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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-851

Filed: 21 July 2020

Mecklenburg County, No. 14 CVD 3550

AUDRA LYNN TOUSSAINT, Plaintiff,

v.

KENTON NOLAN KING, Defendant.

Appeal by defendant from order entered 11 March 2019 by Judge Kimberly Best in Mecklenburg County District Court. Heard in the Court of Appeals 18 March 2020.

*No brief filed for plaintiff-appellee.*

*Richard Croutharmel for defendant-appellant.*

ZACHARY, Judge.

Defendant-Father Kenton Nolan King appeals from an order holding him in civil contempt and ordering his incarceration for 30 days, or until he purged himself of his contempt. After careful review, we affirm in part, and remand for additional findings of fact.

***Background***

TOUSSAINT V. KING

*Opinion of the Court*

Father and Plaintiff-Mother Audra Lynn Toussaint are the parents of a minor child born in February 2012. Numerous orders have been entered over the years regarding custody and child support. As relevant to the issue at hand, on 19 March 2014, the trial court entered a child-custody consent order, which awarded Mother primary physical custody of the parties' minor child, and granted visitation privileges to Father. On 30 August 2016, the trial court ordered that Father, beginning 1 August 2016, pay Mother the sum of \$709.00 per month "as permanent regular ongoing child support[.]" together with the sum of \$50.00 per month toward his child-support arrearage (the "Child Support Order").

Father moved to modify his child-support obligation on 3 October 2016, 19 September 2017, and 30 October 2018. By orders entered on 7 February 2017 (the "Second Rule 12 Order"), 15 November 2017 (the "Rule 12 Order"), and 31 January 2019, the trial court dismissed Father's motions.<sup>1</sup> In both Rule 12 orders, the trial court imposed sanctions against Father for filing motions that were "frivolous and baseless and upon which relief cannot be granted pursuant to Rule 12[.]" The Rule 12 Order directed Father to pay Mother's "reasonable attorney's fees in the amount of \$937.50 to be paid at a rate of \$234.37 per month beginning March 1, 2017[.]" The Second Rule 12 Order directed Father to pay Mother's "attorney's fees in the amount

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<sup>1</sup> We adopt the designations used by the trial court in the order from which Father appeals, in which the Second Rule 12 Order was entered before the Rule 12 Order.

TOUSSAINT V. KING

*Opinion of the Court*

of \$987.50 at a rate of \$100.00 per month beginning December 1, 2017[.]” Father did not appeal any of the trial court’s orders.

Thereafter, on 5 September 2018, Mother moved to have Father held in contempt for his failure to comply with the payment provisions of the Child Support Order, Rule 12 Order, and Second Rule 12 Order. Mother alleged that, despite his ability to do so, Father failed to comply with the Child Support Order in that he had “not made complete or timely child support payments . . . on any regular or ongoing basis since the entry of the Child Support Order”; failed to comply with the Rule 12 Order in that he had “only made one payment on January 3, 2018, in the amount of \$200.00[.]” and was “behind in his attorney’s fees obligation in the amount of \$737.50”; and failed to comply with the Second Rule 12 Order in that he had “made payments that total \$938.00[.]” and was “behind in his obligation by \$49.50.” On 25 September 2018, the trial court entered an amended order for Father to appear and show cause why he should not be held in contempt of court for failure to abide by the court’s orders in this matter.

On 30 October 2018, Father filed another motion to modify his child support obligation.

On 20 November 2018, Mother’s motion to modify the 2014 child custody order came on for hearing. Mother and her attorney were present; Father was not present, and had no attorney of record.

TOUSSAINT V. KING

*Opinion of the Court*

On 14 January 2019, the trial court entered an order finding that there had been a substantial change in circumstances affecting the child since the entry of the prior custody order in that, *inter alia*, Father’s “violent and erratic behavior ha[d] escalated”; Father’s own mother had obtained a domestic violence protective order against Father; Father abused drugs and alcohol, and likely suffered from mental illness; Father had no stable housing; and the child returned from visits with Father with unexplained injuries. The trial court granted Mother sole legal and physical custody of the minor child, together with “an award of attorney’s fees in the amount of \$5,750.00[.]” and did not grant Father any unsupervised visitation with the child. Father was directed to pay Mother’s counsel “\$1,916.67 per month for three (3) consecutive months beginning on December 15, 2018, and continuing on January 15, 2019, and February 15, 2019, until . . . paid in full.”

