

IN THE COURT OF APPEALS OF IOWA

No. 0-123 / 09-0983
Filed March 24, 2010

TASHA RAE DONTJE,
Plaintiff,

vs.

**IOWA DISTRICT COURT FOR
CARROLL COUNTY,**
Defendant.

Certiorari to the Iowa District Court for Carroll County, Gary L. McMinimee,
Judge.

Plaintiff in a certiorari action challenges an order of contempt arising out of
a dissolution decree. **WRIT ANNULLED IN PART, SUSTAINED IN PART, AND
CASE REMANDED.**

Tammy Westhoff Gentry and Trevor J. Anderson of Parrish Kruidenier
Dunn Boles Gribble Parrish Gentry & Fisher, L.L.P., Des Moines, for plaintiff.

Donavon Dontje, Irwin, pro se.

Considered by Vogel, P.J., Eisenhauer, J., and Miller, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.**I. Background Facts & Proceedings**

A dissolution decree was entered for Donavon and Tasha Dontje on September 18, 2006. The decree awarded the parties joint legal custody of their two children, Damian, born in 1996, and Lateesha, born in 1999, with Tasha having physical care. Donavon was granted visitation on alternating weekends, Wednesday evenings, alternating holidays, and six weeks during the summer. The decree provided, "This award of physical care places primary responsibility on Tasha to assure visitation and to attempt to establish a closer relationship between the children and Donavon."

On May 23, 2008, Tasha filed an application seeking to modify the visitation and child support provisions of the dissolution decree. She also filed a petition seeking to have Donavon found in contempt for failing to transfer certain personal property to her and falling behind on his child support obligation. In August 2008, Tasha and the children moved to Tripoli, Iowa, which was about 220 miles away from their previous residence in Irwin.

The parties entered into a joint stipulation and modification of the dissolution decree on December 8, 2008, which was approved by the court. The order provided that Wednesday evening visitation would be eliminated. Donavon would have visitation on alternating weekends, summer visitation, and certain holidays. The parties were to meet halfway between their residences to exchange the children for visitation.

On December 30, 2008, the district court entered a ruling on contempt matters stating Tasha had dismissed her contempt allegations against Donavon. The order also provided, “[Donavon] agrees to waive any possible contempt issues against [Tasha] with respect to the loss of any of his visitation to date.”

On March 9, 2009, Donavon filed an application seeking to have Tasha found to be in contempt for failing to follow the visitation provisions of the dissolution decree. He alleged Tasha did not present the children for visitation on the weekends of January 30 to February 1, February 13 to February 15, and February 27 to March 1.

Tasha testified she signed Lateesha up for a Cheer and Dance Clinic to be held on January 31 and February 1, although she was aware this was Donavon’s scheduled weekend to have the children. The registration deadline for the clinic was January 16. Tasha sent Donavon an e-mail at 11:38 a.m. on January 30, stating Lateesha was not coming to visitation that weekend and asking if she could trade weekends.¹ He was to have the children beginning at 6:00 p.m. on January 30. Tasha testified she did not tell Donavon sooner about the clinic because Lateesha at first stated she was not going to go to the clinic, but at the last minute she decided to go. Tasha stated, “I let my daughter make the choice.” She testified that Damian asked to watch his sister, so he also did not go to visitation that weekend.

Tasha testified she started out taking the children to visitation on February 13, but it was snowing and the roads got slippery so she turned around and went

¹ Donavon testified he worked every other weekend, and stated that if he traded weekends he would have the children on a weekend when he was working. Tasha stated she was aware Donavon worked alternating weekends.

home. She then informed Donavon they were not coming for visitation that weekend.

Donavon was also scheduled to have the children on the weekend starting February 27. Damian was invited to a birthday party to be held at 7:00 p.m. on February 28. The invitation stated he was to R.S.V.P. by February 10. Damian sent his father an e-mail at 8:07 p.m. on February 24, stating he was not going to visitation that weekend because he was going to a birthday party. Tasha stated she told Damian to talk to his father about it because “[Damian] was a young man and I could not be caught in the middle of that” Lateesha still came for visitation that weekend.

