IN THE COURT OF APPEALS 2/11/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00922 COA

RALPH TODD WILLIS

APPELLANT

v.

LISA J. WILLIS

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. WILLIAM L. GRIFFIN, JR.

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

PHILIP MANSOUR, JR.

ATTORNEY FOR APPELLEE:

WILLARD L. MCILWAIN, JR.

NATURE OF THE CASE: DOMESTIC RELATIONS

TRIAL COURT DISPOSITION: APPELLANT FOUND IN CONTEMPT; APPELLANT'S MOTION FOR MODIFICATION DENIED

BEFORE BRIDGES, C.J., BARBER, AND DIAZ, JJ.

BRIDGES, C.J., FOR THE COURT:

This is an appeal from the Washington County Chancery Court, where Ralph Todd Willis was held in contempt and sentenced to serve ninety days in the county jail for his failure to pay past due alimony and child support. On appeal, Ralph alleges the chancellor erred in holding him in contempt and erred in not granting him a motion to modify the original support decree.

FACTS

Lisa and Ralph were divorced on June 23, 1993. Pursuant to the final decree, Ralph was ordered to pay alimony to Lisa in the amount of $500 per month, child support for the three minor children in the amount of $1,500 per month, $536 per month for Lisa's car, and a $12,000 yearly mortgage on their jointly owned residence. In February 1994, Ralph filed a motion to modify the final decree, to which Lisa responded by filing a cross-complaint for contempt because of Ralph's failure to make child support and alimony payments. The court answered both motions by declining to modify the original decree and entered a finding of contempt against Ralph.

In July 1994, Lisa filed another motion for contempt. The court ruled that Ralph was in contempt, but that he did not have the financial means to purge himself of that contempt. Lisa was given a judgment for $12,832.80, and was awarded $500 in attorney's fees.

In May of 1994 and November of 1994, Lisa's car was repossessed and her home foreclosed upon as a direct result of Ralph's failure to obey the order of the court. On April 1, 1994, Ralph obtained a $500 reduction in child support because he was given custody of one of the children. Ralph's share of the proceeds from the foreclosure sale on the house was $10,029.43. This amount was transferred to Lisa and applied to the judgment previously rendered, and the additional arrearages accrued since the rendition of the judgment.

In January 1995, Lisa purchased a new home at a monthly mortgage rate of $652. In the court's findings of facts, it found that Ralph had the specific obligation to provide Lisa with housing, and despite the foreclosure of the original home, Ralph was now responsible for the new mortgage. With income in excess of $60,000 in just the last five months of 1994, notwithstanding Ralph's pleadings that he was unable to meet his obligations, the court found Ralph did not prove his inability to pay. The lower court pronounced that Ralph "has not proved an inability to pay his court ordered obligations nor has he proved an impossibility of performance. He is in contumacious contempt of this court. The court orders that he serve ninety days in the Washington county jail for this contempt, said sentence to commence immediately."

SCOPE OF REVIEW

This Court has a limited scope of review concerning the chancellor's decision regarding matters of child support and alimony. We are without authority to disturb the chancellor's decision unless we determine that there has been a manifest abuse of discretion or an erroneous application of law. *Ethridge v. Ethridge*, 648 So. 2d 1143, 1145-46 (Miss. 1995). Findings of facts will be affirmed where there is substantial evidence in the record to support the chancellor's findings, and absent manifest error, this Court will not reverse. *Gebetsberger v. East*, 627 So. 2d 823, 826 (Miss. 1993); *Bank of Mississippi v. Hollingsworth*, 609 So. 2d 422, 424 (Miss. 1992) (citations omitted). With

regard to the standard of review for contempt, the Supreme Court has stated, "contempt matters are committed to the substantial discretion of the trial court which, by institutional circumstance and both temporal and visual proximity, is infinitely more competent to decide the matter than we are." *Varner v. Varner*, 666 So. 2d 493, 496 (Miss. 1995) (citing *Cumberland v. Cumberland*, 564 So. 2d 839, 845 (Miss. 1990)).

