UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1442

September Term, 2015

JASON W. SHOEMAKER

v.

FALLON G. SHOEMAKER

Berger,
Friedman,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: October 4, 2016

On July 23, 2013, appellant, Jason Shoemaker ("Mr. Shoemaker") was awarded an absolute divorce from appellee, Fallon Shoemaker ("Ms. Shoemaker"). The trial judge incorporated a voluntary separation and property settlement agreement signed by both parties into the judgment of absolute divorce. Thereafter, on May 6, 2014, the parties modified their separation agreement by executing and filing a consent order with the circuit court. On July 17, 2014, Ms. Shoemaker filed a petition for contempt alleging that Mr. Shoemaker breached the consent order.

On September 24, 2014, the Circuit Court for Frederick County held a hearing and found that Mr. Shoemaker was in contempt of the consent order. The trial court further found that Mr. Shoemaker had not shown that he had an inability to comply with the order. Upon finding Mr. Shoemaker to be in contempt, the circuit court ordered Mr. Shoemaker to pay $12,000 within sixty days to purge the contempt.

On appeal, Mr. Shoemaker challenges the purge provision provided in the circuit court's contempt order.[1] Specifically, Mr. Shoemaker presents two questions for our review,[2] which we rephrase as follows:

[1] Notably, Ms. Shoemaker did not file a brief or otherwise participate in this appeal.

[2] The issues, as presented by Mr. Shoemaker, are:

> 1. Did the Circuit Court for Frederick County commit reversible error in issuing a purge provision for contempt based on an inaccurate "guess" as to the amount of client escrow monies in a law firm escrow account for which no additional evidence or testimony was set forth? (continued…)
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> 2. Did the Circuit Court for Frederick County commit

1. Whether the circuit court erred by ordering Mr. Shoemaker to pay $12,000 to purge his contempt.

2. Whether the circuit court erred by ordering the reinstatement of Mr. Shoemaker's alimony obligation under the terms of the parties' separation agreement.

For the reasons set forth below, we shall affirm in part, and vacate in part, the judgments of the Circuit Court for Frederick County.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. and Ms. Shoemaker were married in March of 2007. During their marriage, the couple had two children. Thereafter, Mr. and Ms. Shoemaker separated in 2012, and they obtained an absolute divorce in July of 2013. At the time the couple obtained their divorce, they entered into a separation agreement which included terms relating to child custody and visitation, child support, alimony, and property distribution. Specifically, with regard to alimony, the parties agreed that:

> [Mr. Shoemaker] shall pay to [Ms. Shoemaker], alimony in an amount of Four Thousand Five Hundred Dollars ($4,500.00) per month for Year One (first 12 months), Five Thousand Dollars ($5,000.00) per month for Years Two through Five (second 48 months), and Four Thousand Five Hundred Dollars ($4,500.00) per month for Years Six through Sixteen (final 120 months), for her support, on the first day of each month starting on the first day of August, 2012, for so

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> reversible error by executing a written Contempt Order which further punished [Mr. Shoemaker] by "resurrecting" a prior alimony amount and term unrelated to Appellant's alleged contempt at the September 24, 2014 hearing?

> long as the parties live separate and apart and until the first to occur of any of the following events: (a) death of either party, (b) that date which is sixteen (16) years from the date of this Agreement, or (c) [Ms. Shoemaker] remarries.

Thereafter, a series of disputes arose between the parties as to the other party's performance under the terms of the separation agreement. Mr. Shoemaker alleged that the separation agreement was induced by fraud because at the time of the agreement Ms. Shoemaker had acquired a significant other whom she intended to sustain with Mr. Shoemaker's alimony payments. Ms. Shoemaker, for her part, alleged that Mr. Shoemaker was in violation of the custody and visitation terms of the agreement that required Mr. Shoemaker to abstain from illicit drug use. Ms. Shoemaker further alleged that Mr. Shoemaker was in default of his child support and alimony payments under the separation agreement.

On May 6, 2014, the parties reached an accord in consideration for the resolution of their disputes relating to "custody, visitation, alimony, child support and all pending matters." The accord was recited into the record and contained new terms relevant to child custody, visitation, child support, and alimony, among other things.[3] Later, on June 12,

[3] The record contains a civil courtroom worksheet which indicates that the contents of the parties' agreement were read into the record, and articulated the general terms of the agreement. Record at page 777. We cannot know, however, the exact terms of the agreement uttered onto the record on May 6, 2014, because Mr. Shoemaker has failed to obtain a transcript of that proceeding as he was required to have done pursuant to Md. Rule 8-411.

