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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1072

Filed: 2 May 2017

Carteret County, No. 11 CVD 1123

ERIC SCOTT ROWE, Plaintiff,

v.

SARAH CHARLENE ROWE, Defendant,

v.

MARLENA ROWE, Intervenor.

Appeal by plaintiff from orders entered 28 April 2016 by Judge Karen A. Alexander in Carteret County District Court. Heard in the Court of Appeals 6 April 2017.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson and K. Edward Greene, for plaintiff-appellant.

No brief for appellee.

TYSON, Judge.

Eric Scott Rowe (“Plaintiff”) appeals from orders awarding Sarah Charlene Rowe (now Doans) (“Defendant”) custody of their minor child and finding him in

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contempt. We reverse the trial court's custody determination and remand for a new hearing. We vacate the trial court's order holding Plaintiff in civil contempt and remand for further findings of fact and conclusions of law.

I. Factual Background

This case is related to another appeal before this Court, *Rowe v. Rowe*, No. COA16-1073, __ N.C. App. __, __ S.E.2d __ (filed May 2, 2017). While these cases were joined for trial, each case involves separate children with separate mothers. The related case involves two children, A.T. and E.B., from Plaintiff's prior marriage to Leslie Leigh Rowe (now Jones). The present case involves custody of M.C., the biological child of Plaintiff and Defendant.

On 22 August 2011, Plaintiff initiated this custody action against Defendant. Soon thereafter, Plaintiff and Defendant entered into a temporary consent order for visitation. The temporary consent order provided an alternating week custody arrangement with M.C. being exchanged every other week.

A. 2014

On 1 February 2014, Plaintiff testified he attempted to pass a truck by moving into the left lane and the truck cut him off. When Plaintiff and the truck arrived at a stop light, the truck pulled up in the left turn lane beside Plaintiff. Plaintiff testified "out of the corner of [his] eye [he] saw a flash, [he] heard a bang, and then [he] heard something and felt something hit [his] car" Thinking he was being fired upon,

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Plaintiff rolled down his window and fired three shots into the truck, which drove away. Plaintiff's three children were inside the car during the incident. His older daughter, A.T., woke up, but his other two children, M.C. and E.B., remained asleep.

Plaintiff ultimately faced criminal charges and entered a plea of no contest. The trial court suspended Plaintiff's sentence and placed him on probation for thirty-six months. As a condition of his plea agreement, Plaintiff agreed to surrender all firearms. Defendant did not contest the revocation of his concealed carry permit.

On 23 April 2014, Defendant filed an emergency motion to modify custody based, in part, upon the February shooting incident. Plaintiff and Defendant entered into a Temporary Memorandum of Judgment ("May 2014 Order") on 28 May 2014. This order provided Plaintiff visitation with M.C. every other weekend and each alternating Wednesday. The order required Plaintiff's mother, Marlena Rowe ("Intervenor"), to supervise each visit.

On 23 June 2014, Defendant filed a motion to show cause, in which she asserted Plaintiff had violated the May 2014 Order because his mother had failed to supervise all of Plaintiff's visitations with M.C. The trial court entered an order to show cause on 25 June 2014, which required Plaintiff to appear in court on 14 July 2014. Nothing in the record shows a contempt hearing occurred on 14 July 2014, and the issue appeared to remain unresolved until the trial court's order in April 2016.

B. 2015

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In March 2015, Defendant spoke with Leslie Rowe, the defendant in the companion case, and no longer allowed Plaintiff to visit with M.C. as provided by the May 2014 Order. In December 2015, a contempt hearing was held before Judge Alexander to address the show cause order entered against Defendant in April 2015.

The trial court held Defendant in willful contempt of the May 2014 Order. The trial court found Defendant and Leslie Rowe “conspired to deprive the Plaintiff of his visitation with [M.C.] and with Leslie Rowe’s children.” The court ordered Plaintiff’s visitation, as set forth in the May 2014 Order, be gradually re-instated. Judge Alexander asserted jurisdiction over the entire case and scheduled a hearing on permanent custody and permanent child support for 1 February 2016.

At the contempt hearing, the trial court did not rule on the order to show cause issued against Plaintiff in April 2014. Defendant’s counsel contended the issue was not abandoned and noted that Intervenor’s failure to supervise visitation as required was an ongoing issue. The trial court agreed to hear the 2014 show cause order at the scheduled hearing in February 2016.

While the trial court agreed to hear the 2014 show cause order at the later hearing, the trial court explicitly spoke with Intervenor to clarify the requirements of supervised visitation:

[INTERVENOR]: I need some guidelines because, evidently, I was told (inaudible) are two different things, so I need some guidelines as to exactly what I’m supposed to do and not supposed to do.

