[Cite as *T.C. v. K.C.*, 2018-Ohio-5403.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
NOBLE COUNTY

T.C.,

Plaintiff-Appellee,

v.

K.C.,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case Nos. 17 NO 0453; 17 NO 0454

Civil Appeal from the
Court of Common Pleas, of Noble County, Ohio
Case No. 216-0080

BEFORE:
Cheryl L. Waite, Gene Donofrio, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed in part. Reversed and Remanded in part.

Atty. Miles D. Fries
Gottlieb, Johnston, Beam, & Dal Ponte, P.L.L., 320 Main Street, P.O. Box 190, Zanesville, Ohio 43702-0190, for Plaintiff-Appellee

Atty. Dennis E. Horvath, and
Atty. Eric M. Brown, Wolinetz & Horvath, LLC, 250 Civic Center Drive, Suite 220, Columbus, Ohio 43215, for Defendant-Appellant.

Dated: December 31, 2018

WAITE, J.

{¶1} Appellant, K.C. appeals a September 13, 2017 Noble County Common Pleas Court judgment entry suspending twenty-three days of a thirty-day term of incarceration imposed by the court after he was found to be in contempt. This arose during the pendency of a divorce action filed by Appellee T.C. On appeal, Appellant raises three issues: first, whether the trial court erred in finding him in contempt. Second, whether the trial court erred in not providing him the opportunity to purge his contempt before incarcerating him. Third, whether the trial court erred in conducting a hearing and suspending the remainder of Appellant's term of incarceration without his trial counsel present at the hearing. For the reasons set forth below, the judgment of the trial court is affirmed in part, reversed in part, and remanded on the sole issue of attorney fees.

Factual and Procedural History

{¶2} This case involves a divorce action filed by Appellee on July 22, 2016, which remains pending in the trial court. The parties were married on June 22, 2001 and had two minor children: A.C., born 6/20/2004, and P.C., born 1/31/2007.

{¶3} The record demonstrates that Appellee moved out of the family home a number of months prior to the filing of the divorce complaint. Appellee exercised parenting time with the children for approximately three months without any incident. According to Appellee's testimony, when she informed Appellant that she was not interested in reconciling the marriage, tensions escalated and Appellee's relationship with her children also began to deteriorate. (9/5/17 Tr., pp. 59-60.) Following a court-ordered mediation session on March 30, 2017, temporary orders were issued establishing a parenting schedule to which the parties had agreed at mediation. The

order provided that Appellee would have visitation from 3:30 p.m. on Wednesday until 3:30 p.m. on Friday, alternating weekly with visitation from 3:30 p.m. on Wednesday until noon on Sunday. Appellee was to pick up one child at school when it was in session and at Appellant's residence when it was not. The other older child was to be contacted by Appellee to see if that child would participate in visitation. Appellant was to direct the older child to respond to Appellee's requests for visitation. The children were also to remove any "blocks" or similar restrictions from their cell phones that prevented contact by Appellee. In addition, the order required Appellee to contact the children's counselor, Dr. William Bauer ("Bauer"), to arrange for the children's counseling. (3/30/17 J.E.)

{¶4} On April 20, 2017, Appellee filed a motion requesting an order to compel Appellant to transport the older child to counseling with Dr. Bauer, as Dr. Bauer told Appellee that Appellant refused to cooperate with the child's transportation to counseling and the child's relationship with Appellee had deteriorated to the extent that he would not communicate with her or allow her to transport him to counseling.

{¶5} On May 4, 2017, Appellee filed a motion for contempt, asserting that Appellant was harassing her in violation of the temporary orders filed at the outset of the action. She sought a no-contact order between herself and Appellant and any other orders deemed necessary by the trial court. Appellee alleged in the motion that Appellant repeatedly sent threatening texts and had contacted her in an attempt to intimidate her into dismissing the divorce action and returning to live with him.

{¶6} On May 5, 2017, Appellee filed a motion to prevent Appellant from relocating with the children and requesting modification of both the parenting schedule

and the order requiring her to pay for one-half of the children's expenses. Appellee contended that the current parenting schedule was not in the best interests of the children and that Appellant was threatening to move out of state with the children. Appellee also alleged her financial situation prevented her from paying for one-half of all of the children's expenses.

{¶7} On May 8, 2017, Appellant filed a *pro se* motion requesting a restraining order against Appellee and an order granting permission for him to apply for U.S. passports for the children.

{¶8} A hearing was held on Appellee's motion involving the transportation of the older child to counseling and the trial court issued a judgment entry on May 19, 2017 requiring both parties to "use their best efforts to get the children to counseling with Dr. Bill Bauer or the other individual in his office taking his place during his absence." (5/19/17 J.E.)

{¶9} On June 20, 2017, Appellee filed a second motion for contempt, alleging Appellant was not using his best efforts to get the children to counseling. Appellee also requested that she be named the temporary residential parent and legal custodian of the children. Appellee contended that she attempted to schedule counseling appointments for the children but Appellant refused to cooperate, telling her that he would not take the children. Appellee attempted to go to Appellant's residence to pick up the children for a scheduled counseling appointment on June 8, 2017. Appellant was not home. The children were home, unsupervised, but the door was locked. In her motion Appellee contended that Appellant's actions "have served to alienate the children from [Appellee]" and that "[Appellant's] conduct in alienating the children from

her is not in their best interest." (6/20/17 Motion for Contempt.) Appellee requested a modification of the parenting time schedule to designate her as the temporary residential parent and legal custodian.

