COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-1947

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

IN RE THE FINDING OF CONTEMPT IN RE THE MARRIAGE OF CHRISTINA M. GOERLITZ N/K/A CHRISTINA M. JACOBSON V. JAMES A. GOERLITZ:

STATE OF WISCONSIN,

APPELLANT,

V.

CHRISTINA M. GOERLITZ N/K/A CHRISTINA M. JACOBSON,

RESPONDENT.

APPEAL from an order of the circuit court for Grant County: ROBERT P. VAN DE HEY, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] The State of Wisconsin appeals the decision and order of the trial court dismissing the State's order to show cause why Christina

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (1997-98).

M. Jacobson (formerly Goerlitz) should not be found in contempt for failure to comply with an order of the court relating to child support. The State contends the trial court erred in concluding that Jacobson could not be held in contempt for failure to pay child support because she was unemployed, and the court order required that she pay a percentage of her income in child support and contained no minimum payment. The State also contends the trial court erroneously exercised its discretion in concluding that Jacobson's conduct in voluntarily terminating her employment was not contemptuous of the court order. We conclude the trial court correctly applied the law and did not erroneously exercise its discretion. We therefore affirm.

BACKGROUND

¶2 Christina Jacobson and James Goerlitz were divorced on November 13, 1995. Two minor children were born to them during the marriage. With respect to child support, the divorce judgment provided that Jacobson "shall pay 25% of her gross income toward the support of the children. Such child support payments shall be paid by wage assignment until further order of the Court." Jacobson was also ordered to "notify the clerk of court and James within 10 days of any change of employer and of any substantial change in the amount of her income such that her ability to pay child support is affected."

¶3 On January 14, 1999, the State filed an order to show cause why Jacobson should not be held in contempt, alleging that she had failed to make child support payments since September 28, 1998. At the hearing held on the motion on April 23, 1999, the State presented evidence showing that Jacobson's last child support payment was made on September 28, 1998. Jacobson testified that she had been employed at Monona Wire but quit her job there because she

and her current husband were having domestic problems and she decided to move to California where her mother lived. She was in California just under four weeks, staying with her mother, and then she returned to her home in Wisconsin. She had a job interview in California the week she left to come home. One week after she returned to Wisconsin, she applied for work at Monona Wire, but it was not hiring. She testified as to four other employers she had applied to without success. She and her husband have only one vehicle that works, and her husband takes that out of town to work, so she has to find a job within walking distance. The other vehicle they own is not working and they cannot afford to get it fixed. She has been looking for jobs in the paper.

¶4 The trial court concluded that Jacobson's act of quitting her employment with Monona Wire was not contempt of a court order, because the order did not order a minimum level of support and did not order that she not terminate her employment. The court also determined that her reason for terminating her employment with Monona Wire was reasonable and not part of a plan to avoid paying support.

DISCUSSION

¶5 A trial court may hold someone in contempt if he or she intentionally refuses to comply with a court order. ***State v. A.W.O.***, 117 Wis. 2d 120, 126, 344 N.W.2d 200 (1983). We review a trial court's use of the contempt power for an erroneous exercise of discretion. ***Krieman v. Goldberg***, 214 Wis. 2d 163, 169, 571 N.W.2d 425 (Ct. App. 1997). We affirm discretionary determinations if the trial court applied the correct law to the facts of record and reached a reasonable decision. ***State v. Keith***, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997). We review de novo any questions of law a trial court must

decide in the exercise of its contempt powers. ***City of Wis. Dells v. Dells Fireworks, Inc.***, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995).

¶6 The child support order in this case did not order Jacobson to maintain employment or to pay a minimum amount in child support but ordered her only to pay 25 percent of her gross income for child support. The State's position is apparently that from this one can infer an obligation to maintain employment. However, the State does not provide any authority for this proposition. Instead the State relies on cases which either concern criminal actions for non-support, *see, e.g.,* ***State v. Duprey***, 149 Wis. 2d 655, 439 N.W.2d 837 (Ct. App. 1989); cases finding civil contempt where there was an order to pay a specified amount; *see, e.g.,* ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 496 N.W.2d 660 (Ct. App. 1992); ***Haeuser v. Haeuser***, 200 Wis. 2d 750, 548 N.W.2d 535 (Ct. App. 1996); and cases setting child support based on earning capacity rather than actual earnings. *See, e.g.,* ***Sellers v. Sellers***, 201 Wis.2d 578, 549 N.W.2d 481 (1996). None of these cases or the reasoning in these cases supports a finding of civil contempt for voluntarily terminating employment where the support order is a percentage order.

