

No. 43589-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

THAI V. NGUYEN,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-3-01944-7
The Honorable Frank Cuthbertson, Judge

CORRECTED OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Thai V. Nguyen in contempt of court on April 27, 2012.
2. The trial court erred when it affirmed the contempt order by denying Thai V. Nguyen's motion for revision.
3. The trial court erred when it found that Nguyen intentionally failed to comply with a lawful support order and that he had the ability to comply with the order.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err when it found that Nguyen intentionally failed to comply with a lawful support order and that he had the ability to comply with the order, where Nguyen is functionally illiterate in both his native language and the English language, where his job history consists of manual labor jobs only, and where he suffered an industrial injury that severely limits his ability to perform manual labor?
(Assignments of Error 1, 2 & 3)
2. Is Thai V. Nguyen "unemployable" and therefore unable to comply with the support orders, where Nguyen is functionally illiterate in both his native language and the English language, where his job history consists of manual labor jobs

only, and where he suffered an industrial injury that severely limits his ability to perform manual labor? (Assignments of Error 1, 2 & 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On October 17, 2008, an administrative order was entered requiring Thai V. Nguyen to pay \$302.00 per month for the support of his daughter G.N. (CP 21-27) On June 1, 2010, the State filed a Petition for Support, asserting that Nguyen had not been making payments as required by the administrative order, and asking the court to direct Nguyen to make payments. (CP 19-20) On June 8, 2010, the State filed a motion and order to show cause regarding contempt of the administrative order. (Sup. CP 246-47)

The State amended its Petition for Support on December 28, 2011, asserting that Nguyen had failed to make payments to support a second child J.N., as required by an administrative order entered on October 25, 2011. (Sup. CP 248-75) The State also filed a second motion and order to show cause regarding contempt of the administrative orders. (Sup. CP 276-77)

Nguyen was found in contempt of the administrative support orders after a show cause hearing held on April 27, 2012.

(04/27/12 RP 26-27; CP 35-39)¹ The court found that: Nguyen intentionally failed to comply with a lawful support order; Nguyen had the ability to comply with the order; Nguyen had the income or had the ability to earn income but did not pay support; and Nguyen is not unemployable and therefore has the ability to pay. (CP 36-37) The court ordered that Nguyen should be imprisoned for an indeterminate period of time, but suspended imprisonment on the condition that he pay \$8,560.27 in past child support, and that he continue to pay monthly payments as previously ordered. (CP 37)

Nguyen filed a motion to revise or strike the contempt order, arguing that he presented sufficient evidence to establish that he tried but could not comply with the support orders. (CP 178-79, 42-165) That motion was denied. (CP 178-79) This appeal timely follows. (CP 182-84)

B. SUBSTANTIVE FACTS

Thai V. Nguyen was born in 1970 in South Vietnam. (04/27/12 RP 15; CP 43). His formal education lasted less than five years. (04/27/12 RP 16; CP 43). Nguyen's ability to read or write in Vietnamese is extremely limited, and he speaks little English.

¹ The transcripts in this case will be referred to by the date of the proceeding contained therein.

(04/27/12 RP 16) During Nguyen's childhood he had a multitude of traumatic experiences which likely contributed to him suffering several mental disorders, including depression, post traumatic stress disorder, and anxiety disorder. (04/27/12 RP 12, 16, CP 1-18, 43; Sup. CP 230-32)

Nguyen came to the United States in 1991. (CP 43). Nguyen has worked on a consistent basis in manual labor jobs. (04/27/12 RP 17, 22-23). But on February 12, 2009, Nguyen suffered an industrial accident at his place of work, Leonard's Metals Inc. (CP 1-18; 04/27/12 RP 17). Nguyen was struck in the back by a steel fan blade, which was flying through the air at approximately 60 miles per hour. (CP 10, 43; Sup. CP 199)

Since the accident, Nguyen has suffered severe physical pain. (04/27/12 RP 18, 19; Sup CP 199, 212). Because of the pain, and the work restrictions suggested by treating physicians, Nguyen is no longer capable of productively performing manual labor. (04/27/12 RP 18-19, 20-21; CP 11-13). Nguyen has not been able to work since his industrial accident, and he is currently seeking time-loss compensation for his injury from the Board of Industrial Insurance Appeals. (04/27/12 RP 24, 27; 05/16/12 RP 6; CP 17-18, 44)

IV. ARGUMENT & AUTHORITIES

If a parent fails to comply with a child support order, then a court may hold that parent in contempt. RCW 7.21.010; RCW 26.18.050; In re Marriage of Didier, 134 Wn. App. 490, 500, 140 P.3d 607 (2006) (citing Rhinevault v. Rhinevault, 91 Wn. App. 688, 693–94, 959 P.2d 687 (1998)). Contempt of court is defined as "intentional disobedience of any lawful judgment, decree, order or process of the court." RCW 7.21.010(1)(b).

