IN THE COURT OF APPEALS

7/29/97

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00152 COA

JAMES CURTIS FLOYD APPELLANT

v.

CYNTHIA KAY FLOYD APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. THOMAS L. ZEBERT

COURT FROM WHICH APPEALED: RANKIN COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT: G. DAVID GARNER

ATTORNEY FOR APPELLEE: L. WESLEY BROADHEAD (WITHDRAWN);

CYNTHIA DAVIS (PRO SE)

NATURE OF THE CASE: DOMESTIC RELATIONS-HEARING ON CONTEMPT MOTION FOR FAILURE TO PAY CHILD SUPPORT

TRIAL COURT DISPOSITION: THE CHANCELLOR FOUND JAMES CURTIS FLOYD TO BE IN CONTUMACIOUS CRIMINAL CONTEMPT OF COURT FOR FAILURE TO PAY CHILD SUPPORT.

MANDATE ISSUED: 8/19/97

BEFORE McMILLIN, P.J., HERRING, AND KING, JJ.

McMILLIN, P.J., FOR THE COURT:

James Curtis Floyd was found to be in "contumacious criminal contempt" of the Chancery Court of Rankin County for non-payment of child support. The chancellor ordered Floyd incarcerated "until such time as he has purged himself by paying the judgment [determining the arrearage] in the amount of $12,248.57, plus interest at the legal rate, or an amount to be approved by this Court." Floyd has appealed this judgment claiming that the chancellor was manifestly in error in determining that his non-payment was wilful. Floyd claims that his failure to pay was based upon his inability to work due to medical problems.

We determine that the present judgment must be reversed and remanded for problems apparent on the face of this record. The basis on which we reverse does not require us to reach a determination of whether, in the times that Floyd's child support obligations were accruing, he was unable to pay or merely unwilling to do so. It may be, because his support obligations were accruing on a monthly basis, that a proper inquiry would produce varying results, *i.e.*, that at times his non-payment was in wilful disregard of his obligation and at other times, due to circumstances beyond his control, he lacked the ability to pay his monthly obligation. These are matters properly reserved for determination by the chancellor at a hearing held on remand in accordance with the terms of this opinion.

We begin our consideration with an observation. This Court concludes that the chancellor was in error in his terminology concerning the nature of his contempt adjudication. The chancellor adjudicated Floyd to be in "contumacious criminal contempt," yet proceeded to impose sanctions that are considered civil contempt sanctions. This confusion between the two concepts appears to be widespread. There seems to be a common misconception that the line dividing civil contempt from criminal contempt is drawn based upon considerations of the wilfulness or maliciousness with which the alleged contemnor disregards his obligation. Under that concept, at some undefined (and essentially undefinable) point along a continuum, a party's "civil contempt" becomes so egregious that it rises to a "criminal" disregard for his obligations to the court and thus transforms itself into "criminal contempt."

There is no such concept recognized in the law. A person who knowingly and wilfully disobeys a court order by which he is legally bound is in contempt of court. The issue of whether the contempt will be treated as civil or criminal depends, not on the necessity to quantify the party's disdain for the

court's order, but rather on how the court proposes to deal with the alleged contemnor. Thus, it is the nature of the proceeding that controls the terminology properly to be applied to the contempt -- whether "civil" or "criminal" -- and not some subjective analysis of how obstinate the contemnor's behavior is deemed to be.

Civil contempt proceedings are designed, not to punish the contemnor for past transgressions, but to coerce the intransigent party to carry out the court's order. *See Newell v. Hinton,* 556 So. 2d 1037, 1044 (Miss. 1990). Included among the coercive remedies available to the court in a civil contempt proceeding is the ability to confine the contemnor until such time as he complies with the court's order. It has been said that in such case, the contemnor "carries the keys to his prison door in his own pocket," since his ability to perform is within his control. He may purge himself of his contempt by performing his obligation and thereby obtain his release from confinement. *See Gompers v. Buck's Stove and Range Co.,* 221 U.S. 418, 442 (1911); *see also Newell,* 556 So. 2d at 1044.

On the other hand, there may be acts of contempt that the court deems worthy of punishment whether or not they are subsequently performed in the face of the court's coercive power. In such a proceeding, the contemnor is exposed to a confinement intended to punish him for his prior act of disobedience rather than to compel some future action. The contemnor is sentenced to a fixed term of imprisonment which he must serve without regard to whether he is now prepared to perform, or has already performed in a belated manner. This is a criminal contempt proceeding. *See Newell,* 556 So. 2d at 1045; *see also* Miss Code Ann. § 9-5-87 (1972).

There are procedural differences in the two proceedings. The burden of proof for civil contempt is a simple preponderance of the evidence. *Caldwell v. Caldwell,* 579 So. 2d 543, 545 (Miss. 1991). In a criminal contempt proceeding the burden is the same as in a criminal trial -- beyond a reasonable doubt. *See Jenkins v. State,* 136 So. 2d 205, 208 (Miss. 1962). In a criminal contempt proceeding, the accused contemnor may not be compelled to testify. *Id.* If the contemplated penalty is severe enough, he may even be entitled to a jury trial. *See Hinton v. State,* 222 So. 2d 690, 691 (Miss. 1969) (quoting *Bloom v. Illinois*, 391 U.S. 194, 196-198 (1968)) (where court discussed the fact that "serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution. . . .").

