

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 26, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-3628

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE FINDING OF CONTEMPT IN RE THE
MARRIAGE OF TERRY G. SMITH AND CAROLE D. SMITH:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

TERRY G. SMITH,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Florence County:
ROBERT A. KENNEDY, Judge. *Affirmed.*

MYSE, J. Terry G. Smith appeals an order placing him in contempt for failure to pay a child support arrearage of \$2,647.50, and sentencing him to serve ninety days' imprisonment. Smith complains that the child support established by the trial court was improper, and that he is financially unable to meet the obligation. Therefore, he argues, the trial court lacked the authority to

impose imprisonment. For the reasons discussed below, this court disagrees and affirms the order of the trial court.

The essential facts leading to the appeal are undisputed. On May 9, 1995, the trial court held a hearing in which it changed Smith's child support obligations from 25% of income to a flat \$112.10 weekly amount. The court stated that Smith was "dedicating [his] life to trying to evade child support," and found that Smith was being evasive in his answers to opposing counsel on such relevant issues as his earnings. The court also found Smith lacked credibility based on such claims as his living on \$1,000 in earnings for over six months. Therefore, the trial court assessed Smith's earning capacity as \$23,000 annually, and set his child support obligations based on that amount.

Smith did not meet these payments fully, and about five months later owed \$2,647.50. A hearing was held on November 21, 1995, demanding that he show cause why he had not made the payments. At the conclusion of the hearing, the trial court found Smith in contempt for nonpayment. To enforce payment, Smith was ordered committed to jail for ninety days. In making this order, the trial court noted that Smith owned real estate, and therefore had an ability to pay. The trial court also heard Smith testify that in the six months since the attribution of earnings to him, he had not changed his employment, and earned less than \$1,000.

Smith first argues that the trial court improperly assessed his earning capacity in the May 1995 trial, which caused the arrearage leading to the contempt order. This is really a collateral attack on the earning assessment, and is rejected as untimely. An appeal to the court of appeals must be initiated within ninety days of entry of the order appealed from if written notice is not given within twenty-one

days of the order. Section 808.04(1), STATS. Smith's attempt to raise the issue now, over two years later, is too late.

Smith next argues that the trial court lacked the authority to impose the jail sentence. Although his specific argument is unclear, it appears his claim is that he cannot satisfy the arrearage because the restraining order prevents him from selling or mortgaging his house, and therefore imprisonment is impermissible. Imprisonment for contempt should not be ordered for failing to pay money unless the failure is willful and contemptuous and not a result of inability to pay. *Mercury Records Prods., Inc. v. Economic Consultants, Inc.*, 91 Wis.2d 482, 506, 283 N.W.2d 613, 625 (Ct. App. 1979). Because this is a civil contempt proceeding, the burden of proof was on Smith to show his conduct was not contemptuous. See *Balaam v. Balaam*, 52 Wis.2d 20, 29, 187 N.W.2d 867, 872 (1971). On appeal, this court reviews the trial court's use of the contempt power under an erroneous exercise of discretion standard. *State ex rel. N.A. v. G.S.*, 156 Wis.2d 338, 341, 456 N.W.2d 867, 868 (Ct. App. 1990).

This court holds that the trial court did not erroneously exercise its discretion. A hearing was held ordering Smith to show cause why he had not paid, and the trial court found he was in willful contempt and had an ability to pay. This court will uphold a trial court's findings of facts on appeal unless clearly erroneous, giving due regard to the trial court's ability to judge the credibility of the witnesses. Section 805.17(2), STATS. The trial court concluded that Smith was able to pay based on some real estate he owned having a fair market value of around \$17,900, which could have been used to satisfy the obligation. Smith knew unequivocally he could mortgage or sell the house to meet the obligation and has failed to do so. Smith also has not changed his employment since the

attribution of earnings, a factor equally important to the finding of willful contempt. The trial court is therefore affirmed.

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

