

Summary of SC91160, *Dennie L. Carothers v. Pamela Carothers*

Appeal from the Macon County circuit court, Judge James P. Williams

Argued and submitted February 9, 2011; opinion issued May 17, 2011

Attorneys: The mother was represented by James McConnell, a solo practitioner from Shelbina, (573) 588-2115, and the father was represented by Danieal H. Miller of The Law Offices of Danieal H. Miller PC in Columbia, (573) 443-1645.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A mother found in contempt for failing to pay child support appeals the circuit court's judgment. In a decision written by Judge Michael A. Wolff and joined by five other judges, the Supreme Court of Missouri reverses the circuit court's judgment and remands (sends back) the case. A civil contempt judgment becomes final and appealable when it is enforced. If the warrant of commitment is stayed, however, the judgment will not be final and appealable until either the person found in contempt actually is incarcerated or, after a hearing to determine whether the contempt has been purged, the court reissues a warrant of commitment. While final and appealable, this judgment must be reversed because the mother was not represented at the contempt hearing by counsel and no valid waiver of her right to counsel appears on the record.

In a concurring opinion, Judge Zel M. Fischer notes that the holding will continue to create confusion concerning when a contempt judgment is final for purposes of appeal. He believes the better and traditional rule for when a contempt judgment is final and appealable is when the person found in contempt is incarcerated.

Facts: A father and mother's marriage was dissolved in 1993. The decree awarded custody of the youngest child to the father and custody of the older two children to the mother. After offsetting child support, the decree required the father to pay the mother a certain amount of monthly child support. After the older two children became emancipated, the child support attributable to them was terminated in September 1999, and the mother was ordered to pay child support to the father for the youngest child until April 2007. In September 2009, the father filed a motion for contempt alleging that the mother owed him back child support. The mother appeared pro se during an October 2009 hearing, which the court rescheduled for December 2009, when she again appeared pro se. The circuit court entered a contempt judgment against the mother on January 12, 2010, finding that she made no child support payments from September 1999 until February 2004 or after July 2005, putting her nearly \$16,000 in arrears, plus more than \$8,500 in accrued interest. The court further found that the father still owed the mother about \$13,000 from a December 1999 civil judgment and that the circuit clerk was holding nearly \$2,900 in a court account for that judgment from the father's garnished wages. The court ordered that the mother be incarcerated in the county jail until she purged the contempt and stayed the judgment until 10 a.m. January 25, giving the mother time to purge her contempt to avoid going to jail. It noted she could purge her contempt in the child support case by relinquishing any right to the garnished wages held in the court account and by filing a satisfaction of judgment for the judgment she held against the father in the civil case. The circuit court further noted in its contempt judgment that a warrant of commitment should issue at 10 a.m. January 25 if the mother had not filed a

satisfaction of judgment by that time. There is some confusion in the record as to when the warrant actually issued. It is dated January 12, 2010, and the court's docket sheet indicates it was mailed to the mother on January 13, but the docket sheet also states that a warrant for commitment was not issued until February 1, 2010, and not served on the mother until March 31, 2010. In February 2010, an attorney for the mother filed a notice of appeal on her behalf. She voluntarily dismissed the appeal March 24, 2010. A week later, she and the father both appeared, with counsel, before the circuit court. The warrant of commitment was served on the mother, and she was taken into custody. Six days later, the mother filed a second notice of appeal.

REVERSED AND REMANDED.

Court en banc holds: (1) The mother's second notice of appeal, filed six days after she was served with the warrant and taken into custody, was filed timely. A civil contempt order becomes final and appealable when it is enforced. In issuing an order of commitment, the trial court imposes the specific remedy of incarceration. If the warrant of commitment is stayed, however, the judgment will not be final and appealable until the contemnor (person found in contempt) actually is incarcerated on the warrant of commitment or the trial court takes evidence to determine whether contempt has been purged and then reissues a warrant of commitment. *See Emmons v. Emmons*, 310 S.W.3d 718, 723 (Mo. App. 2010). If either of these two things happen, the contemnor will have actual notice that the contempt order is enforceable and that incarceration is imminent (or already has occurred). Here, at the March 31 hearing, the contempt order was enforced, the mother was served with the warrant and incarcerated, and the contempt judgment became final and appealable.

(2) The record reflects that the circuit court erred in failing to advise the mother at the December 2009 hearing of her right to counsel and to determine that she made an intelligent and knowing waiver of that right on the record. In civil contempt actions, procedural due process requires that the court either must predetermine no jail time will be warranted or must advise the defendant that he or she has the right to be represented by counsel. Unless the defendant in a contempt action knowingly and intelligently waives the right to counsel, the court must give that defendant an adequate opportunity to obtain representation. Here, the January 2010 contempt judgment stated that the mother waived counsel at the December 2009 hearing, and the father asserts that the mother told the court she was ready to proceed without an attorney. This waiver, however, is not reflected in the record of the hearing. The transcript indicates that, at the beginning of the hearing, the judge stated that the mother "is present in person, pro se. And there was some conversation at the bench before we started the record." The transcript further indicates that, at the end of her testimony, the mother stated, "Well, like I said, I don't have the money for an attorney." This is not enough for an appellate court to determine that the mother was advised of her right to counsel and that she knowingly, voluntarily and intelligently waived it. Accordingly, the contempt judgment is reversed and the warrant of commitment is set aside.

Concurring opinion by Judge Fischer: The author concurs in the result of the principal opinion and the analysis regarding the right to counsel in contempt proceedings. He would hold, however, that the better and traditional rule for when a contempt judgment is final and appealable is that, when imprisonment is the remedy, the judgment actually is final and appealable upon its actual enforcement, when the person found in contempt is incarcerated. *See*

In re Marriage of Crow and Gilmore, 103 S.W.3d 778, 781 (Mo. banc 2003). Basing finality of the judgment on whether the court holds a hearing to determine whether the contempt has been purged and, if not, reissuing a warrant of commitment does not mean incarceration is imminent or that the judgment actually is enforced. Adhering to this traditional rule would eliminate confusion and draw a bright line as to when the time for appeal begins to run. Additionally, this would be consistent with the rule providing that when the remedy for civil contempt is a fine, the contempt judgment is considered final when the moving party executes on the fine.