COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2335 **Cir. Ct. No. 97FA000116**

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

MELVIN R. SMITH, JR.,

PETITIONER-APPELLANT,

V.

LINDA A. SMITH, N/K/A HOTTON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J. and Peterson, J.

¶1 PER CURIAM. Melvin Smith, Jr., pro se, appeals an order suspending his former wife Linda Hotton's child support obligation and her monthly contribution toward health insurance and uninsured medical expenses. Smith argues that he received improper notice of the hearings, that Hotton's testimony is not credible, and insufficient evidence supports the trial court's

determination.[1] Because the record demonstrates the trial court reasonably exercised its discretion, we affirm the order.[2]

¶2 This case has an extensive procedural history. In lieu of a statement of the case, *see* WIS. STAT. RULE 809.19(1),[3] Smith relies on the procedural summary set forth by the trial court in May 2003. We agree with Smith that the trial court's procedural summary is well-written, quite thorough and should stand in lieu of restating the background.[4] We will limit our discussion to the facts necessary for an understanding of the issues.

¶3 The parties were married in 1985 and had two children; the first on April 14, 1986, and the second on July 15, 1988. The parties divorced in 1998 and no child support was set. The court held open the issue of child support. In 2001, based on stipulation, the court ordered Hotton to pay monthly child support. After Hotton failed to keep up with her support obligation, a number of hearings and correspondence followed.

¶4 On May 19, 2003, a hearing was scheduled at Hotton's request to contest a lien imposed as a result of Hotton's child support arrearage. Smith

[1] Smith's statement of issues does not track his precise arguments.

[2] While Hotton has not filed a response brief, this court will not summarily reverse the order without a finding of egregiousness, bad faith, or abandonment of the appeal, or an unequivocal order clearly stating the consequences for failure to comply. *See* ***Raz v. Brown***, 2003 WI 29, ¶36, 260 Wis. 2d 614, 660 N.W.2d 647. Because these circumstances are not present, this court declines to summarily reverse based upon Hotton's failure to file a response brief.

[3] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[4] We acknowledge and appreciate the trial court's efforts in creating the twelve-page procedural history, especially in this case where we have non-represented parties.

received a notice of this hearing on May 7 and appeared in person without counsel. The child support agency indicated that the issues were limited to whether there has been a mistake of fact in setting the lien. Smith advised the court that he was unaware of any pending motions between himself and Hotton. Hotton also advised the court that she had no formal motions pending. However, she asked that the child support lien be dropped because on October 6, 2002, she tried to commit suicide for the second time due to bipolar disorder and was unemployable. She admitted she owed back support because she had not been working.

¶5 The court defined the issues as to whether child support should be changed prospectively and whether the arrearage should be modified. The court received copies of items Hotton had sent the child support agency and adjourned the hearing to May 27.

¶6 At the May 27 hearing, Hotton appeared pro se by telephone, and Smith appeared pro se in person. The assistant corporation counsel appeared on behalf of the child support agency. The court explained that it was halfway through the very lengthy file and was unable to determine the history of the case. The court noted that it had received a "so-called financial disclosure" from Hotton and other items including a psychiatric report. In response to an inquiry from Hotton, the court noted she was pro se and that it could not act as an advocate. Smith inquired as to what the issues were, and the court replied that it "won't know what all the issues are until I review the entire case." The court ordered that it would reconvene the hearing on June 6.

¶7 On May 28, the court mailed Smith copies of items Hotton had submitted. Smith acknowledges that on June 2, he received the information from the court.

¶8 On June 6, Hotton appeared pro se by telephone, and Smith appeared pro se in person. The assistant corporation counsel also appeared, with two members of the child support agency staff. The court ascertained that Smith received copies of the court's May 28 letter, its procedural summary and submissions. Smith did not, however, receive a copy of what was labeled a petition, which apparently merely summarized items in Hotton's May 19 letter to the court.

¶9 The court recited the issues to be considered: (1) the validity of the WIS. STAT. § 49.854 child support lien against Hotton; (2) whether Hotton should be forgiven past child support arrearages; (3) whether Hotton's current and future child support obligations should be changed, forgiven or suspended; and (4) whether Hotton's obligation to provide a portion of health insurance should be limited or eliminated.[5]

¶10 There were no objections to the court's statement of issues to be considered at the hearing and no objection to the timeliness of the notice of the hearing. Both parties were sworn on oath and the court took testimony. The court stated that according to the file, Smith had not received notice of Hotton's request to modify her support obligation until after May 28, when the court sent Smith

[5] The court stated four additional issues, but these issues are not raised on appeal. They are: (5) whether Smith has any child support arrearages to an educational fund; (6) whether Smith should be required to make future contributions to the educational fund; (7) what the court characterized as "crib and bassinette" issues that Hotton raised in her letter; and (8) Hotton's request to be left alone.

copies of Hotton's submissions. The court inquired whether Smith agreed with Hotton that her mental illness disabled her from working. Smith disagreed.

