

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000878-MR
AND
NO. 2004-CA-002247-MR

SAMUEL RICHARD WHITE, II

APPELLANT

v.

APPEALS FROM OLDHAM CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 02-CI-00538

MICHELLE S. WHITE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, JOHNSON, AND McANULTY, JUDGES.

JOHNSON, JUDGE: Samuel Richard White, II has appealed in Case No. 2004-CA-000878-MR from an order of the Oldham Circuit Court entered on April 19, 2004, which held him in criminal contempt for his failure to reimburse his former wife, Michelle S. White, for health insurance premiums, extraordinary medical expenses, and daycare expenses for the parties' two minor children, and ordered him to serve 48 hours in the Oldham County Jail. White has also appealed in Case No. 2004-CA-002247-MR from an order of

the Oldham Circuit Court entered on September 29, 2004, which held him in contempt for his failure to abide by the circuit court's previous orders requiring him to pay past-due amounts to Michelle, and to serve 96 hours in the Oldham County Jail. Having concluded that the circuit court did not abuse its discretion in ordering Samuel to serve a fixed amount of time in the county jail for criminal contempt, we affirm.

Samuel and Michelle were married in 1995. One child was born before the marriage, namely Brittany Michelle (D/O/B December 5, 1990),¹ and one child was born during the marriage, namely Ashley Danielle (D/O/B April 20, 1996). On January 31, 2003, a limited decree of dissolution of marriage was entered in the Oldham Circuit Court, wherein the parties' marriage was dissolved and issues concerning the care, custody, and support of the minor children, maintenance, and division of marital property and debts were reserved for later determination.

On May 12, 2003, the circuit court entered an order awarding full custody of the children to Michelle with Samuel receiving specific visitation. Samuel receives disability benefits,² and he was ordered to pay Michelle \$464.00³ per month

¹ Samuel was established as Brittany's biological father pursuant to a judgment of paternity entered by the Oldham District Court on November 20, 2002.

² Samuel is legally blind.

³ As a result of Samuel's disability, the two children each receive Social Security benefits of \$232.00 per month.

as child support for the two children. Also, he was ordered, after the passing of 90 days, to pay Michelle one-half of the children's health insurance premiums, extraordinary expenses, and daycare expenses. Further, the circuit court determined that Samuel was capable of obtaining gainful employment despite his disability,⁴ and stated that after 90 days and upon Michelle's motion it would review the child-support issue, including Samuel's voluntary unemployment if he was still unemployed.

On July 3, 2003, Michelle filed a motion requesting the circuit court to hold Samuel in contempt for failing to abide by the May 12, 2003, order. A hearing on Michelle's motion was held on August 6, 2003, and both parties were present with counsel. In its order entered on August 7, 2003, the circuit court did not hold Samuel in contempt, but instead ordered him to pay the past-due child support for the months of June and July 2003, in the amount of \$928.00.⁵ Samuel did not appeal from this order.

⁴ During the parties' marriage Samuel worked as a financial advisor for Morgan-Stanley from May 1998 until March 2000. He was then employed by PNC Bank as a financial consultant from March 2000 until February 2002, earning as much as \$3,000.00 per month. Samuel voluntarily quit his position at PNC, but he has testified he is capable of working, although he has not actively sought employment since February 2002.

⁵ This order also addressed Samuel's failure to allow Michelle access to the marital residence, Samuel's failure to place the children's education accounts solely in Michelle's name, and payment of Michelle's attorney's fees. However, for purposes of this appeal, these issues are not relevant.

On October 21, 2003, Michelle filed another motion requesting the circuit court to hold Samuel in contempt for failing to comply with the previous orders entered by the circuit court regarding the payment of the children's expenses. The circuit court held a hearing on November 14, 2003, and both parties were present with counsel. In an order entered on November 17, 2003, the circuit court ordered Samuel to pay Michelle \$900.32⁶ within ten days. Samuel did not appeal from this order.

