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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1198

Filed: 7 April 2020

Columbus County, No. 10 CVD 152

COLUMBUS COUNTY DEPT. OF SOCIAL SERVICES, EX REL.: TIFFANY A. MOORE, Plaintiff,

v.

CALVIN T. NORTON, Defendant.

Appeal by defendant from order entered 28 June 2018 by Judge William F. Fairley in Columbus County District Court. Heard in the Court of Appeals 3 December 2019.

Columbus County DSS, by Assistant County Attorney David S. Tedder, for plaintiff-appellee.

Calvin Tyrone Norton, pro se, for defendant-appellant.

DIETZ, Judge.

In 2015, Defendant Calvin T. Norton appealed an order finding him in civil contempt for failure to pay child support. While that appeal was pending, Norton filed a motion to modify child support and, when the trial court denied the motion, appealed to this Court.

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There are certainly scenarios where a trial court would have jurisdiction to rule on a motion to modify while an earlier, separate order in that same child support proceeding was on appeal. But here, Norton’s *pro se* arguments in the motion to modify are a rehash of the same arguments this Court was addressing in the pending appeal. Because those arguments—although most were patently meritless—are the same, the trial court lacked jurisdiction to address them while the court’s earlier ruling on those same issues was on appeal. *Joyner v. Joyner*, 256 N.C. 588, 592, 124 S.E.2d 724, 727 (1962). Accordingly, we vacate the trial court’s order.

Facts and Procedural History

The underlying facts in this case are detailed in *Columbus Cty. D.S.S. ex rel. Moore v. Norton*, __ N.C. App. __, 824 S.E.2d 209, 2019 WL 1035243, at *1 (2019) (unpublished). We address only the facts and procedural history relevant to this second appeal.

In April 2015, the trial court entered an order holding Norton in civil contempt for failure to pay his child support obligations. At the hearing in the matter, the trial court discovered that Norton received money from verifiable sources and “that he lives in and holds title to a home” but “incurs no cost to live in this home as his father pays his monthly house and utility bills.” *Id.* at *2. Additionally, the trial court determined that Norton paid \$3,000 and \$1,500 in cash as down payments to purchase “both a 2014 Chevrolet Corvette and a 2017 Chevrolet Spark in 2017.” *Id.*

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Based upon these findings, the trial court held that Norton had the present ability to pay and to take responsible steps to have paid the deficiency amount, and thus held Norton in civil contempt for nonpayment. *Id.* at *3. Norton timely appealed the trial court's order.

While that order was on appeal, the Department of Health and Human Services issued a decision adjudicating Norton as disabled and certifying him for medical assistance despite his "obvious attempt to make himself appear worse than he is." Based on this adjudication, in June 2016, Norton filed a motion to suspend or modify child support, arguing that his disability constitutes a material change in circumstances. Thus, because he has no income to pay child support, his child support obligations should be suspended or decreased.

On 14 June 2018, while Norton's first appeal was still pending, the trial court held a hearing over the matter and found Norton's "contention that he had no income at the time of the filing of [his] motion to utterly lack credibility" because his father and fiancée were gifting him nearly \$2,000 on a recurrent, monthly basis to pay for his cars, car insurance, mortgage, and utilities. Based on these facts, the trial court entered an order concluding that Norton "failed in his burden of proof to show a material change in circumstances warranting a modification of [his] child support obligation."

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On 23 July 2018, Norton appealed the trial court's second order. The Columbus County Department of Social Services did not file an appellee brief in the proceeding but appeared for the sole purpose of moving to dismiss the appeal. DSS argued that Norton is subject to a trial court gatekeeping order because of past frivolous filings and Norton had failed to get permission from the trial court before filing this appeal.

Analysis

We begin by addressing DSS's motion to dismiss this appeal. DSS contends that Norton was barred from filing the notice of appeal in this case because of a prefiling injunction often referred to as a "gatekeeping" order. The trial court entered that gatekeeping order after Norton's repeated, frivolous filings in the trial division. The gatekeeping order prohibits Norton from filing any documents with the "State of North Carolina Courts" without either attaching an affidavit from a licensed attorney or obtaining permission from the senior resident superior court judge in "the involved Judicial District." DSS asserts that, because Norton did not do either of these things before filing his notice of appeal, this appeal must be dismissed.

We disagree. This Court has held that violations of this type of gatekeeping order, through the filing of a notice of appeal in the trial division, are issues properly raised with the trial court at the time the notice of appeal is filed. *Bennett v. News & Observer Pub. Co.*, 197 N.C. App. 757, 680 S.E.2d 904, 2009 WL 2138669, at *3–6 (2009) (unpublished). Although *Bennett* is unpublished, we agree with its reasoning;

DSS should have sought relief from the trial court at the time Norton filed the notice of appeal.

In any event, even assuming that this Court, too, has authority to sanction Norton for violation of the trial court’s gatekeeping order, that order does not provide that dismissal is the only permissible sanction. As explained below, Norton has asserted a meritorious argument in this appeal. In light of this fact, we deny DSS’s motion to dismiss and address Norton’s claims on the merits.¹

We next turn to Norton’s arguments in this appeal. Norton asserts a number of plainly frivolous arguments that are simply a rehash of arguments both the trial court and this Court rejected in his previous appeal from the civil contempt order. But Norton’s first argument in his brief is new, and it is meritorious. Norton contends that trial court erred by “hearing the defendant’s motion for modification while the order for civil contempt is on appeal of the same subject matter.”

“When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein.” N.C. Gen. Stat. § 1-294. Thus, the general rule in North Carolina is that an “appeal removes the entire proceeding to the [appellate court] and leaves

¹ DSS also moves to dismiss on the ground that Norton’s *pro se* filings on appeal violated various provisions of the North Carolina Rules of Appellate Procedure. DSS has not shown that it suffered any prejudice sufficient to warrant the extreme remedy of dismissal and we therefore reject these arguments as well. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366 (2008).

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the superior court functus officio until the cause is remanded” unless a statutory exception to the rule applies. *Joyner v. Joyner*, 256 N.C. 588, 592, 124 S.E.2d 724, 727 (1962).

Here, while his first appeal was pending, Norton moved for relief in the trial court by reasserting largely the same arguments that he had previously asserted and that this Court was evaluating on appeal. In this circumstance, the trial court was without jurisdiction to rule on the motion because it involved matters embraced by the order already on appeal. N.C. Gen. Stat. § 1-294. We therefore vacate the trial court’s order.

Conclusion

For the foregoing reasons, the trial court’s order is vacated.

VACATED.

Chief Judge McGEE and Judge ZACHARY concur.

Report per Rule 30(e).