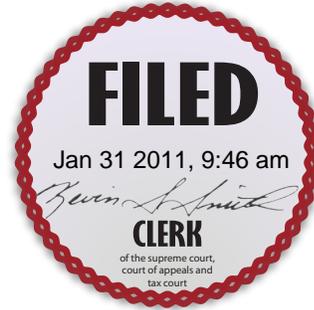


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**IN THE
COURT OF APPEALS OF INDIANA**

JACKIE JOINER,)

Appellant-Defendant,)

vs.)

No. 89A01-1005-CR-249

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable Charles K. Todd, Jr., Judge
Cause No. 89D01-0801-FC-001

January 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Jackie Joiner (“Joiner”) appeals from his conviction for Nonsupport of a Dependent Child, as a Class C Felony.¹ We affirm.

Issues

Joiner presents two issues for our review, which we restate as:

- I. Whether his conviction was contrary to law because undisputed evidence established his inability to pay as a defense to the crime; and
- II. Whether his inability to pay his child support obligation while incarcerated should result in an abatement of the amount of support for which he should be held criminally liable, thereby resulting in a reduction of his conviction to a Class D felony.

Facts and Procedural History

S.J., the child of a brief relationship between Joiner and her mother, E.T., was born in May 1995, in Richmond, Indiana. Joiner was in prison when S.J. was born. In applying for public assistance, E.T. was required to establish S.J.’s paternity. On August 16, 1996, after Joiner submitted to a court-ordered DNA test, Joiner’s paternity of S.J. was established. A child support order for \$35.00 per week was established, retroactive to S.J.’s date of birth, placing Joiner in arrears in the amount of \$2,205 and resulting in an assessment of an additional \$5.00 per week against him.

Joiner was released from prison on September 27, 2002, and soon afterward met S.J. for the first time. From his release in 2002 until the end of 2007, he worked at a number of service jobs for several months at a time, including work as a dishwasher at several

¹ See Ind. Code § 35-46-1-5.

restaurants, a forklift driver, a machine operator, and a welder. Joiner also spent time in and out of prison and home detention as a result of several criminal convictions. Though only occasionally employed and often imprisoned, at no point did Joiner seek a reduction in his weekly support obligation, pay any money to S.J. or E.T., or provide any form of care directly to S.J.

The Prosecutor twice pursued contempt proceedings against Joiner. The first of these resulted in the entry of “Stipulations and Agreed Order” of August 14, 2003, which permitted Joiner to avoid jail time for contempt of court in exchange for payment of support at the previously designated rate or the performance of community service. Joiner’s child support arrearage at this time was \$14,754.00.

After Joiner’s continued failure to pay support, accruing an arrearage of \$17,519.00 by January 31, 2005, the Prosecutor filed a second information for contempt. After missing the original hearing on the information because he was incarcerated, Joiner appeared for a hearing on August 24, 2005, by which point his support arrearage was \$18,259.00. An Order on Contempt was entered by the court, and Joiner was imprisoned for thirty days.

The Wayne County Prosecutor (“Prosecutor”) sent income withholding orders to numerous of Joiner’s employers, but was only able to recover a total of \$1,318.86 in support payments between December 31, 2002, and December 27, 2007. By December 27, 2007, Joiner’s total support arrearage was \$21,245.14.

On January 4, 2008, the State charged Joiner with Nonsupport of a Dependent Child, as a Class C felony. A jury trial was held from April 26, 2010, to April 28, 2010, at the

conclusion of which the jury found Joiner guilty of Nonsupport of a Dependent Child, as a Class C felony. On May 24, 2010, the trial court sentenced him to six years imprisonment.

This appeal followed.

Discussion and Decision

Inability to Pay

Joiner concedes that the State's case is supported by sufficient evidence. Joiner instead appeals on the basis that the undisputed evidence established his inability to pay as a defense to the charge of Nonsupport of a Dependent Child because of his imprisonment and because, when not imprisoned, he was working and subject to a income withholding order, seeking work, or struggling with health problems, "all while repeating a cycle of poverty." (Appellant's Br. 5.)

