Opinion issued May 22, 2018.

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00073-CV

IN RE KELLEY WHITE, Relator

Original Proceeding on Petition for Writ of Habeas Corpus

MEMORANDUM OPINION

This is a challenge to a contempt finding in a suit affecting a parent-child relationship.[*] Relator Kelley White—the mother of the child who is the subject of the proceedings—seeks a writ of habeas corpus or, alternatively, a writ of mandamus. She asks this court to compel the trial court to vacate its December 23,

[*] The underlying case is *In the Interest of A.W., A Child*, cause number 2011–20103, pending in the 309th District Court of Harris County, Texas, the Honorable Sheri Y. Dean presiding.

2017 order of enforcement by contempt and suspension of commitment. The mother raises three issues: (1) the underlying order is not specific enough to support contempt; (2) she did not violate any provisions of the underlying order; and (3) she established the defense of involuntary inability to comply with the underlying order.

Because one of the contempt findings did not establish a violation of the underlying order, we grant habeas relief in part. We deny the mother's petition in all other respects.

Background

The child's parents signed a mediated settlement agreement in a previous modification and enforcement action. The trial court signed an order incorporating the parties' agreement.

The child's father—the real party in interest in this original proceeding—subsequently filed a motion for enforcement alleging four violations of the underlying order. The two allegations from this motion that resulted in contempt findings are: (1) "Violation 2"—the mother set up, but then canceled the child's counseling session on September 7, 2017; and (2) "Violation 3"— the mother violated the mediated settlement agreement requiring her to transport the child to and from each counseling session, because the order required counseling to occur at least on a monthly basis, and yet she delivered the child to only four sessions in the six months following the agreement.

After a hearing, the trial court signed an order of enforcement by contempt. The trial court found that the mother had committed Violation 2 by canceling a September 7, 2017 session, which the court found to be a violation of the provision of the agreement requiring the parties to follow the counselor's recommendation regarding the frequency of sessions. The trial court also found that the mother had committed Violation 3 by transporting the child to and from only four counseling sessions in the six months since the agreement was signed. The trial court assessed punishment for each violation of a period of 179 days in the county jail, with the sentences to run concurrently. The trial court then suspended commitment and placed the mother on community supervision for a period of one year with the conditions that she attend compliance hearings, report to a community supervision officer, and pay the community supervision fee.

Analysis

I. Propriety of habeas corpus relief

The mother contends that she has been restrained of her liberty and this allows her to seek habeas relief. Alternatively, she seeks mandamus relief. The father argues that neither remedy is appropriate under these circumstances.

The method for challenging an order of contempt in a civil case is an application for writ of habeas corpus. *See In re Reece*, 341 S.W.3d 360, 370–71 (Tex. 2011); *Ex parte Williams*, 690 S.W.2d 243, 244 (Tex. 1985) (orig. proceeding).

To obtain habeas relief, a relator must show restraint of liberty, but proof of actual confinement is not necessary. *See Williams*, 690 S.W.2d at 244; *In re Campbell*, No. 01–17–00251–CV, 2017 WL 3598251, at *2 (Tex. App.—Houston [1st Dist.] Aug. 22, 2017, orig. proceeding) (mem. op.). The mother asserts that the contempt order restrains her liberty because it requires her to periodically report to a probation officer. The father argues that the mother is not entitled to habeas relief because she is not in custody and her probation conditions do not rise to the level of custody.

Probation conditions that tangibly restrain a relator's liberty may be sufficient to support a habeas application. *See Ex parte Brister*, 801 S.W.2d 833, 835 (Tex. 1990) (orig. proceeding) (probated 30-day sentence with conditions of payment of fees, participation in counseling, and 60 days' house arrest sufficient restraint to pursue habeas relief); *In re Ragland*, 973 S.W.2d 769, 771 (Tex. App.—Tyler 1998, orig. proceeding) (probation requirement of weekly community service for one year sufficient to pursue habeas relief); *Ex parte Duncan*, 796 S.W.2d 562, 564 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding) (probation requirement to report to probation officer monthly and prohibiting travel outside Harris County without permission held sufficient to seek habeas relief); *In re Sanner*, No. 01–09–00001–CV, 2010 WL 2163140, at *3 (Tex. App.—Houston [1st Dist.] May 20, 2010, orig. proceeding) (holding that probation conditions, including reporting to community supervision officer, participating in employment assistance, completing counseling,

and having only supervised visitation, constituted sufficient restraint on liberty); *In re Boswell*, No. 07–03–0527–CV, 2004 WL 253267, at *1–2 (Tex. App.—Amarillo Feb. 11, 2004, orig. proceeding) (holding that community supervision with unspecified conditions were sufficient restraint on liberty to allow relator to seek habeas relief); *In re Burleson*, No. 05–99–00703–CV, 1999 WL 330375, at *2 (Tex. App.—Dallas May 26, 1999, orig. proceeding) (holding that probation requirement to report to probation officer monthly was sufficient restraint on liberty to permit relator to pursue habeas relief).