The show cause order for contempt was heard and resolved shortly before the order granting Mother sole custody. The trial court’s 25 September 2018 amended order to show cause came on for hearing on 14 November 2018. Mother, her counsel, and Father appeared, and Father requested court-appointed counsel. The trial court acceded to Father’s request, and continued the contempt hearing until 11 January 2019. In the meantime, Mother attempted to conduct discovery. In his responses to discovery requests, Father refused to provide evidence of his income or any of his personal bank statements, but he did produce his 2017 tax return; the Articles of

Incorporation for Father's new CBD oil business, Mother Earth Therapies, Inc.; the lease agreement for Mother Earth Therapies, Inc.; a single bank statement for Mother Earth Therapies, Inc.; and his judgment of divorce from his previous wife, Terry King.

At the contempt hearing, on 11 January 2019, Father failed to appear, but his attorney appeared on his behalf. Mother and the parties' son testified, and numerous exhibits were introduced, including some of Father's bank statements. On 11 March 2019, the trial court entered an order holding Father in civil contempt, and committing him to the custody of the Mecklenburg County Sheriff, to be released after 30 days, or after purging himself of his contempt by paying the sum of \$3,500.00 toward his child-support arrears.

Father timely filed written notice of appeal.

### ***Discussion***

On appeal, Father argues that the trial court erred by (i) holding him in civil contempt because "the competent evidence failed to support the trial court's finding that [he] had the ability to comply with the Child Support Order from August 2016 through September 2018"; and (ii) "failing to find that [he] had the present ability to comply with the purge condition of paying \$3,500 to get out of jail before the next court date."

#### ***I. Standard of Review***

In a civil contempt proceeding, appellate review “is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.” *Tigani v. Tigani*, 256 N.C. App. 154, 156, 805 S.E.2d 546, 548-49 (2017) (citation and internal quotation marks omitted). “Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment.” *Id.* at 156, 805 S.E.2d at 549 (citation omitted).

## *II. Civil Contempt: Legal Principles*

“The purpose of a proceeding for civil contempt is not to punish, but to coerce the defendant to comply with the order.” *Id.* (citation omitted). A party’s failure to comply with a court order constitutes continuing civil contempt as long as:

- (1) The order remains in force;
- (2) The purpose of the order may still be served by compliance with the order;
- (2a) The noncompliance by the person to whom the order is directed is willful; and
- (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2019).

Subject to certain limitations, “[a] person who is found in civil contempt may be imprisoned as long as the civil contempt continues[.]” *Id.* § 5A-21(b). However, “a defendant in a civil contempt action should not be fined or incarcerated for failing to comply with a court order without a determination by the trial court that the defendant is presently capable of complying[.]” *McBride v. McBride*, 334 N.C. 124, 130, 431 S.E.2d 14, 18 (1993) (citation omitted). Consequently, to find a party in civil contempt,

the [trial] court must find that the party acted willfully in failing to comply with the order at issue. Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so. Therefore, in order to address the requirement of willfulness, the trial court must make findings as to the ability of the contemnor to comply with the court order during the period when in default. Second, once the trial court has found that the party had the means to comply with the prior order and deliberately refused to do so, the court may commit such party to jail.

*Tigani*, 256 N.C. App. at 157, 805 S.E.2d at 549 (citations and internal quotation marks omitted).

It is well established that a defendant “need not have the ability to pay his entire support obligation to be held in civil contempt for failure to pay.” *Cty. of Durham ex rel. Wilson v. Burnette*, 262 N.C. App. 17, 23, 821 S.E.2d 840, 847 (2018), *aff’d per curiam*, 372 N.C. 64, 824 S.E.2d 397 (2019). “If he had the ability to pay some

of his obligation, but he paid none, or less than he could have paid, he may still be held in contempt.” *Id.*

“When determining ability to pay, the trial court must look at two periods of time: (1) the period of time [during which] the party did not pay [the court-ordered obligation]; and (2) the date of the hearing, i.e., the present ability to comply.” *Cumberland Cty. ex rel. Mitchell v. Manning*, 262 N.C. App. 383, 389, 822 S.E.2d 305, 309 (2018) (citations and italics omitted). “For these findings, there are several points of argument for an appealing contemnor—the lack of a finding on these issues, the wording of the finding, and whether the finding is supported by competent evidence.” *Id.* (emphases omitted).