To convict Joiner of Nonsupport of a Dependent Child as charged the State was required to prove beyond a reasonable doubt that, between December 31, 2002, and December 31, 2007, Joiner knowingly failed to provide support to S.J., his minor child, which support consisted of food, clothing, shelter, medical care or financial assistance, in an amount exceeding \$15,000. See I.C. § 35-46-1-5(a); (App. 25). Because Joiner concedes the State produced sufficient evidence to support his conviction, we consider only Joiner's affirmative defense of inability to pay support.

Pursuant to subsection (d) of Indiana Code section 35-46-1-5, "[i]t is a defense that the accused person was unable to provide support."

The defendant bears the burden of proving his or her inability to pay. We will reverse this negative judgment only if the decision of the trial court is contrary to law. In assessing whether a judgment is contrary to law, we must determine

if the undisputed evidence and all reasonable inferences lead to one conclusion and the trial court reached another conclusion. Stephens v. State, 874 N.E.2d 1027, 1034 (Ind. Ct. App. 2007) (internal citations omitted), trans. denied. While proof of incarceration may be offered as an affirmative defense, it is “not an absolute bar” to a conviction for nonsupport of a dependent. See Cooper v. State, 760 N.E.2d 660, 666 (Ind. Ct. App. 2001), trans. denied; see also Lambert v. Lambert, 861 N.E.2d 1176, 1177 (Ind. 2007) (holding that “incarceration does not relieve parents of their child support obligations”).

Culbertson v. State, 929 N.E.2d 900, 904 (Ind. Ct. App. 2010), trans. denied.

Here, there is no dispute that Joiner was incarcerated before S.J.’s birth in 1995 through late September, 2002. There is also no dispute that Joiner was in and out of prison for various criminal offenses between December 31, 2002, and December 31, 2007; that some, but not all, of his employers forwarded wages collected pursuant to income withholding orders; that he never made direct payments to the Prosecutor, S.J., or E.T.; that he made limited attempts to locate S.J. and provided no direct care or other non-monetary support for her; that he never sought any abatement in the support order; and that in 2005 he agreed to the amount of weekly support and the amount of his arrearage. Joiner testified that he had contracted sarcoidosis severe enough to prevent him from working sometime in 2005 or 2006. He also testified that that his mandatory appearance at various court proceedings, only some of which were related to his support obligation for S.J., interfered with those periods when he was employed, resulting in his dismissal from several jobs.

Nevertheless, Joiner was employed during periods when he was not imprisoned and did not attempt to provide support payments directly to S.J., E.T., or the Prosecutor when income withholding orders were not in effect. Joiner never provided tax returns or any other

form of income or financial verification to establish his ability to pay or lack thereof. He also never sought to introduce medical records that could confirm the nature and duration of his illness, and acknowledged that he was healthy and capable of working except during his bout of sarcoidosis. Moreover, even though he appeared in court several times related to his support obligation, Joiner never sought to compel E.T.'s compliance with his right to reasonable parenting time with S.J. Finally, he possessed skills as a welder with which he might have found work.

Thus, even though he was incarcerated for much of S.J.'s life, we cannot say that Joiner "adequately established an inability to pay any child support," Culbertson, 929 N.E.2d at 905 (emphasis in original), in accordance with our standard of review.

Reduction of Joiner's Conviction to a Class D Felony

Joiner also contends that even if he failed to establish a total defense to Nonsupport of a Dependent Child, his imprisonment from 1995 to 2002, during which much of the arrearage accrued, as well as his sporadic imprisonment from 2003 onward, should result in a reduction of his conviction from a Class C felony to a Class D felony. Joiner argues that "unless a modification is filed, the support obligation continues to accrue" even though an incarcerated individual will lack the ability to pay, and that "therefore the affirmative defense of inability to pay should apply to the enhancement provision of Ind. Code 35-46-1-5." (Appellant's Br. 9-10.)

