

IN THE COURT OF APPEALS OF IOWA

No. 2-1094 / 12-0934
Filed February 13, 2013

LEONARD LAVERN ELLIOTT,
Plaintiff-Appellant,

vs.

**IOWA DISTRICT COURT FOR
WAPELLO COUNTY,**
Defendant-Appellee.

Appeal from the Iowa District Court for Wapello County, Myron L. Gookin,
Judge.

Plaintiff in a certiorari action challenges an order of contempt arising out of
the visitation provisions set forth in a protective order. **AFFIRMED AND WRIT
ANNULLED.**

R. E. Breckenridge of Breckinridge Law, P.C., Ottumwa, for appellant.

Michelle Mackel-Wiederanders of Iowa Legal Aid, Des Moines, and
Edward Conrad, Ottumwa, for appellee.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

Leonard Elliott, plaintiff in a certiorari action, challenges an order of contempt arising out of the visitation provisions set forth in a protective order. Upon our review, we find substantial evidence supports the finding of contempt beyond a reasonable doubt. We affirm the district court's contempt finding and annul the writ of certiorari.

I. Background Facts and Proceedings.

Jennifer and Leonard Elliott are married. Their daughter was born in November 2010. On May 3, 2011, Jennifer filed a petition for relief from domestic abuse, alleging threats of physical harm perpetrated by Leonard and that she was afraid for her life and the life of their child.

The district court entered a temporary protective order that granted Jennifer temporary custody of the child. Following a hearing on May 23, 2011, the district court entered a protective order by consent, granting Jennifer temporary custody of the child and providing Leonard with alternating weekend visitation from 7:00 p.m. Friday to 7:00 p.m. Sunday. The order specified that initially exchanges of the child were to take place at the Wapello County Sheriff's Office in Ottumwa, with Leonard providing all transportation. Beginning July 8, 2011, however, exchanges were to take place at the home of Irene Lewellen, a third party facilitator in Des Moines, with each party providing their own transportation to Lewellen's residence.

Jennifer filed a request to change the protective order, requesting that after July 8, 2011, the visitation exchanges continue to take place at the Wapello

County Sheriff's Office with Leonard providing transportation. On July 6, 2011, following a hearing, the court entered an order¹ providing that Leonard's visitation times remained the same, but that starting July 8, 2011, Leonard was to pick up the child from the Wapello County Sheriff's Office at the commencement of each visit on Friday, and Jennifer or her designee was to pick up the child from Leonard's residence in Des Moines at the conclusion of each visit on Sunday. Because the parties believed the reference in the court's order to Leonard's residence in Des Moines as the exchange point in Polk County was an error, they agreed to utilize Irene Lewellen's residence in Des Moines as the Polk County exchange point.

At some point, Leonard filed a dissolution action in Polk County. Custody and visitation issues are in dispute in that pending action.

Leonard was scheduled to have visitation with the child the weekend of March 30 to April 1, 2012. Jennifer testified that the week before Leonard's visit, she had car trouble and was not able to drive to Des Moines to pick up the child at the conclusion of Leonard's visit on Sunday. According to Jennifer, she and Leonard reached an agreement that Leonard would provide transportation to bring the child back to the Wapello County Sheriff's Office in Ottumwa on Sunday, April 1 at 7:00 p.m. Leonard claimed no such agreement was made.

In any event, Jennifer went to the Wapello County Sheriff's Office at 7:00 p.m. on Sunday, April 1. She waited two to three hours, but Leonard did not

¹ The court's initial order entered on July 6, 2011, contained an apparent scrivener's error stating it expired on "July 5, 2011." The court entered an amended order on July 8, 2011, identical to the initial order, but expiring on "July 5, 2012."

show up. Jennifer attempted to contact her attorney, Gary Hill,² in Des Moines. She also spoke with an officer from the Wapello County Sheriff's Office and contacted the Polk County Sheriff's Office. Nothing occurred in Jennifer's attempt to locate the child until she was able to contact Hill the following day.

Meanwhile, Leonard had dropped the child off at Lewellen's house in Des Moines at approximately 7:00 p.m. on April 1. Obviously Jennifer did not appear to pick up the child because she was waiting in the parking lot of the Wapello County Sheriff's Office. At about 8:30 p.m., Lewellen called Leonard and told him to come back and pick up the child because Jennifer had not arrived and Lewellen had to leave due to a family emergency. Leonard went back to Lewellen's to pick up the child.