Finally, “the order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt.” *Id.* at 390, 822 S.E.2d at 309. However, the findings of fact must reflect the trial court’s determination that the obligor has the *present ability* to comply with the purge conditions. *See Cty. of Durham ex rel. Wilson*, 262 N.C. App. at 37, 821 S.E.2d at 855 (noting that “the evidence presented d[id] not support a finding that [the] defendant had the ability to pay the purge payments ordered by the trial court”). “This finding must also be supported by competent evidence in the record.” *Cumberland Cty. ex rel. Mitchell*, 262 N.C. App. at 390, 822 S.E.2d at 309 (citation omitted).

Proceedings for civil contempt may be initiated “by the order of a judicial official directing the alleged contemnor to appear . . . and show cause why he should not be held in civil contempt,” or “by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears . . . and shows cause why he should not be held in contempt.” N.C. Gen. Stat. § 5A-23(a). “Under either of these circumstances, the alleged contemnor has the burden of proof.” *Tigani*, 256 N.C. App. at 158, 805 S.E.2d at 549. Such a proceeding may also “be initiated by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt.” N.C. Gen. Stat. § 5A-23(a1). Under this approach, “the burden of proof is on the aggrieved party, because there has not been a judicial finding of probable cause.” *Cumberland Cty. ex rel. Mitchell*, 262 N.C. App. at 388, 822 S.E.2d at 308 (citations omitted).

### *III. Analysis*

In the instant case, the trial court made the following relevant findings of fact:

27. The [c]ourt finds by clear, cogent, and overwhelmingly convincing evidence that Father *has had, and still has, the ability to comply or to take reasonable measures to comply* with the Child Support Order, the Rule 12 Order, and the Second Rule 12 Order, the following:

a. Father’s son testified, and the [c]ourt finds, that Father and his ex-wife, Terry King, sold their former marital residence in or around the beginning of October, 2018, and that in distributing the proceeds from the sale of the residence, Father received, after taxes, liens and the like were removed, approximately \$15,000.00.

A deposit into Father's Fifth Third Bank account confirm[s] the deposit of \$15,000.00 into Father's bank account on October 19, 2018. There were subsequent deposits into Father's account from Ethan Mayes and Emily Mayes, the purchasers of Father's former residence, for "DD 8303 Popular Road". This check was made out to Terry King and Father, both Terry King and Father endorsed the back of the check and [the] same was deposited into Father's bank account on September 19, 2018. Other checks associated with the sale of the residence were made out to Terry King and Father and they too were endorsed by both parties and deposited into Father's bank account, totaling not less than \$2,701.00 over the course of approximately two (2) months. On Father's 2017 Federal and State Income Tax Return, Father claimed the mortgage interest deduction associated with the residence that was sold in 2018. Father represented to the [c]ourt at the first setting<sup>2</sup> for Mother's Motion for Contempt that the money in Father's bank account associated with the sale of [the] residence was not his money and, instead, belonged to Terry King. The [c]ourt does not find that assertion credible under the circumstances given how the money was deposited into Father's account and his spending in the months immediately following the deposit of said money.

b. In Father's Fifth Third Bank statements from June 21, 2018, through November 19, 2018, there were a plethora of charges to the ABC Board for the purchase of alcohol, debits reflecting that Father was frequently eating meals out (Mingfu Sushi, Brazwell's Premium Pub, Starbucks, Moe's, Deep Sea Seafood, Salt Life Food, Chick-Fil-A, Bojangles, Liberty on the Lake, the Roasting Company), and going out to the movies and enjoying aquatics. Father's son, Carson King, testified, and the [c]ourt finds, that Father went out to eat often and Carson saw his Father consuming alcohol and

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<sup>2</sup> We do not have a transcript of the parties' appearance in court on 14 November 2018.

under the influence of alcohol on numerous occasions.

c. Father's son testified, and the [c]ourt finds, that Father purchased a paddle board for \$660.51 on October 29, 2018, and Father subsequently posted about the paddleboard on Facebook.

d. Father's son testified, and the [c]ourt finds, that Father paid to Carson \$4,000.00 in October and November of 2018, shortly after \$15,000.00 was deposited into Father's Fifth Third Bank account.