Here, the mother's probation contains two conditions: that she appear for compliance hearings and that she report monthly to a community supervision officer. Although the conditions do not restrict the mother from travel, they are similar to the conditions held by two courts to impose a sufficient restraint on liberty to permit habeas relief. *See Boswell*, 2004 WL 253267, at *1–2; *Burleson*, 1999 WL 330375, at *2. Thus, the mother appropriately seeks a writ of habeas corpus.

II. Review of contempt findings

The mother contends that the contempt order must be set aside because: (1) the underlying order was not specific enough to support contempt; (2) she did not violate the underlying order; and (3) the evidence showed an inability to comply with the requirements that the trial court order imposed.

Contempt is broadly defined "as 'disobedience to or disrespect of a court by acting in opposition to its authority.'" *Reece*, 341 S.W.3d at 364. Contempt may be direct, occurring in the presence of the court, or constructive, occurring outside the court's presence. *See id.* at 365. Contempt is further classified into civil or criminal. *See id.* Contempt is criminal if it is punitive and the contemnor is punished for a completed act. *See id.* Civil contempt is "remedial and coercive" and confinement is conditioned on obedience with the court's order. *See id.* Here, the purpose of the order was to punish relator for violations of the underlying order, and thus, the order imposes criminal constructive contempt.

To satisfy due process requirements, a conviction for criminal contempt for violation of a court order "requires proof beyond a reasonable doubt of: (1) a reasonably specific order; (2) a violation of the order; and (3) the willful intent to violate the order." *In re Braden*, 483 S.W.3d 659, 664 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) (citing *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995) (orig. proceeding)); *In re R.E.D.*, 278 S.W.3d 850, 855 (Tex. App.—Houston [1st Dist.] 2009, orig. proceeding).

Unless the relator's petition establishes that the contempt order "is void on its face or is so completely without evidentiary support as to be rendered void, the petition must be denied." *R.E.D.*, 278 S.W.3d at 855. An appellate court lacks

jurisdiction to weigh the evidence; it may only determine if the contempt order is void. *See id.*

A. "Violation 2"—alleged failure to "follow the counselor's recommendations regarding the frequency of the sessions"

In the first contempt finding, the trial court found that the mother violated a provision in the underlying order that required her to "follow the counselor's recommendations regarding the frequency of the sessions." The court found that the mother violated this provision because she canceled a counseling session between the child and the counselor scheduled for September 7, 2017.

The actions the trial court found to be a violation do not constitute a breach of the specified aspect of the agreed order. The mother's cancelation of one particular appointment was not shown to establish a violation of the requirement that she follow the counselor's recommendation concerning the frequency of counseling sessions.

The father contends that in addition to violating the frequency-of-sessions provision by canceling the September 7 session, the mother violated the order by failing to reschedule another session. But that was not the action (or inaction) the trial court found to constitute a violation of the order. The contempt order stated that the mother violated the order regarding following the counselor's recommendation about the frequency of sessions by canceling the September 7 session, yet that act

could not constitute a violation of the required frequency of sessions without findings of some additional facts.

B. "Violation 3"—alleged failure to bring the child to the counselor's office "a minimum of once per month"

The trial court also found that the mother violated a provision requiring her to bring the child "to the counselor's office before each counseling session and pick him up from the counselor's office after each counseling session." The agreed order requires the child to "participate in reunification counseling" with his father "a minimum of once per month, with the frequency to be directed by the counselor." Both parents agreed to follow the counselor's recommendations regarding the frequency of the sessions. Read together, these provisions of the agreed order obligate the mother to take the child to counseling sessions at least once per month.

The mother contends that nothing in the order forbids cancelation of appointments or requires her to take the child to more sessions than she did. The father responds that the order is clear and that the mother violated it by canceling appointments and refusing to reschedule to achieve the required frequency.