ARGUMENTS AND DISCUSSION OF THE LAW

I. DID THE CHANCELLOR ERR IN HOLDING RALPH WILLIS IN CRIMINAL AND CIVIL CONTEMPT?

Ralph contends that the chancellor erred in holding him in criminal and civil contempt after he refused to pay the arrearage owed to Lisa. He was first held in civil contempt in August 1994, but the court ruled that Ralph did not have the financial means to pay Lisa. It was later discovered that Ralph did have significant income, but that he had been hiding money through various corporate facades that he used to disguise his assets. In July 1995, Ralph was described as being in contumacious contempt and ordered to serve ninety days in the Washington County jail.

To begin with, it is necessary to distinguish between criminal and civil contempt. If the purpose of the proceedings is to coerce action or non-action by a party, the order of contempt is characterized as civil. This type contempt proceeding is ordinarily instituted by one of the parties to the litigation who seeks to coerce another party to perform or cease performing an act. The order of contempt is entered by the court for the private benefit of the wounded party. Such orders classically provide for termination of the contemnor's sentence upon purging himself of the contempt. The sentence is usually indefinite and not for a fixed term. Consequently, it is said that the contemnor "carries the key to his cell in his own pocket." *Jones v. Hargrove*, 516 So. 2d 1354, 1357 (Miss. 1987) (quoted in *Varvaris v. State*, 512 So. 2d 886, 887 (Miss. 1987)).

On the other hand, a criminal contempt proceeding is solely to vindicate the authority of the court, or to punish for conduct offensive to the public in violation of an order of the court. *Jones v. Hargrove*, 516 So. 2d 1354, 1357 (Miss. 1987). Criminal contempt is punishment for a past offense, is quasi-criminal, and the essence of the offense is that a defendant willfully, maliciously, and contumaciously has refused to comply with a decree of the court. *Langford v. Langford*, 176 So. 2d 266, 267 (Miss. 1965).

Furthermore, there are certain safeguards available to one exposed to the possibility of criminal sanctions that are not available if only civil sanctions are sought. If criminal punishment is sought, the burden of proof is higher, being beyond a reasonable doubt. *Gompers v. Buck's Stove and Range Co.*, 221 U.S. 418, 444 (1911). Also, the alleged contemnor is entitled to assert his Fifth Amendment right against self-incrimination. *Id.* If the criminal sanctions are severe enough, he may even be entitled to a jury trial. *Purvis v. Purvis*, 657 So. 2d 794, 798 (Miss. 1995). Because of the inherent differences in a proceeding for punishing one criminally for contempt as opposed to a proceeding seeking only coercive civil remedies, it is also clear that one being exposed to possible criminal sanctions is entitled to appropriate notice. *Wood v. State*, 227 So. 2d 288, 290 (Miss. 1969) (citation omitted).

Though on appeal Willis alleges both civil and criminal contempt, the more accurate argument should have been whether the court erred in holding him in civil contempt. This distinction is made clear by the above definitions; therefore, we will review whether the lower court erred in holding Willis in civil contempt.

As with the case at hand, it is the general rule that a decree ordering alimony or child support payments, with proof of defendant's failure to make the payments, is sufficient to make out a prima facie case of civil contempt. *Masonite Corp. v. International Woodworkers of America*, 206 So. 2d 171, 183 (Miss. 1967) (citations omitted). A defendant may avoid a judgment of contempt by establishing that he is without the present ability to discharge his obligations. *Varner v. Varner*, 666 So. 2d 493, 495 (Miss. 1995); *Gebetsberger v. East*, 627 So. 2d 823, 826 (Miss. 1993). However, since Willis raised his inability to pay his child support obligation as a defense, the burden is on him to show this with particularity. *Morreale v. Morreale*, 646 So. 2d 1264, 1267 (Miss. 1994).

When Ralph raised the defense of inability to pay, the judge found that he "has not proved an inability to pay his court ordered obligations nor has he proved an impossibility of performance." Therefore, Ralph was in civil contempt, which is defined as follows:

> If the purpose of the proceedings is to coerce action or non-action by a party, the order of contempt is characterized as civil. Such orders, although imposing a jail sentence, classically provide for *termination of the contemnor's sentence upon purging himself of the contempt.* The sentence is usually indefinite and not for a fixed term.

Newell v. Hinton, 556 So. 2d 1037, 1044 (Miss. 1990); *Jones v. Hargrove*, 516 So. 2d 1354, 1357 (Miss. 1987) (citations omitted) (emphasis added).