2014 -- eleven days before the parties' consent order reflecting the terms of their agreement was filed -- Mr. Shoemaker moved for the court to exercise its revisory power and vacate the yet-to-be-filed consent order. The consent order signed on June 12, 2014, and filed June 23, 2014, indicates that Mr. Shoemaker agreed:

> that [Mr. Shoemaker] shall pay to [Ms. Shoemaker] the sum of $100,000.00 as satisfaction for any and all child support arrearage, alimony arrearage and attorney[']s fees contribution for the period prior to May 31, 2014, to be paid as follows: $40,000.00 to be paid on or before May 20, 2014; . . . and the remaining $50,000 to be paid at the rate of $4,166.00 per month for a period of 12 consecutive months from June 1, 2014 through May 1, 2015 . . . and it is further,
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> ORDERED, that commencing from June 1, 2014, alimony is reduced to $1.00 per month and shall automatically be terminated upon [Mr. Shoemaker] paying the $100,000.00 as provided above. Failure to pay the total $100,000.00 as provided above will resurrect alimony per the original Separation Agreement to re-commence from the first day of the 13th month (i.e. June 1, 2015) for the balance of the alimony term per the original Separation Agreement (i.e. duration and amount of non-modifiable alimony).

Six days after the consent order was entered into the record, Ms. Shoemaker filed a petition for contempt alleging that Mr. Shoemaker had failed to tender a $40,000.00 payment by May 20th as required under the consent order. Thereafter, on September 24, 2014, the court had a hearing on Ms. Shoemaker's petition for contempt.

At the contempt hearing, Mr. Shoemaker testified that since the parties entered into their agreement on May 6, 2014, Mr. Shoemaker had not paid $40,000.00 by May 20, 2014,

as required under the terms of their agreement.[4] Mr. Shoemaker further testified that he did not have the financial wherewithal to remain current on his obligations under the consent order and that he would not likely be able to satisfy his obligation in the near future.

The trial court found that Mr. Shoemaker had not satisfied his financial obligations under the parties' consent order. Further, the court was not persuaded that Mr. Shoemaker had an inability to contribute more towards his obligations than he had up to that point. Finally, the trial judge imposed a $12,000 purge provision and scheduled a hearing in sixty days to determine whether Mr. Shoemaker should be incarcerated. This timely appeal followed. Additional facts will be discussed as necessitated by the issues presented.

DISCUSSION

In this instant appeal, Mr. Shoemaker asserts that the circuit court erred by imposing an improper purge provision after finding him to be in contempt, and that the circuit court erred in finding that Mr. Shoemaker would be liable for alimony payments in accordance with the parties' original separation agreement. We shall address these arguments in turn.

I. The Circuit Court Did Not Craft an Improper Purge Provision in Its Contempt Order.

The scope of our review of a trial court's contempt finding is as follows:

> (a) *Scope of review*. –Any person may appeal from any order or judgment passed to preserve the power or vindicate the dignity of the court and adjudge him in contempt of court,

[4] Mr. Shoemaker did testify that he had paid $4,166.67 on June 10, 2014, after the $40,000.00 came due.

> including an interlocutory order, remedial in nature, adjudging any person in contempt, whether or not a party to the action.

Md. Code (2006, 2013 Repl. Vol., 2015 Suppl.) § 12-304(a) of the Courts and Judicial Proceedings Article ("CJP"). Under Md. Rule 15-207(e), in a proceeding to enforce a child or spousal support order by means of the contempt power, a petitioner must show "by clear and convincing evidence that the alleged contemnor has not paid the amount owed." Md. Rule 15-207(e)(1), (2). Upon such a showing, the court may find the contemnor in contempt unless,

> the alleged contemnor proves by a preponderance of the evidence that . . . from the date of the support order through the date of the contempt hearing the alleged contemnor (i) never had the ability to pay more than the amount actually paid and (ii) made reasonable efforts to become or remain employed or otherwise lawfully obtain the funds necessary to make payment.

