An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-487

Filed: 19 June 2018

Cabarrus County, No. 13 CVD 2783, IV-D 7647841

CABARRUS COUNTY DEPARTMENT of HUMAN SERVICES, obo DENESHA S. MORGAN, Plaintiff

v.

DANIEL J. MORGAN, Defendant

Appeal by defendant from order entered 16 November 2016 by Judge William G. Hamby, Jr. in Cabarrus County District Court. Heard in the Court of Appeals 10 January 2018.

No plaintiff-appellee brief filed.

Leslie Rawls, for defendant-appellant.

CALABRIA, Judge.

Daniel J. Morgan ("defendant") appeals from the trial court's order withholding his income for the purpose of paying off child support arrears. After careful review, we reverse and remand.

I. Factual and Procedural Background

On 18 September 2013, Denesha Smith Morgan ("the mother") filed a complaint against defendant asserting claims for child custody and child support; divorce from bed and board; postseparation support and alimony; equitable distribution; and injunctive relief to preclude defendant from disposing of marital property. On 25 November 2013, defendant filed an answer and counterclaim for equitable distribution. On 4 September 2015, the trial court entered a permanent custody order awarding legal and physical custody of the minor children to the mother and declining to order visitation between the minor children and defendant. On 4 April 2016, the trial court entered a permanent child support order requiring defendant to pay ongoing child support in the amount of $1,325.35 per month; arrears of $2,156.57 in the amount of $100.00 per month until paid in full; and reimbursement for health insurance. The trial court further ordered that "[t]he issue of [d]efendant's reimbursement to the [mother] for unreimbursed counseling expenses shall remain open."

On 12 July 2016, Cabarrus County Department of Human Services ("DHS") filed a motion to intervene alleging that the mother had applied for child support assistance, authorizing DHS to join as a plaintiff to collect child support on her behalf. Pursuant to this arrangement, DHS moved that child support payments be paid directly to DHS, and thereafter be disbursed to the mother. DHS further noted that defendant had incurred additional arrears since the order was entered, and provided

an affidavit of arrears from the mother for support. DHS sought to subject defendant "to all administrative or judicial enforcement remedies available to the [mother] as prescribed by state and federal law in a title IV-D case[,]" *inter alia*, immediate income withholding.

On 6 October 2016, defendant filed a motion pursuant to Rule 60 of the North Carolina Rules of Civil Procedure, seeking relief from the 4 April 2016 child support order. Defendant alleged that the trial court miscalculated both his monthly child support obligation and his total arrearage. According to defendant, his monthly child support obligation should have been $1,314.68, and he actually owed $1,602.85 in arrears. Defendant further alleged that his Health Savings Account paid for "medical expenses relating to counseling and other services[,]" and therefore, the issue of "unreimbursed counseling expenses" should "no longer remain open[.]"

On 25 October 2016, the trial court entered an order on DHS's motion to intervene. The trial court concluded that intervention was proper, and accordingly allowed the motion. The trial court further noted that defendant's Rule 60 motion was not properly served on DHS. Therefore, the court continued defendant's Rule 60 motion and determined that any outstanding issues from DHS's motion to intervene would be addressed after defendant's Rule 60 motion was heard.

On 16 November 2016, following a hearing on defendant's Rule 60 motion and DHS's remaining arguments, the trial court entered an order redirecting payments

and establishing arrears. The trial court found that, as of 30 September 2016, defendant had accrued additional arrearages. The trial court concluded that the 4 April 2016 "order for child support and arrears was not entered by mistake, inadvertence, surprise, or excusable neglect, nor pursuant to fraud, misrepresentation or other misconduct of an adverse party, nor any other reason justifying relief[,]" and therefore denied defendant's Rule 60 motion. The trial court ordered, *inter alia*: that all child support payments "shall be withheld from Defendant's income wages or other sources of disposable income" and transmitted to DHS for disbursement to the mother; that these payments "shall be collected by immediate income withholding pursuant to N.C. Gen. Stat. § 110-136.4(b) . . . from any payer of disposable income"; and that defendant "shall be subject to income withholding of any unemployment compensation benefits . . . pursuant to N.C. Gen. Stat. § 110-136.2(f)." The court also specifically ordered defendant to "be subject to all administrative or judicial enforcement remedies available to the plaintiff as prescribed by State and Federal law in a title IV-D case[.]"

From the 16 November 2016 order, defendant appeals.

