

MEMORANDUM DECISION

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APPELLANT PRO SE

Eric Smith
Greenwood, Indiana

IN THE COURT OF APPEALS OF INDIANA

Eric D. Smith,
Appellant-Petitioner,

v.

Shanna LaMar,
Appellee-Respondent.

February 4, 2022

Court of Appeals Case No.
21A-JP-1540

Appeal from the Shelby Superior
Court

The Honorable Andrew S.
Roesener, Special Judge

Trial Court Cause No. 73D01-
1606-JP-43

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Petitioner, Eric Smith (Smith), appeals the trial court's calculation of his child support obligation pursuant to a petition to modify child support.

[2] We affirm.

ISSUE

[3] Smith raises one issue on appeal, which we restate as: Whether the trial court erred in calculating his weekly gross income for the purposes of determining the amount payable toward his child support arrearage.

FACTS AND PROCEDURAL HISTORY

[4] Smith and Appellee-Respondent, Shanna LaMar (LaMar), are the biological parents of Child, born on December 14, 2015. On November 28, 2017, the trial court entered an order that Smith pay child support of \$129.15. The trial court established his arrearage in the amount of \$9,557.10 as of November 24, 2017 and ordered him to pay an additional \$20.85 per week toward the arrearage for a total weekly payment of \$150.¹ Two years later, on December 30, 2019, Smith filed a petition to modify his child support, arguing that his income had been reduced since the prior support order was entered.

[5] The trial court held a child support modification hearing on February 24, 2020. On March 6, 2020, the trial court issued a modification order, granting Smith's

¹ The record shows that the trial court entered an order on May 17, 2018, stating that Smith's arrearage as of April 13, 2018, was \$11,707.10.

petition to modify his child support. In its order, the trial court found that \$2,380, income derived from the sale of Smith's house was irregular income, and that Smith's weekly gross income from the \$2,380 was \$46. Thus, the trial court added \$46 to Smith's gross weekly income of \$686 and found Smith's total weekly gross income to be \$732. Nonetheless, it reduced Smith's weekly child support from \$129.15 to \$74 effective February 21, 2020. With respect to Smith's child support in arrearage, which the trial court determined was more than \$11,000, the trial court ordered Smith to pay \$70 per week until paid in full. In sum, Smith's total weekly support obligation amounted to \$144.

[6] Smith appealed the modification order, arguing that there was insufficient evidence to support the amount of his arrearage and the trial court erred in ordering him to pay an additional \$70 weekly towards his arrearage. Smith also claimed that the trial court should not have included the \$46 in his weekly gross income since the income he received from the sale of his house was irregular income.

[7] On December 21, 2020, we set aside the child support modification order for several reasons. First, we found that Smith had established *prima facie* error because the trial court's inclusion of \$46 in Smith's weekly gross income based on the profit he made when he closed on the sale of his house was erroneous since Smith's receipt of those funds was a one-time event and not regular or dependable income. See *Smith v LaMar*, Case No. 20A-JP-657, slip op. at 1-4 (Ind. Ct. App. Dec. 21, 2020) (*Smith I*). In addition, we concluded that there was insufficient evidence to support the amount of his arrearage because the

only evidence regarding the amount of arrearage was LaMar's testimony that Smith's arrearage had increased since April of 2018 and "may have grown to more than \$20,000.00." *Smith I*, slip op. at 4. Further, we found that the trial court "did not make any findings" calling for that "significant decrease of his basic weekly child support obligation," or Smith's "ability to pay an additional \$70 weekly toward his arrearage." *Id.* Thus, we remanded to the trial court and ordered for "an amended child support modification order which sets Smith's basic weekly child support obligation, determines the exact amount of his arrearage, and sets a reasonable amount that he must pay weekly toward the arrearage based on his weekly income." *Id.*

