COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0755

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

IN RE THE MARRIAGE OF:

SHERRY L. GREEN N/K/A SHERRY L. KISLIA,

PETITIONER-RESPONDENT,

STATE OF WISCONSIN,

RESPONDENT,

V.

JOHN E. GREEN,

RESPONDENT-APPELLANT,

KEITH OLDFIELD AND BETTY OLDFIELD,

INVOLUNTARY-RESPONDENTS.

APPEAL from an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed in part; reversed in part and cause remanded.*

VERGERONT, J.[1] John Green appeals an order committing him to the Rock County Jail for 180 days for failing to purge himself of a July 30, 1996 finding that he was in contempt for failing to pay child support.[2] The trial court found that Green had the ability to pay child support as ordered in the July 30, 1996 purge conditions and willfully failed to do so. Green argues on appeal that the trial court erroneously exercised its discretion in finding Green in contempt, either because the trial court did not find that John had the ability to pay the ordered child support or, alternatively, because the evidence does not support such a finding. We affirm in part, reverse in part for the reasons explained below, and remand for further proceedings.

BACKGROUND

John Green and Sherry Kislia (then Green) were divorced by judgment entered November 30, 1988. Custody of their minor child was awarded to Kislia. At that time, Green was working forty hours per week and making four dollars per hour. He was ordered to pay $30 per month, which represented 17% percent of his gross income for current child support, due to Kislia, and an additional $5 per month toward an arrearage due the State.

On December 13, 1990, the court held a hearing on the petition of the State and Kislia for an order finding Green in contempt of court for failure to pay the child support ordered at the time of the divorce. Green testified and was not represented by counsel. In a written order rendered on December 31, 1990, the court found that Green was $2,100 in arrears to Kislia and $1,767 in arrears to

[1] This appeal is decided by one judge pursuant to § 752.31(2)(h), STATS.

[2] The trial court stayed the order of commitment pending appeal.

the State; that Green had remarried and neither he nor his wife were employed; and that both received general relief from Rock County Department of Social Services. The court concluded in the order that it would not be appropriate to make a finding of contempt at that time. The court ordered Green to diligently seek employment by filling out a minimum of ten job applications per week; report his efforts to secure employment in writing on a weekly basis to the Rock County child enforcement support agency; notify that agency within five days of finding employment or changing employment; and, upon finding employment, pay his current child support order of $30 per week or 17% of his gross income, whichever was greater. The court reserved the question of how he was to pay the arrears for a later date.

In June 1991, the State and Kislia again petitioned the court for an order to show cause why Green should not be held in contempt. Green appeared, unrepresented, at an initial appearance on the petition, but did not appear at the hearing, held on September 27, 1991. The attorney for the State at that hearing presented a certified copy of a record of the clerk of court indicating that Green made no payment since the previous order and represented to the court that Green had submitted only two reports on his efforts to find work, both in December 1990. At the State's attorney's request, the court entered an order finding Green in contempt. In that order, the court found that Green had been properly notified of the September 27, 1991 hearing but had not appeared; there was no known reason why he had not appeared; and he had not provided any reason for failure to comply with the previous order. Green was sentenced to 180 days in jail but was permitted to purge himself of contempt by paying $30 per week or 17% of his gross income, whichever was greater. The order also directed that at any time he was unemployed he fill out a minimum of ten job applications per week and report

on these efforts in writing to the child support enforcement agency. Green was further directed to immediately notify the agency of his present place of employment or, if not employed, within five days of finding employment. This order was entered on October 4, 1991, and personally served on Green on January 7, 1992.

The State and Kislia petitioned the court on April 20, 1992, for an order to show cause why Green should not be committed to jail for failure to pay any support or make any reports under the October 4, 1991 order. Green eventually appeared before the court on November 18, 1992, represented by counsel. His attorney stated to the court that Green had told him he had not paid support because his former wife had cut off visitation. Green told the court that was his only excuse. The court ordered Green sentenced to jail for 180 days unless he purged himself by paying the arrearages. It appears from the record that he did serve this sentence.