The evidence supports the trial court's finding of a violation. The mother admitted in December 2017 that she had only transported the child to a total of four sessions since March 2017. The mother argued that she was not in charge of scheduling, and thus her failure to take the child to more than four sessions could not be a violation. However, she could not reasonably claim compliance with the

order to transport her child to each session—which she agreed would occur at least monthly—by only transporting him to four sessions in approximately six months. The evidence supports the trial court's finding of "Violation 3."

C. Defense of involuntary inability to comply

In her final issue, the mother contends that she established a defense by proving an involuntary inability to comply with the underlying order. To hold a party in contempt for violating a court order, there must be proof of a willful intent to violate the order. *See Braden*, 483 S.W.3d at 664 (citing *Chambers*, 898 S.W.2d at 259); *R.E.D.*, 278 S.W.3d at 855. Proof of an "involuntary inability to comply with an order is a valid defense" because the failure to comply is not willful if it was involuntary. *See Chambers*, 898 S.W.2d at 261.

The mother asserts that her son is a 17-year-old, 6-foot-tall football player, and she is unable to force him to attend counseling sessions if he refuses. Both the mother and her son both testified that the son refused to attend the September 7 session, despite the mother's admonitions that he must do so. The child further testified that, after telling his mother that he would not go to the session, he took the car and left the house.

Relying upon *Ex parte Rosser*, 899 S.W.2d 382 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding), and *Ex parte Morgan*, 886 S.W.2d 829 (Tex. App.—Amarillo 1994, orig. proceeding), the mother contends that the evidence established

an involuntary inability to comply with taking the child to the September 7 counseling session. Neither case supports her defense.

In *Rosser*, the trial court held the father in contempt for failing to deliver his daughter for visitation with the mother. 899 S.W.2d at 384. Both the father and daughter testified that the daughter refused to go and the father was unable to force her. *See id.* at 384–85. The appellate court upheld the contempt order, observing "that the relator has the burden to conclusively prove involuntary inability and that the trial court is allowed to judge the credibility of the witnesses and the weight to be given their testimony." *Id.* at 386. Because the father and daughter were both interested witnesses, the appellate court held that their testimony could not be readily contradicted if untrue and the trial court was not bound by their testimony. *See id*.

In this case, the evidence supporting the defense of involuntary inability to comply came from the mother and her son, who were both interested witnesses and whose testimony could not be readily contradicted if it was untrue. *See id.* Therefore the trial court was not bound by the testimony if disbelieved, and this court may not substitute its judgment for that of the trial court. *See id*. The trial court determined that relator had the ability to comply, implicitly finding that relator had not conclusively established her involuntary inability to comply. *See id.*

In *Morgan*, the underlying decree granted the father standard visitation rights. 886 S.W.2d at 830. The father arrived to pick up the children for his extended

summer visitation, but the children were not ready. *See id.* at 831. The parents agreed that the father would return at noon the same day to pick up the children. *See id.* When the father returned, the mother had the children and their bags at the designated area, but the children refused to go. *See id.* The father alleged that mother violated the court's order and impeded his court-ordered visitation by failing to insist that the children accompany the father. *See id.* Although the appellate court vacated the trial court's order on other grounds, the court observed that the mother's passivity could not support contempt because she had the children at the designated spot ready to go. *See id*. at 832.

In this case, the mother's reliance on *Morgan* is misplaced. The order in *Morgan* did not require the mother to perform a specific act, but instead gave the father extended summer visitation under a standard possession order. *See id.* at 830. The alleged violation was that the mother interfered with the father's exercise of this visitation. *See id.* But the court in *Morgan* noted that the mother did what she was required to do—she had the children and their baggage at the designated location for the father to pick up the children, and there was no evidence that the mother either overtly or covertly sought to interfere with visitation. *See id.*

Here, the underlying court order required the mother to follow the counselor's recommendations regarding the frequency of sessions (at least monthly), and the mother was required to transport the child to and from each counseling session.

Thus, unlike the mother in *Morgan*, the mother in this case actively violated the underlying court order. We hold that she has not shown she conclusively established the defense of inability.

Conclusion

We grant relief in part. We direct the trial court to vacate its finding of "Violation 2," the portion of the contempt order holding the mother in contempt for violating the provision requiring the parties to follow the counselor's recommendation regarding session frequency by canceling a single appointment. We deny the mother's remaining requests for relief. Because the trial court imposed a separate punishment for each violation, and only one violation is invalid, the invalid portion may be severed and the valid portion may be retained. *See In re Hall*, 433 S.W.3d 203, 207 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding).

PER CURIAM

Panel consists of Chief Justice Radack and Justices Massengale and Brown.