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THE COURT: Okay. Well, you are to be around him when he has the children. And that doesn't mean in the same town or in the same street. It means you need to be in the same room or the same house.

[INTERVENOR]: Okay. That was not explained to me before.

...

THE COURT: And if you're not going to do that, then you're going to have to contend with them and I'm going to hear about it on February 1st.

[INTERVENOR]: . . . I will do that[.]

Each of the parties' attorneys agreed to this understanding of the supervision requirement moving forward.

C. 2016 Hearing

During the February 2016 hearing, the trial court conducted an in-chambers interview with E.B over the objection of Plaintiff's and Intervenor's counsel. Only the judge and clerk were present for the interview. After the interview, the trial court stated:

And I will tell you this, that each of you that are in this courtroom today are under a court order not to question the child about the content of the conversations that he had with the Court or -- ask him any questions about that conference that he had with the judge and the clerk. There are mechanisms in place that he's well aware of if someone contacts him to ask him about what he said. And if that happens, whoever has done that, regardless of whether or not they are a party to this lawsuit, will go to jail for 30

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days. Not suspended, but they'll go to Carteret County jail for 30 days.

The trial court concluded "Plaintiff-Father is not a fit or proper person to have physical and/or legal custody of the minor child. His conduct since the entry of the last Order created an injurious environment and caused emotional distress to the minor." The trial court awarded custody of M.C. to Defendant and provided Plaintiff supervised visitation every alternate weekend.

The trial court also entered an order holding Plaintiff in contempt of the May 2014 Order. The order requires Plaintiff to follow all orders entered by the court that are in effect and comply with any therapy regimen recommended for his children. The order also provides, as a result of his contempt, Plaintiff forfeits his right to attorney's fees based on Defendant's violation of the May 2014 Order and any missed visitation. Plaintiff appeals.

II. Jurisdiction

This child-custody determination is properly before this Court as an appeal from a final judgment of the district court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2015). Plaintiff's appeal to this Court from the civil contempt order is properly before us under N.C. Gen. Stat. § 5A-24 (2015).

III. Issues

Plaintiff argues the trial court erred by: (1) conducting an in-chambers interview of the minor child's step-sibling over Plaintiff's objection and without

counsel for the parties present, (2) applying the “substantial change of circumstances” test to an initial custody determination, and (3) finding Plaintiff’s conduct during a single incident of road rage constituted prima facie evidence of “unfitness” of a parent. Plaintiff further asserts the trial court’s findings of fact are mere recitations, are not supported by the evidence, and do not support the trial court’s conclusions of law.

In regards to the trial court’s civil contempt order, Plaintiff contends the trial court erred because there was no continuing contempt on the part of Plaintiff.

IV. Child-Custody Determination

Regarding the custody determination, Plaintiff contends the trial court improperly conducted an in-chambers interview with E.B. over his objection. Plaintiff also asserts the trial court’s custody order contains several other substantive errors.

A. Standard of Review

In child custody cases, the trial court’s decision is reviewed for abuse of discretion. *Scott v. Scott*, 157 N.C. App. 382, 385, 579 S.E.2d 431, 433 (2003). “However, the trial court’s findings of fact must be supported by substantial evidence, and its conclusions of law are reviewable *de novo*.” *Id.*

B. In-Chambers Interview of a Minor

This Court has stated:

All parties in a court proceeding have a constitutional right to be present at all of its stages so that they may hear the evidence and have an opportunity to refute it. Consequently, while the trial judge may question a child in

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open court in a custody proceeding, *he cannot do so privately except by the consent of the parties.*

Smith v. Rhodes, 16 N.C. App. 618, 620, 192 S.E.2d 607, 608 (1972) (emphasis supplied) (citing *Raper v. Berrier*, 246 N.C. 193, 97 S.E.2d 782 (1957)). Where the trial court interviews a child privately over a party's objection, we typically reverse the trial court's order and remand for a new hearing. *See e.g., id.; Raper*, 246 N.C. at 196, 97 S.E.2d at 784; *Cook v. Cook*, 5 N.C. App. 652, 654, 169 S.E.2d 29, 31 (1969). However, in cases where the parties' counsel are present for the child's interview, this Court has determined the error was not prejudicial. *Cox v. Cox*, 133 N.C. App. 221, 227, 515 S.E.2d 61, 66 (1999).

