STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2014AP001947
(Eau Claire County Case No. 06PA163)

IN RE THE FINDING OF CONTEMPT IN RE THE PATERNITY OF M.J.F.-S.:

MICHELLE L. STEELE AND STATE OF WISCONSIN,

Petitioners-Respondents,

v.

JASON G. FOSTER,

Respondent-Appellant.

Appeal From The Order re Contempt Entered In The Circuit Court For Eau Claire County,

The Honorable Jon M. Theisen, Circuit Judge, Presiding

REPLY BRIEF OF RESPONDENT-APPELLANT TO STATE OF WISCONSIN

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ARGUMENT

Mr. Foster hereby restates and relies on the argument made in his Brief previously filed, and denies the arguments made in the County's Response Brief. Mr. Foster also states the following:

I. THE AFFIDAVIT AND MOTION FOR RULE TO SHOW CAUSE SHOULD HAVE BEEN FOUND TO BE VAGUE AND IN VIOLATION OF MR. FOSTER'S DUE PROCESS.

The county argues that it can put together an order for rule to show cause with an accompanying affidavit that does not tell the respondent how he is in contempt. The Affidavit for Contempt states:

> "I am a representative of the Eau Claire County Child Support Agency, which represents the State of Wisconsin. I do not represent any individual in this action. The State of Wisconsin is a real party in interest in this case, pursuant to s. 767.205(2), Wis. Stats. According to the payment records maintained on the Kids Information Data System (KIDS), Jason G. Foster has failed to comply with the court order for support and owes an arrearage on this case. Jason G. Foster has an obligation to pay $574.00 per month for child support, with an additional $25.00 per month toward his outstanding accounts. The arrears as of August 12, 2013 are $13,992.88, of which $380.01 is owed to the State of Wisconsin. This affidavit is in support of the state's request for an Order to Show Cause for contempt, and to increase payments toward the outstanding accounts."

(R. 128). This affidavit does not state how Mr. Foster is in contempt. It nicely states how much Mr. Foster

owes each month and also lists the arrears he owed, but this information alone does not put Mr. Foster on notice as to how he would be in contempt—especially since the arrears amount listed in the affidavit[1] was less than the amount from the contempt hearing in December of 2012. The information in this affidavit actually shows that Mr. Foster was making payments in order to reduce the amount of arrears that he was put on notice of in the December of 2012 hearing[2]. This notice did not specify why, how or when Mr. Foster was in contempt. It would especially be confusing for a respondent if at the previous hearing the respondent's monthly payments were averaged and the respondent believed that he was in compliance with an order with average monthly payments.

Respondents in child support contempt proceedings need to be able to come to court at the time of the hearing and bring with them any evidence, witnesses, etc. to show why they are not willfully

[1] The affidavit put Mr. Foster on notice that the arrears amount was $13,992.88 (R. 128), but the testimony at the September 16, 2013 hearing stated the arrears were $17,653.14 (R. 151, 4:22).

[2] At the December 2012 hearing, Mr. Foster owed $16,121.38 in child support arrears (R. 183, 5:10-14).

disobeying the court's order. This order and accompanying affidavit violated due process by failing to give Mr. Foster adequate notice. Allowing this type of notice to be issued around the State would be unjust to those trying to defend themselves, especially given the fact their personal freedom may be at stake.

II. THE CIRCUIT COURT ERRED IN FINDING MR. FOSTER IN CONTEMPT.

Mr. Foster is a little unclear as to some of the points the county is attempting to make in its brief (Response Brief pp. 12-19). It appears that the county is attempting to make an argument that Mr. Foster's child support amount is $574 per month and not $200 per month. Although Mr. Foster was previously allowed to make minimum payments of $200 per month towards his $574 monthly obligation prior to the December 2012 hearing, it was clear this was not the case after that. Mr. Foster has never argued that he could pay a minimum amount after December of 2012. Mr. Foster is confused as to why the county is inferring that Mr. Foster was making this argument. Mr. Foster only stated that he relied upon the method the circuit court

used in December 2012 when he made subsequent support payments after that time. In fact, Mr. Foster believed that he could overpay one month and that the overpayment portion would be applied to the next month (R. 285, 20:18-21:14;30:18-31:7; 31:22-32:21). It has never been argued that his payment was $200 per month (minimum) after December of 2012 as the county is arguing in its brief (Response Brief p. 17).