Md. Rule 15-207(e)(3). Should the court find that the alleged contemnor has committed a constructive civil contempt:

> the court shall issue a written order that specifies (A) the amount of the arrearage for which enforcement by contempt is not barred by limitations, (B) any sanction imposed for the contempt, and (C) how the contempt may be purged. If the contemnor does not have the present ability to purge the contempt, the order may include directions that the contemnor make specified payments on the arrearage at future times and perform specified acts to enable the contemnor to comply with the direction to make payments.

Md. Rule 15-207(e)(4).

Critically, in this appeal Mr. Shoemaker does not challenge the circuit court's finding that he was in contempt of the consent order filed on June 23, 2014. Stated differently, Mr. Shoemaker does not dispute the court's finding that he was in default of his obligations under Md. Rule 15-207(e)(2), or the finding that Mr. Shoemaker had failed to satisfy his burden of persuasion under Md. Rule 15-207(e)(3). Rather, Mr. Shoemaker contends that the court's purge provision was improper under Md. Rule 15-207(e)(4)(C).

The court's power to hold an individual in civil contempt is a tool of coercion, and accordingly must be conditional. *Jones v. State*, 351 Md. 264, 277 (1998). Stated differently, "[t]he sanction imposed for civil contempt is coercive and must allow for purging." *In re Ann M.*, 309 Md. 564, 569 (1987). Indeed, "the civil contemnor is said to hold the keys to the jailhouse door, and may terminate the incarceration any time he or she satisfies the purge provision." *Jones*, *supra*, 351 Md. at 277.

Moreover, we have previously articulated that:

> The authority granted to a court to fashion both a sanction and a purge under Rule 15-207(e)(4) is constrained because a defendant in a civil contempt proceeding "must have the ability to avoid both the commencement and the continuation of incarceration." *Arrington* [*v. Dept. of Human Res.]*, 402 Md. [79,] 101, 935 A.2d 432 [(2007)] (citing *Jones*, [*supra*,] 351 Md. at 282, 718 A.2d 222). Any purge must be within the present ability of the defendant to perform at the time of sentencing. *Arrington*, [*supra*,] 402 Md. at 101, 935 A.2d 432; *Bryant* [*v. Howard Cnty. Dept. of Soc. Serv. Ex rel. Costley*], 387 Md. [30,] 48, 874 A.2d 457 [(2005)]; *Jones*, [*supra*,] 351 Md. at 275, 718 A.2d 222. The reason for the rule lies in the coercive, as opposed to punitive, nature of sanctions in a civil contempt proceeding. *Jones*, [*supra*,] 351

> Md. at 281, 718 A.2d 222 ("If a defendant is unable to pay a purge provision, no amount of time in prison will induce compliance."). Therefore, if the sanction is incarceration and the purge is the payment of money,
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> > the question will be whether the defendant is then, on that day, able to make that payment. The court may not order an incarceration to commence in the future, because the finding of ability to purge must be contemporaneous with when the incarceration is to commence and must remain in existence throughout the period of incarceration.
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> *Arrington*, [*supra*,] 402 Md. at 101, 935 A.2d 432 (citing *Jones*, [*supra*] 351 Md. at 282, 718 A.2d 222) (italicized emphasis in original, underlined emphasis added).

Bradford v. State, 199 Md. App. 175, 195-96 (2011).

To be sure, Mr. Shoemaker correctly observes that incarceration is not an available tool that can be used to coerce compliance where that contemnor lacks a present ability to satisfy the purge provision. Whether the contemnor possesses a present ability to satisfy the purge provision, however, is an inquiry that is resolved at the moment the contemnor is to be incarcerated and through the duration of the incarceration, as opposed to the moment the court crafts the purge order pursuant to Md. Rule 15-207(e)(4)(C). Stated differently, "the finding of ability to purge must be contemporaneous with when the incarceration is to commence and must remain in existence throughout the period of incarceration." *Bradford*, *supra*, 199 Md. App. at 196 (emphasis omitted) (quoting *Arrington*, *supra*, 402 Md. at 101).

In the instant action, the trial judge found that Mr. Shoemaker was in default of his obligations under the consent order by an amount of $52,500. Having found Mr. Shoemaker in default, and having failed to be persuaded of Mr. Shoemaker's ability to contribute more than he had towards his arrearage, the trial judge appropriately found Mr. Shoemaker to be in contempt. Thereafter the judge ordered a purge provision requiring Mr. Shoemaker to pay $12,000 within sixty days or he would be incarcerated.