[8] Following remand, the trial court held hearings on April 8, and June 28, 2021. LaMar presented a signed worksheet showing Smith's weekly income to be \$686. Smith maintained that his weekly income was \$440 and claimed that overtime pay was not guaranteed. Smith testified that he could only afford paying \$20 toward his child support arrearage amount. On June 29, 2021, the trial court, on remand, issued a child support modification order stating in part that:

1. Pursuant to the court's order issued May 17, 2018, [Smith] had an accumulated child support arrearage of eleven thousand seven hundred and seven dollars and ten cents (\$11,707.10) as of April 13, 2018.
2. One hundred and sixty-seven (167) weeks have passed from the date of the court's most recent arrearage determination [see above, April 13, 2018] and today's hearing date [June 28, 2021].

3. During the first ninety-six (96) weeks of this one hundred and sixty-seven (167) week period, [Smith] owed [LaMar] weekly support in the amount of one hundred twenty-nine dollars and fifteen cents (\$129.15).

4. This order, see *infra.*, modifies [Smith's] weekly support obligation to sixty-nine dollars (\$69.00) per week retroactive to February 21, 2020. There have been seventy-one (71) weeks from the said date to and including June 28, 2021.

5. Based on the foregoing, [Smith] owed a total of seventeen thousand two hundred and ninety-seven dollars and forty cents (\$17,297.40) since April 13, 2018.

6. [Smith] has paid child support totaling seven thousand six hundred thirty-five dollars (\$7,635) since April 13, 2018.

7. Thus, [Smith's] net underpayment since April 13, 2018, is nine thousand six hundred sixty-two dollars and forty cents (\$9,662.40).

8. Adding this deficiency to the arrearage of eleven thousand seven hundred seven dollars and ten cents (\$11,707.10) established by the court's 2018 order, [Smith] has a total child support arrearage of twenty-one thousand three hundred sixty-nine dollars and fifty cents (\$21,369.50) as of June 28, 2021.

9. [Smith] asks that any arrearage be repaid at a rate of twenty dollars (\$20.00) per week.

10. This would result in a full arrearage repayment not being realized for twenty (20) years. The minor would be approximately twenty-six (26) years of age at this time.

11. It bears remembering that [Smith] achieved earnings of between thirty thousand dollars (\$30,000) and forty thousand dollars (\$40,000) from the sale of his residence in 2019.

12. A pittance of this revenue went to his already bloated child support arrearage. [Smith] explained that those monies were principally used to pay credit card debts, an automobile loan, and medical bills as opposed to his child support arrearage. [Smith] asserted that the payment of these consumer debts would result in significant financial relief moving forward thus, by implication, permitting him to dutifully support his child. [Smith] asserts today (June 28, 2021) that this anticipated financial relief was not realized based upon [Smith] accumulating new credit card debt, new medical debt, and student loan debt. Put another way, [Smith] asks the court to accept the premise that his financial circumstances are unchanged.

13. Given that [Smith] is already over twenty-thousand dollars (\$20,000) in the hole for a child who is not even six (6) years old, the court does not find it a reach to conclude, his protestation to the contrary, that [Smith] will always have credit card debt, medical bills, car loans, student loan debt, or other financial obligation that will, in his mind, take precedence over fully supporting his child.

14. The court concludes that asking [LaMar], and [C]hild to wait another twenty (20) years to receive this child support is a bridge too far.

15. The court concedes that [Smith] is not presently earning what could be described as significant income, but the court finds that he is capable of repaying this arrearage sooner than two (2) decades from now. [It bears noting that [Smith]'s financial house must be in order to some degree because he just obtained a mortgage on a residence he moved into last month.]

16. The court concludes that asking [Smith] to repay this arrearage amount in roughly a decade, given his current earnings and financial situation, is reasonable. This schedule will allow the minor child to actually realize the benefits of [Smith's] unpaid support while she remains a minor child and in [LaMar's] custody.

