

IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION
AT KNOXVILLE

BARBARA ANN SMITH,

Plaintiff/Appellee.

VS.

MARION HOWARD SMITH,

Defendant/Appellant.

)
) Knox County Circuit Court
) Div. IV, No. 65563
)

) C. A. NO. 03A01-9603-CV-00078
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FILED

October 11, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

From the Circuit Court of Knox County at Knoxville.
Honorable Bill Swann, Judge

Jeffrey L. Hall, Jacksboro, Tennessee
Attorney for Defendant/Appellant.

J. Elaine Burke, Knoxville, Tennessee
Attorney for Plaintiff/Appellee.

OPINION FILED:

AFFIRMED

FARMER, J.

CRAWFORD, P.J., W.S. : (Concurs)

LILLARD, J. : (Concurs)

Defendant-Appellant, Marion Howard Smith (“Father”), appeals the trial court’s order finding the Father guilty of two counts of criminal contempt and suspending the Father’s visitation privileges with the parties’ minor child.

The parties were divorced in June 1995. Pursuant to the parties’ agreement, the final divorce decree awarded sole custody of the parties’ minor daughter to Plaintiff-Appellee, Barbara Ann Smith (“Mother”). The Father was granted visitation rights as set forth in the trial court’s Local Rule 17. *See* Knox County Cir. Ct. Div. 4 R. 17.¹ The decree also adopted Rule 17's restriction against exposing children to tobacco smoke:

Circuit Court Division Four takes judicial notice of the dangers of second-hand, or passive, smoke. Parents will not expose their children to tobacco smoke in enclosed spaces, or allow others to expose them to it. That means NO SMOKING indoors or in vehicles with the children present. It means not allowing them to be in the presence of others who do so. It means parents must keep the air in their home clean.

If children are exposed to smoke, it will be strong evidence that the exposing parent does not take good care of them.

Knox County Cir. Ct. Div. 4 R. 17(B). Further, the decree made permanent certain injunctions contained in the court’s previous orders, including one enjoining the parties “from coming about the

¹Rule 17 sets forth the following visitation schedule:

- a. 1st and 3rd weekends from Friday at 6:00 PM to Sunday at 6:00 PM.
- b. December 25 at 6:00 PM to January 1 at 6:00 PM.
- c. July 1-15 each year.
- d. Thanksgiving holidays, from Wednesday at 6:00 PM to Sunday at 6:00 PM.
- e. The child’s spring vacation.
- f. Phone communication at such times and with such frequency as is reasonable.
- g. All exchanges of the child shall be done between 6:00 PM and 6:15 PM, with the actual transportation done by that parent who is receiving the child.

other or their home or place of employment or from any telephone contact with the other.”

Within days of entry of the final divorce decree, the Mother filed a motion for contempt alleging, *inter alia*, that the Father was in contempt of the trial court’s previous orders because the Father came to the Mother’s home on June 6, 1995, and because the Father smoked around the child and subjected her to cigarette smoke during visitation. Regarding the first incident, the Mother testified that she and the child were returning home between 9:30 and 9:45 p.m. on June 6, 1995, when the Mother observed the Father coming out of the carport of her condominium. The Father proceeded “down the street with his hands in his pockets not ten, twenty feet away from [the Mother] in the direct beam of [her] headlights.” The Mother testified:

And I kind of followed along, and [the Father] ducked behind the building across from me, and I turned the car around going back towards my condominium. And he ran across in front of the headlight again, coming the other direction. So I saw him twice.

. . . .

. . . I then was curious because he was on foot, so I drove around to the front entrance of the condominium and then observed him in his vehicle, in his car [a white Geo Tracker].

Regarding the child’s exposure to cigarette smoke, the Mother testified that, when the child returned from visitation with the Father, “[h]er clothes and her hair will smell like cigarettes, and sometimes even the clothes in her overnight bag will smell.” One time the child returned from visitation with a cigarette burn on her hand. The child told the Mother that she received the burn when she reached for the Father’s hand, not realizing that the Father had a lit cigarette in his hand. The child’s maternal grandfather, James R. Martin, testified that, several times when he picked up the child from visitation, he “could smell heavy smoke on her clothing.” No witnesses had observed the Father smoking around the child in an enclosed area, but once the grandfather saw the Father smoking as the Father walked with the child across the parking lot from his car.

The Father denied being in the area of the Mother’s condominium on the evening of June 6, 1995. The Father testified that he was near Harrison, Tennessee, making a sales call between

the hours of 7:10 and 9:30 p.m., and he introduced a Customer Appointment Form to corroborate his testimony. The Father also produced telephone records showing that he tried to call the child at 8:05 p.m. on June 6, 1995, from Georgetown, Tennessee. The Father insisted that he could not have traveled from Georgetown to the Mother's condominium between 8:05 and 9:45 p.m.