{¶10} On June 28, 2017, Appellant, now represented by counsel, filed two motions. The first sought modification of the parenting time schedule and payment of child support by Appellee. The second was a motion seeking a contempt order against Appellee for failing to share in the payment of expenses for the children. A hearing on Appellant's motions was set in early July. At that time, the trial court elected to defer hearing all pending motions until the court could appoint a guardian ad litem. The court did file a judgment entry, dated July 11, 2017, holding that the previous temporary parenting schedule was to remain in place except for a modification to the summer visitation and that all exchanges of the children would take place at the Noble County Sheriff's Department in a meeting room inside of the Sheriff's office. The court noted in its entry that the parties had met outside of the courtroom to schedule further counseling sessions for the children and had scheduled four counseling sessions: July 18, July 25, August 1 and August 8, 2017. The court stated that both parties were available at those times and would use their best efforts to get the children to the scheduled counseling appointments.

{¶11} On August 4, 2017, Appellee filed another motion for contempt, alleging that Appellant was in violation of the July 11th order because he failed to bring the children to the counseling appointments scheduled in that order. Appellee also alleged that Appellant "continues in his ongoing campaign to alienate the children from their mother." (8/4/17 Motion for Contempt.)

{¶12} On August 7, 2017, Appellant filed a motion to remove the court appointed guardian ad litem based on an apparent conflict of interest. The guardian ad litem was employed at a law firm that was currently defending Appellant in another matter.

{¶13} On August 25, 2017, the trial court issued a judgment entry changing the children's counselor from Dr. Bauer to Dr. Gary Wolfgang. The parties were ordered to transport the children and attend any scheduled counseling sessions.

{¶14} On September 5, 2017, the trial court appointed a new guardian ad litem in the matter and the court held a hearing to determine any outstanding motions. Appellee's counsel noted that two motions for contempt had been filed relating to Appellant's failure to comply with two previous court orders dated May 19 and July 11. These concerned counseling for the children and Appellee's desire to be designated residential parent of the children. Appellant's counsel sought to defer hearing on his contempt motions because the motion relating to child support was awaiting discovery information from Appellee and the motion relating to the parenting time should wait for the newly appointed guardian ad litem to conduct his investigation.

{¶15} The hearing proceeded on Appellee's contempt motions. Appellee's first motion for contempt concerned Appellant's failure to comply with the court's May 19, 2017 order to take the children to counseling. In that motion she sought to be designated as residential parent. Appellee's second contempt motion involved Appellant's violation of the court's July 11th order because once again, he failed to use his best efforts to get the children to counseling on the four dates the parties had scheduled and agreed to in the order. Appellee also alleged Appellant continued to alienate the children from their mother.

{¶16} At hearing, Dr. Bauer and both parties testified. Dr. Bauer stated that Appellant contacted him initially in an attempt to "save his marriage." Only later was counseling for the children considered. Dr. Bauer testified that both parents and both children attended the initial appointment on August 16, 2016. (9/5/17 Tr., p. 7.) He met with the children for an half an hour each, followed by a short meeting with Appellant on February 1, 2017. (9/5/17 Tr., p. 13.) At that time, both children indicated that Appellant was verbally abusive to Appellee in their presence. (9/5/17 Tr., pp. 13, 26.) Dr. Bauer also drafted a written summary for the court which he read at the hearing:

> In my opinion it appeared that [Appellant] may have some influence over the boys [sic] thoughts and actions. It appears that perhaps many of the conversations [Appellant] may have had with them should have been held between [Appellee] and he rather than the boys. Evidence of this was manifested in my opinion with the many comments the boys have stated that he would not follow, for example, [A.C.] said that he would not follow the court recommendations and he did not care what the Court said. He did tell me that. I do remember that. I don't know where [A.C.] would have gotten that information, that's why I said it previous.

(9/5/17 Tr., pp. 14-15.)

{¶17} Dr. Bauer also testified that he last saw the family on April 5, 2017, but only Appellee and one child appeared. When Dr. Bauer went on sabbatical his patients were all referred to his officemate, Dr. Patrick Ward. Dr. Bauer testified that ultimately the office notified the parties that they would no longer see the children because they did not feel the children were making progress. Dr. Bauer testified that the children kept

repeating themselves at every appointment. The children were angry that their mother had moved out and simply repeated that they were angry. They did not want their mother to participate in counseling but were fine with their father attending counseling. (9/5/17 Tr., p. 22.)

{¶18} On cross-examination, Appellant's counsel questioned Dr. Bauer about each party's ability to co-parent, whether Appellant informed Dr. Bauer that the children should not have a relationship with their mother, and whether Appellant provided Dr. Bauer with any evidence that he was interfering with counseling. Dr. Bauer testified that Appellant did not show up for two appointments with the children. (9/5/17 Tr., p. 31.)

