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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-232

No. COA21-536

Filed 5 April 2022

Cumberland County, No. 18 JA 191

IN THE MATTER OF:

W.A.

Appeal by respondent from order entered 1 April 2021 by Judge Cheri Siler-Mack in Cumberland County District Court. Heard in the Court of Appeals 23 February 2022.

Patrick A. Kuchyt for petitioner-appellee Cumberland County Department of Social Services.

Matthew D. Wunsche for guardian ad litem.

Samuel R. Gray for appellee guardians.

Benjamin J. Kull for respondent-appellant father.

DIETZ, Judge.

¶ 1 Respondent is a party to an ongoing juvenile proceeding concerning his child. That proceeding is subject to a gag order entered by the trial court that prohibits the parties from discussing the proceeding in social media postings. The trial court

entered an order holding Respondent in civil contempt for violating the gag order. The court ordered Respondent to pay a fine and serve time in jail. As explained below, the trial court's order does not contain the findings and accompanying conditions necessary to support imposition of civil contempt. We therefore vacate the trial court's order.

Facts and Procedural History

¶ 2 Petitioner Cumberland County Department of Social Services filed the underlying juvenile petition concerning Respondent's child. On 2 November 2020, the trial court entered a status review order with the following term: "That a Gag Order shall be put in place and no one is authorized to discuss this matter on social media."

¶ 3 The child's guardians later filed a "motion for order to show cause and motion for contempt," alleging that Respondent violated the trial court's gag order by posting videos about the case on social media.

¶ 4 Respondent filed several *pro se* motions asking for appointed counsel to represent him in the contempt hearing, but the hearing took place with Respondent representing himself. The transcript of the hearing indicates that the trial court treated the guardian's motion as one for civil contempt, but the court also mentioned the possibility of pursuing criminal contempt:

> Now, I'm going to tell you, at this point, I'm going to allow you to fill out an affidavit [for court appointed counsel]. I don't know if you qualify. You might. You may not. If you don't, I'm going to hold a hearing as to whether or not this court is going to [indiscernible]. I've already found you in contempt, but whether or not I'm going to place you in jail or

> whether or not I'm going to hold you in civil contempt, and that's what I am going to do. So [indiscernible] contempt to allow him to fill out an affidavit, but this court has found him in contempt of this show-cause on the previous one. I'll allow him to fill out an affidavit by his request. If he qualifies, the court will appoint an attorney because he is facing jail time.

After the court's remarks, the parties noted that the guardians' motion was one for civil contempt under N.C. Gen. Stat. § 5A-23. The trial court stated:

> This is civil contempt on the show-cause right now pursuant to 5A–23. . . So at this point, sir, I can hold you in -- I can hold you in contempt, you can have a [indiscernible] monitor in my office [indiscernible] I can place you in jail. And that's what -- this is what I am going to do. I'm going to find that he has -- the court did make the findings that the respondent father did constitute contempt, and that the court is going to order that he -- I'm going to order that he be placed with the . . . sheriff's department.

¶ 5 At another point in the hearing, the trial court again mentioned both civil and criminal contempt: "I just did a civil contempt. If you violate now, I'm going to do criminal because [indiscernible] and I will know what happened because that's different because I told you. Thank you."

¶ 6 Later that same day, the trial court entered its written contempt order. The trial court checked the box in the preprinted form order to indicate the order was for civil contempt. The written order required Respondent to both pay a fine of $150.00 and spend five days in jail. The order did not include conditions that Respondent must satisfy to purge himself of the civil contempt.

¶ 7 Respondent appealed. On appeal, the guardian ad litem filed an appellee's brief acknowledging that the challenged order contains reversible error. The

Cumberland County Department of Social Services filed an appellee's brief taking no position in this appeal. The child's guardians filed what they candidly admit is a "de minimis" one-paragraph appellee's brief asking this Court to affirm but providing no legal argument defending the trial court's order.

Analysis

¶ 8 Respondent challenges the trial court's civil contempt order. In civil contempt proceedings, pursuant to N.C. Gen. Stat. §5A-23, a trial court must specify the actions which the contemnor must take to purge the contempt. N.C. Gen. Stat. § 5A-23(e). "The court's conditions under which defendant can purge herself of contempt cannot be vague such that it is impossible for defendant to purge herself of contempt, and a contemnor cannot be required to pay compensatory damages." *Watson v. Watson*, 187 N.C. App. 55, 65, 652 S.E.2d 310, 317 (2007) (internal citations removed). The purpose behind the contempt is to make the party comply with the court order—not to punish that party for noncompliance. *Cox v. Cox*, 133 N.C. App. 221, 226, 515 S.E.2d 61, 65 (1999). Thus, in a civil contempt proceeding, the party in noncompliance and facing imprisonment must have means to "obtain his release immediately upon complying with the court's order." *Brower v. Brower*, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984). By contrast, "criminal contempt is administered as punishment for acts already committed that have impeded the administration of justice in some way." *Id.* Thus, entry of criminal contempt can result in imprisonment not accompanied by conditions permitting the party to immediately secure release. *Id.*

¶ 9 Here, the trial court entered what it captioned a civil contempt order, but the order contains no purge condition and its terms are inconsistent with civil contempt. Instead, the order resembles a criminal contempt order, in which the court is punishing a party for past violations of a court order. When a trial court's contempt order does not contain the necessary findings or purge conditions, the appropriate remedy is to vacate the contempt order. *Graham v. Graham*, 77 N.C. App. 422, 425, 335 S.E.2d 210, 212 (1985). Accordingly, we vacate the trial court's order.

¶ 10 Respondent also contends that the gag order itself violates his First Amendment rights and asserts other, related challenges to the gag order and the proceedings below. Respondent did not appeal that underlying order and, thus, we decline to address this constitutional issue. On remand, Respondent may present these arguments to the trial court, as well as Respondent's accompanying request for appointment of counsel, should the need arise.

Conclusion

¶ 11 We vacate the trial court's order.

VACATED.

Judges DILLON and GRIFFIN concur.

Report per Rule 30(e).