IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE o/b/o
SINTERIA SMITH,

Petitioner,

vs. CASE NO.: SC01-913

KELVIN M. JACKSON,

Respondent.
_____/

DEPARTMENT OF REVENUE o/b/o
DONNA LANE, etc.,

Petitioner,

vs. CASE NO.: SC01-914

MORGAN P. TILLERY, SR.,

Respondent.
_____/

INITIAL BRIEF ON THE MERITS

JON J. JOHNSON, Esquire
Assistant Attorney General
Child Support Enforcement
2002 North Lois Avenue
Westwood Center, 7th Floor
Tampa, Florida 33607
Telephone: 813-801-0689

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHERS

INTRODUCTION

This brief is filed on behalf of the Petitioners, THE FLORIDA DEPARTMENT OF REVENUE o/b/o SINTERIA SMITH and THE FLORIDA DEPARTMENT OF REVENUE o/b/o DONNA LANE, challenging the panel opinion of the Fifth District Court of Appeal filed on March 30, 2001. In this opinion, the Fifth District affirmed two separate orders of the Marion County Circuit Court and, in the process, adhered to the rule of law established in the opinion of Pickett v. Pickett, 709 So. 2d 182 (Fla. 5th DCA 1998). Additionally, the Fifth District certified conflict with the Fourth District's opinion in Mascola v. Lusskin, 727 So. 2d 328 (Fla. 4th DCA 1999).

The issue presented herein is whether it is proper for a trial court to abate or suspend an existing child support obligation during a period when the paying parent is incarcerated since, as a result of the imprisonment, the parent does not have the present ability to pay support. As will be argued in detail below, this question should

be answered in the negative based on the logic articulated in the Fourth District's comprehensive and well reasoned analysis in Mascola.

The Department respectfully urges this Court to reject the conclusion reached in the panel opinion under review in addition to the conclusion reached in the Fifth District's opinion in Pickett. The Department respectfully asks this Court to expressly adopt the reasoning of the Mascola, which held a paying parent's incarceration cannot justify a reduction in said parent's previously ordered child support obligation.

Throughout this brief, the Petitioners will be referred to as either "The Department" or "The Mother." The Respondents, KELVIN M. JACKSON and MORGAN P. TILLERY, each of whom are incarcerated fathers, will be referred to as "The Father."

References to the documents included in the Jackson appellate record will be designated "R1." followed by the appropriate page in the record. References to the documents included in the Tillery appellate record will be designated "R2." followed by appropriate page in the record.

STATEMENT OF THE CASE AND FACTS

The issue and facts presented in the Jackson and Tillery cases are virtually identical. In each case, the Father had been ordered to pay on-going child support for his child as well as an additional amount toward arrearages. (R1. 1; R2. 2). At some point after the entry of the support orders, each of the Fathers was incarcerated[1] and each filed a motion with the court seeking to suspend and/or abate his child support obligation until after his release from prison. (R1. 3-4; R2. 9-11). Each of the motions contained allegations essentially stating that as a result of the incarceration, the Father did not have the present ability to support his child. (R1. 3; R2. 9-10).

Both motions were heard on the same day by the same Marion County circuit court judge. During each hearing, the trial court acknowledged the existing inter-district conflict on the issue. The trial court recognized the Fifth District's opinion in Pickett v. Pickett, 709 So. 2d 182 (Fla. 5th DCA 1998) was controlling. (R1. 2d Supp R. 6-8, 12-18; R2. 18-20). In Pickett, the Fifth District held it was improper to impute income to an incarcerated individual for purposes of child support where there was no showing of a capacity to earn that income.

---

[1] Respondent Jackson was convicted and incarcerated on charges of dealing in stolen property and drug possession. (R1. 2d Supp R. 4) Respondent Tillery was convicted and incarcerated on charges of burglary. (R2. Supp. transcript of July 27, 2000 hearing, p. 3).

Since the trial court was bound by Pickett precedent, in each case it entered a order granting the Father's request to suspend and/or abate his child support obligation during his incarceration based on a finding of no ability to pay. The court expressly permitted the Department to re-establish the support obligation upon the Father's release from prison. (R1. 8; R2. 12-13). In both orders, the trial court addressed the existing appellate opinions regarding the issue and concluded that, regardless of its agreement with the Fourth District's reasoning in Mascola v. Lusskin, 727 So. 2d 328 (Fla. 4th DCA 1999), it was bound to follow and apply the Pickett decision to the facts before it. (R1. 8-10;R2. 18-20).

