FOR PUBLICATION

APPEAL NO. 02-026-GA

IN THE SUPREME COURT
OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ESTHER DLR. KAAINOA, et al.,

Plaintiffs-Appellants,

v.

ALVIN ARRIOLA CABRERA,

Defendant-Appellee.

OPINION

Cite as*: Kaainoa V. Cabrera,* 2003 MP 18

FCD PA 95-0779

Argued and submitted April 30, 2003
Decided December 10, 2003

For Appellants:

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For Appellee:

No appearance.

BEFORE: DEMAPAN, Chief Justice, CASTRO and MANGLONA, Associate Justices.

MANGLONA, Associate Justice:

¶1 Appellants appeal an order of the trial court, entered on September 10, 2002, wherein it declined to order the incarceration of a defendant found in contempt. We have determined that jurisdiction is not proper and accordingly dismiss this appeal.

I.

¶2 Haulani Marie DLR Kaainoa was born to Esther DLR Kaainoa and Alvin Arriola Cabrera on July 21, 1992.[1] Esther and Haulani sought a determination of paternity and a child support award in 1996. The court granted the relief requested and ordered Cabrera to pay $100 per month for child support, due on the 20th day of each month starting January 1996. Cabrera immediately failed to pay.

¶3 Esther took Cabrera to court, which then ordered Cabrera to make the missed payments. For six months Cabrera paid child support substantially as ordered, but he soon stopped again.

¶4 In 2001, after a period of spotty compliance[2] with the trial court's orders, the trial court issued an Order to Show Cause, and Cabrera was eventually brought before the court.[3] The trial

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[1] The facts are taken from the Appellants' Brief and Excerpts of Record. Appellee did not file a brief.

[2] In 2000, the court held Cabrera in contempt and sentenced him to jail for three days, but suspended the sentence on the condition that Cabrera make future payments of $125 per month (for current and arrears child support). Cabrera paid for a while and then again stopped making payments. The trial court issued an arrest warrant and commitment order. Cabrera was arrested and paid to stay out of jail. When he next missed his payments, Cabrera was arrested and served the 3-day sentence rather than pay. In 2001, Cabrera was still not paying the ordered support. He was once again found guilty of contempt and sentenced to five days in jail. The sentence was again suspended on condition that Cabrera comply with the orders to pay $125 per month for current and arrears support. Cabrera immediately failed to pay and was arrested, but paid $125 and stayed out of jail. Later in 2001, he again stopped his payments, was arrested, and spent 5 days in jail. When he was out of jail, he again stopped making his ordered payments.

[3] Cabrera did not show up for the hearing and a bench warrant was issued. Cabrera was arrested, brought to court and released when he promised to show up for the next O.T.S.C. hearing. Cabrera did not show as promised and another bench warrant was issued. Cabrera was re-arrested and held until the next O.T.S.C. hearing the next morning.

court immediately granted judgment for the arrears and continued the matter for one month to give Cabrera the opportunity to get caught up to date on his payments. Cabrera paid nothing.

¶5 At the next hearing, the trial court found Cabrera in contempt and sentenced him to 10 days in jail.[4] The sentence was suspended on condition that Cabrera pay $125 per month for current and arrears support as previously ordered by the court. Cabrera substantially complied for approximately four months, after which, he completely stopped paying.

¶6 The case was then transferred to another judge, who set the matter for a hearing. At the hearing, held on May 23, 2002, the court accepted Cabrera's offer to pay $150 by 4:00 p.m. that day to avoid going to jail.[5] The court also kept the October 25, 2001 order in effect.

¶7 Cabrera paid $99 that afternoon. For June 2002 child support, he paid only $100. In July 2002, he paid nothing. Appellants, by a motion dated August 14, 2002, then asked the court to impose the sentence to compel Cabrera to pay child support. By a written order, the trial court declined to issue a commitment order, stating:

> The court notes that while Defendant failed to pay the $150 on time, Plaintiff filed her motion for a warrant of arrest on August 14, 2002, over a month *after* Defendant met the required amount. As such, the court hereby denies Plaintiff's motion because Defendant had already purged the contempt by satisfying the $150 court-ordered amount.