{¶19} Appellee testified that she had not seen her children for an extended period of time, and then only sporadically. She had last seen one child a week prior to the hearing. She had not had parenting time with the other child since January of that year. She stated that she had made multiple attempts to see the children but was continually thwarted by Appellant. Once the temporary orders required that exchanges were to occur at the Noble County Sheriff's Department, she appeared for each visit, but since July of 2017 Appellant brought only one child, one time. (9/5/17 Tr., p. 35.) Prior to the order requiring exchanges through the Sheriff's office, Appellee would attempt to exercise parenting time by picking up the children after their baseball or football practices and games. During one such exchange, Appellee recorded a conversation with Appellant. A copy of that recording was played for the court. There was no objection to the recording itself or the manner in which it was introduced. Instead, counsel raised only a procedural objection to its relevance:

> Your Honor, maybe before we can on a procedural matter my understanding is we're here for a contempt based on noncompliance with an order relating to the counselor. We're talking about parenting time. I'm not aware of the contempt that's been filed based on the parenting time schedule.

(9/5/17 Tr., p. 36.)

{¶20} Counsel for Appellee responded: "it's quite relevant to the issue of whether [Appellant] is complying with the order to bring the children to counseling when he tells his wife that she isn't going to see these F'n children again. Which kind of suggest [sic] that he's not going to cooperate with counseling." (9/5/17 Tr., p. 36.) Counsel also contended that the testimony and evidence was relevant to Appellee's request to be named residential parent.

{¶21} Addressing Appellant's objection on relevance grounds, the trial court determined that the contempt motion was based on all issues involved in the court's July of 2017 order, both as to the failure to comply with counseling for the children, and parenting time issues. The trial court concluded, "[v]iolation of the Court's order dated July 11, 2017. The whole orders [sic] in issue." (9/5/17 Tr., p. 36.) Following this ruling, the recording was played for the court. The recording was transcribed and incorporated into the transcription of the hearing and is part of the record before us:

> [Appellant]: Tracy, look at me right now as long as I live on this earth you will never see those fucking kids for what you did to me and my family. Look at me, look at me.
>
> [Appellee]: Don't threaten me.

[Appellant]: This is serious. This is not a threat. You will never see those fucking kids, look at me in the eye, you will never see those fucking kids.

[Appellee]: Yes I will.

[Appellant]: No you won't.

[Appellee]: Yes I will.

[Appellant]: I promise you, you won't. Alright. Stop it, stop it [A.C.]. Get the fuck out of here.

[Appellee]: No I want to see my babies.

[Appellant]: Get the fuck out of here, stop fucking with me, listen to me, look at me in the eye. I'm telling you right now as long as I live you will never see those fucking kids. You understand me. I will not let them be around somebody who has turned into the biggest piece of shit I've ever met.

[Appellee]: You're a psychotic person. What about yourself.

[Appellant]: I'm going to raise these boys the right way in a traditional family setting.

[Appellee]: This is not the right way.

[Appellant]: We will replace you, we will replace you * * * it is the right way. You can't win. You can't win.

[Appellee]: I heard you said you already had a girl at the house.

[Appellant]: Subpoena them.

[Appellee]: I will.

[Appellant]: Subpoena your source.

[Appellee]: Okay, I will.

[Appellant]: They have no proof. Bring it Friday and we will prove them they have no proof they're big mouths. That person shows their face in court, they'll be lucky to be alive if they fuck with me. I'm a connected man who will fuck them up. Okay? That's not a threat. Okay.

[Appellee]: What is it then?

[Appellant]: That's the truth. Threat? You don't know what the difference between a threat is and what the truth is * * *. Stop now or you know what. (inaudible) the keys in my pocket. (Inaudible)

(9/5/17 Tr., pp. 37-39.)

{¶22} The recording was stopped, but was continued after Appellee indicated that it had not concluded:

[Appellant]: Argue with the Judge about it. You're stupid.

[Appellee]: You're stupid.

[Appellant]: You're stupid.

[Appellee]: You don't show up at the Sheriffs [sic] office. Okay.

[Appellant]: It's not going to happen.

[Appellant]: Nothing's going to happen.

[Appellee]: And I asked the boys to come with me for the week-end on Friday.

[Appellant]: I could whip my dick out in that fucking courtroom and piss and nothing would happen to me.

[Appellee]: I asked them on Friday to come with me for the week-end and they said no.

[Appellant]: You're exactly right.

(9/5/17 Tr., pp. 39-40.)

{¶23} Appellee then testified about an incident wherein she attempted to exercise her parenting time shortly after the children were back in school. Appellee is employed as a teacher and got permission from her school principal to leave early so that she could pick up one of her children at his school at the end of the day. (9/5/17 Tr., p. 41.) The child's principal indicated she would be waiting in the school office with the child for Appellee to pick up. However, Appellant showed up at the school and got into an altercation with the child's principal and the school resource officer. (9/5/17 Tr., p. 42.) Appellee had to take the child to football practice without his equipment because Appellant refused to bring it to the exchange or make arrangements for it to be at the school for the child. When Appellee left the school and arrived at a nearby intersection, Appellant was waiting at a stop sign. Appellee had her ten year old child in the back seat. Appellant had been calling the child on the phone, angry that the child left with Appellee. Appellant was encouraging the child to jump out of Appellee's car at the intersection and get into his truck. Appellee told the child to stay in her car. When Appellee turned left Appellant followed her. She stopped at a traffic light and Appellant again encouraged the child by phone to jump out of Appellee's car and to run to his truck. Appellee called the Sheriff's office, but Appellant then drove his truck alongside Appellee's car, all the while encouraging the child to go with him. Appellee then drove

to the Sheriff's office, where she waited to make sure the situation was safe, as Appellant apparently did not follow her there.