On March 18, 2004, Michelle filed a third motion requesting the circuit court to hold Samuel in contempt on the child support issue. On April 19, 2004, the circuit court held a hearing on Michelle's motion, and both parties were present with counsel. In its order,⁷ entered the same day, the circuit court found Samuel in contempt of court and ordered him to pay Michelle \$995.35⁸ to satisfy the overdue health insurance

⁶ This amount is one-half of the health insurance premiums and daycare expenses that were overdue. The November 17, 2003, order also addressed Samuel's failure to sell the marital residence and his failure to allow Michelle access to the marital residence to retrieve the children's personal property. Again, these issues are not relevant to this appeal.

⁷ This order also addressed Samuel's failure to return Ashley to Michelle following visitation, transportation of the children for visitation, non-emergency medical care for the children, and payment of Michelle's attorney's fees. These issues are not relevant to this appeal.

⁸ During the hearing held on April 19, 2004, evidence was presented that one-half of the children's daycare expenses from November 14, 2003, through April 19, 2004, was \$445.00; one-half of the children's dental insurance from the same time period was \$100.40; and one-half of the children's major medical and emergency expenses from this time period was \$449.95. This evidence is the basis for the \$995.35 total.

premiums and daycare expenses for the children, and to serve 48 hours in the Oldham County Jail.⁹

In the April 19, 2004, order, the circuit court allowed Samuel until April 21, 2004, at 6:00 p.m. to pay the amount of money he owed to Michelle. Samuel's mother tendered a check to Michelle's attorney before this deadline. Therefore, Samuel purged himself of the civil contempt once the money was paid to Michelle's attorney.

On April 22, 2004, Samuel filed a motion to vacate the circuit court's judgment stating that it could not legally incarcerate him for contempt without affording him the recourse to purge himself of the contempt. The circuit court denied Samuel's motion on April 23, 2004. This appeal in Case No. 2004-CA-000878-MR followed.¹⁰

On August 10, 2004, Michelle filed another motion for contempt proceedings against Samuel for his failure to abide by the circuit court's previous orders. The circuit court held a

⁹ Samuel did not report to the Oldham County Jail as ordered. Instead, he posted a \$500.00 bond.

¹⁰ Because Samuel did not appear at the Oldham County Jail on April 24, 2004, to serve his 48-hour sentence, the circuit court entered a bench warrant for his arrest. On May 5, 2004, Samuel filed a motion in the circuit court stating that he had filed a motion for emergency relief in this Court, which was denied and instead instructed him to seek an appeal bond in circuit court. On May 6, 2004, the circuit court withdrew its bench warrant for Samuel and did not incarcerate him pending appeal, but rather allowed him to post a \$500.00 bond.

hearing on Michelle's motion on September 28, 2004.¹¹ In its order dated September 29, 2004, the circuit court once again held Samuel in contempt for failing to reimburse Michelle for the children's health insurance premiums, extraordinary expenses, and daycare expenses.¹² The circuit court ordered Samuel to pay Michelle \$981.50 within seven days, and to serve 96 hours in the Oldham County Jail.¹³ This appeal in Case No. 2004-CA-002247-MR followed.¹⁴

Samuel argues in his brief that the circuit court erred (1) by using both its civil and criminal contempt powers; (2) by denying him due process by not giving him adequate notice that he was subject to criminal contempt; and (3) by imposing criminal contempt when he did not have the ability to comply with the court's orders. We reject all three arguments and hold the circuit court did not abuse its discretion in sentencing Samuel to jail for periods of 48 hours and 96 hours.

¹¹ The hearing was originally scheduled for September 24, 2004, but neither Samuel nor his counsel appeared at the hearing. The circuit court rescheduled the hearing for September 28, 2004.

¹² This order also addressed Samuel's visitation schedule with the children and payment of Michelle's attorney's fees. These issues are not relevant to this appeal.

¹³ Samuel did not report to the Oldham County Jail on October 4, 2004, as he was ordered. It is unclear from the record if Samuel paid the \$981.50 within the seven days.

¹⁴ This Court entered an order on March 30, 2005, consolidating the two appeals.