The Department timely appealed each of these orders to the Fifth District. On appeal, the Department requested that the Fifth District reconsider its opinion in Pickett in light of Mascola. Alternatively, the Department asked the Fifth District to certify conflict if it was inclined to affirm the trial court decisions.

After considering the issue, the panel ruled that even though it may have ruled differently than did the panel in Pickett, it elected to adhere to the rule in Pickett and to certify conflict with Mascola. It is as a result of this express and direct inter-district conflict that this case is presented to this Court.

SUMMARY OF THE ARGUMENT

Florida law is very clear that a paying parent is not entitled to a reduction and/or modification of his child support obligation where the cause of the parent's financial hardships is his own self-induced, voluntary conduct. Additionally, courts in this State have consistently recognized that the unclean hands doctrine precludes a trial court from relieving a party of his support obligation when the decrease in ability to pay results from the party's own voluntary conduct.

The decision of the Fifth District in Pickett v. Pickett, 709 So. 2d 182 (Fla. 5th DCA 1998) and the opinions under review, which are based entirely on the Pickett decision, is unsound and not in accordance with well established principles of law and equity. Furthermore, it is extremely injurious to the well-being of the minor children for a trial court to permit an incarcerated parent, who is imprisoned as a result of having voluntarily participated in and committed criminal activities, to be relieved of his support obligation during any period of incarceration.

The basis for the father's incarceration in both Jackson and Tillery , as well as in Pickett, was self-induced insofar as it was caused by the father's intentional and voluntary conduct in committing criminal acts. This situation is no different from the scenario where a father voluntarily quits his job, causes himself to suffer self-induced income tax problems, or otherwise willfully divests himself of assets with which he

would have otherwise had the ability to pay the support obligation. Just as these situations are not a proper basis for relief from a child support obligation, it is improper and contrary to longstanding and well settled principles of Florida law to permit incarceration to serve as a shield against the father's responsibility and obligation to his child.

ARGUMENT

WHETHER A PARENT WHO IS INCARCERATED AS A RESULT OF A CRIME THAT WAS COMMITTED INTENTIONALLY SHOULD BE BARRED FROM MODIFYING, ABATING, OR SUSPENDING HIS SUPPORT OBLIGATION BASED ON AN INABILITY TO PAY DURING THE PERIOD OF IMPRISONMENT WHEN THE CAUSE OF THE INABILITY TO PAY WAS VOLUNTARY AND SELF-INDUCED.

The question presented in this case is a vexing one and one which has been answered by courts not only within this state, but throughout the country. There are two prevailing theories on the issue. See Macsola v. Lusskin, 727 So. 2d 328 (Fla. 4th DCA 1999)(providing an analysis of different state courts on the issue). Some courts have looked at the question of whether the incarcerated parent has the ability to pay the support obligation. These courts concluded if there are no assets with which to pay the support, then either a partial or full reduction is warranted based on a change of circumstances. Id. at 330-331. Alternatively, other courts have refused to allow an incarcerated parent to modify or suspend a support obligation based on the incarceration on grounds that imprisonment results from purposeful, intentional criminal conduct that is foreseeable and voluntary, and thus cannot serve as grounds to justify a downward modification. Id. at 331.

In Florida, the issue has been considered several different times by different

district courts of appeal. The first Florida court to address the issue was Waskin v. Waskin, 484 So. 2d 1277 (Fla. 3d DCA 1986), rev. denied 494 So. 2d 1153 (Fla. 1986). In Waskin, the Third District considered a trial court's granting of a former husband's request for relief from his alimony obligation due to a decrease in his ability to pay. The trial court acknowledged the former husband had a decrease in income due to his criminal acts, and granted him relief. The Third District reversed, stating:

> [T]he clean hands doctrine prevents a court of equity from relieving a former husband of his obligation to pay alimony to his former wife where the decrease in the former husband's financial ability to pay (the requisite substantial change in circumstances) has been brought about by the former husband's voluntary acts. . . .

Id.

