COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1526 **Cir. Ct. No. 2015FA6145**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JESSICA D. SMITH,

RESPONDENT,

DWAYNE KYLE PEARSON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Affirmed*.

Before Brennan, Brash and Dugan, JJ.

¶1 PER CURIAM. Dwayne K. Pearson, *pro se*, appeals the circuit court's order denying his motion to vacate and/or modify prior court orders pertaining to his two children. Pearson argues that: (1) the State did not have authority to commence legal proceedings against him because it is not a real party in interest; and (2) the circuit court did not have personal jurisdiction over him. We affirm.[1]

¶2 Pearson and Jessica D. Smith have two children. Their son D.N.P. was born on June 30, 2011, at which time Pearson signed a voluntary acknowledgment of paternity. Their daughter D.D.P. was born on February 2, 2015. The State, by Milwaukee County Child Support Agency, commenced a paternity action with regard to D.D.P. The State also commenced a separate child support action for D.N.P.

¶3 Pearson challenged personal service in the child support action for D.N.P.[2] After a hearing on March 22, 2016, the circuit court ruled that Pearson had been properly served. The circuit court awarded Pearson joint legal custody of D.N.P., awarded primary placement to Smith, held child support open, directed Pearson to pay $5 a week toward D.N.P.'s birth costs, and adjourned to July 13, 2016, for further proceedings on D.D.P.'s paternity, possible consolidation, and other matters. On July 13, 2016, neither Pearson nor Smith appeared. A court commissioner adjudicated Pearson to be the father of D.D.P., consolidated the two

[1] Pearson also moved to vacate a voluntary acknowledgment of paternity he signed on June 30, 2011, pertaining to his child D.N.P. The circuit court denied the motion. Pearson has not renewed this argument on appeal.

[2] Pearson did not challenge service in the paternity action involving D.D.P.

cases, held child support open in both cases, and ordered Pearson to repay the State $5 per week for birth expenses for D.N.P.

¶4 On November 29, 2016, the State moved to modify child support. At a hearing before a court commissioner on February 1, 2017, Pearson was ordered to pay $238 per week in child support. On March 24, 2017, Pearson moved for circuit court review of the commissioner's decision and to vacate prior orders in the case. After the circuit court held hearings on May 15, 2017, and July 24, 2017, it denied Pearson's motion to vacate and/or modify the court's prior orders.

¶5 Pearson first argues that the State did not have authority to commence legal proceedings against him because the State is not a real party in interest. Pearson's argument is unavailing. Smith received medical assistance at the time D.N.P. was born and she received public assistance through the Wisconsin Works program while she was the custodial parent of the children. Smith's receipt of this aid made the State a real party in interest under WIS. STAT. § 767.205(2) (2017-18).[3] In his reply brief, Pearson argues that no factual evidence was presented to establish that Smith received public benefits. We generally will not consider issues that a party did not raise before the circuit court and did not raise in the brief-in-chief on appeal. *See* ***Jackson v. Benson***, 218 Wis. 2d 835, 901, 578 N.W.2d 602 (1998) (we do not usually review issues raised for the first time on appeal); ***State v. Marquardt***, 2001 WI App 219, ¶14 n.3, 247 Wis. 2d 765, 635 N.W.2d 188 (an appellant may not raise an argument for the first

[3] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

time in the reply brief). Even if the argument were properly raised, however, Pearson would not be entitled to relief because Smith acknowledged at a hearing held on March 22, 2016, that she had previously received assistance through the Wisconsin Works program and the children were receiving health insurance through the State. Therefore, the State had the authority to commence this action because it was a real party in interest.

¶6 Pearson next argues that the circuit court did not have personal jurisdiction over him because he was not properly served. Pearson's challenge to service is two-fold. First, Pearson contends that he was not properly served when the action was commenced. The statutory requirements to prove service of a summons are set forth in WIS. STAT. § 801.10(4). "In the face of a challenge to the sufficiency of service of process, the party serving the process has the burden to show that process was sufficient." ***Dietrich v. Elliott***, 190 Wis. 2d 816, 826, 528 N.W.2d 17 (Ct. App. 1995). "However, a defendant may overcome such evidence with 'clear and satisfactory proofs' to the contrary." ***Id.*** (citation omitted).

¶7 The process server testified that on September 30, 2015, she went to Pearson's home and asked for him. She further testified that a man came to the door and she provided him with the service papers. Her testimony was supported by her certificate of service. In contrast, Pearson testified that he did not recall if he was served.

¶8 "A process server has a right to expect that when he [or she] asks for a person to accept service, and, apparently in response to that request, a person comes out and accepts the papers, proper service has been obtained." ***Horrigan v. State Farm Ins. Co.***, 106 Wis. 2d 675, 683, 317 N.W.2d 474 (1982). As was the

situation in ***Horrigan***, the process server believed the person she served to be Pearson. Pearson did not contradict the process server's testimony; instead, he testified that he did not remember whether he had been served, which in no way discredits the process server's affirmative testimony on this point. Therefore, based on the undisputed testimony of the process server, we conclude that Pearson was properly served and the circuit court had personal jurisdiction over him.[4]

¶9 Second, Pearson argues that he was not properly served by mail on November 29, 2016, with the State's motion to modify child support. He contends there is no proof that he *actually received* the State's letter. In an action to enforce or modify child support, a parent is properly served when written notice of the action has been delivered to the parent's most recent residential address. *See* WIS. STAT. § 767.70(1). The Milwaukee Child Support Agency testified that it sent written notice of the motion to modify child support to Pearson's address. Pearson testified that he still lives at that address but did not recall whether he received the service by mail. Again, Pearson's testimony that he does not remember does not undermine the State's positive assertion that it served Pearson by mail. Therefore, we conclude based on the undisputed testimony that Pearson was properly served by mail.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[4] The State argues that Pearson lost his right to contest personal jurisdiction when he failed to appeal the circuit court's March 22, 2016 ruling, or the court commissioner's July 13, 2016 order. Neither order, however, was a final circuit court order from which an appeal could be taken. *See* WIS. STAT. § 808.03(1).