{¶24} Appellee also testified that during the recess of hearing on June 28, 2017 the parties and their respective counsel were ordered to telephone the children's counselor to set up appointments for the children. She testified that the four agreed dates were chosen after both parties confirmed they would be available to take the children to counseling on those dates: July 18, July 25, August 1 and August 8, 2017.

{¶25} Appellee testified that Appellant failed to abide by the order, and presented text messages from Appellant where he stated that he was not bringing the children to the Sheriff's office for the parenting time exchange, despite the fact that the July 11th temporary order required such an exchange. Appellee introduced other texts from Appellant, one where he threatened her brother for challenging him after Appellee's brother overheard a conversation between the parties; and another stating that Appellant had instructed the children to pretend their mother died of cancer. (9/5/17 Tr., pp. 54-55.)

{¶26} During Appellant's testimony, Appellant's counsel asked him a number of questions regarding parenting time and whether Appellant interfered with Appellee's ability to spend time with the children. Appellant testified that he did not interfere with the children's relationship with their mother.

{¶27} When asked whether he encouraged the children to see their mother Appellant responded, "I do. I have for a very long time." (9/5/17 Tr., p. 71.) When asked why he did not arrive at the Sheriff's office to exchange the children on the

previous Wednesday, Appellant said one son was at Boy Scout Camp and it was family night, so he was scheduled to drive to camp to see the child. Regarding his other child:

> I went home I explained to [P.C.] what was going on he did not want to go. I was able to get him in the car much later than I expected. It took me about a half hour to get him in the car, the truck. Once we got to the Sheriff's Department he would not go. In fact the Sheriff's Department, two Sheriff's Deputies just lined him up and he basically told them that he does not wish to go with his mother. I had to get to Boy Scout Camp, [A.C.] had a family night that night and I volunteer and help with the Boy Scouts and I wanted to get there. We had to go. So, I politely told the Sheriff's Deputies and was a little upset the way that they yelled at my son but I told them that I do need to go. We have somewhere to be and if we're done here could we please go. They allowed me to take [P.C.] and we left. [sic]

(9/5/17 Tr., p. 72.)

{¶28} Appellant testified that Appellee missed most of the children's baseball games or would arrive late. (9/5/17 Tr., p. 72.) He testified that on the occasions when she did come to these games it was difficult for her to exercise parenting time because the children refused to go with her. (9/5/17 Tr., p. 73.)

{¶29} Appellant disputed Appellee's version of the facts regarding the incident where he followed Appellee, urging his child to leave Appellee's vehicle. According to Appellant:

> [Appellee] drug [P.C.] outside to the jeep [sic]. She was forcing him in the Jeep. The school Principal came out with a Security Officer [sic] and proceeding [sic] to tell me exactly how I'm going to father my children and everything else at which point I told her that it was really none of her business.

(9/5/17 Tr., p. 76.)

{¶30} Appellant also testified:

> I went to McDonalds [sic] and got my lunch at 3:30 believe it or not. I've got a big truck, it's a dually, can't drive through the drive through so I parked on the side, at the park and go in. And, got back in the truck there's [Appellee]. I had to go to Wheeling, I was late. I pulled over and got fuel at the gas station. I know from [P.C.], from what he told me he was trying to run away. He ran away from her like 5 times that day and she was able to, run him down and tackle him, she tackled him out by the highway as a matter of fact, tackled him on the ground. She tackled him at football practice and sat on him later that night. But I do have text messages that show that I ran home to get [P.C.'s] pads and that she needed to call me, needed to text me, do something let me know what I got to do, I'm late. I got to get going. I'm at the park and ride. I'll bring the pads to the park and ride and she just , she will not communicate whatsoever, period. I left. I told her I said hey listen I've got to go we're late for the football game I've got to go. I got it all on text messages.

(9/5/17 Tr., pp. 76-77.)

{¶31} Appellant's counsel asked him whether he wanted the children to have a relationship with their mother. He replied that he had the children with him "24, 7 over the summer" and "at the end of the day I got tired of hearing my name, Dad." (9/5/17 Tr., p. 77.) He also stated that he was "tired" and "can no longer try to facilitate that relationship" because it "gives me unpleasant memories." (9/5/17 Tr., p. 77.) When his attorney asked why he did not take the children to counseling as ordered and agreed, he said he was on vacation during one session and assumed the counselor did not want to see them any longer at the other scheduled appointments. (9/5/17 Tr., p. 79.)

{¶32} On cross-examination Appellant refused to acknowledge that it was his voice on Appellee's audio recording. (9/5/17 Tr., p. 80.) He also denied sending threatening text messages to Appellee and her brother. (9/5/17 Tr., p. 80.) Counsel for Appellee presented Appellant with additional threatening text messages from Appellee to Appellant, which he had Appellant read into the record:

> I'm going to make you suffer as your consequence I'm going to make you suffer in every which way. All quitters must suffer and wither away. Not a threat. I promise. Cross my heart and hope to die. You dropped the hammer and I'm in Missouri the next day and the boys will be with me. You push there and I will be in California and you keep pushing there I'll be in Canada. Suffer and suffer greatly you will.

(9/5/17 Tr., p. 82.)