Here, the trial court interviewed E.B. over the objection of both Plaintiff's counsel and Intervenor's counsel. The interview took place in the judge's chambers, with only the judge and clerk present. None of the parties' attorneys were permitted to be present during the in-chambers interview with E.B. After the interview, the trial court warned each of the parties against speaking to E.B. about his testimony.

Based upon our precedents, the trial court committed a prejudicial error by interviewing E.B. in-chambers over the objection of counsel and outside of the presence of the parties' counsel. We reverse the trial court's custody determination and remand for a new hearing. As such, we do not address Plaintiff's other arguments regarding the custody determination.

V. Contempt

Plaintiff contends the trial court erred by holding him in civil contempt where no continuing contempt existed.

A. Standard of Review

The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether those findings support the conclusions of law. *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997). Where the evidence supports the trial court's findings, those findings are binding on appeal "even if the weight of the evidence might sustain findings to the contrary." *Hancock v. Hancock*, 122 N.C. App. 518, 527, 471 S.E.2d 415, 420 (1996). "[T]he credibility of the witnesses is within the trial court's purview." *Scott*, 157 N.C. App. at 392, 579 S.E.2d at 438.

B. Analysis

According to the civil contempt statute:

(a) Failure to comply with an order of a court is a continuing civil contempt as long as:

(1) The order remains in force;

(2) The purpose of the order may still be served by compliance with the order;

(2a) The noncompliance by the person to whom the order is directed is willful; and

(3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply

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with the order.

N.C. Gen. Stat. § 5A-21(a) (2015).

“The purpose of civil contempt is to coerce the defendant to comply with a court order, not to punish him.” *Scott*, 157 N.C. App. at 393, 579 S.E.2d at 438. As a result, the trial court “does not have the authority to impose civil contempt after an individual has complied with a court order, even if the compliance occurs after the party is served with a motion to show cause why he should not be held in contempt of court.” *Ruth v. Ruth*, 158 N.C. App. 123, 126, 579 S.E.2d. 909, 912 (2003) (citation and quotation marks omitted).

Here, the trial court concluded:

2. The Plaintiff-Father is in willful contempt of the Court’s Order of May 28, 2014, by exercising his visitation with [M.C.] unsupervised, in violation of the May 28, 2014 order.

The trial court’s findings of fact indicate Plaintiff exercised visitation outside the presence of his mother, Intervenor, on several occasions. The trial court found in June 2014 and March 2015 Plaintiff drove the minor children to locations several hours away from Plaintiff’s home. Intervenor was not present during these trips.

While the trial court did not rule upon Plaintiff’s show cause order at the December 2015 hearing, the court clarified the requirements of supervised visitation and warned Plaintiff and Intervenor, “if you’re not going to do that, then you’re going to have to contend with [Defendants] and I’m going to hear about it on February 1st.”

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Furthermore, the December 2015 Order finding Defendant in contempt specifically states, “[a]ll visitations with the Plaintiff will be supervised *in their entirety* by [Intervenor].” (emphasis supplied).

It appears that all of the trial court’s findings regarding unsupervised visitations without Intervenor present are limited to situations that occurred prior to the trial court’s December 2015 hearing and order. No findings of fact indicate whether Plaintiff complied with the May 2014 Order following the December 2015 hearing and order. In fact, we note that at the February 2016 hearing Intervenor testified she supervised all visitations following the clarification given in December 2015.

While the trial court is the sole judge of the credibility of the witnesses and is not required to accept the Intervenor’s testimony, the trial court’s order contains no findings regarding whether Plaintiff complied with the supervised visitation requirements after the December 2015 hearing and order. *See Scott*, 157 N.C. App. at 392, 579 S.E.2d at 438. A finding of civil contempt is improper where there is “no longer any purpose to be served by holding plaintiff in civil contempt.” *Ruth*, 158 N.C. App. at 126, 579 S.E.2d. at 912. We vacate the trial court’s civil contempt order and remand for findings of fact and conclusions of law regarding Plaintiff’s compliance following the December 2015 hearing and order.

VI. Conclusion

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Because the trial court interviewed E.B. in-chambers over the objection of counsel and without counsel for the parties being present, we reverse the trial court's child custody order and remand for a new hearing. We also vacate the trial court's order holding Plaintiff in contempt and remand for further findings of fact and conclusions of law regarding Plaintiff's compliance following the December 2015 hearing and order. *It is so ordered.*

REVERSED IN PART; VACATED IN PART; AND REMANDED.

Judges McCULLOUGH and DILLON concur.

Report per Rule 30(e).

Judge McCULLOUGH concurred in this opinion prior to 24 April 2017.