If a court finds reasonable cause to believe an obligor has failed to comply with a support or maintenance order, the court may issue an order requiring the obligor to appear at a hearing to show cause why he or she should not be held in contempt. RCW 26.18.050(1). A finding of contempt may only be entered if the court finds that "the person has failed or refused to perform an act that is yet within the person's power to perform." RCW 7.21.030(2).

However, the court's "contempt power must be used with great restraint." In re M.B., 101 Wn. App. 425, 439, 3 P.3d 780 (2000). In reviewing a trial court's finding of contempt, an appellate court reviews the record for a clear showing of abuse of discretion. In re James, 79 Wn. App. 436, 439-40, 903 P.2d 470 (1995). Discretion is abused if it is exercised on untenable grounds or for

untenable reasons. James, 79 Wn. App. at 440. In this case, the trial court abused its discretion when it found Nguyen in contempt because Nguyen established that it is not within his ability to comply with the child support orders.

An obligor may assert at the show cause hearing that they lacked the means to comply with the support order. RCW 26.18.050(4). To assure that there is no purposeful avoidance of child support obligations, the obligor must show that they "exercised due diligence in seeking employment, in conserving assets, or otherwise in rendering himself or herself able to comply with the court's order." RCW 26.18.050(4). Nguyen met this burden because he presented sufficient evidence at the show cause hearing to establish that, due to his functional illiteracy and recent work-related injury, he is unemployable and lacks the means to comply with the support orders; and he presented sufficient evidence to establish that he exercised due diligence in conserving his assets or otherwise rendering himself able to comply with the support orders.

A. NGUYEN IS UNEMPLOYABLE

Because the term "unemployable" is not defined by statute, courts have relied upon the dictionary definition, which "defines the

term unemployable, used as an adjective, as 'not acceptable for employment as a worker.'" Matter of Marriage of Blickenstaff, 71 Wn. App. 489, 496, 859 P.2d 646 (1993) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 2493(2nd College ed. 1969)). The most analogous statutory determination is that of voluntary underemployment or voluntary unemployment. RCW 26.19.071(6).

The following factors are to be used to assess an individual's employment prospects: "work history, education, health, and age, or any other relevant factors." RCW 26.19.071(6); Curran v. Curran, 26 Wn. App. 108, 109, 611 P.2d 1351 (1980). These factors are useful and appropriate in making a determination as to whether or not someone is unemployable. In examining these factors, it is clear that Mr. Nguyen is unemployable.

Nguyen's work history consists entirely of manual labor. (CP 1-18, 04/27/12 RP 17) His past employment has included: rice planting, commercial fishing, glass manufacturing, and metals manufacturing. (04/27/12 RP 17; CP 43) All of these jobs involve substantial physical labor. And Nguyen has no history of attempting to avoid his child support obligations through intentional unemployment; he most recently maintained continual employment from 2002 through 2009. (CP 3-5; CP 46; 04/27/12 RP 22-23)

Nguyen's educational background also supports a conclusion that he is unemployable. Nguyen obtained only four to five years of education in Vietnam. (04/27/12 RP 16). Nguyen is functionally illiterate in Vietnamese and entirely illiterate in English. (04/27/12 RP 16). His spoken communication skills are also circumscribed as he speaks with a limited vocabulary in Vietnamese and he speaks extremely sparse English. (04/27/12 RP 16). This language barrier has restricted Mr. Nguyen's employment in the past, as he described through a translator:

Everybody speaks English there. And there were a lot of meetings and every time they give me form to fill out, but I always return them blank because I don't know -- I don't understand.