17. Based upon the foregoing the court ORDERS, as follows:

- a. [Smith] shall pay child support in the amount of sixty-nine dollars (\$69.00) per week effective February 21, 2020.
- b. [Smith] has accumulated child support arrearage of twenty-one thousand three hundred sixty-nine dollars and fifty cents (\$21,369.50) as of June 28, 2021.
- c. [Smith] shall repay said arrearage at rate of forty dollars (\$40.00) per week in addition to [Smith's] weekly child support obligation.

(Appellant's App. Vol. II, pp. 34-36).

[9] Smith now appeals. Additional information will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[10] First, we observe that LaMar has not filed an appellee's brief. When the appellee fails to submit a brief, we will not develop an argument on her behalf, but instead, we may reverse the trial court's judgment if the appellant's brief presents a case of *prima facie* error. *GEICO Ins. Co. v. Graham*, 14 N.E.3d 854,

857 (Ind. Ct. App. 2014). “*Prima facie* error in this context means at first sight, on first appearance, or on the face of it.” *Salyer v. Washington Regular Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020) (citation omitted). This less stringent standard of review relieves us of the burden of controverting arguments advanced in favor of reversal where that burden properly rests with the appellee. *See, e.g., Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App. 2014). We are obligated, however, to correctly apply the law to the facts in the record to determine whether reversal is required. *Id.*

[11] Smith argues that the trial court’s determination of his weekly gross income for purposes of calculating his weekly child support arrearage is clearly erroneous. Child support calculations are made utilizing the income shares model set forth in the Indiana Child Support Guidelines. *See McGill v. McGill*, 801 N.E.2d 1249, 1251 (Ind. Ct. App. 2004). The Guidelines apportion the cost of supporting children between the parents according to their means, on the premise that children should receive the same portion of parental income after a dissolution that they would have received if the family had remained intact. *See id.* The trial court is vested with broad discretion in making child support determinations. *Carter v. Dayhuff*, 829 N.E.2d 560, 569 (Ind. Ct. App. 2005). A calculation of child support under the Guidelines is presumed to be valid. *McGill*, 801 N.E.2d at 1251.

[12] We will reverse a trial court’s grant or denial of a request for modification of child support only where the court has abused its discretion. *Carter*, 829 N.E.2d at 569-70. An abuse of discretion occurs when the trial court misinterprets the

law or the decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* We do not reweigh the evidence or judge the credibility of the witnesses upon review; rather, we consider only the evidence most favorable to the judgment and the reasonable inferences to be drawn therefrom. *Id.* at 570.

- [13] Child support orders may be modified “upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable,” or upon a showing that “(A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines,” and “(B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.” Indiana Code section 31-16-8-1(b).

II. *Calculation of Smith’s Weekly Gross Income*

- [14] On appeal, Smith maintains the trial court did not even attempt to calculate his weekly gross income as directed in *Smith I* for the purposes of calculating the amount payable toward his arrearage, and instead, the trial court relied on its prior *incorrect* calculation of his weekly gross income that was calculated at the 2020 child support modification hearing.
- [15] When fashioning a child support order, the trial court’s first task it to determine the weekly gross income of each parent. *In re G.R.G.*, 829 N.E.2d at 118. “Weekly gross income” is broadly defined to include not only actual income

from employment but also potential income and imputed income from “in-kind” benefits. *Id.* Guideline 3(A) encompasses in the definition of “gross income” “income from salaries, wages, . . . , bonuses, [and] overtime[.]” The Commentary to Guideline 3A provides that “[t]here are numerous forms of income that are irregular or nonguaranteed, which cause difficulty in accurately determining the gross income of a party” and “[o]vertime, commissions, bonuses, . . . [and] voluntary extra work and extra hours worked by a professional are all illustrations.” Subsection 2(b) to Commentary to Guideline 3A. It provides “[c]are should be taken to set support based on dependable income, while at the same time providing children with the support to which they are entitled.” *Id.*