The State and Kislia filed another petition for an order to show cause in June 1996. As a result of that petition, Green stipulated to the entry of an order finding that he was in contempt for willfully failing to pay child support as ordered, and sentencing him to 180 days in jail, but allowing him to purge the contempt by paying $30 per week in child support or 17% of his gross income, whichever is greater, and $10 on the arrearages; by diligently seeking full-time work anytime he is not employed by filling out a minimum of ten job applications per week and reporting on these efforts on a monthly basis to the agency; and by notifying the agency of any change in his employment status. This order was rendered on July 30, 1996.

The State and Kislia filed another petition for an order to show cause in July 1997 and a hearing was held on November 12, 1997. Green testified at the hearing and was represented by counsel. The State introduced evidence that from July 30, 1996 through October 30, 1997, Green paid only $91. The attorney for the State also represented that Green had not submitted any work search forms during that time period.

Green testified that he was thirty-five years old and had been employed at Panoramic for three weeks. He earned $5.50 an hour and worked forty hours a week; his gross income was about $200 or $230 per week. He had learning disabilities, which included not understanding certain words and sentences, and attention problems. He had been in special education in high school and did not graduate from high school. He was married and had a six-year-old child. He had no other income except his job, and was the sole support of his wife and their child. The longest period he had spent unemployed was two and one-half or three weeks, and the highest hourly wage he had ever earned was $7. He had worked at Janesville Products the preceding year, and, in between that job and this job he had had numerous jobs that were not paying well. He did not report those jobs to the child support agency because it was difficult to support a family and he wanted to see if he could "get [his] feet back on the ground before [he] started telling them." At the time of the hearing, he was looking for work that would pay a higher hourly wage. His wife did not work, because she did not have a high school diploma and could not find jobs that did not require one, and because she suffered from depression but did not take medication because they could not afford it. Their rent was $350 per month. He did not drink, smoke, have hobbies or own a car.

Green testified that in the two weeks since he had counsel, he had made three payments of $40 and one payment of $100. He saved up his money to make the $100 payment. He was going to continue to attempt to make the payments. If he had the ability to pay the child support, he would pay it.

On cross-examination, Green testified that he was working at Manpower when he signed the stipulation agreeing to entry of the July 30, 1996 order. He denied voluntarily quitting that job and testified that he was laid off.

After this evidence, the attorneys presented argument to the court. Green's counsel argued that the court should give Green a "trial run" now that Green had counsel, and that if Green went to jail, the Huber fees would eliminate any income he had for the support of his current family or his child with Kislia. The attorney for the State argued that Green had been given numerous chances over the past nine years and all he had paid over that entire time was a few hundred dollars.

The court made the following comments in deciding to commit Green to jail. It observed the discrepancy between the $30 per week that Green should have been paying since the July 30, 1996 order and the $91 he had paid from then to October 30, 1997, noting that $30 was less than 17% of minimum wage. The court found that Green had been working almost that entire period, but did not meet the minimum requirements of the order. The court stated that it had found Green in contempt previously for the same type of conduct but Green's conduct had not changed. The court found that Green had only started to pay regularly since he had an attorney, but the court could not keep the attorney in the case for the next five or six years to make sure Green paid. The court did not consider it relevant that Green did not have an attorney when he stipulated to the

entry of the July 30, 1996 order, because the court would have entered the same order—an amount less than 17% of minimum wage and reporting requirements—regardless of the stipulation. The court observed that, had Green paid something on a regular basis, the State would not have a good argument that Green was not trying to do the best he could, but Green had not done that.

Following the hearing, the court entered a written order committing Green to 180 days in jail and providing that he may be released upon paying $2,389 toward the arrearage. This is the order Green appeals.

DISCUSSION

Child support orders are enforceable in contempt proceedings under ch. 785. *See* § 767.305, STATS. "A person may be found in contempt if he or she refuses to abide by an order made by a competent court having personal and subject matter jurisdiction." ***State v. Rose***, 171 Wis.2d 617, 622-23, 492 N.W.2d 350, 353 (Ct. App. 1992). "The person may disagree with the order, but he or she is bound to obey it until relieved therefrom in some legally prescribed way." ***Id.*** Whether to exercise contempt powers is a discretionary decision in that a court may, but need not, hold a party in contempt when the party has refused to comply with a court order. *See* ***State v. A.W.O.***, 117 Wis.2d 120, 127, 344 N.W.2d 200, 203-04 (Ct. App. 1983).