{¶33} As Appellant refused to acknowledge that those were his texts, Appellee was called on redirect examination to authenticate the texts. She testified that her brother heard Appellant screaming at her on the phone, and that her brother took

Appellant to task for bullying his wife. Appellant subsequently sent the text to Appellee threatening her brother. On recross, she could not recall the exact date that she had received the text. (9/5/17 Tr., p. 87.)

{¶34} Closing statements were made by counsel for each party. The trial court issued its findings, concluding that Appellant was in contempt of the court's orders:

> Who is [Appellant]? Is he that silver tongued devil who sits here in the courtroom and spins this tale about how great of a person he is, which I didn't believe. Or is he that individual who just flouts my orders, not going to do anything. We set up visitation schedules and both of the parties were to encourage the children to spend time with the other parent. And, an individual who rants like he did on that recording you're not going to convince me that he's encouraging these children to see their mother. I don't know what happened. The uncontested information before me, mother leaves and for three months these children spent time with her. Now what happened? I think I got a pretty good idea but hopefully that's what the counselors are going to do. Figure out and get to the bottom of what happened here. There's no question in my mind [Appellant] but you're in contempt of my order. You just simply flaunt what I said as though it doesn't make any difference. Because nothing's going to happen, well something is going to happen. You're in contempt. You're going to jail for thirty days. And [Appellee's counsel] you're going to get me the time that you spent on these motions, get me a statement and [Appellant] will reimburse you for the time you've had to spend in this

> proceeding. I'll get in touch with [the new counselor]. We'll have a conversation. I'll figure out what he needs to know and I'll pen a little order which each one of you will get a copy of. We're in recess.

(9/5/17 Tr., pp. 88-89.)

{¶35} Counsel for Appellant attempted to argue that this was a civil contempt action and that the court was required to permit him to purge his contempt. The trial court took a five minute recess. Once the court was back on the record, the judge allowed counsel for Appellee to respond to whether purge was required. Appellee's counsel responded that purge was not required in this instance. The trial court concluded:

> 2705.03(1), says this court will have jurisdiction to make a finding of contempt for failure to comply with or interference with a parenting time or visitation order or decree. And to impose the penalties set for [sic] in 2705.05. 2705.05 sets forth the penalties for a first offense a fine of not more than 250 dollars, a definite term of imprisonment of not more than thirty days in jail or both. And there's nothing in there that says anything that I have to give him an opportunity to purge. And, I think I can but I don't think I'm obligated to. And I'm not going to. You're remanded to the custody of the Sheriff. You have him for thirty days. He's to have no contact with the kids.

(9/5/17 Tr., p. 90.)

{¶36} Appellant was taken into custody at the end of the hearing. Appellant filed a motion seeking to suspend his term of incarceration on September 8, 2017. Hearing

was held on September 12, 2017. Appellee was present with counsel; Appellant was present but his counsel was not. At the hearing, the trial court acknowledged Appellant counsel's absence, "[y]ou don't appear to be represented by a lawyer here today. Are you proceeding without a lawyer?" (9/12/17 Tr., p. 1.) When Appellant stated that he would proceed without a lawyer, the court asked him to call his first witness. Appellant said that he would be his only witness. The court instructed him to address his motion. Appellant stated:

> [Counsel] filed a motion for me last week to reduce the sentence based on the fact that we feel that this could be detrimental to the children. They're pretty upset with the situation right now. I really don't want to drag these children through anymore [sic] than they've already been through with things that myself and their mother put them through. I think that when you get the guardian ad litem involved very quickly, I think that counseling will definitely help the situation with our personal and private family matters, that I prefer to keep private outside of this courtroom. But further more [sic] I think it's going to help interact with the children a little bit better and not be quite as angry with their mother if I am not incarcerated at the Noble County prison, or Noble County jail.

(9/12/17 Tr., pp. 1-2.)

{¶37} Appellee's counsel did not cross-examine Appellant and did not present any testimony, but did state that Appellee was opposed to the suspension of the rest of Appellant's sentence. Citing R.C. 2705.08, counsel urged that Appellant should only be released if it will not impugn the public interest. As Appellant's conduct demonstrated a

disregard for the court's orders, a light sentence would essentially send the wrong message to the public, as the community was aware of the case and of Appellant's conduct. Counsel also stated that since Appellee had been given time with her children while Appellant was incarcerated, after "[t]otal exclusion from their mother," their relationship had begun to improve. Counsel asked for extended parenting time for mother. (9/12/17 Tr., pp. 2-4.)

{¶38} Appellant was permitted to make final remarks:

> Once again, I have not seen this motion. I have not gotten any correspondence, I can't make phone calls out of the prison. I do know a little bit about what [Appellant's counsel] may have put in there in regards to the public interest. I don't think it is in the public's interest for me to be incarcerated. I believe it's in the public interest for me to make sure that my, that my children and their mother have a facilitated relationship, which I do want, I do want shared parenting. I do want these things unfortunately due to circumstances and my wife are at serious conflict [sic]. We're not in with co-parent (inaudible). I think that the Court will see through the appointment of the guardian ad litem and through counseling and through further evidence that I have to present to the Court, and I have, I have more evidence than I think you may want, that I have tried to facilitate. I have videos of me dropping the children off at her house and she not being home. I have videos and witnesses where I have waited 20 minutes after practices for them for her to pick those kids up and –

(9/12/17 Tr., pp. 4-5.)