"The power to punish for contempt is an essential and inherent attribute of judicial authority."¹⁵ "Contempt is the willful disobedience of -- or open disrespect for -- the rules or orders of a court."¹⁶ A contempt of court may be "criminal" or "civil". "A "criminal contempt" is conduct directed against the dignity and authority of the court. It includes those acts done in disrespect of the court or its processes or which obstruct the administration of justice or tend to bring the court into disrepute. It covers not only acts which directly and openly insult or resist the powers of the court or the persons of the judges."¹⁷ Direct criminal contempt occurs in the court's presence and may be punished summarily by the court, whereas indirect criminal contempt, which occurs outside the court, requires a hearing and the presentation of evidence to establish the violation of the court's order.¹⁸ Thus, a court may punish a person for disobeying a judicial order.¹⁹ And "[t]he use of contempt proceedings as a means to enforce child

¹⁵ Dunagen v. Commonwealth, 31 S.W.3d 928, 929 (Ky. 2000).

¹⁶ Bailey v. Bailey, 970 S.W.2d 818, 820 (Ky.App. 1998).

¹⁷ Akins v. Peak, 239 Ky. 847, 40 S.W.2d 324, 325 (1931) (quoting Mitchell v. Commonwealth, 206 Ky. 634, 268 S.W. 313 (Ky. 1925)).

¹⁸ Campbell v. Schroering, 763 S.W.2d 145, 147 (Ky.App. 1988).

¹⁹ KRS 432.280.

support payments has long been judicially approved in this state.”²⁰

A trial court’s decision regarding whether to hold a party in contempt is reviewed under an abuse of discretion standard.²¹ “‘Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.’ . . . ‘The exercise of discretion must be legally sound.’”²²

In Samuel’s first argument he relies on Shillitani v. United States,²³ for his claim that the circuit court abused its discretion by invoking its criminal contempt powers when civil contempt alone would have been sufficient to accomplish its purpose. We reject this argument because it was clearly within the circuit court’s discretion to not only attempt to compel Samuel to pay the money owed to Michelle under its orders, but also to punish him for his repeated violations of the court’s orders.²⁴ Under the circumstances of this case, the criminal contempt sanctions imposed by the circuit court were not an

²⁰ Bailey, 970 S.W.2d at 820.

²¹ Smith v. City of Loyall, 702 S.W.2d 838, 839 (Ky.App. 1986).

²² Sherfey v. Sherfey, 74 S.W.3d 777, 783 (Ky.App. 2002) (quoting Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994)).

²³ 384 U.S. 364, 371, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966).

²⁴ Bailey, 970 S.W.2d at 820.

arbitrary or capricious disposition or an unreasonable and unfair decision or not legally sound.²⁵

Samuel also claims he was denied due process of law because he did not receive adequate notice that he was subject to criminal contempt. He stated in his brief that had he "known that he faced the possibility of jail time he would have specifically explained his inability to comply with the Court's order regarding [] payment of funds to [Michelle]."

This argument begs the question that why would Samuel not specifically explain his inability to comply with the circuit court's orders if he merely faced civil contempt. Regardless, as pointed out in our factual summary of the proceedings before the circuit court, Michelle filed motions on July 3, 2003, October 21, 2003, and March 18, 2004, asking the circuit court to hold Samuel in contempt. In Michelle's affidavit attached to the third motion, she stated, in part, as follows: "On no occasion has the Court actually jailed the Respondent for his willful contempt. I ask the Court to take those steps at this point plus make him pay all Attorney's fees and costs." Thus, Samuel was clearly given notice that Michelle was asking the circuit court to jail him for contempt. Samuel received the due process of law to which he was entitled.²⁶

²⁵ Sherfey, 74 S.W.3d at 782-83.

²⁶ Campbell, 763 S.W.2d at 147.

Samuel's final argument is similar to his second argument. He claims the circuit court abused its discretion by punishing him for not complying with its orders requiring him to pay various sums to Michelle because "he never had the ability to perform." This argument is without merit because the evidence of record supports the circuit court's finding that Samuel was willfully disobeying its orders. Further, Samuel has failed to comply with CR 76.12(4)(c)(iv) and (v) by not directing this Court to where this argument was preserved for appellate review or to any facts in the record to support his claimed inability to comply with the court's orders.

For the foregoing reasons, the orders of the Oldham Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ashley Holloway Frank
Louisville, Kentucky

BRIEF FOR APPELLEE:

James L. Theiss
LaGrange, Kentucky