The Second District in Waugh v. Waugh, 679 So. 2d 1 (Fla. 2d DCA 1996) was the next court to address this issue. In Waugh, the former husband appealed an initial determination of child support in his final judgment dissolution of marriage. At the time of the final hearing, the former husband was incarcerated. The opinion is silent as to the length of time the former husband was to be incarcerated. The trial court imputed income to the former husband based upon the testimony from the former wife regarding his wages at his last job. The former husband did not attend the final hearing. The Second District reversed the trial court's imputation of income to the

former husband, finding there was no showing that the former husband had the capability to earn the amount imputed to him while in prison.

The Fifth District was the third court to address the incarceration issue in Pickett v. Pickett, 709 So. 2d 182 (Fla. 5th DCA 1998). In Pickett, it appears the former husband petitioned the court for a downward modification of child support due to his anticipated incarceration for thirty-three months. The original order of support was for $5,500.00 per month. At the time of trial, the former husband had not been sentenced for his offense. The trial court imputed income to the former husband. The Fifth District found the imputation of income to the former husband was error when there was no showing that the husband had the capability to make the income imputed to him. The Court cited to Waugh as support for its opinion.

One troubling and significant factual difference between Waugh and Pickett appears to have been overlooked by the Fifth District. In Waugh, the court was dealing with an initial establishment of child support. Based upon this fact, the Second District was correct finding imputation of income to an incarcerated individual without him having an independent source of income was error. However, paying parent in Pickett had a previously established child support obligation. This obligation was established prior to the paying parent becoming incarcerated. This significant difference, as explained further below, adds support to this Court aligning itself with

the Fourth District's well-reasoned opinion in Mascola.

Finally, prior to the Fifth District's opinions on review before this Court, the Fourth District was the last Florida court to address in the incarceration issue in Macsola v. Lusskin, 727 So. 2d 328 (Fla. 4th DCA 1999). In Mascola, the Fourth District reviewed a trial court order that granted a father's request for a downward modification of child support due to his incarceration. The trial court held that a downward modification was warranted because the father had no income. The Fourth District reversed the trial court's decision, holding incarceration could not justify a reduction in previously ordered child support. The father sought a modification of child support after being sentenced to fourteen years in prison. The Third District narrowly focused the issue, "whether an incarcerated father parent without current actual income or assets is entitled to be relieved of the obligation to pay child support while imprisoned." Id. The Fourth District went through a comprehensive analysis of both Florida law and other states' laws regarding this issue. In finding incarceration does not provide a basis for an obligor to reduce or eliminate his obligation, it adopted the following reasoning:

> We see no reason to offer criminals a reprieve from their child support obligations when we would not do the same for an obligor who voluntarily walks away from his job. Unlike the obligor who is unemployed or faced with a reduction of pay through no fault of his own, the

> incarcerated person has control over his actions and should be held to the consequences.

Id. The Court went on to state that it would be in the child's best interest to allow the child support to accrue in anticipation that the obligor will some day be able to pay toward such an arrearage.

The Fourth District mentioned both Waugh and Pickett in its analysis. It concluded that both cases were written without any analysis or discussion of the issue.

The Department respectfully suggests that the rationale of the Third and Fourth Districts is more sound and more in accord with the well settled and longstanding legal principles that have developed in this State in regard to the issue of modification of child support. The validity of this position becomes apparent when considering that Florida courts have consistently recognized that, based on the unclean hands doctrine, an obligor parent is not entitled to relief from a support obligation where the decline in the ability to pay, which serves as the requisite change in circumstances, is brought about by voluntary acts of the paying parent. In light of this principle, it seems somewhat ironic and contrary to public policy to deny a downward modification to a voluntarily unemployed or underemployed law abiding individual who does not have the present ability to pay support, while, on the other hand, granting that same

modification to an incarcerated individual who is suffering the consequences of his own voluntary acts. The Department submits that such a perverse result cannot and should not be justified and approved by this Court.

It is well settled law that a prerequisite for a modification of child support is that the petitioner prove there has been a substantial change in circumstances involving the financial condition of one of the parties. § 61.14, Fla. Stat. (2000); Overbey v. Overbey, 698 So. 2d 811 (Fla. 1997). The change of circumstances must be significant, material, involuntary, and permanent in nature. Id. The burden of proving such a change in circumstance is upon the moving party.