{¶39} The trial court told Appellant he was going beyond the scope of the hearing, but granted his motion to suspend the remaining 23 days of his incarceration under the following terms and conditions: (1) Appellant had to "seasonably and faithfully" abide by the orders of the trial court; (2) Appellant could not "denigrate [Appellee] in the presence of the children or in a manner that ultimately reaches the children;" and (3) Appellant was to pay the statement provided by Appellee's counsel for prosecuting the contempt motions within 15 days of the statement being presented to the trial court. (9/13/17 J.E.)

{¶40} The court also noted that temporary custody of the children would remain with Appellee and that both parties were ordered to make sure they got themselves and the children to any and all scheduled counseling appointments. (9/12/17 Tr., p. 6.) On September 29, 2017, Appellant filed this timely appeal. Due to the related nature of the first two assignments of error they will be addressed together.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT FOUND APPELLANT IN CONTEMPT OF COURT.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT FAILED TO ALLOW APPELLANT AN OPPORTUNITY TO PURGE HIMSELF OF CONTEMPT PRIOR TO INCARCERATING HIM.

{¶41} Appellant argues the trial court abused its discretion in finding him in contempt because he did not have proper notice of the contempt charges against him; Appellee did not prove by clear and convincing evidence that Appellant violated court

orders; and that Appellant should have been provided with an opportunity to purge the contempt before being incarcerated.

{¶42} We review a trial court's finding of contempt for abuse of discretion. *State ex rel. Ventrone v. Birkel,* 65 Ohio St.2d 10, 11, 417 N.E.2d 1249 (1981). Abuse of discretion connotes more than an error in judgment; it implies the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶43} Contempt can be defined as the disregard or disobedience of an order or command of judicial authority or an act or omission that disrespects the judicial process in a particular case. *Home S. & L. Co. v. Midway Marine, Inc.,* 7th Dist. No. 10 MA 109, 2012-Ohio-2432, ¶ 19. Contempt can be direct or indirect. Direct contempt occurs when a party engages in conduct in the presence of the court that interferes with the administration of justice. R.C. 2705.01. Indirect contempt involves conduct outside of the presence of the court that exhibits a lack of respect for the court or its lawful orders. *Byron v. Byron,* 10th Dist. No. 03 AP 819, 2004-Ohio-2143, ¶ 12. Failure to comply with a court order is indirect contempt, as it occurs outside of the presence of the court, but demonstrates a disregard for a command for judicial authority. *Home S. & L. Co.* at ¶ 19.

{¶44} Contempt may also be criminal or civil depending on the exact nature of the contempt sanctions. Criminal contempt is characterized by sanctions that are punitive in nature and are intended to punish a party for past disobedience and to vindicate the authority of the court. *Brown v. Executive 200, Inc.*, 64 Ohio St.2d 250, 253, 416 N.E.2d 610 (1980). Civil contempt is conditional, and the contemnor "carries

the keys of his prison in his pocket," as freedom is earned when certain conditions have been completed. *Burke v. Burke,* 7th Dist. No. 13 MA 24, 2014-Ohio-1402, ¶ 6. Thus, in civil contempt, any sanction imposed by the trial court must also provide the contemnor with an opportunity to purge the contempt. *DeLawder v. Dodson,* 4th Dist. No. 02CA27, 2003-Ohio-2092, ¶ 10.

{¶45} A trial court has the authority to impose sanctions for contempt as defined within R.C. 2705.02 which reads, in pertinent part:

> A person guilty of any of the following acts may be punished as for a contempt:
>
> (A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer[.]

{¶46} R.C. 2705.05 provides for a hearing for contempt proceedings.

> (A) In all contempt proceedings, the court shall conduct a hearing. At the hearing, the court shall investigate the charge and hear any answer or testimony that the accused makes or offers and shall determine whether the accused is guilty of the contempt charge. If the accused is found guilty, the court may impose any of the following penalties:
>
> (1) For a first offense, a fine of not more than two hundred fifty dollars, a definite term of imprisonment of not more than thirty days in jail, or both[.]

Appellant argues that the trial court found him guilty of civil, indirect contempt despite the fact that he had no notice of the contemptable behavior of which he was found guilty. Appellant complains that Appellee's motions only referred to his failure to take his children to counseling and did not raise issues regarding parenting time violations.

Appellant also argues that Appellee failed to prove any contempt by clear and convincing evidence.

{¶47} Appellee's motions for contempt were based on Appellant's violation of the March 30, 2017, May 19, 2017, and July 11, 2017, judgment entries. In her motions she asserted that Appellant was in contempt for failing to use his "best efforts" to get the children to counseling. In her June 20 motion she stated that Appellant was deliberately alienating her children from her. The second motion for contempt also alleged that Appellant was continuing his "ongoing campaign to alienate the children from their mother." (8/4/17 Motion for Contempt.) In every case, Appellee sought a change to the parenting time schedule and to be named as residential parent.

