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NO. COA12-1471
NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2013

COUNTY OF DURHAM, by and through,
DURHAM DSS, ex rel:

ROBIN WILLIS,
Plaintiff,

v.

Durham County
No. 00 CVD 2860

GILBERT ROBERTS,
Defendant.

Appeal by defendant from order entered 9 May 2012 by Judge Doretta L. Walker in Durham County District Court. Heard in the Court of Appeals 9 April 2013.

Office of the County Attorney, by Assistant County Attorney Geri Nettles, for plaintiff-appellee.

Mary McCullers Reece for defendant-appellant.

GEER, Judge.

Defendant Gilbert Roberts appeals from the trial court's order of 9 May 2012 holding him in civil contempt for failure to pay \$110.00 per month in child support arrearages allegedly owed to plaintiff Durham County. Because, as Mr. Roberts argued to

the trial court, the record contains no order still in effect that requires the monthly payment of the child support arrearages, Mr. Roberts was, in effect, held in contempt of a non-existent order. We, therefore, reverse.

Facts

On 13 July 2000, Mr. Roberts entered into a voluntary support agreement whereby he agreed to pay \$216.00 per month in child support for his two minor children as well as \$19.00 per month to DSS to reimburse the County for \$9,429.00 of public assistance paid on behalf of his children. Although the record contains no order regarding child support arrears, a 28 October 2002 consent order specified that Mr. Roberts had previously been ordered to pay not only \$216.00 per month in current support, but also \$59.00 per month for child support arrears.

The 28 October 2002 consent order arose out of a motion by plaintiff for an order to show cause why Mr. Roberts should not be held in contempt. The motion is not in the record. The 28 October 2002 consent order did not specifically address the motion for an order to show cause, but rather was an order modifying Mr. Roberts' child support obligation. In the 28 October 2002 order, the court found that "both parties now have one child residing with them." The trial court, therefore, ordered that "[b]eginning 10/01/02 the Defendant shall pay

\$00.00 per month for current child support, plus \$110.00 per month toward arrears, which amount totals \$13389.42 as of 10/28/02 for a total payment of \$110.00 per month." The order included a handwritten provision at the end that appears to provide that "current support suspended as both parties have one child. Case continued to 1/14/03 for review payment history and for defendant to provide proof of incarceration."

On 17 January 2003, the trial court entered an order stating that it was "[r]ecall[ing] order for arrest issued 1/14/03." In addition, the order noted that DSS had requested continuance of the hearing due to "payment posted 1/15/03 -- will review for consistent monthly payments." The order continued the hearing until 29 April 2003.

The trial court conducted a hearing on 29 April 2003 and entered an order on contempt the same day. The order stated that the hearing was pursuant to the order to show cause and indicated that defendant was not present although plaintiff Robin F. Roberts was. The order is a form order with boxes that can be checked and with blanks that need to have information inserted. A number of the blanks were filled in, at some point, in handwriting. The order found that Mr. Roberts had been previously ordered to pay \$110.00 per month towards child support arrears. The next purported finding of fact -- stating

that Mr. Roberts is out of compliance with the prior order "in the amount of \$00.00 and has a total arrears of \$12682.98 as of April 29, 2003" -- is completely crossed out. No other findings of fact are checked.

The preprinted conclusions of law specified that "[t]he previous Order remains in effect and the purpose of the Order may still be served by the Defendant's compliance with it." That conclusion of law did not require the court to check any box or make any notation on it. The form's remaining preprinted conclusions of law regarding contempt are not checked and, therefore, were not made.

The decretal portion of the order specified that Mr. Roberts was required to appear on 29 July 2003 "to review the Defendant's payments and to determine any further disposition in this action" and, in handwriting, "for show cause disposition." Someone had written in by hand that Mr. Roberts was ordered to pay "\$00.00 per month current support plus \$110.00 per month toward arrears totaling \$9306.10 as of April 29, 2003 for a total payment of \$110.00 per month, beginning April 1, 2003." That portion of the order is, however, again completely crossed out.

At the end of the order, a handwritten provision specifies that "Plaintiff forgives her arrears of \$3376.88." That

provision appears to relate to the mother Robin F. Roberts, who signed that she consented to the order. Originally, whomever initially completed the form then specified in handwriting that "Defendant remains responsible for \$9302.10 owed to the State and \$4.00 filing fee. \$9306.10 [illegible] arrears still owed to the state." That handwriting regarding arrears due the State is, however, completely crossed out and that change was initialed by the judge.