In applying this legal premise to various factual scenarios, courts have relied heavily on the notion of "voluntariness" to the extent that they have delved into and considered whether a paying parent's diminished financial circumstance was brought about by matters beyond that party's control or whether the party substantially brought the situation upon themselves. To the extent that the circumstances giving rise to the party's situation are not caused by his own doing, courts have consistently and correctly permitted a downward modification. See Harbin v. Harbin, 762 So. 2d 561 (Fla. 5th DCA 2000)(father who was forced into mandatory retirement and sought unsuccessfully to find employment to replace loss of income, entitled to modification of child support and alimony obligations); Newnum v. Weber, 715 So. 2d 306 (Fla.

5th DCA 1998)(father who was terminated from former law firm and started new firm that had not yet reached profitability, entitled to downward modification of child support obligation); Laliberte v. Laliberte, 698 So. 2d 1291 (Fla 5th DCA 1997)(podiatrist who relocated his practice in good faith attempt to better his financial circumstance was entitled to downward modification where opportunity did not pan out as expected); Haas v. Haas, 552 So.2d 252 (Fla. 4th DCA 1989)(surgeon who lost operating privileges due to alcoholism, thereby causing reduction in income, constituted sufficient change of circumstances to warrant reduction of alimony).

On the other hand, where there has been a finding that a parent has brought about his own financial hardships, either by virtue of a purposeful divestment of the ability to pay or otherwise, courts have recognized that, despite a present inability to pay, a modification is not warranted. For example, in both Conness v. Conness, 607 So. 2d 492 (Fla. 4th DCA 1992) and Linn v Linn, 523 So. 2d 642 (Fla. 4th DCA 1988), the Fourth District held that where a father's ability to pay support is hindered by self-induced tax problems and the collection efforts of the Internal Revenue Services, he is not entitled to a reduction in his support obligation. The Linn court recognized that although it was undisputed that the Father was suffering cash flow problems due to ". . . the manner in which he has elected to expend his income and deal with his monetary obligations," reduction was not appropriate since ". . .the poor

management of one's income is not the equivalent of a substantial change in circumstances sufficient to warrant a downward modification of [support]." Id at 643.

Likewise, in Leone v. Weed, 474 So. 2d 401 (Fla. 4th DCA 1985), the court refused to reduce a support obligation for a parent who had left his medical practice on his own free will after a dispute with his partners since any change of circumstance could not be said to be involuntary and thus did not warrant a modification. See also Hirsch v. Hirsch, 642 So. 2d 20 (Fla. 5th DCA 1994)(father who chose to leave his position when he was next in line for a promotion and a full time position was not entitled to a downward modification).

Based on the same logic, the Third and Fourth Districts ruled in Waskin v. Waskin, 484 So. 2d 1277 (Fla. 3d DCA 1986) and Mascola v. Lusskin, 727 So. 2d 328 (Fla. 4th DCA 1999) that where a father hired a "hit man" to kill the custodial parent in order to avoid his support obligation, he would not be relieved of his child support obligation based on an inability to pay said support since any financial hardship that was experienced by the father was brought upon by his own actions. The Waskin court stated:

> We have little difficulty concluding that Waskin's voluntary act in seeking to do away with his ex-wife– the epitome of unclean hands– was the cause of his financial woes. What

> Waskin did to bring about his financial downfalls is, quite obviously, far more condemnable than closing down a lucrative practice, failing to seek gainful employment, or going on spending sprees.

Id.

At first glance one can easily, but erroneously, generalize both Waskin and Mascola as standing for the proposition that an individual who attempts to kill a custodial parent in order to avoid the support obligation may not receive relief. However, such an interpretation is far too narrow.

The Fourth District wrote at length to arrive at a fair and well-reasoned policy regarding modifications of existing child support obligations for subsequently incarcerated individuals. The Court correctly concentrated on the "voluntariness" aspect of incarceration as a consequence of engaging in criminal behavior rather than on the specific nature of the crime. In support of its conclusion, Mascola quoted from a New Jersey and an Iowa court, which cogently stated:

> Criminal conduct of any nature cannot excuse the obligation to pay support. We see no reason to offer criminals a reprieve from their child support obligations when we would not do the same for an obligor who voluntarily walks away from his job. Unlike the obligor who is unemployed or faced with a reduction in pay through no fault of his own, the incarcerated person has control over his actions and should be held to the consequence.