Whether Mr. Shoemaker possessed an ability to pay $12,000 at the time the court crafted the purge provision is immaterial for our analysis. Rather, the material inquiry is whether Mr. Shoemaker possesses the present ability to pay at the time he is to be incarcerated. Accordingly, Mr. Shoemaker's challenge to the purge provision in the trial court's order finding him in contempt is premature. As such, we affirm the judgment of the Circuit Court for Frederick County finding Mr. Shoemaker in contempt and setting a purge provision for $12,000. Of course, Mr. Shoemaker's contention that he has an inability to pay $12,000 will acquire relevance when at the time when the sentence of incarceration is to be imposed. At that time, the court must make an affirmative finding that Mr. Shoemaker possesses the present ability to pay $12,000.

II. The Circuit Court's Interpretation of Mr. Shoemaker's Future Obligations Under the Consent Order Exceeded The Scope of Remedies Available Under Md. Rule 15-207.

Mr. Shoemaker further contends that the circuit court erred when it found that Mr. Shoemaker's default:

> has resurrected Plaintiff's alimony obligation per the parties'[] original Separation Agreement, which was incorporated but not merged into the July 23, 2013 Judgment of Absolute Divorce, and Plaintiff's alimony obligation shall therefore re-commence on June 1, 2015 for the balance of the alimony term per Section 7 of the August 29, 2012 Separation Agreement.

Pursuant to Md. Rule 15-207(e)(4), when a court makes a finding of constructive civil contempt, the court must issue an order articulating the amount of arrearage, any sanction imposed for the contempt, and a means for the condemner to purge the contempt. Notably, these three elements must necessarily be included in an order of a contempt, but the text of the Maryland Rule does not limit a contempt order exclusively to these elements.

In the present action, the trial judge found Mr. Shoemaker in default of his obligation in the amount of $52,000.00. This finding satisfies the trial judge's obligation under Md. Rule 15-207(e)(4)(A). The trial judge, however, continued to render an opinion of the legal relationship of the parties going forward under the consent order.

Mr. Shoemaker asserts that the trial judge's interpretation of the consent order going forward was erroneous because that interpretation had no relation to whether he was in contempt of the consent order as alleged in the petition for contempt. "[I]t is clear that Rule 15-207(e) is a remedial rule with expressly intended retrospective sweep." *Rawlings v. Rawlings*, 362 Md. 535, 554 (2001). Accordingly, the Court of Appeals has previously provided that, Md. Rule 15-207(e)(4) "does not . . . provide that the order may include directions to make future child support payments as a way in which to purge past contempt." *Wilson v. Holliday*, 364 Md. 589, 605-06 (2001). Similarly, in *Stevens v.*

Tokuda, 216 Md. App. 155 (2014), we reversed a purge provision conditioned the contemnor's freedom on directives not relevant to the subject of the contempt.

Willison and *Stevens*, however, are distinguishable from the case *sub judice*, because in those cases the trial court crafted a purge provision that required contemnors to refrain from committing *future* contempts in order to purge a *past* contempt. *Wilson*, *supra*, 364 Md. at 597. Such a purge provision creates a tautology whereby a contemnor is summarily incarcerated for their *past* contempt due to the failure to satisfy a condition, the satisfaction of which was never proved. As such, under Md. Rule 15-207(e), "the court cannot order a self-executing prison sentence . . ., i.e., one that does not first require a hearing to determine whether [the contemnor] possessed the present ability to pay the purge amounts and whether he failed to make current payments." *Id.* at 603.

Contrary to *Wilson* and *Stevens*, the order in this case did not impose a self-executing sentence, or condition Mr. Shoemaker's freedom on his continued performance under the consent order. Rather, the court's interpretation of the parties' obligations under the consent order was merely an utterance that was superfluous to the question before it. Indeed, all Mr. Shoemaker needs to do in order to purge himself of the contempt is to tender $12,000.00. Accordingly, the portion of the order purporting to interpret Mr. Shoemaker's obligation going forward did not constitute an improper purge provision under Md. Rule 15-207(e)(4)(C).