We cannot agree with Joiner's approach to the statute. Our Indiana Code states that "[a] person who knowingly or intentionally fails to provide support to the person's dependent

child” commits a Class D felony and that this offense is enhanced to a Class C felony “if the total amount of unpaid support that is due or owing ... is at least fifteen thousand dollars (\$15,000).” I.C. § 35-46-1-5(a). As this court noted in State v. Land, Indiana law criminalizes “the present act of failing to provide child support and enhances it if the amount due and owing at the time of the underlying act is in excess of \$10,000.” 688 N.E.2d 1307, 1311 (Ind. Ct. App. 1997) (interpreting a prior version of I.C. § 35-46-1-5), trans. denied. Incarceration may be introduced as evidence of inability to pay, though it does not bar a conviction for nonsupport. Culbertson, 929 N.E.2d at 906-07 (quoting Cooper v. State, 760 N.E.2d 660, 666 (Ind. Ct. App. 2001), trans. denied).

Thus, in Cooper v. State, we held that a defendant “is chargeable for the amount due and owing at the time of the underlying act, regardless of whether some of that arrearage accrued while he was incarcerated.” 760 N.E.2d 660, 666 (Ind. Ct. App. 2001) (holding thus in response to Cooper’s claim that only that portion of his arrearage that accrued when he was not incarcerated should be used to charge him with Nonsupport), trans. denied.² The affirmative defense afforded for inability to pay under Indiana Code section 35-46-1-5(d), then, applies to a defendant’s act of knowing or intentional failure to pay during the period of time for which the offense of nonsupport is charged by the State, rather than to any specific element of the offense or the enhancement. Cf. Blatchford v. State, 673 N.E.2d 781, 783

² We recognize that this court recently denied relief in a similar case, observing that a defendant failed to present evidence that abating a support obligation in light of his imprisonment would have resulted in an arrearage less than \$15,000. Culbertson, 929 N.E.2d at 905, 906-07. We see no indication that the Culbertson court would have arrived at a decision different from our own; rather, we understand the Culbertson court to say that it need not have reached the issue we address today.

(Ind. Ct. App. 1996) (holding that the affirmative defense in section 35-46-1-5(d) does not defeat a specific element of the offense but is instead a separate statutory defense for which defendant has the burden of proof).³

Because the affirmative defense in section 35-46-1-5(d) does not apply directly to the enhancement from Class D to Class C, for which the \$15,000 minimum arrearage amount is effectively an element of the offense, we affirm Joiner's conviction of the Class C felony offense. Here, Joiner not only failed to seek a modification of the support order but agreed to both the amount of the weekly support payment and the amount of his arrearage. Though Joiner was incarcerated for much of S.J.'s life, he has not established that he was unable to pay at all times during the period of nonsupport charged by the State. Because of this, and because the affirmative defense does not afford a defense to the enhancement of the offense standing alone from the underlying crime of nonsupport, we affirm Joiner's conviction in this respect.

Conclusion

Joiner did not establish his inability to pay any child support during the period charged in the information. Because Indiana Code section 35-46-1-5(d) does not provide a defense as to the class of the offense of nonsupport, Joiner is not entitled to a reduction of his conviction from a Class C felony to a Class D felony due to his inability to pay while incarcerated.

³ In support of his argument here, Joiner advances our supreme court's holding in Lambert v. Lambert that pre-incarceration and/or reasonable post-incarceration income should not be imputed in determining a support amount during a parent's imprisonment. 861 N.E.2d 1176, 1177 (Ind. 2007). Because Lambert and its progeny address the modification of support orders rather than the inability to pay as a defense to the crime of nonsupport of a dependent child, we decline to adopt Joiner's approach under Lambert.

Affirmed.

NAJAM, J., and DARDEN, J., concur.