The county argues that Mr. Foster intentionally failed to comply with the court's order to pay his obligation. As evidence to support its argument, the county stated in its brief:

> Despite that, Jason Foster failed to comply with the court's order to pay his child support obligation of $574 per month for the seven of the eight months between the December 2012 hearing and the September 2013 hearing. *One can reasonably infer, based on his arguments, that Jason Foster choose not to make his child support payments after February 2013 because he thought he could count the tax refund intercepts as a payment towards current support and average the payment throughout the year*. This is contrary to the law and also the December 2012 order of the court that requires Jason Foster to pay $574 per month for current support and $25 per moth towards his arrears. Either way you get to the same conclusion that Jason Foster willfully choose [sic] not to make his child support payments.

(Response brief p. 17-18) (emphasis added).

The mere failure to comply with a court order is not enough to find someone in contempt. If this was

the case, we would not need "show cause" hearings. The violation must be willful and not due to an inability to comply with the court's order (see cases cited in Mr. Foster's brief in chief). The county's own argument points out that Mr. Foster's belief was that he could count other payments through his tax intercept and that his payments would be averaged. Both of these things were done to find him in contempt in December of 2012, and it was reasonable for him to believe that was how the system worked (R. 285, 20:18-21:14;30:18-31:7; 31:22-32:21; 36:10-37:21; R. 283, 5:21-6:8, 12:2-13:12). Even the circuit court could "see some degree of confusion on Mr. Foster's part" (R. 285, p. 61:1-2).

Mr. Foster is confused by the argument made by the county on pages 18 through 19. The county is attempting to confuse the two motions that were heard on July 24, 2014. During the July 2014 hearing, Mr. Foster's postconviction motion was heard as well as a hearing on the county's motion for hearing asking that Mr. Foster serve 60 days in jail based on the September 19, 2013 order. The circuit court asked that the motions be heard simultaneously in the testimony

(R. 285, 16:20-18:20). The county's motion for hearing asking that Mr. Foster serve 60 days in jail based on the September 19, 2013 written order was denied by the circuit court at the July 24, 2014 hearing (R. 285, 64:18-22). However, the county's motion was not appealed by Mr. Foster, nor was it cross-appealed by the county. On pages 18-19, the county attempts to argue facts that occurred *after* the September 16, 2013 hearing (and after the notice provided on August 13, 2013). However, these facts would not be relevant to this appeal, as they occurred after the September 19, 2013 written order (from the September 16, 2013 hearing). Mr. Foster objects to the county's use of those facts. Further, they do not negate the fact that Mr. Foster was not intentionally out of compliance with the September 19, 2013 order.

Mr. Foster believed he was in compliance with the court's September 19, 2013 written order from the September 16, 2013 hearing, and therefore should not be found in contempt.

CONCLUSION

Mr. Foster was not provided proper notice to defend himself regarding the order to show cause, which prejudiced him to be able to prepare a defense knowing precisely the allegations against him. Mr. Foster believed that he made adequate child support payments. He is not in contempt based upon his reliance on previous calculations of child support to determine contempt done by the court from the December 4, 2012 hearing.

Dated at Ellsworth, Wisconsin, March 2, 2015.

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BRIEF CERTIFICATION

I certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 1,330 words.

Dated: March 2, 2015

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CERTIFICATE OF MAILING

STATE OF WISCONSIN)
PIERCE COUNTY)

I, Melissa Petersen, a licensed Wisconsin attorney, hereby certify that copies of Defendant-Appellant's Reply Brief in Appeal No. 2014AP001947 were placed in the U.S. Mail, with proper postage affixed this 2nd day of March, 2015, addressed to the following as indicated below:

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RULE 809.19(12) ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of the reply brief is identical to the text of the paper copies of the reply brief.

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