e. On October 4, 2018, Father filed his Articles of Incorporation for Mother Earth Therapies, Inc. with the North Carolina Secretary of State and paid any and all fees associated with the same. Carson testified, and the [c]ourt finds, that Father intends to, or has already, opened a CBD Oil store in Monroe, North Carolina. Shortly after \$15,000.00 was deposited in Father's bank account, he told Carson about his purchase of CBD oil for inventory for his store. Father also provided a lease between Father[,] Mother Earth Therapies, Inc., and S&P Investments providing for the rental of a [storefront] in Monroe, North Carolina, for a period of two (2) years. The monthly rent on the store space is \$1,375.00. On or about December 1, 2018, Father opened a Mother Earth Therapies, Inc., Fifth Third Bank account and deposited \$10,000.00 into that account. There is at least one (1) payment from that account in the amount of \$1,375.00.

f. In the four (4) months preceding this hearing, Father received multiple checks from Barbara E. Perreault totaling no less than \$500.00. On November 10, 2018, Father wrote a check to Ms. Perreault for \$500 and on October 23, 2018, mere days after the \$15,000.00 was deposited into Father's bank account, Father wrote a check to Ms. Perrault [sic] for \$1,000.00.

g. Father has made regular contributions to "Elevation"

in the amount of \$20.00 since at least October, 2018.

h. Father wrote a check to Lee Goff for \$200.00 on October 5, 2018, for the “deposit on Sequoia.”

i. As of December 31, 2018, approximately seven (7) days before Father was incarcerated after being arrested for his second (2<sup>nd</sup>) DUI in one (1) year, there was still \$4,527.00 in the Mother Earth Therapies, Inc. [Fifth] Third Bank Account.

(Emphasis added).

The trial court also found, *inter alia*, that despite his ability to comply with the Rule 12 Order, “Father ha[d] failed and refused to follow the [c]ourt’s Order in that” he had “only made one payment on January 3, 2018, in the amount of \$200.00[,]” and “was behind in his attorney’s fees obligation in the amount of \$737.50”; and that despite his ability to comply with the Second Rule 12 Order, “Father ha[d] made payments that total \$938.00[,]” and “[wa]s behind in his obligation by \$49.50.”

Regarding his child-support obligation, the trial court made specific findings that Father had “not made complete or timely child support payments to Mother on any regular or ongoing basis since the entry of the Child Support Order[,]” and that “[a]t the time of the filing of Mother’s Motion for Contempt, Father owed Mother \$7,725.00 in overdue regular ongoing child support.”<sup>3</sup>

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<sup>3</sup> Father notes that the trial court’s finding should reflect that he owed Mother \$7,735.00—rather than \$7,725.00—in child-support arrears at the time Mother filed her Motion for contempt.

Based upon its findings of fact, the trial court made the following relevant conclusions of law:

2. The Child Support Order, the Rule 12 Order, and the Second Rule 12 Order referred to herein are *valid and continue to be in force and effect*.

3. *At all times pertinent herein, Father has been able to comply with the [c]ourt's Orders or take reasonable measures which would enable him to comply. Despite his ability to comply, Father willfully failed and refused to abide by the Child Support Order, the Rule 12 Order, and the Second Rule 12 Order referred to herein.*

4. *Father's failure to abide by the terms of the Child Support Order, the Rule 12 Order, and the Second Rule 12 Order, as set forth herein, is willful and without legal justification or excuse.*

5. Father is in civil contempt [of court for his failure to comply with the terms of the three orders].

(Emphases added).

Based on these findings and conclusions, the trial court entered its order holding Father in contempt of court, and committing him to the custody of the Mecklenburg County Sheriff, to be released after 30 days, or after purging himself of his contempt by paying the sum of \$3,500.00 toward his child-support arrears.

*A. Ability to Pay Court-Ordered Obligations*

On appeal, Father does not dispute that he was ordered to pay certain amounts in child support and attorney's fees, or that he had not complied with the court's orders at the time of the hearing. He also does not challenge the veracity of any of the

trial court's findings. Rather, Father contends that the trial court erred by holding him in civil contempt because the trial court's findings "fail to support a finding or conclusion [that] he was capable of paying \$759 per month [in] child support from August 2016 to September 2018." In short, Father contends that there was no evidence presented of his ability to pay his child-support obligation. We disagree.

In the instant case, "the trial court entered an order to show cause, which shifted the burden to [Father]." *Cumberland Cty. ex rel. Mitchell*, 262 N.C. App. at 390, 822 S.E.2d at 309 (citation omitted). Despite the burden shifting, Father's failure to appear and present evidence did not "relieve the trial court of its duty to make findings of fact supported by competent evidence." *Id.* at 390, 822 S.E.2d at 310 (citation omitted). We hold that the trial court met its duty.