On April 3, 2012, Jennifer initiated these proceedings by filing an affidavit to start contempt proceedings based on the Chapter 236 protective order, alleging Leonard had the child in Des Moines and that he refused to return the child. Ultimately, Jennifer's attorney Hill sought relief in the Polk County dissolution action to return the child to Jennifer. On April 13, following a hearing, the Polk County District Court ordered Leonard to return the child to Jennifer.

On April 23, 2012, a hearing was held on Jennifer's application seeking to have Leonard found in contempt. Leonard testified he was "not obligated" to bring the child to the Wapello County Sheriff's Office and that "the only thing" Jennifer had to do "was to contact either [Lewellen] or somebody else in Polk County to get ahold of me." As Leonard further testified:

² Hill is Jennifer's attorney in her Polk County dissolution action.

[Hill] knows how to get in contact [with me], Jennifer knows how to get in contact [with me]. They didn't even have to go through the courts. All they had to do was call [Lewellen] and say, "Hey, look, I'm in Des Moines, and I want my daughter." "Oh, okay. Cool. Now that you're finally here."

Leonard also justified his actions in keeping the child until April 13 by alleging he was entitled to make up "back" visitation because of weekends he missed in the winter due to bad weather.

On May 2, 2012, the district court issued its ruling finding Jennifer had sustained her burden of proving Leonard had willfully failed or refused to comply with the visitation provisions of the protective order. The court acknowledged, as Leonard contended, that the Sunday visitation exchanges were supposed to occur at Lewellen's residence.³ The court observed, however, that the bottom line was that Leonard knew his visitation period ended at 7:00 p.m. on Sunday and he willfully violated that provision of the court's order. As the court found:

Jennifer has proven beyond any reasonable doubt that Leonard willfully, knowingly, intentionally and deliberately deprived Jennifer of the physical custody of the child from and after 7:00 p.m. on April 1, 2012, until April 13, 2012, knowing that Jennifer is the custodial parent entitled to the physical care of the child except during his court ordered periods of visitation.

The court ordered Leonard to serve twelve days in the Wapello County Jail on the contempt finding, which was "the same period of time he wrongfully withheld physical care of the child from Jennifer."

Leonard filed a petition for writ of certiorari.

³ The court observed, however, that Lewellen's house was not the designated visitation exchange point per the active protective order issued July 8, 2011, but rather, the parties had decided to conduct some exchanges there.

II. Standard of Review.

On a writ of certiorari, we review for the correction of errors at law, and we are to “examine only the jurisdiction of the district court and the legality of its actions.” *Reis v. Iowa Dist. Ct.*, 787 N.W.2d 61, 66 (Iowa 2010). The district court acts illegally when its factual findings lack substantial evidentiary support. *Id.* Because proof beyond a reasonable doubt must be established for a finding of contempt, substantial evidence to support such a finding consists of evidence that “could convince a rational trier of fact that the alleged contemnor is guilty of contempt beyond a reasonable doubt.” *Id.* We review the district court’s conclusions of law for errors at law. *Id.* Our review of constitutional issues de novo. *Lewis v. Jaeger*, 818 N.W.2d 165, 175 (Iowa 2012).

III. Due Process.

Leonard contends he was “denied a full and fair hearing on the allegation of contempt and thus his due process rights were violated.” Leonard states the district court “limited presentation of evidence on the grounds that the court had only limited time to hear the matter,” and that he “never rested in his defense, instead the court abruptly stopped the hearing and decided the case on incomplete evidence.”

Article I, section 9 of the Iowa Constitution guarantees that “no person shall be deprived of life, liberty, or property, without due process of law.”⁴ “Due process requires fundamental fairness in a judicial proceeding.” *State v. Becker*, 818 N.W.2d 135, 148 (Iowa 2012). Due process has two essential requirements:

⁴ Leonard relies on Iowa constitutional grounds in support of his contention.

notice and an opportunity to be heard. *State v. Seering*, 701 N.W.2d 655, 665-66 (Iowa 2005). Leonard argues he was denied an opportunity to be heard.

Even assuming, *arguendo*, that this issue was preserved for our review,⁵ we determine Leonard was given sufficient time to present evidence in his defense. The April 23, 2012 hearing commenced at 2:18 p.m. and concluded at 3:01 p.m. Leonard and Jennifer appeared and were represented by counsel, R.E. Breckinridge and Edward Conrad, respectively. At the outset of the hearing, the district court acknowledged there were several matters filed by the parties scheduled for that day but that the contempt matter filed by Jennifer would be addressed first:

THE COURT: All right. Well, the difficulty that we're gonna have today, as counsel knows, is that we are limited to 30 minutes for any matter that's being heard on a court service day.

I'm going to consider this to have begun at 2:20. But I cannot give more than 30 minutes, because I have other attorneys and their cases waiting for record to be made yet this afternoon also.