Mr. Roberts did not appear at the 29 July 2003 hearing. The trial court entered an order to arrest and order to show cause on the same date. The order stated that the hearing had been continued from 29 April 2003 and that Mr. Roberts was ordered to appear on that date. The court found that Mr. Roberts had willfully failed to comply with the order that he appear and concluded that "there is probable cause to believe the defendant is in willful contempt of the Court and that an Order for Arrest is necessary to secure the defendant's appearance in Court." The order provided that Mr. Roberts could be released from jail upon payment of a \$1,000.00 bond "securing the defendant's appearance before the court at the time, date and place set forth in the Release Order, which shall be 9:00 a.m. on the first Monday following the defendant's release"

The record contains no indication that a hearing was ever held following Mr. Roberts' release. All of the above orders were entered by the same trial judge, the Honorable R.G. Chaney.

On 22 March 2011, almost eight years later, Durham County filed a motion for order to show cause, which alleged that Mr. Roberts had been ordered on 28 October 2002 to pay \$0.00 as support and \$110.00 on arrears with a total arrears in the amount of \$8,854.96 of which \$4.00 was a filing fee. The motion alleged that Mr. Roberts' last payment was on 13 April 2004 and that Mr. Roberts had not provided any information on his inability to pay his child support obligation. On 29 September 2011, Durham County filed a second motion for order to show cause, alleging, based on the 28 October 2002 order, that Mr. Roberts owed \$8,704.96 in arrears and that his last payment had been on 23 May 2011.

The order to show cause directing Mr. Roberts to appear on 18 November 2011 was delivered to Mr. Roberts on 12 October 2011. On 18 November 2011, the trial court issued an order for arrest and order to show cause because Mr. Roberts had failed to appear as ordered.

The trial court, the Honorable Doretta L. Walker presiding, ultimately conducted a hearing on Durham County's motion for an order to show cause based on Mr. Roberts' failure to make

payments on his child support arrears on 8 May 2012. The court entered an order of contempt on 9 May 2012, finding that Mr. Roberts had been ordered to pay \$110.00 per month towards child support arrears with total arrears due of \$8,704.96 as of 1 May 2012 and a compliance amount of \$8,700.96, that Mr. Roberts was at least 90 days in arrears, and that Mr. Roberts had the ability to comply with the prior orders, but had willfully failed and refused to do so.

In handwriting, the order made additional findings. Although they are somewhat difficult to decipher, the court, in the handwritten findings, appeared to find that Mr. Roberts had earned income, had money, and did not pay. The handwritten findings also found that defendant was aware of the obligation based on payments in 2004 and 2011 subsequent to the April 2003 order, which -- the order finds -- only allowed plaintiff (the mother) to forgive arrears. The handwritten findings continued by noting that the 2003 order continued the hearing until 29 July 2003 to review payments (the finding is then cut off). According to the handwritten findings, when defendant did not appear, the judge issued an "OFA of \$1000 based on AFDC balance. Defendant has not appeared in court again until Feb. 2012."

Based on its findings, the trial court concluded that defendant had no just cause for not complying with the prior

court order and should be held in civil contempt. The court ordered that Mr. Roberts be incarcerated for 90 days, although he could be released from jail upon a purge payment of \$550.00. The court suspended this commitment upon condition that Mr. Roberts pay \$110.00 per month on 31 May, 30 June, 31 July, 31 August, and 30 September 2012. Mr. Roberts was then ordered to continue paying \$110.00 per month toward the total arrears of \$8,704.96 as previously ordered. Finally, the order provided that if Mr. Roberts missed one of the payments from May through September, then an order of arrest would issue and "the total bond amount of \$550.00" would be due.

Mr. Roberts did not file a written notice of appeal from this order. His attorney purported to give oral notice of appeal at the end of the contempt hearing.

Discussion

We first address this Court's jurisdiction. Since this order was a civil contempt order, Rule 3(a) of the North Carolina Rules of Appellate Procedure required that Mr. Roberts appeal by "filing notice of appeal with the clerk of superior court." Although Mr. Roberts' failure to file a written notice of appeal deprives this Court of jurisdiction, *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657

S.E.2d 361, 365 (2008), he has filed a petition for writ of certiorari.