At the contempt hearing, Mother and the parties' son testified, and the trial court admitted into evidence several exhibits regarding Father's financial activities and position, including Father's bank statements from the period between 21 June 2018 and 31 December 2018. As is noted in the order, during the first setting for Mother's motion for contempt, Father acknowledged that he had \$15,000.00 in his bank account from the sale of his marital home; yet, despite ample evidence to the contrary, he told the trial court that "it was not his money[.]" which the court did not find credible. Mother testified that Father had been employed earlier in the year. In addition, the testimony and bank statements showed that Father had sufficient funds

to go out to eat and to go out drinking; to purchase a paddle board for several hundred dollars (about which he posted on social media); to make a deposit on an SUV; and to order supplies, pay \$1,375.00 per month in rent, and incorporate his prospective CBD oil business. Father held thousands of dollars in a bank account in the name of the business he was starting.

There was clearly sufficient evidence presented at the contempt hearing to support the trial court's specific findings that Father had the ability to pay some amount toward his court-ordered child-support obligation, which he willfully failed to do. The testimony and bank statements showed that Father had ample funds to make some payment during the relevant months.

Accordingly, the trial court did not err by finding that Father had the ability to pay his court-ordered obligations. The findings of fact were supported by competent evidence, and the findings supported the trial court's conclusions of law. As evidenced in its findings, the trial court determined that the orders were still in force, Father's noncompliance was willful, and Father had the ability to comply with the court's orders during the relevant period of time. Father's argument on appeal lacks merit.

*B. Present Ability to Satisfy the Purge Condition*

Father next argues that the trial court erred by failing to explicitly find that he had the present ability to comply with the purge condition.

It is well settled that a trial court's order finding a party in contempt of court and ordering that the party be incarcerated until he complies with the purge condition must be supported by competent evidence that he is able to satisfy the purge condition:

To justify conditioning [a] defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that [the] defendant has the present ability to pay those arrearages. The majority of cases have held that to satisfy the "present ability" test [the] defendant must possess some amount of cash, or asset readily converted to cash.

*Tigani*, 256 N.C. App. at 160, 805 S.E.2d at 551 (citation omitted).

"While our Court has a clear preference for explicit findings on these issues, we will affirm an order when the trial court finds present ability to comply, but only if there is competent evidence in the record supporting the finding." *Cumberland Cty. ex rel. Mitchell*, 262 N.C. App. at 389, 822 S.E.2d at 309 (citations and emphasis omitted). "Although specific findings as to the contemnor's present means are preferable, this Court has held that a general finding of present ability to comply is [a] sufficient basis for the conclusion of willfulness necessary to support a judgment of civil contempt." *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 574 (1990) (citations omitted), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).

In the present case, the trial court found that Father had the present ability to comply with the court's prior orders, and this finding of fact was supported by

competent evidence. *See Cumberland Cty. ex rel. Mitchell*, 262 N.C. App. at 389, 822 S.E.2d at 309. The trial court made extensive findings regarding Father’s assets. It also found that “[a]s of December 31, 2018, . . . there was still \$4,527.00 in the Mother Earth Therapies, Inc. [Fifth] Third Bank account.” Thus, on 11 January 2019, Father was able to purge himself of his contempt by paying the sum of \$3,500.00—an amount less than the then-current balance in Father’s bank account on 31 December 2018.

Nonetheless, while there appears to have been ample evidence of Father’s ability to comply with the purge condition, the trial court made no explicit finding of his ability to do so. Thus, we remand to the trial court for additional findings of fact regarding Father’s ability to comply with the order directing him to pay the sum of \$3,500.00 to purge himself of his contempt of court. *See Cty. of Durham ex rel. Wilson*, 262 N.C. App. at 38-39, 821 S.E.2d at 856 (remanding for additional findings of fact, including findings as to the defendant’s “ability to pay the full amount of any purge payments ordered”). The trial court may, in its discretion, receive evidence on remand. *See Cumberland Cty. ex rel. Mitchell*, 262 N.C. App. at 391, 822 S.E.2d at 310.

### ***Conclusion***

For the reasons discussed above, we conclude that the trial court did not err by finding Father in civil contempt of court for his failure to abide by the trial court’s orders; however, the trial court erred by failing to make a specific finding of Father’s

TOUSSAINT V. KING

*Opinion of the Court*

ability to comply with the purge condition. Accordingly, the order is affirmed in part, and remanded for additional findings of fact.

AFFIRMED IN PART AND REMANDED.

Judges INMAN and YOUNG concur.

Report per Rule 30(e).