

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 9, 2007

STATE EX REL. C. M., ET AL. v. L. J.

**Appeal from the Juvenile Court for Warren County
No. 1367 & 1369 Larry G. Ross, Judge**

No. M2005-02401-COA-R3-JV - Filed on May 31, 2007

The sole issue on appeal is whether a parent who is incarcerated for the commission of a crime is willfully or voluntarily unemployed for purposes of child support. The State of Tennessee filed a petition to set child support while the parent was incarcerated relying on Tenn. Comp. R. & Regs. § 1240-2-4-.04(3)(d)(ii)(2005), which provides that “any intentional choice or act that affects a parent’s income” constitutes willful underemployment or unemployment. The trial court, relying on *Pennington v. Pennington*, No. W2000-00568-COA-R3-CV, 2001 WL 277993, at *4 (Tenn. Ct. App. Mar. 14, 2001), denied the petition to set child support for the period the parent was incarcerated. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; and Warren Jasper, Assistant Attorney General, for the appellant, State of Tennessee.

OPINION

The parent who is the subject of the State of Tennessee’s petition to set child support is the mother of two children who are in State custody. In March of 2005, the State filed a petition to set child support based on the \$1,120 gross monthly income Mother had previously reported to the Department of Human Services. Mother, who was incarcerated in the Wayne County Jail, filed an answer objecting to the petition, contending that she was unemployed and unable to pay any child support.¹

¹This appeal arises out of separate petitions filed in the Warren County Juvenile Court against the same parent, L.J., to set child support for two of her children, both of whom are in State custody, Docket Nos. 1367 and 1369.

The matter first came on for hearing in July of 2005, while Mother was still incarcerated, and was continued to August of 2005. At that August hearing, the State argued that the new child support guidelines, specifically Tenn. Comp. R. & Regs. § 1240-2-4-.04(3)(d)(ii)(2005), defined willful and voluntary unemployment or underemployment to include “any intentional choice or act that affects a parent’s income” and that the commission of a crime that resulted in incarceration constituted a willful act that affects the parent’s income. Mother argued that the willful or voluntary unemployment or underemployment must arise from the parent’s intent to reduce or terminate income so as to avoid child support obligations. No witnesses testified at the hearing and the evidence was limited to the stipulations that Mother was a parent of the two children at issue, that she had previously been ordered to pay child support based upon her income, that she was currently incarcerated for the commission of an undisclosed crime, and was without assets or employment.

The Juvenile Court Judge took the matter under advisement following the hearing. On September 23, 2005, the court entered an Order finding that although the new child support guidelines broadened the definition of willful and voluntary, the new wording was not “clear enough” to encompass the choices made by a person that led to his or her incarceration, and thus the State could not establish that a parent was willfully or voluntarily unemployed solely on the fact the parent was incarcerated for committing a crime.² The State appeals.

ANALYSIS

The State’s case hinges on the 2005 adoption of two regulations, Tenn. Comp. R. & Regs. § 1240-2-4-.04(3)(d)(ii) and § 1240-2-4-.04(3)(d)(i).³ The first of these provides that a determination of willful and voluntary unemployment or underemployment can be based on “any intentional choice or act that affects a parent’s income.” Tenn. Comp. R. & Regs. § 1240-2-4-.04(3)(d)(ii)(2005). The second provides that the determination of willful and voluntary unemployment is not limited to occupational choices that are motivated only by an intent to avoid or reduce child support obligations. *See* Tenn. Comp. R. & Regs. § 1240-2-4-.04(3)(d)(i)(2005).

Before the 2005 amendments, the courts declined to hold that the commission of a crime, without more, that resulted in the parent’s incarceration, was sufficient to sustain a finding of willful or voluntary unemployment. *See Pennington v. Pennington*, No. W2000-00568-COA-R3-CV, 2001 WL 277993, at *4 (Tenn. Ct. App. Mar. 14, 2001). The *Pennington* court declined to find Mr. Pennington voluntarily unemployed as a result of the act leading to his incarceration, reasoning: “Mr. Pennington did not intend to become incarcerated and unemployed when he made the choice to use cocaine; thus, the record does not support a finding that Mr. Pennington was willfully and voluntarily unemployed.” *Pennington*, 2001 WL 277993, at *4; *see also Coates v. Coates*, No. M2001-01928-COA-R3-CV, 2002 WL 31528512 (Tenn. Ct. App. Nov. 15, 2002); *Johnson v.*

²Mother was incarcerated at all times leading up to the hearing. Following Mother’s release from jail, the court set child support at \$16 per week per child.

³The 2006 Guidelines contain the same provisions, but the two provisions have been combined into one. *See* Tenn. Comp. R. & Regs. § 1240-2-4-.04(3)(a)(2)(ii)(I)(2006).

Johnson, No. M2003-00866-COA-R3CV, 2004 WL 2218478 (Tenn. Ct. App. Oct. 2, 2004). In *Coates*, this court rejected the proposition that “a parent's dishonest acts which lead to unemployment constitute willful and voluntary unemployment.” *Coates*, 2002 WL 31528512, at *3 (citing *Wilson v. Wilson*, 43 S.W.3d 495, 497 (Tenn. Ct. App.2000)). “[A]s a logical extension of that principle, we have also held that unemployment or underemployment resulting from incarceration is not willful and voluntary.” *Coates*, 2002 WL 31528512, at *3 (citations omitted); *Johnson*, 2004 WL 2218478, at *4.

Pennington and its progeny clearly state that a parent is not willfully or voluntarily unemployed as a result of the act leading to incarceration. Thus, the question is whether the 2005 amendments to the regulations supplant *Pennington* and its progeny. We have determined they do not. Our determination is based on two factors.

First, we note the language in the 2005 regulations is merely permissive. Instead of using mandatory terminology, the 2005 amendments are based upon the permissive phrases “can be” and “is not limited to.” See Tenn. Comp. R. & Regs. § 1240-2-4-.04(3)(d)(ii) and § 1240-2-4-.04(3)(d)(i). Tenn. Comp. R. & Regs. § 1240-2-4-.04(3)(d)(ii) provides that a determination of willful and voluntary unemployment or underemployment *can be* based on any intentional choice or act that affects a parent’s income. Such terminology – *can be* – does not, however, mandate that any and all intentional choices that affect a parent’s income constitute willful or voluntary unemployment. The same rationale applies to Tenn. Comp. R. & Regs. § 1240-2-4-.04(3)(d)(i) which merely provides that the determination of willful and voluntary unemployment *is not limited to* occupational choices that are motivated only by an intent to avoid or reduce child support obligations.

The second factor in our determination is that the State has the burden of proof. This is because the party alleging that a parent is willfully or voluntarily underemployed or unemployed carries the burden of proof. See *Demers v. Demers*, 149 S.W.3d 61, 69 (Tenn. Ct. App. 2003); see also *Richardson v. Spanos*, 189 S.W.3d 720, 727 (Tenn. Ct. App. 2005).

Based upon the foregoing analysis, we conclude that without other evidence, direct or circumstantial, of willful or voluntary underemployment or unemployment, the mere fact a parent is incarcerated for committing a crime is insufficient to sustain a finding that the commission of the crime constitutes a willful or voluntary attempt to be underemployed or unemployed for purposes of child support.

Having examined the record, and the few facts set forth therein, we find the State had the burden of proving that Mother was willfully or voluntarily unemployed, and the State failed to carry its burden.

CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the State of Tennessee.

FRANK G. CLEMENT, JR., JUDGE