From our review of the chancellor's order, we determine that the chancellor, despite his use of the term "criminal contempt," actually imposed a civil sanction on Floyd. The incarceration was not for a definite term, but was intended to coerce Floyd to meet his past support obligations, after which he would be released. Were the only concern in this instance whether the proper terminology was employed, we would conclude that the mischaracterization of the adjudication was harmless. However, we have determined that there is a more fundamental error in the chancellor's ruling that requires the intervention of this Court.

The chancellor, apparently convinced that Floyd was unwilling to devote any genuine effort toward meeting his child support obligations, ordered him incarcerated until he paid his arrearage of child support in excess of $12,000. The evident problem with this order for incarceration is that it was not accompanied by a preliminary finding that Floyd had the present ability to purge himself of contempt by making such a payment. It is a "well-settled rule in this state that the court's power to commit a person to jail until he complies with the terms of the decree depends upon his present ability to

comply with the decree." *Wilborn v. Wilborn,* 258 So. 2d 804, 805 (Miss. 1972). There is nothing in the record now before this Court to indicate that Floyd had the capacity to purge himself of contempt by paying such a large sum. In fact, everything in the record suggests the contrary. It appears with some certainty from this record that, were Floyd to be held until he was able to discharge a $12,000 obligation, the judgment of the chancellor would amount to a life sentence. That is not a permissible exercise of the chancellor's power to punish for contempt. *See Newell,* 556 So. 2d at 1045; *Jones v. Hargrove,* 516 So. 2d 1354, 1358 (Miss. 1987).

We observe that the chancellor added an alternative method for Floyd to end his confinement when he added the phrase "or an amount to be approved by this Court" to the judgment. We must, therefore, determine the effect of this alternate provision. This alternative does not specify what lesser amount might satisfy the court; it provides no mechanism for Floyd to seek a determination of what amount would be acceptable; it does not establish a standard by which the chancellor would determine a suitable amount; nor does it offer any assurance that Floyd would have the capacity to meet a lower amount the chancellor might find satisfactory. For those reasons, we conclude that this "escape valve" does not cure the problems inherent in the chancellor's judgment as it now stands. If Floyd is to be incarcerated civilly and be given the means to gain his release, that means must be determined at the inception of the incarceration, and it must be within Floyd's capacity to perform. He may not be incarcerated on the prospect that, at some undetermined future time in some undetermined manner, the chancellor will settle on a means for Floyd to gain his release that is within his ability to perform.

We, therefore, reverse and remand this case for further proceedings not inconsistent with this opinion. Our opinion should not be read as holding that the chancellor is limited on remand to civil contempt remedies. In cases where, at the time performance was due, the contemnor had the ability to perform and wilfully failed to do so, but has since rendered himself unable to perform, a criminal sanction may be the only effective way to uphold the integrity of the chancellor's orders. Nothing we have said constitutes a holding that the chancellor might not consider this alternate means of dealing with Floyd's perceived intransigence on remand. We caution, however, that in the event criminal sanctions are sought, there are procedural requirements and constitutional protections to the contemnor that must be observed, including those previously discussed in this opinion. Also, we observe that the ultimate issue of contempt is fundamentally different in the two proceedings, since criminal contempt is based upon an unwillingness to perform at the time the obligations fell due, but a coercive civil incarceration is based on the idea that the contemnor stands before the court with the present ability to meet his legal obligations under the court's decree.

Should the chancellor elect to proceed civilly and conclude that Floyd does have the present ability to pay some part, though perhaps not all, of the past due amount and is refusing to do so, it would not be improper to order his incarceration for civil contempt until such time as he is prepared to meet this diminished obligation ("diminished" only for purposes of temporarily regaining his freedom -- not permanently diminished in terms of relieving his legal obligation to pay the entire judgment amount). However, this civil incarceration must be based upon a finding of Floyd's present capacity to pay any such lesser amount. Without a finding of that ability, Floyd is not subject to a coercive incarceration.

We also note, to avoid any possibility of confusion, that all portions of the chancellor's judgment except that portion dealing with Floyd's incarceration remain unaffected by this opinion. Specifically,

we leave undisturbed the chancellor's decision to reduce the arrearage to a judgment against Floyd, a matter that has nothing to do with the issue of his alleged contempt.

THE JUDGMENT OF THE CHANCERY COURT OF RANKIN COUNTY IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THE TERMS OF THIS OPINION. COSTS OF THE APPEAL ARE ASSESSED TO THE APPELLEE.

BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR. PAYNE, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY KING, J.

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PAYNE, J., CONCURRING:

I concur with the majority but would caution readers not to read this opinion to aid those non-supporters who refuse to pay when they can, and then render themselves unable to pay when they are caught. Non-supporting parents have a non-forgivable duty to pay court ordered support, which even the court cannot waive for them. *Varner v. Varner*, 588 So. 2d 428, 432-33 (Miss. 1991) sets out the oft quoted statement that "support obligations vest in the child as they accrue, and no court may thereafter modify or forgive them if they be not paid. The only defense to an action therefore is payment." *Id.* at 433 (citations omitted). As the majority so well says, escaping contempt has nothing to do with a vested claim for arrearage in child support.

KING, J., JOINS THIS SEPARATE WRITTEN OPINION.