¶7 In ***State v. Duprey***, 149 Wis. 2d at 659, we held that because the State established Duprey was the father of the children and did not pay any child support for two years, there was a prima facie case of criminal failure to pay child support. The fact that he had a percentage order and was unemployed for parts of the two years did not affect his obligation to pay. However, as Jacobson points out in her brief, a person may be charged criminally for a failure to support a child even though there is no court order requiring support. *See* WIS. STAT.

§ 948.22(4)(b) (1997-98).[2] Therefore, although a person who is under a percentage child support order and has no income because he or she voluntarily terminated employment could be prosecuted for criminal non-support,[3] it does not follow that a finding of civil contempt is proper in those same circumstances. A finding of civil contempt necessarily depends on the precise terms of the court order.

¶8 Cases such as ***Van Offeren***, 173 Wis. 2d at 496,—which find a person in contempt for voluntarily and unreasonably terminating employment with the result that the person no longer pays the dollar amount of support ordered—also do not apply in the circumstances of this case. Here, there is no specific amount ordered.

¶9 Finally, ***Sellers***, 201 Wis. 2d at 583, does not address contempt of a court order, but instead is concerned with establishing a support obligation or modifying it.[4] Therefore, the court's approval in ***Sellers*** of considering earning capacity rather than actual earnings does not support a finding of contempt in this case.[5]

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[2] All references to the Wisconsin Statutes are to the 1997-98 version.

[3] As Jacobson points out, the inability to pay is an affirmative defense in a prosecution for criminal non-support. *See* WIS. STAT. § 948.22(6); ***State v. Schleusner***, 154 Wis. 2d 821, 454 N.W.2d 51 (Ct. App. 1990).

[4] *See also* ***Knutson v. Knutson***, 15 Wis. 2d 115, 117-18, 111 N.W.2d 905 (1961).

[5] Three other cases on which the State relies also concern the setting of support, not a determination of contempt. ***State v. T.J.W.***, 143 Wis. 2d 849, 852, 422 N.W.2d 890 (Ct. App. 1988); ***Wallen v. Wallen***, 139 Wis. 2d 217, 220, 407 N.W.2d 293 (Ct. App. 1987); ***Smith v. Smith***, 177 Wis. 2d 128, 130, 501 N.W.2d 850 (Ct. App. 1993).

¶10 We do not agree with the State that if we affirm the trial court, the State has no means to insure that obligors under percentage orders do not completely avoid paying child support by voluntarily terminating their employment. When a percentage child support order is established, it is in circumstances in which the obligor is employed. If the obligor becomes unemployed for any reason, that is a substantial change in circumstance, which provides a ground for the trial court, upon motion, to consider modifying the order. *See* ***Carpenter v. Mumaw***, 230 Wis. 2d 384, 393, 602 N.W.2d 536 (Ct. App. 1999). In deciding how and whether to modify a percentage order in such a situation, the trial court may take into account the circumstances of the termination of employment, whether the termination is reasonable or not, the obligor's earning capacity, efforts to find other work, and any other relevant factors. The court may establish a minimum monthly amount based on earning capacity rather than actual earnings, if it decides that to be a proper exercise of its discretion. This is the proper procedure for a State or payee to follow when a child support order contains only a percentage payment and the State or payee believes the obligor has voluntarily and unreasonably reduced income or terminated employment, or is not diligently seeking employment.

¶11 We conclude the trial court correctly determined that Jacobson did not violate the court order by voluntarily terminating her employment. It is therefore unnecessary to decide whether the trial court erred in determining that Jacobson's decision to leave her job at Monona Wire because she wanted to move to California was a reasonable one, and we do not address this issue.

By the Court.—Order affirmed.

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