Kaainoa v. Cabrera, Civ. No. 95-0779 (N.M.I. Super. Ct. Sept. 10, 2002) ([Unpublished] Order Denying Plaintiff's Motion for Warrant of Arrest).

II.

¶8 Appellants argue that "nothing in the May 23, 2002 order states that the payment of the $150 would purge, clear, or otherwise exonerate Cabrera from the contempt. The Judge's own

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[4] *See Kaainoa v. Cabrera,* Civ. No. 95-0779 (N.M.I. Super. Ct. Oct. 25, 2001) ([Unpublished] Order Re Contempt).

[5] As of May 23, 2002, Cabrera was $150 in arrears. *See* Order entered June 19, 2002 (hereinafter "May 23 Order"). The court ordered the appellants' counsel to prepare the order. It is unclear why it was not signed until June 19, 2002

words on the record at the hearing contradict such an interpretation." Appellants' Br. at 9. They argue that Cabrera did not purge the contempt, and contend that, since Cabrera didn't exactly comply with the letter of both the October 25 and May 23 Orders, he should be incarcerated pursuant to each order. *See id.* at 9-14.

¶9 We do not, however, reach the merits of the appeal, for we have determined that we are without jurisdiction to determine this appeal. The fact that the trial court has chosen not to sign an order committing Cabrera to jail convinces us that the May 23 order is not sufficiently final such that appellate review is currently appropriate.

¶10 The right to review normally springs from the imposition of punishment. *See Harell v. Peteet,* 214 S.E.2d 5, 6 (Ga. Ct. App. 1975) (On appeal of a contempt order when no fine or imprisonment had been imposed, the court stated: "[u]ntil further action is taken, the contempt proceeding is pending in the court below and the alleged order is not appealable."); *In re Estate of James,* 11 A.2d 289, 292 (R.I. 1940) ("An adjudication of contempt is not final until punishment is imposed. Here no punishment has been imposed. Conceivably punishment may never be imposed."); *Semrow v. Semrow*, 46 N.W. 446 (Minn. 1879).

¶11 The non-final nature of the proceeding below[6] is evident because the appellants are actually seeking writ relief. "Writs may be issued only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Mundo v. Superior Court*, 4 N.M.I. 392, 393 (1996) (quotation and citation omitted).

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[6] The interlocutory nature of the May 23 order was evident to the trial court, as the trial court not only foresaw further proceedings, but actually recommended that the Plaintiff (now Appellants) file a motion for further proceedings. *See* Excerpts of Record at 48 n.1 ("The court recommends that Plaintiff move for a hearing on the additional child support arrears.").

¶12 Here, the appellants want us not only to reverse the May 23 Order, but also to "remand the matter with instructions that the Court issue the Warrant of Arrest and Order of Commitment." Appellants' Br. at 18. In other words, the appellants want us to order the trial court to commit Cabrera to jail. This, to us, seems like a petition for an extraordinary writ cleverly disguised as a prayer for appellate relief, for the appellants desire that we compel the trial court to exercise its authority.

¶13 While it is true that, were we so inclined, we could treat the notice of appeal as a petition for a writ of mandamus, *Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1211 n.6 (3rd Cir. 1991) ("[W]e could treat the notice of appeal as an application for the writ."), we do not feel that the current circumstances warrant such a deviation. First, the appellants have not requested that we treat their notice of appeal as a petition for mandamus relief. *See Ukiah Adventist Hosp. v. FTC*, 981 F.2d 543, 548 n.6 (D.C. Cir. 1992) *(citing Sierra Rutile Ltd. v. Katz*, 937 F.2d 743, 749 (2d Cir. 1991) (court finds no appellate jurisdiction but treats notice of appeal as a petition for writ of mandamus upon appellant's request); *Beard v. Carrollton R.R.*, 893 F.2d 117, 120 (6th Cir. 1989) (appellate court may treat appeal as petition for mandamus upon request made in appellant's brief).