A finding of contempt for failure to pay child support rests on the court's factual findings regarding the person's ability to pay. ***Rose***, 171 Wis.2d at 623, 492 N.W.2d at 353. "The critical findings are that the defendant is able to pay and the refusal to pay is willful and with intent to avoid payment." ***Id.*** We do not reverse a trial court's findings that a person has committed a contempt of court unless they are clearly erroneous. ***Id.*** In a civil proceeding for contempt, such as

this, the burden is on the person proceeded against to show he or she is not in contempt. ***Id.***

Under ch. 785, two types of sanctions may be imposed for contempt of court: remedial and punitive. Section 785.03(1)(a) and (b), STATS. A remedial sanction, the type we are concerned with on this appeal, is a sanction imposed for the purpose of terminating the contempt. Section 785.01(3), STATS. The remedial sanctions authorized in § 785.04(1), STATS., are the only permissible remedial sanctions. ***State ex rel. N.A. v. G.S.***, 156 Wis.2d 338, 341, 456 N.W.2d 867, 869 (Ct. App. 1990). A remedial sanction of imprisonment is permissible only if it is purgeable through compliance, ***id.*** at 342, 456 N.W.2d at 869, and the purge provisions must be within the power of the contemnor. ***Id.*** at 343, 456 N.W.2d at 869. Whether an act is within the contemnor's power is a finding of fact that we do not disturb unless it is clearly erroneous. ***Id.***

Green argues that there has never been a finding that he has the ability to pay $30 per week plus $10 in arrearages. He points out that when the judgment of divorce was entered, the trial court ordered only $5 on the arrearages, rather than the $10 requested by the State's attorney, stating that Green "can hardly get by"; and that the court, in its December 31, 1990 order, concluded that it would not be appropriate to find Green in contempt at that time. Green then observes that the finding of contempt of October 4, 1991, was by default, and that the finding of contempt in the July 30, 1996 order was based on a stipulation that Green signed when he was not represented. In the alternative, Green argues the evidence presented at the November 12, 1997 hearing does not support a finding that Green had the ability to pay the purge conditions of the July 30, 1996 order or the sum of $2,389.

Since the July 30, 1996 order is the one that found Green in contempt and set the purge conditions at issue on this appeal, we begin our analysis with that order, rather than earlier orders. Green signed a stipulation to the entry of that order, and the stipulation stated that he "could have paid more towards his child support obligation [under the December 31, 1990 order] than he in fact paid and willfully failed to do so." Based on this stipulation, the order provided that "John E. Green is in contempt of court for willfully failing to pay child support as ordered." We conclude that this order did contain the requisite finding that Green had the ability to pay the support ordered in the December 31, 1990 order—the greater of $30 per week or 17% of his gross income. Green has provided no authority for the proposition that a court must hold a hearing and make its own findings when the person proceeded against enters into a stipulation such as Green did, or that the person must personally appear before the court when entering into such a stipulation. Indeed, we have held that a court may find a person in contempt of a court order in the person's absence if the person does not appear at a hearing after the person has been notified of the hearing and that the issue is whether to hold the person in contempt for refusal to comply with a court order. ***Noack v. Noack***, 149 Wis.2d 567, 575-76, 439 N.W.2d 600, 603 (Ct. App. 1989).

Similarly, Green agreed by stipulation to the purge conditions in the July 30, 1996 order—payment of the greater of $30 per week or 17% of his gross income and $10 per week on the arrearages, and the work search and reporting requirements. Green emphasizes that he was unrepresented at the time. If he means that he did not understand what he was agreeing to, his remedy was to seek

a vacation or modification of that order, but he has not done so.[3] Therefore, the question properly before the court at the November 12, 1997 hearing was whether Green had willfully failed to meet the purge conditions of the July 30, 1996 order.

The trial court found in its written order after the November 12, 1997 hearing that Green had the ability to pay the child support ordered in the July 30, 1996 purge conditions and willfully failed to do so; and that he had the ability to report his efforts to secure employment and to report where he was employed and any change in employment, and willfully failed to do so. We do not agree with Green that this does not constitute the requisite findings, and we therefore examine the evidence to determine if these findings are clearly erroneous.