So, um—we will begin with the contempt matters, because that's what Mr. Breckinridge is here and is representing Mr. Elliott on. And as far as the matters relating to modifying the 236 order concerning visitation, I don't think we're going to be able to deal with those today, and that'll either have to be continued, or as I understand it, there is a pending divorce action in Polk County. Those matters may have to be dealt with as part of that pending divorce action.

So that being said, at this point, we'll proceed with the contempt matters. And we'll begin with the contempt matter that Ms. Elliott has filed, and Mr. Conrad, you may make whatever record you'd like to make with regard to that.

⁵ At no time did Leonard alert the district court to his alleged dissatisfaction with the time allotted to present his defense on the contempt action filed by Jennifer. "Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal." *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008).

Jennifer testified as the sole witness for her case. After re-cross examination by Breckinridge, the attorneys stated they had no further questions for Jennifer. The district court stated, “At this time, we’re going to have to give Mr. Breckinridge the opportunity to present his evidence, so Mr. Breckinridge, what evidence would you like to present?” For Leonard’s defense, Breckinridge presented testimony from Irene Lewellen and Leonard. After direct examination and cross-examination of both witnesses, the following exchange occurred:

MR. CONRAD: Nothing further, Your Honor.

THE COURT: Any further questioning, Mr. Breckinridge?

MR. BRECKINRIDGE: No, sir.

THE COURT: You may step down [to Leonard]. Counsel, at this time, the Court simply doesn’t have any more time. I’ve given you ten more minutes than what’s allowed on a court service day. So I’ll take the matter under advisement and I’ll issue a ruling. Thank you very much.

MR. CONRAD: Your Honor, just as a matter—will the other matters be reset?

THE COURT: Uh, yes, the request for modification of the 236 order, I’m going to actually have to look at—if there’s a pending divorce action where custody matters are going to be heard in Polk County, that’s really the appropriate venue to hear those matters.

And so I can’t tell you at this point exactly what I’m gonna do, but either those matters will be continued to a later date here in Wapello County, or I may investigate transferring those matters to Polk County. Thank you.

Upon our review of the record from the April 23, 2012 hearing, we find no indication that Leonard raised a contention to the district court that he was not allowed sufficient time to present evidence. When asked by the district court, Leonard’s attorney stated he had no further questions for the witnesses. At no point after the hearing did Leonard object to the opportunity he was allowed to present his defense. We find Leonard was given ample opportunity to present evidence, and he has failed to establish any violation of his due process rights.

IV. Sufficiency of the Evidence.

Leonard argues the district court erred in finding him in contempt and imposing punishment. Leonard contends the court's finding "is without adequate proof" because he could not have "refused to return the child at the end of visitation" where "[t]he facts are undisputed that Jennifer never traveled to Des Moines to retrieve the child." Leonard essentially alleges he was merely "rel[ying] on the court's previous order that Jennifer was required to come to Des Moines to retrieve the child" during the twelve days he kept the child after his weekend visitation ended.

Contempt is willful disobedience to a court order or decree. *Reis*, 787 N.W.2d at 68; *In re Marriage of Lytle*, 475 N.W.2d 11, 12 (Iowa Ct. App. 1991). To support a finding of willful disobedience, the court must find evidence the alleged contemnor's conduct was "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).

In other words, 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). "In Iowa, all actions for contempt are quasi-criminal, even when they arise from civil cases." *Reis*, 787 N.W.2d at 68. Accordingly, we review the record to determine whether

there is substantial evidence to show the alleged contemnor is guilty of contempt beyond a reasonable doubt. *Id.*

In July 2011, the district court entered a protective order, in effect through July 5, 2012, granting Jennifer temporary custody of the child and providing Leonard with alternating weekend visitation from 7:00 p.m. Friday to 7:00 p.m. Sunday. On April 1, 2012, Leonard failed to return the child to Jennifer after his specified visitation time. We observe that the record indicates there may have been some confusion between the parties in regard to the location the visitation exchange was to occur on Sunday however, no amount of confusion could explain Leonard's refusal to return the child to Jennifer until twelve days later and only when he was ordered to do so by the Polk County District Court. Indeed, Leonard's own testimony supports the finding that he willfully disobeyed the court's order by keeping the child after his ordered visitation period and during the time Jennifer was ordered to have physical care of the child.

Upon our review of the record in this case, we find substantial evidence supports beyond a reasonable doubt the district court's findings that Leonard was in contempt of the visitation provisions of the protective order. We affirm the district court's contempt finding and annul the writ of certiorari.

AFFIRMED AND WRIT ANNULLED.