

ORDER ON EMERGENT APPLICATION

**ELENORA G. WILLIAMS and DEBBIE
BROOKINS,**

Plaintiffs-Respondents,

vs.

RAY TOLBERT,

Defendant-Appellant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-
MOTION NO.
PART: A
JUDGE(S): SKILLMAN
NEWMAN

EMERGENT APPLICATION
FILED: JUNE 6, 2000

By: David Perry Davis
attorney for appellant

ANSWER(S) FILED:

By:

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON
THIS 7TH DAY OF JUNE, 2000, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION FOR	GRANTED	DENIED	OTHER
LEAVE TO APPEAL OUT OF TIME,	(X)	(X)	(X)
FOR WAIVER OF FILING FEES, FOR			
REIMBURSEMENT OF COST OF			
TRANSCRIPT AND FOR SUMMARY			
DISPOSITION			

SUPPLEMENTAL:

The court grants appellant Ray Tolbert's motion to appeal order of April 13, 2000 out of time and for waiver of filing fee. Appellant's motion for reimbursement of the cost of transcript is denied.

Pursuant to R. 2:8-3(b), the court elects to dispose of the appeal summarily.

Initially, we note that the court's oral directive that appellant be incarcerated indefinitely, subject to review in six months, for non-payment of child support, was apparently never reduced to a written order. Nevertheless, because appellant was apparently incarcerated based solely on the court's oral directive, we treat the court's oral opinion of April 13, 2000 as a final order subject to this court's review.

The order for appellant's incarceration is summarily reversed and the case is remanded to the trial court to conduct an ability to pay hearing. Appellant shall be released from incarceration forthwith, conditioned on his cooperating with

future enforcement proceedings, and he shall not be reincarcerated until an ability to pay hearing is conducted.

A matrimonial litigant may not be "incarcerated for failure to pay his support obligation until [the court] has determined that he has the ability to pay on the basis of evidence adduced at a hearing at which he has had the opportunity to testify." Saltzman v. Saltzman, 290 N.J. Super. 117, 123 (App. Div. 1996).

At a hearing held on April 13, 2000, appellant testified that he had only \$1,500 available for his support obligations that had been provided by his fiancè. Nevertheless, without adducing any evidence that appellant had an ability to pay any greater amount, the trial court ordered appellant's incarceration until he pays \$10,000 and shows that he has a job. This was manifest error. A litigant may not be incarcerated for failure to pay support in accordance with a court order except upon a showing of an "ability to comply." Pierce v. Pierce, 122 N.J. Super. 359 (App. Div. 1973). There was no showing that appellant has the present ability to pay more than \$1,500. Therefore, he should not have been incarcerated.

Reversed and remanded.

FOR THE COURT:

STEPHEN SKILLMAN, P.J.A.D.