[16] Following remand, and with respect to his weekly gross income, Smith testified that he worked forty hours a week and earned \$11 an hour. Smith testified that he did not understand how the trial court arrived at the \$686 figure, because his testimony was that he worked forty hours a week and earned \$11 an hour, and therefore, his weekly gross income was \$440. The trial court rejected Smith’s argument by referring to our opinion in *Smith I* and stated

Well, let me just say I don’t think I’m gonna do that and here’s why. If you look further along in [*Smith I*], on pages 5 and 6 and they quote my order, um, I so I calculated your base support amount at [\$]686. I know that’s something you’ve long contested, right? But that’s what I calculated it at and then I determined that a percentage of the proceeds from the sale of the house should have been paid using a ratio in the Guidelines. And I think I said that was another \$22,380.00 and if I sort of spread that over a weekly basis, that was another [\$]46, so adding

[\$]686 plus [\$]46 is where I got the [\$]732. If you look at the bottom of page 9, the last sentence. It was “we reverse the court’s findings that Smith’s weekly gross income includes [\$]46 attributable to the sale of his house.” That to me is a clear expression from the Court of Appeals that says it’s not [\$]732, it’s [\$]686. So in my mind, that ship has sailed and I’m gonna calculate your support based on gross weekly income of \$686. I know you don’t agree with it. Um, you filed a motion [to re-open evidence], I know, to set that aside and I think I’ve denied that. So for better or for worse, I think the expression from Judge Brown here says it’s [\$]686 and so that’s what I’m goin’ with.

(Transcript p. 46). In addition, LaMar, who had offered a signed child support obligation worksheet dated April 21, 2021, calculated Smith’s gross income as \$686. When asked if he agreed with LaMar’s calculation of his weekly gross income, the following exchange occurred

[Trial Court]: Alright. Let me ask one other question and then I’ll – I’ll let [LaMar’s counsel] ask you some. If you look at [LaMar’s Exhibit] A, from the April [28, 2021,] hearing – do you have that in front of you? That’s their Child Support Worksheet. It calculates [\$]69 a week.

[Smith]: I don’t, Your Honor.

[Trial Court]: Um, that shows your gross weekly income at [\$]686. It shows [LaMar’s] at [\$]731, which I think was her income at the last hearing. It gives you credit for, um, a parenting time credit for \$40.11. It gives [LaMar] a credit for \$23.38 a week for health insurance. Um, shows your support at \$69.00 a week instead of \$74.00, that’s the current obligation. Um, it seems to me that those numbers arose at the last hearing and so my question is do you object to the current ongoing support obligation of [\$]69 a week based on taking that, uh, I

think it was [\$]46 a week based on the proceeds of the sale of your home out of there.

[Smith]: Yes I do,[y]our Honor.

[Trial Court]: Okay. And is that for the same reason that you think the [\$]686 was wrong to begin with?

[Smith]: Yes, [y]our Honor. I just think if we're gonna be setting child support, we should set it by the exact numbers and those are not the exact numbers. It's – by using that number, [y]our Honor, it's causing more financial strain on me because I'm – I'm having to pay money that I don't have available.

[Trial Court]: Let me ask it this way, [Smith], do you agree with me that the Court of Appeals, as part of its opinion, did not find that it was error to arrive at [\$]686? That their declaration was that the error was the overage, the additional amount?

[Smith]: I – I believe that the Court of Appeals on that was really vague. I wish they would've [given] us more clarification. Um, but I'm just looking at the very last paragraph on page 10 where it orders the court to set the base child support. I think that would mean for us to – what are these real numbers so that we can get everything clear and correct.

[Trial Court]: Okay.

[Smith]: I mean, that's what I – how I interpret it. And, you know, if I have to[,] I'll appeal that and maybe get a determination, a yay or nay on that. And if the Court of Appeals sides with the trial court, then I'll respect and honor that. But at the same time, I feel like we're talking about real numbers, we should be using real numbers, Your Honor.