According to the Mississippi Supreme Court, "the determination of punishment for contempt falls within the discretion of the chancellor, and this Court will not reverse on appeal absent manifest error or application of an erroneous legal standard." *Smith v. Smith*, 607 So. 2d 122, 126 (Miss. 1992). In the case at hand, the chancellor applied an erroneous legal standard by sentencing Willis to ninety days in the Washington county jail. A chancellor must either abide by the civil contempt procedure, which is to sentence the defendant to incarceration until he purges himself, or follow section 9-1-17, which states:

> The Supreme, circuit, chancery, and county courts and the Court of Appeals shall have power to fine and imprison any person guilty of contempt of the court while sitting, but the fine shall not exceed one hundred dollars for each offense, nor shall the imprisonment continue longer than thirty days.

Miss. Code Ann. § 9-1-17 (Supp. 1995). In addition, a chancellor contemplating criminal contempt punishment must be sure to carefully abide by the constitutional safeguards outlined above. Since the aforementioned safeguards were not afforded to Willis, this Court will assume the chancellor intended to impose civil contempt sanctions upon him. This being the case, the judge should have sentenced Willis to remain in jail until he paid his arrearage. Instead, he improperly imposed a criminal penalty upon Willis. Because we feel that the imposition of any criminal penalty in this case

would be incorrect due to the absence of any of the attending safeguards, we need not address the possibility that the ninety day sentence was in violation of Miss. Code Ann. § 9-1-17. It is also a well-settled rule in this state that the court's civil power to commit a person to jail until he complies with the terms of a decree depends upon his present ability to comply with the decree. *Jones v. Hargrove*, 516 So. 2d 1354, 1357 (Miss. 1987); *Wilborn v. Wilborn*, 258 So. 2d 804, 805 (Miss. 1972). According to the record, Ralph did have the present ability to discharge his obligation; therefore, he should remain in jail until he complies with the final decree. Although sections 9-5-87 and 9-1-17 do not directly refer to a chancellor enforcing a final decree, they both authorize a chancellor to fine and imprison persons refusing to obey judgments of the court until the judgment shall be complied with.

It should be finally noted that the petition for contempt in this case originally prayed only that Willis be placed in jail until he purged himself of the contmept. No criminal contempt was ever sought. It is well-settled law in this state that a chancellor may not grant relief not prayed for in the pleadings. *Witt v. Mitchell*, 437 So. 2d 63, 65 (Miss. 1983); Warner's Griffith, Mississippi Chancery Practice (Rev. Ed.), § 564. Any attempt to do so would improperly expand the pleadings.

We find that the chancellor erred in sentencing Willis for a period of ninety days. Willis should have been incarcerated until he purged himself of the amount due to his ex-wife. For the reasons stated throughout this opinion, we reverse and remand this issue for consideration solely on what appropriate civil sanctions might be available to procure Willis' obedience to the chancellor's order.

> II. DID THE TRIAL COURT ERR IN NOT GRANTING APPELLANT'S MOTION FOR MODIFICATION OF CHILD SUPPORT AND ALIMONY?

As already stated above, findings of facts will be affirmed where there is substantial evidence in the record to support the chancellor's findings, and absent manifest error, this Court will not reverse. *Gebetsberger v. East*, 627 So. 2d 823, 826 (Miss. 1993); *Bank of Mississippi v. Hollingsworth*, 609 So. 2d 422, 424 (Miss. 1992) (citations omitted).

The chancellor in this matter stated in his findings that Ralph had "not proved an inability to pay his court ordered obligations nor has he proved an impossibility of performance." As an appellate court, we are not at liberty to deviate from the chancellor's findings of fact unless we determine that there has been a manifest abuse of discretion or an erroneous application of law. *Ethridge v. Ethridge*, 648 So. 2d 1143, 1145-46 (Miss. 1995). Because of this authority, we affirm the lower court's denial of Ralph's motion and find this proposition to be without merit.

THE JUDGMENT OF THE WASHINGTON COUNTY CHANCERY COURT IS REVERSED AND REMANDED IN PART AND AFFIRMED IN PART, WITH ALL COSTS TAXED TO THE APPELLANT.

MCMILLIN AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. HERRING, J., NOT PARTICIPATING.