The district court concluded Tasha willfully violated the terms of the modified decree by failing to make the children available for visitation on January 30 and to have Damian available on February 27. The court determined it could not find beyond a reasonable doubt that Tasha willfully denied visitation on February 13 and Donavon had not established contempt as to that weekend. The court noted, “[a]s the custodial parent, Tasha is responsible for making the children available for scheduled visitation; it is not the children’s decision.”

Donavon asked for a modification of physical care in lieu of punishment. The court denied this request, finding there was insufficient evidence to address the issue. The court also found it would not be reasonable to order make-up visitation due to Donavon’s work schedule. The court ordered Tasha to serve one day in jail for each day Donavon did not receive visitation. Tasha was

ordered to serve four days in the Carroll County jail. She was also ordered to pay \$500 toward Donavon's attorney fees.

Tasha filed a motion to amend and enlarge. She asserted that she should not have been found in contempt for permitting the children to engage in wholesome extracurricular activities. Furthermore, she stated that she gave birth to a child on June 10, 2009, and should not be forced to be away from this child to spend time in jail. Tasha also argued the court should not have given consideration to previously raised issues of contempt.

The district court noted that Tasha's post-trial motion was not timely. The court denied the motion to amend or enlarge. The court extended the time, however, for Tasha to complete her sentence. Tasha filed a petition for writ of certiorari pursuant to Iowa Rule of Appellate Procedure 6.301 (2009). The Iowa Supreme Court granted the petition and stayed the district court's order.

II. Standard of Review

Certiorari actions are tried at law. *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998). Our review, therefore, is for the correction of errors at law. Iowa R. App. P. 6.907; *Bell v. Iowa Dist. Ct.*, 494 N.W.2d 729, 730 (Iowa Ct. App. 1992). In certiorari actions we are strictly limited to reviewing the jurisdiction of the lower court and the legality of its actions. *State v. McKinney*, 756 N.W.2d 678, 679 (Iowa 2008). An illegality exists when the findings of the court do not have substantial evidentiary support, or when the court does not apply the proper law. *Farrell v. Iowa Dist. Ct.*, 747 N.W.2d 789, 790 (Iowa 2008); *Amro v. Iowa Dist. Ct.*, 429 N.W.2d 135, 138 (Iowa 1988).

III. Sufficiency of the Evidence

A person may be found in contempt if the person has willfully violated a court order or decree. Iowa Code § 598.23(1) (2009). A person's conduct is considered "willful" if there is evidence it is "intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemnor had the right or not." *City of Dubuque v. Iowa Dist. Ct.*, 725 N.W.2d 449, 452 (Iowa 2006).

A party alleging contempt must show the alleged contemnor had a duty to obey a court order, and willfully failed to perform the duty. *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995). A person should not be punished for contempt unless the alleged contumacious actions have been established by proof beyond a reasonable doubt. *Phillips v. Iowa Dist. Ct.*, 380 N.W.2d 706, 709 (Iowa 1986). We review to determine whether there is substantial evidence in the record to show the alleged contemnor is guilty of contempt beyond a reasonable doubt. *Christensen*, 578 N.W.2d at 678. The alleged contemnor may show the failure to comply with a court order was not willful by showing the order was indefinite, or that the person was unable to comply with the order. *Id.*

We determine there is substantial evidence in the record to support the district court's findings that Tasha was in contempt of the modified provisions of the dissolution decree regarding visitation. Tasha was specifically required "to assure visitation . . . between the children and Donavon." Tasha disobeyed the court order by not making the children available for visitation on the weekends of

January 30 and February 27. The evidence shows her actions were willful. Tasha's actions were contrary to her known duty to give Donavon visitation time with the children under the terms of the decree. She showed a disregard for Donavon's right to spend time with the children. See Iowa Code § 598.41(1) (providing children should have "maximum continuing physical and emotional contact with both parents"). Tasha did not show the court order was indefinite, or that she was unable to comply with her duties under the decree. See *Christensen*, 578 N.W.2d at 678.

We conclude the district court did not exceed its jurisdiction or act illegally in finding Tasha in contempt of the visitation provisions of the modified dissolution decree on the weekends of January 30 and February 27.