Green did not offer an explanation for not reporting that he was laid off from Manpower and not reporting his subsequent efforts to find employment. His explanation for not reporting the jobs he did have was that he wanted to get on his feet first. The trial court's findings that he had the ability to meet the reporting requirements and willfully failed to do so is not clearly erroneous.

We reach the same conclusion with respect to the trial court's finding that Green had the ability to pay the amount ordered as purge conditions in the July 30, 1996 order and willfully refused to do so. The evidence that Green was regularly making payments since he had a lawyer, that he had been unemployed only two and one-half weeks, and that he was presently earning $5.50

[3] If Green's contention is that his support obligation should be modified because of a substantial change in circumstance since the divorce judgment, he must bring a motion to modify his support obligation under the divorce judgment. *See* ***State v. Rose***, 171 Wis.2d 617, 625 492 N.W.2d 350, 354 (Ct. App. 1992).

for forty hours a week support a finding that he could have made the payments. In addition, as the court observed, the fact that he failed to make regular payments in smaller amounts is evidence that he was not trying his best to comply with the purge conditions, and supports the conclusion that his failure to pay was willful. *See* ***Rose***, 171 Wis.2d at 620-21, 624, 492 N.W.2d at 352, 353.

Since the requisite findings are not clearly erroneous, we conclude that the trial court did not erroneously exercise its discretion in exercising its contempt powers by sentencing Green to jail. We affirm discretionary determinations when the trial court considers the facts of record, applies the correct law, and reaches a reasonable result through a rational process. *See* ***Rodak v. Rodak***, 150 Wis.2d 624, 631, 442 N.W.2d 489, 492 (Ct. App. 1989). The court's explanation of its decision that jail sentence was necessary took into account the facts of record, applied the correct law, was rational, and the conclusion was reasonable.

We also understand Green to argue that the purge conditions ordered after the November 12, 1997 hearing—payment of $2,389 toward the arrearage—is not permissible because the court made no finding, and the record does not support a finding, that Green can pay this amount. The written order explains that this amount is the difference between what he actually paid since the July 30, 1996 order and what he was ordered to pay as a purge condition. However, neither the written order nor the court's comments in its decision from the bench contain a finding that Green has the present ability to pay this amount. We have searched the record of the November 12, 1997 hearing to determine whether the evidence could support such a finding had the court made it. *See* ***Moonen v. Moonen***, 39 Wis.2d 640, 646, 159 N.W.2d 720, 723 (1968) (we may affirm if the evidence shows the trial court reached a result which the evidence would sustain if a

specific finding had been made). However, we are unable to conclude that the record does support such a finding.

We understand that the court may have considered that since it found that Green could have paid the weekly support under the purge conditions of the July 30, 1996 order, a purge condition of this total amount was proper after the November 12, 1997 hearing. However, we conclude that even when the jail sanction is the result of a finding of a willful failure to comply with purge conditions, as long as the proceeding remains one of civil contempt, the contemner must be able to purge the sanction either through compliance with the original court order or with alternative conditions. *See* ***Diane K.J. v. James L.J.***, 196 Wis.2d 964, 969, 539 N.W.2d 703, 705 (Ct. App. 1995). If Green does not have the ability to pay $2,389 to avoid jail, and the record does not support a finding that he does, then the sanction of jail time is a punitive one rather than a remedial one. *See* ***N.A. v. G.S.***, 156 Wis.2d at 342, 456 N.W.2d at 869. A punitive sanction may be imposed only in a proceeding brought pursuant to § 785.03(1)(b), STATS. *See* ***Diane K.J.***, 196 Wis.2d at 970, 539 N.W.2d at 705.

In summary, we conclude the record supports the trial court's findings that Green had the ability to comply with the July 30, 1996 purge conditions and willfully failed to do so, and the decision to exercise the court's powers of contempt by sentencing Green to jail for six months was a proper one. We therefore affirm the first paragraph of the court's order signed on November 19, 1997. However, we also conclude the record does not support a finding that Green has the present ability to purge the sanction of jail by paying $2,389. We therefore reverse the second paragraph of that order and remand for a determination of purge conditions that are presently within Green's ability to fulfill.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.