¶14 Second, we will not now treat this matter as a petition for a writ after it has been briefed and argued as an appeal. To do so would be inequitable. Pursuant to the rules of appellate procedure, if we do not deny outright a petition for a writ, the trial court is afforded an opportunity to respond. *See* Com. R. App. P. 21(b). No such courtesy was extended to the trial court in this matter. Thus, we shall not treat the instant appeal as a petition for the extraordinary writ of mandamus.

¶15 The third reason we will not transform the notice of appeal into a petition for a writ of mandamus is that we are not confident that the writ would issue, even if we were to accommodate the appellants. We are not convinced that the trial court committed clear error. *See Sablan v. Superior Ct.*, 2 N.M.I. 165, 168 (1991).

¶16 While the appellants have supplied ample authority for the proposition that an appellate court will uphold a trial court's decision to keep a litigant in jail by strictly enforcing the purge conditions set by the trial court, they have failed to direct us to a single case where an appellate court ordered the trial court to incarcerate a litigant whom the trial court had found in contempt but had yet to commit to jail.

¶17 In fact, a contention central to their appeal, that a trial court cannot find that substantially complying with the purge conditions is sufficient to keep the trial court from entering a commitment order, tends to be disproved by some of the cases appellants cite, such as *Ohio ex rel. Thurman v. Thurman*, No. 2765-M, 1999 Ohio Ct. App. LEXIS 2165 and *In re Marriage of Moore*, No. 2-685/00-1743, 2002 Iowa Ct. App. LEXIS 1298.[7] Thurman is an appeal from a magistrate's decision not to hold a litigant in contempt,[8] and it contains the following passage:

> On June 10, 1981, pursuant to Marjorie's motion, William was found in contempt of court for failure to pay child support. *William was sentenced to seven days in jail unless he purged his contempt by paying the arrearage of $2,091. William paid $1,000 and the trial court declared that the contempt was purged.*

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[7] We note that no decision has been made by the Iowa Court of Appeals as to whether *In re Marriage of Moore* will be a published case, thereby rendering its persuasive value dubious at best. *See In re Marriage of Moore*, No. 2-685/00-1743, 2002 Iowa Ct. App. LEXIS 1298, *1 (Notice). Further, another case cited by appellants, *In re Marriage of Burkstrand*, No. C2-01-1200, 2002 Minn. Ct. App. LEXIS 281, is unpublished, and consequently was disregarded.

[8] This fact distinguishes *Ohio ex rel. Thurman v. Thurman*, No. 2765-M, 1999 Ohio Ct. App. LEXIS 2165 from the present appeal, as here, the trial court has determined that Cabrera is in contempt of court, and has determined that he shall be incarcerated for ten days unless he remains current with his payment. The trial court has just, in essence, stayed the sentence. *See supra* ¶¶*5-6.*

Thurman, 1999 Ohio Ct. App. LEXIS 2165, at *2 (emphasis added). Further, in *In re Marriage of Moore,* the reviewing court determined that it was not an abuse of discretion for the trial court to withhold sanctions entirely[9] even though the contemnor failed to "satisfy the letter of the contempt order." *In re Marriage of Moore,* 2002 Iowa Ct. App. LEXIS 1298 at *3.[10]

¶18 The appellants' inability to cite precedent for their contention stems, we think, from the vast discretion vested in the trial court in contempt proceedings. At common law, the trial court's contempt proceedings were unreviewable. *Tugaeff v. Tugaeff,* 42 Haw. 455, 459 (1958) ("The general rule at common law does not permit a review of a contempt proceeding on appeal.") (*citing* 12 AM. JUR. *Contempt* § 80 (1936); 17 C.J.S. *Contempt* § 112 (1963)). While there is no doubt that, pursuant to the supervisory authority vested in this Court, we may issue a writ compelling the trial court to exercise its authority, *see Bd. of Elections v. Superior Ct.*, 4 N.M.I. 111, 112 (1994), there is also no doubt that the trial court has a generous amount of leeway when issuing orders in aid of its judgment and coercing litigants to comply with its validly-entered orders.