IV. Punishment

Tasha contends the district court abused its discretion by sentencing her to four days in jail. The district court has a wide range of discretion in imposing punishment for contempt. *Newby v. Iowa Dist. Ct.*, 259 Iowa 1330, 1343, 147 N.W.2d 886, 894-95 (1967). We will interfere only when the court has clearly abused its discretion. *Id.*

In determining Tasha's punishment, the district court stated:

Although Donavon has previously raised issues of contempt, the issues have been resolved without an adjudication of contempt against Tasha. Given these circumstances this court finds an appropriate sentence is to require Tasha to serve one day in jail for each day Donavon was deprived visitation.

In the punishment portion of the court's ruling, the court took into consideration instances mentioned by Donavon at the contempt hearing,² that the parties specifically stated were not being raised as allegations of contempt in the present case.³ The court's order of December 30, 2008, stated "[Donavon] agrees to waive any possible contempt issues against [Tasha] with respect to the loss of any of his visitation to date." This order was approved as to form and content by Donavon and Tasha. Thus, Donavon waived any possible contempt issues he could have raised against Tasha for incidents prior to December 30, 2008.

Previous contempt judgments may be considered in determining the punishment for contempt. See *Sarich v. Iowa Dist. Ct.*, 256 Iowa 437, 441-42, 127 N.W.2d 618, 621 (1964). In this case there were no previous contempt judgments, only allegations of previous incidents. Donavon expressly waived his right to raise "any possible contempt issues" concerning lost visitation previous to December 30, 2008. We conclude the district court improperly considered these waived allegations regarding previous incidents in determining Tasha's punishment for contempt.

² Donavon presented a calendar as an exhibit showing when he had visitation with the children. He briefly mentioned problems on the weekend of October 8, Thanksgiving, and December 19. Tasha objected to the evidence. The district court overruled the objection, stating it would give the evidence the weight it deserved. Tasha was not questioned about these earlier incidents.

³ Donavon was questioned as follows:

Q. Donavon, you're not asking the Court to cite her for contempt for matters prior to December, are you? A. No, sir.

Q. In fact, you were just pointing those out to show a pattern of what's been happening? A. Exactly.

In addition, we find there is not substantial evidence in the record to show Tasha was in contempt for the previous incidents alleged by Donavon. There is little information in the record about these incidents, and no evidence from Tasha as to why the children may not have been available for visitation. We note the district court did not make any findings that these allegations of prior contempt were proven beyond a reasonable doubt. When the court's factual findings lack substantial evidentiary support, an illegality exists. See *Christensen*, 578 N.W.2d at 678. We conclude the court acted illegally by considering these unproven, and waived, allegations in determining the punishment for contempt. We therefore vacate the four-day jail sentence.

We determine the matter should be remanded to the district court for a reconsideration of Tasha's punishment for not making the children available for visitation on the weekends of January 30 and February 27. In doing so the court should not consider "any possible contempt issues" regarding visitation arising prior to December 30, 2008.

V. Attorney Fees

A. In her appellate brief, in the heading to an argument, Tasha argues the district court abused its discretion by assessing attorney fees against her. She presents no further argument, however, on the issue of attorney fees in the contempt order. A party's failure to cite authority in support of an issue may be deemed waiver of that issue. Iowa R. App. P. 6.903(2)(g)(3). We conclude Tasha has waived this issue on appeal.

B. Tasha requests appellate attorney fees. This case does not involve an appeal, but a petition for writ of certiorari. Certiorari is a separate action from an underlying contempt action. *Lane v. Oxberger*, 224 N.W.2d 245, 247 (Iowa 1974). Thus, section 598.24 which permits attorney fees in a contempt action does not apply in a certiorari action. *Id.* For this reason, we deny Tasha's request for attorney fees for the certiorari action.

VI. Disposition

We annul the writ of certiorari on the issue of whether Tasha was in contempt of the modified dissolution decree by failing to make the children available for visitation on two occasions. We sustain the writ on the issue of punishment, and remand to the district court for reconsideration of the issue of punishment. Costs of this appeal are assessed one-half each to Donavon and Tasha.

WRIT ANNULLED IN PART, SUSTAINED IN PART, AND CASE REMANDED.