The Father also denied smoking around the child in enclosed spaces. The Father testified that he only smoked around the child in open places, but he stated that, in the future, he would not smoke in front of the child in any type of area, whether inside or outside. The Father frequently asked others not to smoke around the child. The Father admitted taking the child to a former wife's house, where several family members smoked, but the Father stated that they did not smoke in the house when the Father took the child over there.

In its subsequent order, the trial court found the Father guilty of two counts of criminal contempt. Specifically, the trial court found "that beyond a reasonable doubt the father has exposed the child repeatedly to cigarette smoke, either he is smoking around the child or he is allowing others to do so, or both." The trial court also found "[t]hat [the Father] came about [the Mother] on June 6, 1995, in violation of the specific strictures of . . . the parties' Final Decree." The trial court sentenced the Father to ten days incarceration for each contempt conviction but suspended eighteen days of the total twenty-day sentence. The trial court additionally ordered that the Father "shall have no further co-parenting time . . . with the parties' minor child until the Court is persuaded that [the Father] intends to protect the child from any and all exposure to tobacco smoke in enclosed spaces or elsewhere." Finally, the trial court's order broadened Local Rule 17's prohibition against smoking around the child in enclosed spaces to prohibit "both parents from exposing the child to tobacco smoke inside, [and] in the out of doors, by themselves or others around the child."

On appeal, the Father presents the following issues for review:

1. Was [the Father] guilty of criminal contempt for violating the trial court's local rule 17 (as to smoking in the presence of his child)?
2. Was [the Father] guilty of criminal contempt for violating an injunction forbidding him from coming about [the Mother] or her residence?

3. Should [the Father's] visitation privileges with his minor child be restored?

We begin by reviewing the standard of proof to be applied in criminal contempt cases. Persons charged with criminal contempt are presumed innocent, and the prosecution has the burden of proving them guilty beyond a reasonable doubt. *Thigpen v. Thigpen*, 874 S.W.2d 51, 53 (Tenn. App. 1993); *Storey v. Storey*, 835 S.W.2d 593, 599 (Tenn. App. 1992). Once they are convicted of criminal contempt, however,

Persons . . . lose their presumption of innocence, *Robinson v. Air Draulics Eng'g Co.*, 214 Tenn. 30, 37, 377 S.W.2d 908, 912 (1964), and bear the burden of overcoming their presumption of guilt on appeal. *Nuclear Fuel Servs., Inc. v. Local No. 3-677, Oil, Chem., & Atomic Workers Int'l Union*, 719 S.W.2d 550, 552 (Tenn. Crim. App. 1986). Appellate courts do not review the evidence in a light favorable to the accused and will reverse criminal contempt convictions only when the evidence is insufficient to support the trier-of-fact's finding of contempt beyond a reasonable doubt.

Thigpen v. Thigpen, 874 S.W.2d at 53 (citing T.R.A.P. 13(e)).

Applying this standard, we must affirm the Father's two convictions for criminal contempt in this case. Regarding the contempt conviction for coming about the Mother's home, the Mother positively identified the Father as being the person she observed coming out of her carport between 9:30 and 9:45 p.m. on June 6, 1995. Although the Father testified that he was in Harrison, Tennessee, that evening and could not have reached the Mother's home by 9:45 p.m., the trial court obviously did not find the Father's testimony credible. We conclude that the evidence was sufficient to support this criminal contempt conviction. *See* T.R.A.P. 13(e).²

The Father also denied exposing the child to cigarette smoke in enclosed spaces, but the Mother testified that, when the child returned from visitation with the Father, her clothes and hair

²Rule 13(e) provides that:

Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt.

smelled like cigarettes and that sometimes even the clothes in the child's overnight bag smelled like smoke. The grandfather corroborated the Mother's testimony, stating that he had smelled "heavy smoke" on the child's clothing when she returned from visitation. We conclude that this evidence was sufficient to support the trial court's finding that the Father had exposed the child to cigarette smoke in enclosed spaces in violation of Local Rule 17 and the final divorce decree. *See Bowman v. State*, 362 S.W.2d 255, 256 (Tenn. 1962) (holding that, if there is circumstantial evidence in record to support conclusion that defendant was guilty of criminal contempt beyond reasonable doubt, then appellate court is not warranted in disturbing final judgment).