¶11 The court referred to exhibits, copies of which were provided to Smith. The court stated that the exhibits contained medical information regarding Smith's October 2002 suicide attempt, her bipolar disorder, panic attacks and psychiatric opinion that she could not work due to her mental illness.[6]

¶12 Hotton testified that following her suicide attempt she was hospitalized, and after her release she continued on medication and was seeing a psychiatrist. Smith stated that he was surprised by Hotton's request to have her support obligation modified. He asked the court to review Hotton's medical file and financial information.

¶13 Based upon the testimony and the exhibits of record, the court found that Hotton was affected by a mental illness and that her mental illness was a substantial change in circumstances. The court found that due to her mental illness, she had no earning capacity. The court stated that it was "suspending indefinitely" her child support obligation, citing ***Zawistowski v. Zawistowski***, 2002 WI App 86, 253 Wis. 2d 630, 644 N.W.2d 252.[7] The court ordered, however, that Hotton provide medical authorizations to the child support agency to monitor her disability. The court denied Hotton's request to be relieved of past due support and a child support lien.

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[6] Smith does not reference these exhibits in his brief. We do not sift the record to locate them. ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990). It is the appellant's burden to ensure that the record is sufficient to address the issues raised on appeal. ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986).

[7] The court also relieved Smith of any obligation to maintain the college trust fund.

¶14 Smith argues that he received improper notice of Hotton's request to modify her child support obligation. He contends that while he received notice of the hearings, he was not informed of the nature of the hearings. He claims he was advised only that the hearings had to do with the child support lien, until he received from the court on June 2, 2003, a copy of Hotton's letter.[8] He complains that Hotton failed to abide by procedural rules, denying him due process.

¶15 We reject his argument for three reasons. First, the record belies Smith's claim of lack of actual notice. On May 19, Smith was present in court when the court defined the issues as to whether child support should be changed prospectively and whether the arrearage should be modified. Although the court later advised Smith that it would not know what "all" the issues would be until it reviewed the entire file, the court's statement on May 19 advised all parties that prospective modification of child support was one of the issues. In addition, Smith acknowledges that on June 2, he received copies of Hotton's submissions to the court. These items included Hotton's request to have her child support obligation "vacated." The hearing on the issue of support modification was not held until June 6. Therefore, the record discloses that Smith received notice of the child support modification issue on May 19 and on June 2.

¶16 Second, Smith does not identify how he was prejudiced by lack of notice. Without a showing of prejudice, Smith is not entitled to relief. *See* WIS. STAT. § 805.18.

[8] We note that certain facts regarding Smith's lack of notice are not accompanied by record citation, complicating our review of the matter. *See* WIS. STAT. RULE 809.19(1). This court is not authorized to consider facts outside the record before us. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶17 Third, Smith does not indicate that he objected to a lack of sufficient notice. A party who appeals has the burden to establish "by reference to the record, that the issue was raised before the circuit court." ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (citation omitted).[9] Generally, the province of this court is to correct errors of the trial court. After Smith testified, the court asked Smith if he had anything to add, and Smith did not. As a result, the trial court was not given an opportunity to consider Smith's contention regarding insufficient notice and either correct itself or make a ruling that this court could then review. *See* ***Hillman v. Columbia County***, 164 Wis. 2d 376, 396, 474 N.W.2d 913 (Ct. App. 1991). Consequently, Smith's argument that he lacked sufficient notice is raised for the first time on appeal.

¶18 As a general rule, this court will not decide issues that have not first been raised in the trial court. ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). This precept, referred to as the waiver rule, serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for an appeal. ***State v. Huebner***, 2000 WI 59, ¶12, 235 Wis. 2d 486, 611 N.W.2d 727. It also gives the parties and the circuit court notice of the issue and a fair opportunity to address the objection. ***Id.*** Finally, the rule prevents parties from "sandbagging" errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal. ***Id.*** For all of these reasons, the waiver rule is essential to the efficient and fair conduct of our adversary system of justice. ***Id.***

[9] Pro se litigants, other than prisoners, are "bound by the same rules that apply to attorneys on appeal." ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992).