That the trial court's order does not run afoul of Md. Rule 15-207(e)(4)(C), does not mean that order purporting to declare Mr. Shoemaker's obligations under the consent order was otherwise proper. "In order for a circuit court to entertain an action, a justiciable controversy must exist." *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 590 (2014). One prerequisite to justiciability is that an issue must be ripe for judicial review. *Id.* at 591. "The purpose of ripeness is 'to ensure that adjudication will dispose of an actual controversy in a conclusive and binding manner'" *Id.* at 591-92 (quoting *Boyds Civic Ass'n v. Montgomery Cnty. Council*, 309 Md. 683, 691 (1987)). "Where an issue is not ripe, the issue is not justiciable and, thus, a court will not entertain the claim." *Id.* at 592.

In the present action, the circuit court rendered an opinion as to the applicability of the parties' consent order from the breach of that order going forward. The parties, however, were not before the court to resolve a dispute as to how the consent order would apply into the future. Rather, the scope of the dispute before the court was limited to a determination as to whether Mr. Shoemaker had complied with the consent order up to the point of the hearing. The court's *sua sponte* determination that the parties' original separation agreement would govern the couple going forward, then, was an issue that was not yet ripe for judicial review.

Although the circuit court's interpretation of the consent order reinstating the provisions of the parties' separation was not a justiciable case or controversy, we fail to

understand how the court's interpretation -- extraneous as it was -- constituted anything in excess of a mere observation of a truism. Indeed, the plain and unambiguous text of the agreement clearly requires that upon Mr. Shoemaker's breach of the consent order, his alimony payments under the original separation agreement will resume. Moreover, Mr. Shoemaker's understanding of the parties' consent order seems to be consistent with that of the opinion expressed by the judge in the contempt order.

> [Ms. Shoemaker's counsel:] And you understood that you were undertaking an obligation that was enforceable by the Court, correct?
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> [Mr. Shoemaker:] I understand the terms of the agreement as it is written and, ah, the enforceability of it, yes. . . . I apologize for being curt. The agreement says exactly what is, what it says. . . . I think the agreement speaks for itself. The order speaks for itself and, and I, and I understanding the obligations and the enforceability of it.
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> . . .
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> [Ms. Shoemaker's counsel:] You understood that if you did not [comply with the provisions of the consent order] th[e]n the alimony pursuant to the original agreement would revert and become effective. Did you understand that?
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> [Mr. Shoemaker:] I understand the, the terms as they are written in that paragraph, yes.
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> [Ms. Shoemaker's counsel:] Okay. But I'm asking you specifically in terms of the implication of your alimony pursuant to the agreement reviving if you didn't pay the amount in full on time.

> [Mr. Shoemaker:] Ah, yes, again, I'm, I'm aware of the terms of the penalty provision.[5]
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> [Ms. Shoemaker's counsel:] Okay. And you agreed to those terms?
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> [Mr. Shoemaker:] I agreed to the entirety of this consent order . . . .

Accordingly, there appears to be no dispute as to the substance of the court's superfluous statements regarding the "resurrect[ion]" of the parties' original separation agreement. Nevertheless, we recognize that issues involving the parties' obligations under the consent order going forward were not presently before the court in the form of a justiciable case or controversy. We, therefore, vacate in part the portion of the circuit court's order "resurrecting [Mr. Shoemaker's] alimony obligation per the parties's original Separation Agreement." Critically, we offer no opinion as to whether Mr. Shoemaker is--in fact--obligated to pay Ms. Shoemaker in accordance with the terms of the original separation agreement under the consent order. We merely note that any obligations Mr. Shoemaker has to comply with the consent order flow from that consent order, and not the circuit court's July 27, 2015 order finding Mr. Shoemaker to be in contempt.

[5] The question as to whether the terms of the parties' consent order actually constitutes a penalty provision or an improper liquidated damages clause is not presently before us. As such, we offer no opinion as to the enforceability of the provision of the parties' consent order that reinstates alimony payments under the original separation agreement.

We, therefore, affirm the judgment of the circuit court finding Mr. Shoemaker to be in contempt. We further affirm the $12,000.00 purge provision of the court's July 27, 2015 order. We, however, vacate the limited paragraph of the court's July 27, 2015 order purporting to "resurrect" obligations under the parties' original separation agreement.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED IN PART AND VACATED IN PART. APPELLANT TO PAY HALF OF THE COSTS. HALF OF THE COSTS ARE WAIVED.