¶19 For example, Section 4207 of Title 7 of the Commonwealth Code reads: "[a]ny order in aid of judgment made under this chapter may be modified by the court as justice may require, at any time, upon application of either party and notice to the other, or on the court's own motion." 7 CMC § 4207. Further, Section 4208 of Title 7 of the Commonwealth Code reads:

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[9] This fact distinguishes *In re Marriage of Moore* from the present appeal. Again, here, the trial court has determined that Cabrera shall be incarcerated for ten days unless he remains current with his payments, and, in essence, has stayed the imposition of the sentence.

[10] We cite these cases not to conclusively determine the issue of whether a trial court can declare that a contemnor has purged his contempt of court by substantially complying with the order, for, as stated *supra,* we are not determining the merits of this appeal. We cite *In re Marriage of Moore* and *Thurman* only to demonstrate that, if in fact the trial court did commit reversible error (which we feel is unlikely), the appellants have not demonstrated that the trial court committed clear error such that an extraordinary writ of mandamus should issue, for some of their own cases tend to disprove their contention.

> [i]f any debtor fails without good cause to comply with any order in aid of judgment made under this chapter, the debtor may be adjudged in contempt as a civil matter, after notice to show cause why the debtor should not be so adjudged and an opportunity to be heard thereon, and upon such adjudication shall be committed to jail until the debtor complies with the order or is released by the court or serves a period fixed by the court of not more than six months in jail, whichever happens first.

7 CMC § 4208. Assuming we issued a writ compelling the trial court to incarcerate Cabrera, the trial court could, pursuant to 7 CMC §n4208, release Cabrera from jail at any time. Thus, practically speaking, the trial court could, with a stroke of the pen, render any writ issued by this Court on the present facts largely, if not wholly, academic.

¶20 Comity,[11] the statutory power discussed *supra,* and the realization that the trial court is in a far better position to determine when it is time to incarcerate a litigant found in contempt of an order of the trial court, all suggest that it is not very likely that we would ever compel the trial court to order the commitment of a party who violates one of the trial court's orders.[12]

¶21 In parting, we would note that nothing stated herein should, in any way, be read to absolve Cabrera of his inaction in this case. The appellants correctly state that Cabrera has a duty to support his minor child. *See* 8 CMC § 1715(e). It appears, on the record before us, that Cabrera has been shirking his duties as a parent by failing to support his child.[13] He currently remains free solely by fiat of the trial court. It appears to us, however, that the trial court stands ready to incarcerate Cabrera. *See supra* n.6.

III.

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[11] The abuse of peremptory writs "could operate to undermine the mutual respect generally existing between trial and appellate courts." *Tenorio v. Superior Court,* 1 N.M.I. 1, 8 (1989).

[12] That said, when a party violates an order which is entered pursuant to a mandate from this Court, an appeal from an order refusing to find the party in contempt is proper for our consideration, and we can reverse and remand with instructions to order an appropriate punishment. *See Florida Bd. of Funeral Directors and Embalmers v. Cooksey,* 21 So. 2d 542 (Fla. 1945).

[13] We are not unmindful of the arduous process the appellants have had to endure, *see* supra ¶¶ 2-7.

¶22 For the above reasons, appellate relief is not appropriate, and we dismiss this appeal for a want of jurisdiction.

SO ORDERED this 10th day of December 2003.

/s/
MIGUEL S. DEMAPAN, CHIEF JUSTICE

/s/
JOHN A. MANGLONA, ASSOCIATE JUSTICE

/s/
VIRGINIA SABLAN ONERHEIM, JUSTICE PRO TEMPORE

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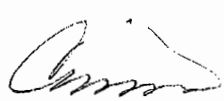
JUDGMENT

¶ 1 THIS CAUSE came on to be heard from the Commonwealth Superior Court and was duly argued and submitted.

¶ 2 Pursuant to Rule 36, Commonwealth Rules of Appellate Procedure, and based on this court's opinion issued on this date, this appeal is DISMISSED for want of jurisdiction.

Entered this 10 day of December 2003.



Cris M. Kaipat, Clerk of Court