We conclude that by failing to object, Smith's contention is not preserved for appellate review.

¶19 Next, Smith argues that the trial court erroneously believed Hotton was telling the truth. He argues that Hotton is able to claim things in court and get away with them without ever being held to task by presentation of the facts. He complains that she consistently refuses to disclose financial and medical records. He contends the court erred by failing to require Linda to make full disclosure. *See* WIS. STAT. § 767.25(1m). He also complains that Hotton lies and slanders him.

¶20 Smith's arguments do not provide grounds for reversal. It has been frequently stated that it is not an appellate function to review questions as to the weight and credibility of testimony; rather, these matters are to be determined by the trier of fact. ***Valiga v. National Food Co.***, 58 Wis. 2d 232, 244, 206 N.W.2d 377 (1973). Testimony is incredible as a matter of law only if it is in conflict with established or conceded facts. ***Haskins v. State***, 97 Wis. 2d 408, 425, 294 N.W.2d 25 (1980). Here, the trial court did not state that it believed everything that Hotton said. It did not indicate that it believed the disparaging remarks Hotton made about Smith. Rather, the court took into account medical records that disclosed a diagnosis of disabling mental illness.

¶21 Finally, Smith challenges the trial court's finding that Hotton's mental illness is a condition that disables her from employment. Without citation to the record, Smith contends that in 1997, following her suicide attempt, Hotton earned over $27,000. The following year she remarried, traveled to Colorado and Florida, and earned over $30,000 per year. He contends that Hotton's mental illness occurs only when the issue of child support is raised.

¶22 Here, the trial court's findings indicate that although Hotton had been diagnosed with a mental illness previously, her illness had flared up in October 2002. The court relied not only on Hotton's statements, but also on medical reports to conclude that her bipolar disorder rendered her unemployable. The trial court's finding is not clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶23 Smith's arguments suggest a misunderstanding of WIS. STAT. § 767.32. This statute governs modifications of child support orders. Whether support provisions should be modified is discretionary, but only upon a finding of a substantial change in circumstances. ***Peters v. Peters***, 145 Wis. 2d 490, 493, 427 N.W.2d 149 (Ct. App. 1988). The burden of showing that there has been a change in circumstances sufficient to justify a modification falls upon the party seeking modification. ***Rottscheit v. Dumler***, 2003 WI 62, ¶11, 262 Wis. 2d 292, 664 N.W.2d 525.

¶24 The question whether there has been a substantial change of circumstances presents a mixed question of fact and law. ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 32-33, 577 N.W.2d 32 (Ct. App. 1998). The first step in a substantial change of circumstances analysis is a factual inquiry requiring a determination of the parties' financial circumstances when the award was made and a determination of their present financial circumstances. ***Erath v. Erath***, 141 Wis. 2d 948, 953, 417 N.W.2d 407 (Ct. App. 1987). The trial court's findings of fact regarding the "before" and "after" circumstances and whether a change has occurred will not be disturbed unless clearly erroneous. ***Harris v. Harris***, 141 Wis. 2d 569, 574, 415 N.W.2d 586 (Ct. App. 1987).

¶25 If a change in financial circumstances has occurred, the second step under WIS. STAT. § 767.32 is to determine whether, as a matter of law, the change

is substantial. ***Harris***, 141 Wis. 2d at 573. Whether the change is substantial is a legal standard, ordinarily one we review independently of the trial court. ***Id.*** at 574. Nonetheless, a determination that something is "substantial" requires the court to make a value judgment, heavily dependent upon interpretation and analysis of underlying facts. Therefore, we "give weight to a trial court's conclusion that a change in circumstances is substantial." ***Id.*** at 575.

¶26 WISCONSIN STAT. § 767.32(1)(c) lists four factors that may constitute a substantial change in circumstances: (1) a change in the payer's income, where the amount of child support is not expressed as a percentage of income; (2) a change in the child's needs; (3) a change in the payer's earning capacity; or (4) any other factor the court deems relevant. ***Id.***; ***State v. Beaudoin***, 2001 WI App 42, ¶7, 241 Wis. 2d 350, 625 N.W.2d 619. Because the record supports the trial court's determination that due to a flare-up of Hotton's mental illness, there has been a substantial change in her earning capacity, its decision to suspend her child support obligation is not subject to reversal.

By the Court.—Order affirmed.

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