{¶48} It is undisputed that Appellant was served with both motions as well as the judgment entry from the court setting the matter for hearing on September 5, 2017. At the hearing, both parties and Dr. Bauer testified. Testimony provided by all witnesses, but most particularly the parties, included extensive questioning regarding parenting time conflicts that extended well beyond the issue of whether Appellant was using his best efforts to get the children to counseling. Appellant's counsel, on both direct examination of Appellant and on cross-examination of Appellee, elicited lengthy testimony regarding Appellant's conduct in facilitating (or not) any relationship between Appellee and the children. There was also extensive questioning regarding Appellant's overall conduct with the children, which Appellee claimed was aimed at alienating her and ensuring that he would dictate the terms of her relationship with the children. Further, the audio recording introduced at hearing by Appellee evidenced Appellant's attitudes regarding both parenting time and counseling and any court orders pertaining

to these issues. At the conclusion of the hearing, the trial court expressly stated that Appellant's testimony was not credible and that it was clear by Appellant's actions and attitudes that Appellant was in contempt of the trial court's orders to facilitate parenting time and to facilitate counseling.

{¶49} Following the court's pronouncement, as earlier quoted in full, the trial court had Appellant immediately taken into custody. It is clear that the trial court found Appellant guilty of indirect contempt as the conduct of Appellant which rose to the level of contempt occurred outside the presence of the court. This conduct, however, was evidenced by the testimony and exhibits presented at the hearing and reflected a clear and cavalier disregard for the court's authority by Appellant. Again, the court stated without further objection that the contempt motions were based on both issues of failure to facilitate counseling for the children and parenting issues. The judgment entry finding Appellant in contempt states, "Defendant is found to be in contempt of this court for his violation of this court's order of July 11, 2017." (9/11/17 J.E.) The court found Appellant in contempt of the entire court order, which would include the allegation of parental alienation. The trial court clearly intended to punish Appellant for his behaviors to vindicate its authority, not to coerce some action on Appellant's part. The punishment for Appellant's contempt was immediate incarceration in accordance with a finding of criminal contempt.

{¶50} Appellant contends the trial court made no reference to the failure to get the children to counseling but, rather, focused on parenting time issues which was not part of the basis of the contempt proceeding. As earlier discussed, Appellant mischaracterizes the language of the motion for contempt as well as the testimony

elicited at the hearing, even by his own counsel, regarding the nature and extent of Appellant's interference with Appellee's ability to have parenting time with the children. The trial court found Appellant in contempt of the July 11th judgment entry. This entry set the schedule for parenting time, ordered the exchange of the children at the Noble County Sheriff's Department, and also served as an order compelling the parties to use their best efforts to get the children to the scheduled counseling sessions. (7/11/17 J.E. pp. 1-2.)

{¶51} Appellant also urges us to hold that the nature of this action was civil contempt, not criminal. As civil contempt is entered to try to coerce the contemnor to convey some benefit to the movant, Appellant contends that Appellee received a benefit in that she was named temporary custodian of the children. Hence, his contempt was civil in nature and the court was required to allow him an opportunity to purge. We find this argument unpersuasive. The punitive nature of immediately incarcerating Appellant constitutes a criminal contempt finding. The trial court was punishing Appellant for his actions and underscoring the court's authority. The judgment entry also includes an order that Appellee be named temporary residential parent and for Appellant to pay Appellee's attorney fees related to the contempt proceedings, but those provisions do not transform the contempt finding from criminal to civil. As the children were primarily in Appellant's care prior to the contempt finding, ensuring that their custodial status was secure prior to Appellant's incarceration was necessary.

{¶52} The trial court did not err in finding Appellant in criminal contempt based on the evidence presented of Appellant's blatant disregard for the orders of the court. Moreover, there was no requirement for the court to provide Appellant with an

opportunity to purge, as the contempt was criminal in nature and immediate incarceration was an appropriate sanction. Appellant's first and second assignments of error are without merit and are overruled.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN PROCEEDING WITHOUT COUNSEL PRESENT AT THE HEARING ON SEPTEMBER 12, 2017.

{¶53} In his third assignment of error, Appellant contends the trial court erred in proceeding with the hearing on his motion to suspend his term of incarceration without his counsel present. While Appellant's counsel states in the brief in this matter, "the trial court instructed counsel for Appellant that his appearance was not required upon the motion. This instruction was communicated to counsel for Appellant telephonically, so there is no formal record of this instruction" (Appellant's Brf., p. 14), this statement is not evidence and may not properly be considered by this Court. There is nothing in the record to support Appellant counsel's contention that he was informed that his appearance was not necessary.

{¶54} Although not expressly argued, Appellant appears to contend that a continuance should have been granted when his counsel failed to appear at the September 12th hearing. It is well established under Ohio law that a decision to grant a continuance lies within the sound discretion of the trial court. *In re R.B.D.,* 7th Dist. No. 17 BE 0049, 2018-Ohio-2770, ¶ 17 citing *State v. Unger,* 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981), syllabus. An appellate court will not reverse the denial of a continuance absent an abuse of discretion. *Id.*

{¶55} In the instant matter Appellant was incarcerated on the contempt offense. His counsel had filed a motion requesting his incarceration be suspended and Appellant be released from jail. In the motion filed September 8, 2017, Appellant sought immediate suspension of his term of incarceration citing R.C. 2705.08:

> Within Chapter 2705, Ohio law provides that "[w]hen a person is committed to jail for contempt, the court or judge who made the order may discharge him from imprisonment when it appears that the public interest will not suffer thereby."

(9/8/17 Motion, p. 2.)