The Father additionally argues that his criminal contempt conviction for exposing the child to cigarette smoke should be reversed on the ground that Local Rule 17 is invalid. The Father first challenges the validity of Rule 17 by contending that the hazards of second-hand tobacco smoke are not sufficiently established to be the proper subject of judicial notice. *See* T.R.E. 201(b). Alternatively, the Father contends that Rule 17 is unconstitutional because it is overbroad and because it violates a parent's constitutionally protected right of privacy. *See* Tenn. Const. art. I, § 8.

We need not reach the merits of these arguments because the Father has waived this issue for purposes of appellate review by failing to challenge the validity of Local Rule 17 at the trial court level. *See Barnhill v. Barnhill*, 826 S.W.2d 443, 458 (Tenn. App. 1991) (holding that issue was waived for purposes of appellate review where husband failed to argue at trial court level that allowing non-lawyer judge to decide custody and property issues constituted denial of due process and equal protection); *Dement v. Kitts*, 777 S.W.2d 33, 35-36 (Tenn. App. 1989) (holding that defendant waived issue of constitutionality of statute by failing to raise it below where provision challenged on appeal was not facially unconstitutional). At trial, both the Father and the Father's attorney affirmatively agreed that the Father would abide by the smoking restrictions of Rule 17.³ Further, even if the trial court was without authority to impose these restrictions, we note that the final decree indicates that Father specifically agreed to be bound by the smoking restrictions of Rule 17 in the parties' marital dissolution agreement. *See Penland v. Penland*, 521 S.W.2d 222, 224 (Tenn. 1975) (holding that, although father had no legal duty to support children beyond age of

³The Father and his attorney even agreed at trial that the Father would not smoke around the child while out of doors.

majority, such obligation was valid contractual area for parties in divorce proceeding); *Holt v. Holt*, 751 S.W.2d 426, 428 (Tenn. App. 1988) (stating that parties to divorce proceeding “should be free to obligate themselves by agreement beyond what the courts could order them to do as a matter of law.”). Under these circumstances, the Father may not challenge the validity of Rule 17 for the first time on appeal.

The most troubling issue in this case is whether the trial court abused its discretion in suspending the Father’s visitation privileges based solely on evidence that the Father had exposed the child to cigarette smoke. Decisions involving child custody and visitation are “peculiarly within the broad discretion of the trial judge, . . . and . . . will not ordinarily be reversed absent some abuse of that discretion.” *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988) (citing *Edwards v. Edwards*, 501 S.W.2d 283, 291 (Tenn. App. 1973)). Although the law clearly favors the noncustodial parent’s right to reasonable visitation, the trial court may limit or eliminate visitation rights if the record contains definite evidence that the exercise of such rights will jeopardize the child’s physical or moral well-being. *Suttles v. Suttles*, 748 S.W.2d at 429. For example, the trial court “may deny or condition continuing visitation on the grounds of parental neglect.” *Turner v. Turner*, 919 S.W.2d 340, 346 (Tenn. App. 1995).

In addition to testimony that the child had burned her finger on the Father’s lit cigarette, the Mother testified without objection that the child suffered from certain medical problems which could be related to exposure to cigarette smoke:

Well, she’s had some problems during the winter with allergies, with sinus that did develop into an ear infection. . . . And she does have ongoing allergies.

. . . .

She’s always sick when she comes home [from visitation with the Father]; takes her a couple of days to get over it. She’ll have a runny nose.

We are mindful that the suspension of a noncustodial parent’s right of visitation is not to be used as a punitive measure. *Turner v. Turner*, 919 S.W.2d at 346. The record in the present case, however, contains evidence that the Father’s cigarette smoking has jeopardized the

child's physical well-being. In addition to the above testimony suggesting that exposure to cigarette smoke has exacerbated the child's allergy problems, the evidence demonstrates a direct link between the Father's smoking habits and the burn on the child's hand. Under these circumstances, we conclude that the trial court did not abuse its discretion in suspending the Father's visitation privileges. In so holding, we note that the suspension was effective only until the court was "persuaded that [the Father] intends to protect the child from any and all exposure to tobacco smoke in enclosed spaces or elsewhere." Thus, the trial court retains continuing control to modify its order upon a proper showing by the Father. *See Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988); *Mittwede v. Mittwede*, 490 S.W.2d 534, 538 (Tenn. App. 1969); *Palanki v. Palanki*, 1990 WL 51350, at *2 (Tenn. App. 1990).

The trial court's order finding the Father guilty of two counts of criminal contempt and suspending the Father's visitation privileges is affirmed. Costs of this appeal are taxed to the Father, for which execution may issue if necessary.

FARMER, J.

CRAWFORD, P.J., W.S. (Concurs)

LILLARD, J. (Concurs)