(Tr. pp. 48-49).

- [17] One of the instructions we gave in *Smith I* was for the trial court to calculate Smith's weekly gross income for purposes of determining how much Smith should pay toward his child support arrearage. While we reversed the trial court's inclusion of \$46 to Smith's weekly gross income, we did not explicitly indicate that the previous calculation of \$686 was erroneous.
- [18] Based on the limited record before us, we turn to the facts in *Smith I* where we noted that in support of his petition to modify child support, Smith attached his payroll statements for the periods ending on November 16 and November 30, 2019, which showed that he had a regular hourly rate of \$11, an overtime hourly rate of \$16.50, and year-to-date earnings of \$32,651.29 as of November 30, 2019. In a footnote, we noted that the November 30, 2019, payroll statement also indicated that there had been year-to-date deductions for health and life insurance totaling \$3,310.25. Aside from his payroll statements, the trial court admitted Smith's W-2 for 2019, which indicated that his taxable wages for that year was \$30,005.38. Based on the facts in *Smith I*, it appears that while the trial court had several conflicting documents demonstrating Smith's income at the child support modification hearing, it determined Smith's weekly gross income to be \$686. It appears as though that this figure was arrived at by taking into account all of Smith's income in 2019, which included his December 2019 pay. It appears that the trial court did not give weight to Smith's testimony that his weekly gross should be \$440, which did not consider his overtime pay.

[19] On appeal, Smith appears to ask us to reweigh the evidence regarding his weekly gross income, which we will not do. *Carter*, 829 N.E.2d at 570. Contrary to Smith’s claims, there is evidence in the record to suggest that at the time of the modification hearing in 2020, as noted in *Smith I*, Smith’s weekly gross income in 2019 was about \$686 and not \$440, and the trial court on remand properly found that \$686 was the correct weekly gross income based on the evidence presented. Because the evidence supports the trial court’s calculation of Smith’s weekly income, we find no error. As always, should Smith’s income hereafter diminish such that the child support order becomes unreasonable, he is free to petition the trial court to modify the same.

[20] Lastly, Smith also claims that the trial court erred in determining that his total child support arrearage was \$21,369.50. The only contention he has regarding this amount is that the initial child support order of 2017 erroneously relied on his tax returns which included his overtime income. First, we note that Smith did not appeal that initial child support order, and we decline his invitation to review that initial child support order now. As to the accuracy of the arrearage amount, the trial court, on remand, entered sufficient findings regarding the exact amount owed to LaMar. Specifically, the trial court noted that Smith’s underpayment as of June 28, 2021, was \$21,369.50. While Smith testified that he could only afford to pay \$20 per week toward the arrearage, the trial court found his request would result in the payment not being realized for twenty years, and to ask Child to “wait another twenty [] years to receive [] child support is a bridge to far.” (Appellant’s App. Vol. II, p. 36). Moreover, the

trial court found that Smith gave other debts like credit cards, medical, and student debt, priority over his child support obligation. Thus, the trial court concluded that based on Smith's "current earnings and financial situation," it was reasonable for him to weekly pay \$40 toward his child support arrearage. (Appellant's App. Vol. II, p. 36). We find no error with the trial court's order.

[21] In sum, we conclude that the trial correctly determined Smith's weekly gross income was \$686 based on the evidence, and that it correctly calculated the arrearage amount due, and based on Smith's current earnings and financial situation, \$40 was a reasonable weekly amount to pay toward his child support arrearage. Thus, we affirm the trial court in all respects.

CONCLUSION

[22] Based on the foregoing, we conclude that the trial court correctly determined Smith's weekly gross income for purposes of determining the amount payable toward his child support arrearage. We also conclude that the arrearage amount as calculated by the trial court is accurate, and we defer to the trial court's calculation of the weekly arrearage amount payable by Smith.

[23] Affirmed.

[24] Robb, J. and Molter, J. concur