Id. at 331 (quoting from Topham-Rapanotti v. Gulli, 674 A. 2d 650, 653 (Ch.

Div.1995) and In re Marriage of Phillips, 493 N.W.2d 872, 878 (Iowa App. 1992)).

As embraced by Mascola, the Topham-Rapanotti Court in New Jersey went on to explain:

> A person who commits a crime must know that he or she may thereby become incarcerated. It is no secret that when criminals are caught they may go to jail. To charge them with their child support obligation while they are incarcerated is certainly not double punishment. It is simply an enforcement of an obligation which currently exists, especially when there is not even an attempt to collect until they are released from jail.

Id. at 654.

To be clear, the Department is not advocating that an incarcerated parent be required to make on-going support payments where he truly does not have the present ability to pay while he is imprisoned. Nor is the Department advocating an incarcerated individual be at risk of being held in contempt for nonpayment. Instead, the most appropriate course of action under the circumstances was clearly articulated by Judge Farmer in Mascola:

> The mere fact that while imprisoned the obligor will not be able to make the actual payment of the support arising from the income imputed to him, and therefore may not be
>
> held in contempt for failing to do so . . . hardly justifies eliminating or reducing the basic support obligation itself.
> . . .

> His incarceration may relieve him from the use of contempt to coerce payment, but that is no cause to reduce the amount of the support where the failure to pay results from the payer's voluntary conduct. The arrearages can continue to accumulate until the obligor returns to the work-a-day world and begins to earn actual income. It will then be appropriate for the court to establish a payment plan to reduce or eliminate the arrearages in accordance with the income-earning ability. Most assuredly, it would be in the child's best interest to have the unpaid support payments grow in the expectation that one day the father will have the ability to make actual payment.

Id. at 332-333. To the extent that the Fifth District's opinions in Pickett v. Pickett, 709 So. 2d 182 (Fla. 5th DCA 1998) and in the orders under review fail to consider this option, the Department respectfully submits that they are flawed.

Furthermore, Pickett is unsound insofar as it relies on the Second District's opinion in Waugh v. Waugh, 679 So. 2d 1 (Fla. 2d DCA 1996), which was an establishment of child support case, not a modification case. While Waugh is correct insofar as it stands for the proposition that a support obligation, when predicated on imputed income, cannot be based upon an amount that a party does not have an actual ability to earn through use of his best efforts, the applicability of this proposition to an already established support obligation, as was the case in Jackson, Tillery, and Pickett, is misguided. In order to avoid future misapplication of Waugh in the future by both trial courts and the district courts of appeal, this Court should use this

case to expressly limit the Second District's holding in Waugh to initial child support establishment cases as opposed to cases where a child support obligations exist prior to the paying parent being incarcerated for his voluntary acts.

CONCLUSION

Based on the foregoing arguments and authorities, the panel opinions of the Fifth District Court of Appeal filed on March 30, 2001 should be quashed and the Pickett decision should be expressly disapproved of. Moreover, the Court should expressly approve of and adopt the reasoning and analysis utilized by the Third District in Waskin and the Fourth District in Mascola. Lastly, this Court should expressly limit the Second District's holding in Waugh to initial child support establishment cases.

JON J. JOHNSON, Esquire
Assistant Attorney General
Child Support Enforcement
2002 North Lois Avenue
Westwood Center, 7th Floor
Tampa, Florida 33607
Telephone: 813-801-0689

By_____
JON J. JOHNSON
Assistant Attorney General
Fla. Bar No. 0946796

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief on the Merits was furnished by mail this _____ day of August, 2001 to PAM SCHNEIDER, ESQUIRE, P. O. Box 1260, Gainesville, Florida 33602, KELVIN M. JACKSON, #990243 G3110U, Wakulla Correctional Institution, 110 Malaleuca Drive, Crawfordville, Florida 32327 and MORGAN P. TILLERY, SR., P. O. Box 3, E. Lake Weir, Florida 32133.

By_____
JON JOHNSON

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. P.

_____
JON JOHNSON