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April 6, 2000

Hon. Mary Catherine Cuff, JAD
151 Bodman Place, 1st. Floor
Red Bank, NJ 07701

Hon. Arthur J. Lesemann, JAD
Suite 1101 North Tower
158 HQ Plaza
Morristown NJ 079600-3965

Re: Bachman a/k/a Cohen v. Cohen
Docket No. FM-13-1106-94B

Dear Judges Cuff and Lesemann:

Please accept this letter brief in lieu of a more formal brief in support of defendant's application to be immediately released from the Monmouth County jail. As explained herein, defendant has been unconstitutionally incarcerated. Aside from the constitutional issue, the trial Court's order committing him to the Monmouth County Correctional Institution must be reversed on two grounds. Initially, the trial Court erred by refusing to hold an ability to pay hearing and by its statement on the record that the burden was on defendant to establish his right to such a hearing prior to his being deprived of his liberty. Moreover, defendant's incarceration is improper as no finding was made that he has the present ability to comply with the Order beyond the $1,000 payment that defendant indicated he was able to make.

I. DEFENDANT MUST BE RELEASED AS HE IS BEING UNCONSTITUTIONALLY HELD IN VIOLATION OF HIS RIGHT TO COUNSEL (not raised below).

II. THE TRIAL COURT ERRED BY REFUSING TO HOLD AN ABILITY TO PAY HEARING AND BY ITS HOLDING THAT THE BURDEN WAS ON DEFENDANT TO ESTABLISH HIS RIGHT TO SUCH A HEARING PRIOR TO HIS BEING DEPRIVED OF HIS LIBERTY.

No person may be incarcerated for defaulting on a support obligation in the absence of a finding made at an ability to pay hearing that he has the present ability to comply with the Order. Saltzman v. Saltzman, 290 N.J.Super. 117 (App.Div. 1996), Pierce v. Pierce, 122 N.J.Super. 359 (App.Div. 1973); Federbush v. Federbush, 5 N.J.Super. 107, (App.Div.1949); Biddle v. Biddle, 150 N.J.Super. 185 (Ch.Div. 1977); Department of Health v. Roselle, 34 N.J. 331 (1961). In the case sub judice, the trial Court erred in denying defendant's application for such a hearing, holding that "defendant had not demonstrated a prima facie basis for inability to pay hearing as to child support" (69-25 to 70-1). Apparently, defendant had made numerous applications over the past five months for the Court hold such a hearing prior to incarcerating him. Those applications were finally denied on February 2, 2000 (69-24), with the Court holding:

Before one can receive an "ability to pay" hearing, with the time and expense involved, the requesting party must make a prima facia demonstration that, indeed, changed circumstances have occurred which make the enforcement of an existing obligation unduly harsh or burdensome (Plaintiff's exhibit G at page 2).

This holding is erroneous. Before a citizen can be deprived of their physical liberty, the constitutional mandate that they receive an ability to pay hearing must be honored.

During the March 31 hearing, defendant testified that he was working two jobs and desperately trying to meet his support and arrears obligations (7-22 to 8-4) while facing eviction from his residence and attempting to pay past-due bills (7-11 to 7-14). He stated explicitly that he was "broke" and unable to comply with the current support order (7-11). Defendant indicated that he had received one $1,000 paycheck, which he had cashed and brought with him on the day of the hearing to apply to his arrears (60-15 to 61-2). No evidence to rebut these allegations was presented.

At no point during the trial Court's findings did the Court determine that defendant was not credible as to his assertion that he was presently "broke" (7-11) aside from the $1,000 he had brought with him to apply to his obligation. Prior to depriving defendant of his liberty, the trial Court would have been required to specifically find that this assertion was not credible. At no point did the trial Court make the required finding that defendant possessed the current ability to pay the arrears (69-4 to 86-24).

The trial Court's finding - that defendant was not diligently seeking employment - might support a charge of willful non-support under 2C:24-5. However, they do not justify a coercive "civil incarceration" in the absence of an explicit finding that defendant has the present ability to comply with the Court's order.

III. THE TRIAL COURT ERRED BY ESTABLISHING A PURGE AMOUNT OF $5,931.83 WHEN NO EVIDENCE WAS PRESENTED THAT DEFENDANT HAS THIS AMOUNT OF MONEY AND WHILE THE RECORDS OF THE PROBATION DEPARTMENT INDICATE AN ARREARAGE OF $3,091.16.

According to the state computer system, defendant has a present arrearage of $3,091.16[1]. There was no evidence adduced at the hearing as to defendant's arrears, except plaintiff's acknowledgement that the $5,931.83 was not the current arrears figure (85-4).

Defendant testified that he had in his possession a copy of a cancelled paycheck and $1,000 in cash. No evidence was presented to indicate that defendant had access to more funds. The trial Court erred in setting a release figure of $5,931.83 in light of the evidence produced at the hearing.

CONCLUSION

Initially and most importantly, defendant must be released as he has been unconstitutionally incarcerated in violation of the Due Process clause of the Fourteenth Amendment to the United States Constitution. Moreover, this Court should order a statewide moratorium on the incarceration of indigent child support obligers unless they are informed of their right to counsel and their right to have an attorney appointed to represent them if they are unable to afford one.

Alternatively, defendant must be released as the trial Court erred by holding that defendant was required to meet a threshold in order to be afforded an ability to pay hearing. Regardless of the "time and expense involved" (Plaintiff's exhibit G at page

[1] 1-800-621-KIDS, Case Number 619 852 17A. Although this fact was not entered into evidence below, the findings of a government agency are subject to judicial notice. Evid.R. 9(2)

2), there is rightfully a heavy burden that must be met before a citizen is deprived of their fundamental right to liberty.

At a minimum, the purge amount of $$5,931.83 was unsupported by the evidence presented at the hearing and should be vacated.

Respectfully submitted,

David Perry Davis, Esq.

cc: Ed Frankin, Esq. (via fax)
Barry Weinstein