{¶56} Appellant's motion further noted that not only would suspension of Appellant's term not "impugn the public interest" it would not serve as a "punitive remedy" against Appellant. *Id.*

{¶57} The matter was set for a September 12, 2017 hearing. There is no journal entry in the record setting the hearing date, but Appellee and her counsel appeared. Appellant appeared without counsel. Review of this record reveals that the trial court acknowledged that Appellant's counsel was not present and inquired whether Appellant wished to proceed without counsel. Appellant responded in the affirmative. Appellant's counsel contends that Appellant had not seen the motion filed on his behalf and was essentially left to his own devices. However, Appellant's testimony reveals that he was very familiar with the basis of the motion and the remedy sought. Further, Appellant's motion was granted and his term of incarceration was suspended. If Appellant had requested a continuance, granting such a continuance due to counsel's absence from the hearing would clearly not benefit Appellant, on whose behalf the motion to be

released from jail was filed. This record shows that, not only did Appellant not request continuance, but waived his counsel's presence at the hearing when asked if he wished to do so by the trial court. While Appellant's counsel assigns as error the trial court's decision to move forward with the hearing and ultimately release his client from incarceration, not only would any error on the part of the court be harmless, but it appears it would actually benefit Appellant.

{¶58} At the conclusion of the hearing, Appellant's motion was granted and the term of incarceration was suspended. Even if we assume Appellant's arguments are correct, this would be, at most, harmless error. Appellant argues that he did suffer harm, as the trial court attached conditions to the suspension of his sentence: that he was to comply with all court orders; not denigrate Appellee to the children; allow Appellee to maintain temporary custody; and pay Appellee's attorney fees associated with the contempt action. Notwithstanding Appellant counsel's assertion that he was informed that his attendance at the hearing was not required, an attorney who has filed a motion seeking to get his domestic relations client out of jail should anticipate that a hearing to determine his client's release from incarceration would require the need for legal assistance. Regardless, the court's instruction to comply with all orders and to cease denigrating Appellee to the children are requirements to which Appellant was at all times subject. These are not new orders. Further, the record of the underlying contempt hearing, at which Appellant was represented, fully supports the court's decision to grant temporary custody to Appellee.

{¶59} Although not directly raised, we do find error with one portion of the judgment entry releasing Appellant, regarding the order to pay Appellee's attorney fees.

"Ohio has long adhered to the 'American rule' with respect to recovery of attorney fees: a prevailing party in a civil action may not recover attorney fees as part of the costs of litigation." *Wilborn v. Bank One Corp.,* 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7. "Attorney fees may be awarded, as an exception to the American rule, as a part of the relief granted a petitioner in actions where the losing party has acted in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons." *State ex rel. Gerchak v. Tablack,* 117 Ohio App.3d 222, 226, 690 N.E.2d 93 (7th Dist.1997). A prevailing party in an action is defined as one in whose favor the decision or verdict is rendered and judgment entered. *Marafiote v. Estate of Marafiote*, 7th Dist. No. 14 MA 0130, 2016-Ohio-4809, 68 N.E.3d 238, ¶ 13.

{¶60} Appellee did not specifically seek attorney fees in her motions for contempt, but did seek "* * * such further legal and equitable relief to which the Plaintiff shall be entitled." (6/20/17 Motion for Contempt.) It does appear from the record of the contempt hearing that such fees could be awarded by the court, but the order is silent as to the basis for the award. Moreover, there was no evidence presented at the hearing as to attorney fees, although a hearing on fees may not be required unless required by statute. See, e.g., R.C. 2323.51 (a hearing is required where the fees are a sanction for frivolous conduct.)

{¶61} The trial court in this matter simply ordered Appellee's counsel to provide a statement reflecting his fees for services related to the contempt motions. "The attorney representing the party seeking an award of attorney fees has the burden to introduce into the record sufficient evidence of services performed and the reasonable value thereof to justify reasonable attorney fees in the amount awarded." *Dombroski v.*

Dombroski, 7th Dist. No. 506, 1999 WL 783975, *9 (Sept. 28, 1999) citing *In re Estate of Verbeck,* 173 Ohio St. 557, 559, 184 N.E.2d 384 (1962).

{¶62} There was no evidence presented to the court relative to the services performed by Appellee's counsel and the reasonableness of the fees charged for those services. The trial court's order permitting Appellee's counsel to present a "statement" for services does not meet Appellee's burden, and does not provide an adequate basis for the award of attorney fees in this matter. Accordingly, that portion of the trial court's judgment entry is reversed and remanded for further action.

{¶63} The evidence presented to the trial court supported its finding of indirect criminal contempt. Appellant's thirty-day sentence of incarceration, of which he served seven days, was imposed for his failure to abide by any of the terms of the trial court's July 11, 2017 order and his cavalier disregard for the court's authority. While Appellant appeared at the hearing to suspend his jail time without counsel, Appellant waived counsel. The trial court did not err in proceeding with the hearing granting that motion. However, one of the conditions of release, that Appellant pay Appellee's attorney fees for the contempt action 15 days after presentation of a statement of these fees, was not properly ordered. For these reasons, Appellant's three assignments of error are overruled and the judgment of the trial court is affirmed in part and reversed in part. This matter is hereby remanded to the trial court for the purpose of determining attorney fees.

Donofrio, J., concurs.

Bartlett, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas, of Noble County, Ohio, is affirmed in part and reversed in part. This matter is hereby remanded to the trial court for the purpose of determining attorney fees. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.