

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 18, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2005AP2195**

**Cir. Ct. No. 2002FA65**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN THE MATTER OF THE FINDING OF CONTEMPT IN MARY J. ZINNECKER V.  
GARY R. SARVER:**

**ASHLAND COUNTY CHILD SUPPORT AGENCY,**

**PETITIONER-RESPONDENT,**

**v.**

**GARY R. SARVER,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Ashland County:  
JOHN P. ANDERSON, Judge. *Reversed.*

¶1 PETERSON, J.<sup>1</sup> Gary Sarver appeals an order finding him in contempt for failure to pay child support. He contends that the court failed to make the required finding that he had the ability to pay and, alternatively, that such a finding was erroneous. He also claims the court's finding that he intentionally failed to pay was erroneous. We agree that the court's findings were clearly erroneous and reverse the order.

### FACTS

¶2 By an order filed on October 30, 2002, Sarver was ordered to pay \$185 per month in child support. On December 10, 2004, the circuit court issued an order for Sarver to show cause for his failure to make the payments.

¶3 A contempt hearing was held on March 17, 2005, by which time Sarver was \$4,362 in arrears. Sarver testified that he collected unemployment benefits during twenty-six weeks of the previous year and currently held two part-time jobs totaling between fourteen and thirty hours per week. He testified that he applied for two to five jobs per week while unemployed, as required by a Minnesota court order, and continued to send applications that were promising after finding employment.<sup>2</sup> Sarver's federal gross income for 2004 was \$6,131. Sarver testified that he is liable for \$526.18 per month for child support in Minnesota and owes substantial arrears there.<sup>3</sup> Jennifer Osmak, an Ashland

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

<sup>2</sup> Sarver stated that Minnesota required him to apply for two jobs per week while collecting unemployment benefits and five per week afterwards until he found work.

<sup>3</sup> Sarver owed arrears for child support in Minnesota totaling between \$40,000 and \$50,000.

County child support specialist, testified that Sarver was making partial payments, but had not made the full payment at any time in the last year.

¶4 The circuit court made the following findings, which are the focus of Sarver's appeal:

Well, the issue here isn't modifying the order; and while there is some case law out there that talks about the ability to comply with an order and a factor to consider in contempt, I'm not satisfied that the evidence before me is such that I can find there is no ability to comply with the order. I can find there is not enough income right now, at least on paper; but for me to find that the actual ability to comply with the order is not possible, we'd have to have testimony or evidence that we don't have today.

So while I sympathize with Mr. Sarver, because I don't think it's realistic that right now he's going to be able to make these payments, I can't ignore the size of the file here either. This issue has been going on for a while.

So I am satisfied that the default on the current order is intentional; and, therefore, I'm going to find Mr. Sarver in contempt.

As a remedial sanction, the court ordered Sarver to spend six months in jail, which he could purge by paying \$185 per month, plus \$50 each month for arrears until those arrears are paid off.

## DISCUSSION

¶5 A person may be held in contempt of court for failing to make payments required by a court order or judgment, but only where the court makes two essential findings. *O'Conner v. O'Conner*, 48 Wis. 2d 535, 543, 180 N.W.2d 735 (1970). The court must find that the person has the ability to pay and that the failure to pay is intentional. *Id.* at 542-43. Further, where a remedial sanction is ordered, the ability to satisfy the purge conditions must be within the individual

power of the contemnor. *Krieman v. Goldberg*, 214 Wis. 2d 163, 169, 571 N.W.2d 425 (Ct. App. 1997) (citing *State ex rel. N.A. v. G.S.*, 156 Wis. 2d 338, 343, 456 N.W.2d 867 (Ct. App. 1990)). The burden of proof in a remedial, or civil, contempt proceeding is upon the person against whom contempt is sought. *State v. Rose*, 171 Wis. 2d 617, 623, 492 N.W.2d 350 (Ct. App. 1992).