II. Subject Matter Jurisdiction

On appeal, defendant first argues that the trial court lacked subject-matter jurisdiction to enter the order because DHS failed to verify its motion, as required by N.C. Gen. Stat. § 110-136. We disagree.

A. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

B. Analysis

Pursuant to N.C. Gen. Stat. § 110-136, a party seeking a wage garnishment order to enforce a child support obligation must file a verified motion to that effect. N.C. Gen. Stat. § 110-136(b) (2017). This motion, "along with a motion to join the alleged employer as a third-party garnishee[,]" must be served on both the responsible parent and the alleged employer. *Id*.

Defendant contends that DHS's failure to verify its motion to intervene and to establish arrears was a fatal defect that divested the trial court of subject-matter jurisdiction to rule on the motion. Although DHS cites no specific statute as authority for its motion, it does not appear to have been made pursuant to N.C. Gen. Stat. § 110-136(b). DHS does not seek to join any alleged employer, nor was the motion served upon one. Similarly, the trial court's order is not a garnishment order pursuant to N.C. Gen. Stat. § 110-136, because the employer was not a party in this case.

Rather, the trial court was explicitly acting pursuant to N.C. Gen. Stat. § 110-136.4(b), which requires the trial court to order immediate income withholding

anytime the court enters a new or modified child support order in a title IV-D case. In *McGee v. McGee*, 118 N.C. App. 19, 453 S.E.2d 531, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995), this Court held that "the statutory provisions for mandatory income withholding in IV-D cases apply with equal force to orders for current support and to orders directing payment of arrearage." *Id.* at 31, 453 S.E.2d at 538. Because the trial court was statutorily required to enter the income withholding order, no verified motion was required of any party. *Compare* N.C. Gen. Stat. § 110-136(b) (providing that an interested party "*may* move the court for an order of garnishment. *The motion shall be verified* . . . ." (emphases added)) *with* N.C. Gen. Stat. § 110-136.4(b) ("When a new or modified child support order is entered, the district court judge *shall*, after hearing evidence regarding the obligor's disposable income, place the obligor under an order for immediate income withholding." (emphasis added)). This argument is overruled.

III. Findings of Fact

Defendant next argues that the trial court erred by making findings of fact without taking evidence. We agree.

A. Standard of Review

"[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

"A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the court's ruling] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Where the trial court bases its determination on no evidence, this constitutes an abuse of discretion. *See State v. Thompson*, ___ N.C. App. ___, ___, 801 S.E.2d 689, 695 (2017) (holding that the trial court abused its discretion by determining "that the offense involved criminal street gang activity even though there was no evidence presented at trial supporting the trial judge's decision").

B. Analysis

On 12 July 2016, DHS moved to intervene. On 6 October 2016, defendant filed his Rule 60 motion for relief. When the trial court held a hearing on 10 October 2016, defendant's testimony was the only evidence presented; DHS offered no evidence with respect to its motions. In fact, during direct examination, the trial court explicitly stated that "[w]e're not talking about garnishment . . . we're talking about whether the Department is -- is allowed to be a party to the case."

In its 25 October 2016 order, the trial court allowed DHS to intervene, continued defendant's Rule 60 motion, and ordered that "[a]ny remaining, open issues from the Department's motion shall be addressed after the Rule 60 motion is heard." At the subsequent hearing, however, DHS presented no evidence. The only testimony

or arguments presented were brought by defendant, regarding his Rule 60 motion. It is clear, then, that the only evidence presented by DHS in this matter, was its motion, which was not verified, and the attached affidavit of arrears.

The trial court's order with regard to DHS's motion for income withholding was extensive and detailed. Nevertheless, there is no evidence in the record, other than a single affidavit of arrears, to support any of the trial court's findings. We hold therefore that the trial court abused its discretion. We reverse the order with respect to DHS's motions, and remand this matter to the trial court. Upon remand, the trial court will conduct a hearing and consider evidence, and will enter findings and conclusions thereupon.

IV. Conclusion

DHS's failure to verify its motion to intervene and establish arrears did not deprive the trial court of subject-matter jurisdiction to enter its order. However, since no evidence was presented at either hearing to support DHS's motion, the trial court's findings of fact are not supported by competent evidence. Therefore, we reverse the order and remand to the trial court for further proceedings. Although defendant raises additional issues on appeal, we need not address those arguments.

REVERSED AND REMANDED.

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).