In our discretion, we allow the petition since it is apparent that Mr. Roberts lost his appeal through no fault of his own, but rather because his trial counsel misunderstood the governing rules. Further, denial of review of Mr. Roberts' appeal would be manifestly unjust. See *In re I.T.P-L.*, 194 N.C. App. 453, 460, 670 S.E.2d 282, 285 (2008) (dismissing appeal based on jurisdictional default but allowing review pursuant to Rule 21 because "the timely, albeit incomplete, notices of appeal together with the amended notices of appeal provide record evidence that Respondents desired to pursue the appeal, understood the nature of the appeal, and cooperated with counsel in filing the notice of appeal" and because allowing review would "avoid penalizing Respondents for their attorneys' errors").

As this Court has previously held, "[t]he purpose of civil contempt is to coerce the defendant to comply with a court order, not to punish him." *Scott v. Scott*, 157 N.C. App. 382, 393, 579 S.E.2d 431, 438 (2003). Necessarily, an alleged contemnor cannot be held in contempt unless he has failed to comply with a court order. See *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985) (holding that prior to

alleged contemnor being found in contempt, trial court must find not only that party failed to comply with court order, but also that he had present ability to comply).

Indeed, it is not sufficient for civil contempt that an alleged contemnor violated an oral order not yet reduced to writing. This Court has observed that even "'an order rendered in open court is not enforceable until it is "entered," *i.e.*, until it is reduced to writing, signed by the judge, and filed with the clerk of court.'" *Carland v. Branch*, 164 N.C. App. 403, 405, 595 S.E.2d 742, 744 (2004) (quoting *West v. Marko*, 130 N.C. App. 751, 756, 504 S.E.2d 571, 574 (1998)).

In this case, as the motions and orders to show cause indicate, the 28 October 2002 order requiring Mr. Roberts to pay \$110.00 per month toward arrears was the basis for Mr. Roberts being found in contempt. Subsequently, however, in the 29 April 2003 order, the trial court *struck through* the portions of a proposed order (1) requiring that Mr. Roberts pay \$110.00 per month beginning 1 April 2003 towards arrears due the County and (2) ordering that Mr. Roberts remained responsible for \$9,306.10 in arrears due the County. In other words, the trial court expressly declined to order Mr. Roberts to pay \$110.00 per month towards arrears and expressly declined to order that Mr. Roberts owed the County \$9,306.10 in arrears.

At that point, following entry of the 29 April 2003 order, no order requiring payment of \$110.00 per month remained in effect. The fact that Mr. Roberts may have made some payments, as the trial court found in its contempt order, does not alter the fact that the record contains no order following the 29 April 2003 order requiring Mr. Roberts to make the \$110.00 per month payment. Indeed, at the contempt hearing, counsel for Durham County acknowledged that the 29 April 2003 order crossed through the \$110.00 per month requirement, but argued that it was because the matter was continued until 29 July 2003. He then argued that "[t]here should be another order[,] " but admitted, "I don't have that."

At no time has Durham County presented any order following the 29 April 2003 order that reinstated the requirement that Mr. Roberts pay \$110.00 per month. The trial court in the appealed order pointed to Judge Chaney's 29 July 2003 order for arrest and order to show cause as indicating that Mr. Roberts had an ongoing child support obligation -- the appealed contempt order states that Judge Chaney "issued OFA of \$1000 based on AFDC balance." In fact, Judge Chaney's 29 July 2003 order expressly indicates that Mr. Roberts was being held in contempt solely because he had failed to comply with the order that he appear on 29 July 2003 and the \$1,000.00 bond was to secure his appearance

at another hearing. Nothing in the 29 July 2003 order even suggests that the contempt finding or the \$1,000.00 bond was in any way related to a failure to make arrearages payments.

Moreover, Durham County, on appeal, has not addressed the significance of the 29 April 2003 order and has not pointed to any other order as supporting the finding of contempt. Given that there was no order to enforce through civil contempt, we hold that the trial court erred in finding Mr. Roberts in civil contempt for failure to pay \$110.00 per month towards arrearages and, therefore, reverse. Consequently, we need not address the parties' remaining arguments on appeal. We note, however, that nothing in this opinion addresses whether Mr. Roberts in fact owes the County arrears. That question remains to be resolved.

Reversed.

Judges McGEE and DAVIS concur.

Report per Rule 30(e).