evidence. John did not dispute the allegation that he had not paid child support through the Waukesha County collection agency. John explained that he had mailed support checks to the Minnesota collection agency and Anne directly but that the checks were returned. John was evasive when the trial court questioned where the money which would have covered those checks had gone.

John admitted that his annual income was at least $32,000 but claimed poverty because of various deductions made from his pay checks. Although he claimed to have receipts and returned checks, John did not present documents in support of his contentions at the hearing or in his countermotion. He continued to assert that these matters would come to light upon the completion of discovery.[3] John failed to meet his burden by his failure to present sufficient and compelling evidence in support of his claim of poverty. Where the alleged contemnor chooses not to present evidence on his or her own behalf, the trial court is not precluded from finding that the underlying conduct is contemptuous. ***Noack***, 149 Wis.2d at 575, 439 N.W.2d at 603. The trial court found John's claim of poverty to be incredible. Its findings that John could pay child support and that his failure to do so was willful are not clearly erroneous.

We also reject John's contention that the contempt order is invalid because the trial court failed to consider the possibility of a wage assignment order instead of contempt. Section 767.305, STATS., provides that a contempt hearing may be ordered "where the wage assignment proceeding under s. 767.265 ... [is] inapplicable, impractical or unfeasible." However, the trial court is not required to hold a separate wage assignment hearing as a condition precedent to a contempt hearing. ***Schroeder v. Schroeder***, 100 Wis.2d 625, 631, 302 N.W.2d 475, 478 (1981).

[3] During a September 3, 1993 hearing, at which the trial court was considering John's ability to make a contribution to guardian ad litem fees which would be incurred to litigate John's motion regarding visitation, John admitted he earns approximately $33,500 but claimed he had no money. In his testimony he claimed not to know exact figures of expenses but explained in general his changed financial circumstances. He asserted that the details of his changed financial circumstances would be proved during discovery and come out during trial. The trial court rejected his claim of poverty as incredulous. John was on notice that his claim of poverty needed to be supported by credible evidence.

Anne asked for a wage assignment in her motion.[4] At the hearing, Anne's attorney indicated that a wage assignment would be ineffective given John's ability to frustrate the assignment. Also, John himself suggested how a wage assignment would be unworkable because after deductions for other items, he has no income left to which the wage assignment could attach. The possibility was raised and rejected by both parties. Judicial estoppel prevents John from claiming on appeal that a wage assignment should have been utilized. *See* ***State v. Michels***, 141 Wis.2d 81, 97-98, 414 N.W.2d 311, 317 (Ct. App. 1987) (a position on appeal which is inconsistent with that taken at trial is subject to judicial estoppel). This estoppel rationale is especially persuasive when a trial court performs some act because of the position taken by a party; that party should not be heard to take a different position on appeal. *See* ***id.***; ***State v. Washington***, 142 Wis.2d 630, 635, 419 N.W.2d 275, 277 (Ct. App. 1987). There was no error in not trying a wage assignment before entering a finding of contempt.

John contends that he should have been afforded a hearing on the feasibility of complying with the purge conditions before he was ordered arrested and jailed. In his reply brief, John asks that the matter be remanded to the trial court for the purpose of conducting a hearing which allows John to explain his failure to fulfill the purge conditions.[5]

"When a contemnor's liberty interests are at risk he or she must be given the opportunity to show the court that the failure to comply with the purge condition was not willful and intentional." ***State ex rel. V.J.H. v. C.A.B.***, 163 Wis.2d 833, 843, 472 N.W.2d 839, 843 (Ct. App. 1991). However, a

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[4] ***Schroeder v. Schroeder***, 100 Wis.2d 625, 631, 302 N.W.2d 475, 478 (1981), states: "[I]n signing the order to show cause for contempt, the judge should and must consider whether a separate and preliminary hearing [for a wage assignment] is applicable, practical or feasible and if the judge rules out the necessity to conduct that separate hearing, the order to show cause or resulting order should recite that determination." Because Anne's motion asked for wage assignment, we see no error in the failure of the order to show cause to recite the trial court's consideration of whether a wage assignment was feasible.

[5] We question whether the issue is properly before the court because John did not appeal from the September 2, 1994, arrest order. An appeal from one order does not embrace a subsequent order. ***Chicago & N.W. R.R. v. LIRC***, 91 Wis.2d 462, 473, 283 N.W.2d 603, 609 (Ct. App. 1979), *aff'd*, 98 Wis.2d 592, 297 N.W.2d 819 (1980).

contemnor who wishes to avoid jail is required to seek a hearing before the court and has the burden of convincing the court that the purge condition is unreasonable or his or her noncompliance is unintentional or the result of unforeseen events. ***Id.*** at 843-44, 472 N.W.2d at 843.

V.J.H. does not mandate that before an arrest order can issue the trial court must schedule an additional hearing on the contemnor's ability to fulfill the purge conditions. Upon being served with the arrest order, John was required to request a hearing. He did not a request a hearing but obtained a stay of the order. Without the request, the trial court was not obligated to afford John an additional hearing. We summarily reject John's contention, unsupported by legal authority, that the trial court was obligated to inform John of his right to seek a hearing upon entry of the arrest order.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.