¶6 A finding of contempt will only be reversed if clearly erroneous. *Id.* A court's factual findings are clearly erroneous where unsupported by any credible evidence. *Insurance Co. of N. Am. v. DEC Int'l, Inc.*, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998). Determinations of credibility are left to the trial court. *Id.*

¶7 Sarver first claims that the court failed to make the required finding that he was able to make his court-ordered payments. In response, the County argues that the court made such a finding, though phrased it with a double negative, when it stated, "I'm not satisfied that the evidence before me is such that I can find there is no ability to comply with the order."

¶8 Unlike Sarver, we are not troubled by the court's language because it merely reflects the burden of proof. Sarver had the burden of proving that he was unable to make his payments, and the court found that he had not met this burden. Were we to find the above language inadequate, we would effectively be shifting the burden of proof. Thus, we reject Sarver's argument that the court failed to find that he had an ability to pay.

¶9 We next address whether the court's findings were clearly erroneous. The child support payment of \$185 per month was based upon the earnings of someone working full-time and earning minimum wage. Neither party indicates that Sarver worked full-time during any timeframe after the issuance of

the order. Sarver was unemployed for at least twenty-six weeks of the year prior to the contempt hearing, and during that time, he applied for two to five jobs per week. He was not able to find full-time work, but found two part-time jobs. One job was at a restaurant called Happy Jo's, where he worked ten to twenty hours per week. The other was at Pizza Hut, where he worked four to ten hours per week. Sarver testified that Minnesota takes \$130 from his Happy Jo's paycheck and it takes all of his Pizza Hut paycheck. Overall, Sarver estimated that Minnesota takes sixty-five percent of his income. He testified that Minnesota has rejected his requests to reduce his child support on three or four occasions and that he is unable to afford a court challenge there. Sarver notified both the Minnesota and Ashland County child support agencies before beginning both of his current jobs. After finding part-time work, Sarver continued to send applications that he thought were promising.

¶10 Sarver's 2004 federal tax return reveals that he collected \$2,702 from unemployment and earned \$3,429 during the balance of the year. Sarver stated that he has two back injuries that prevent him from doing repetitious work, such as factory work. Sarver was thirty-eight years old at the time of the hearing and has no vocational training, though he attended two and a half years of college, considering becoming a teacher.

¶11 At the contempt hearing, the County focused upon proving that Sarver had not made his payments, a proposition that was not contested by Sarver. However, the County presented no countervailing evidence regarding Sarver's ability to pay or whether his failure to pay was intentional, and the court, for its part, did not find that Sarver's testimony lacked credibility.

¶12 The court's findings suggest that Sarver failed to present sufficient evidence to prove that he was actually unable to comply with the order, but the court did not specify what type of evidence was missing. However, the court did state, "I can find that there is not enough income right now, at least on paper ...." This statement implies that the court's ultimate finding is premised not on Sarver's ability to make the payments based on his income at the time, but instead upon his failure to prove that he was unable to obtain full-time work. Here Sarver testified that he sought full-time work, and that statement was not found to lack credibility. Where no contradictory evidence was offered and Sarver's testimony was not found to lack credibility, the court's finding that Sarver had the ability to pay was clearly erroneous.

¶13 The same analysis and result apply to the court's finding that Sarver's failure to pay was intentional. Sarver testified that he made small payments and that he notified the County of his employment. He testified that he sought work and that his failure to pay was not with the intent to avoid payment. Because this statement was not contradicted and Sarver's statements were not found to lack credibility, the court's finding that Sarver's failure to pay was with the intent to avoid payment was clearly erroneous.

¶14 We finally note that, aside from the required factual findings, the remedial sanction ordered was defective. Compliance with the purge condition of \$185 per month plus \$50 for arrears must be within Sarver's individual power. The court acknowledged the contrary here, stating, "I don't think it's realistic that right now he's going to be able to make these payments ...." Even supposing that the court expected Sarver to obtain full-time work to make the payments, such a requirement may not be the basis for imposing sanctions because it requires the

action of a third party, a potential employer, who is not within Sarver's control. *See State ex rel. N.A.*, 156 Wis. 2d at 343.

*By the Court.*—Order reversed.

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