(04/27/12 RP 23). While Nguyen can haltingly speak a small amount of English, he does not read or write English, and can barely read or write in his native tongue. This should be considered when determining if there exists employment which Nguyen could reasonably obtain and perform, and should be considered in determining whether he is unemployable. But the trial court dismissed these impediments, noting only that Nguyen has a "bit of a language barrier." (04/27/12 RP 26)

Another factor which affects Nguyen's employability is his

poor health, due to the injury he sustained as a result of the 2009 industrial accident. Nguyen has experienced pain in his lower back and left shoulder since the time of this injury. (04/27/12 RP 17, 18-19). Nguyen described his pain as debilitating: “Just the simple task of walking gives me pain, or standing like right now, or lying down, it gives me pain.” (04/27/12 RP 19). The continual pain also interferes with his ability to sleep. (04/27/12 RP 19) Nguyen describes even simple daily tasks as being beyond his physical capabilities. For instance, Nguyen states that he cannot pick up his small children or help give them a bath. (04/27/12 RP 25)

Nguyen was given activity prescription forms from two treating doctors. The first indicates that Nguyen was cleared for physical work as follows: “never to climb ladder or stairs, twist or crawl. He is seldom -- meaning less than an hour a day in an eight-hour work day, to sit, stand, walk, bend, stoop, squat, kneel or work above the shoulders. He is occasionally allowed to reach. . . . He is restricted to lifting ten pounds and then only on an occasional basis.” (04/27/12 RP 19-20; Sup. CP 207) A second activity prescription form from another doctor orders similar restrictions and clears Nguyen for sedentary keyboard work. (04/27/12 RP 21; Sup. CP 224) Clearly, Nguyen is not physically capable of doing the

only kind of gainful employment he has been able to obtain in the past: manual labor.

Another factor, Nguyen's mental health, also contributes to his current prospects for employment. Nguyen suffers from long-standing psychiatric issues. (Sup. CP 230-31; 04/27/12 RP 12) Nguyen was diagnosed as suffering from an anxiety disorder, possible post-traumatic stress disorder, and a mood disorder. (Sup. CP 230-31; 04/27/12 RP 12) The examining psychiatrist noted that Nguyen's "history of significant trauma" as a child growing up in war-torn Vietnam "likely had adverse effects on the ability to function." (Sup. CP 231)

Nguyen is not acceptable for employment as a manual laborer due to his current physical condition. Nguyen is not acceptable for other more sedentary forms of employment due to his lack of experience, education, and basic communication skills. After considering all of the factors that effect Nguyen's employability, it is clear that he is currently unemployable.

B. NGUYEN HAS CONSERVED HIS ASSETS

Nguyen also showed that he conserved his assets during the time he was unable to comply with his child support orders, as required by RCW 26.18.050(4). First, there is no evidence in the

record that Nguyen has unwisely squandered any source of income he may have had during his period of non-payment. There is also no evidence in the record that Mr. Nguyen has had any source of income since 2009 other than the time-loss compensation which he received from the Department of Labor and Industries which was properly garnished to pay his child support obligations. (04/27/12 RP 13)

Furthermore, there must be assets in existence which need to be conserved for there to be an irresponsible depletion of assets. Carstens v. Carstens, 10 Wn. App. 964, 966, 521 P.2d 241 (1974) (describing the depletion of assets through the reckless sale of parcels of real property). Nguyen has not caused the depletion or destruction of any asset.

C. NGUYEN ATTEMPTED TO RENDER HIMSELF ABLE TO COMPLY

Nguyen also showed that he had taken steps to try and render himself able to comply with his child support orders. Nguyen did attempt to return to work when he was cleared by treating doctors; however, his employer did not make any attempt to accommodate his physical restrictions, and instead placed him at the same machine he had been working at when he was injured.

(04/25/12 RP 18-19; 05/16/12 RP 9) Due to the pain from his injury, Nguyen could not withstand the physical demands of the job.

(04/27/12 RP 18-19; 05/16/12 RP 9)

At the time of the contempt hearing, Nguyen was also pursuing further time-loss compensation and Department of Labor and Industries rehabilitation coverage for his industrial injury.

(04/27/12 RP 24, 27; 05/16/12 RP 6; CP 17-18) Thus, even though Nguyen is unemployable, he is actively pursuing this potential income source. Nguyen has therefore taken appropriate steps to try and render himself able to comply with his child support obligations.

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V. CONCLUSION

Mr. Nguyen fulfilled his burden of showing that he is unemployable, has conserved his assets, and has taken steps to attempt to render himself able to comply with his child support orders. The trial court therefore erred in entering the order of contempt and in denying Nguyen's subsequent motion to strike the order. The order of contempt entered against Nguyen on April 27, 2012 should be stricken and vacated.

DATED: January 25, 2013



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CERTIFICATE OF MAILING

I certify that on 01/25/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Thai Nguyen, 4907 East I Street, Tacoma, WA 98404.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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