

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL FOLEY,
Appellant,
vs.
PATRICIA FOLEY,
Respondent.

No. 82569-COA

FILED

FEB 04 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER VACATING JUDGMENT AND REMANDING

Michael Foley appeals from a post-decree order adopting a hearing master's recommendation in a child support matter. Eighth Judicial District Court, Family Court Division, Clark County; Heidi Almase, Judge.

The parties were divorced in 2009 and pursuant to the decree, Michael was ordered to pay child support to respondent Patricia Foley for their three minor children. After Michael failed to pay child support, the district court ordered a child support hearing master be appointed to address Michael's arrears and ongoing enforcement of the child support order. As relevant here, Michael was held in contempt for failure to pay in 2015. As part of that contempt determination, the district court imposed a term of 25 days of incarceration and ordered that Michael could purge his contempt upon paying \$2,000. Michael appealed that determination. The Nevada Supreme Court vacated the order, in part, concluding that the district court's order failed to comport with due process requirements because the district court failed to make specific findings regarding whether Michael was able to pay the purge amount, citing *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 809, 102 P.3d 41, 49 (2004) (explaining

that a party cannot be sentenced to jail for failure to pay child support unless the trial court determines that the party has the ability to make the payment and willfully refuses to pay, and concluding that the district court must make specific findings regarding the party's indigency). *Foley v. Foley*, No. 69997, 2018 WL 6807187, at *3 (Dec. 21, 2018) (Order Affirming in Part, Vacating in Part, and Remanding).

After remand, the district court directed the child support hearing master to reconsider the contempt determination and to specifically make findings regarding Michael's ability to pay. The hearing master entered a recommendation concluding that Michael was in contempt, ordering him to serve 25 days in jail, and reducing Michael's updated arrears to judgment. After neither party filed an objection to the master's recommendation,¹ it was adopted and entered as a district court order pursuant to NRS 425.3844. This appeal followed.

On appeal, Michael challenges the district court's order holding him in contempt and ordering him to serve jail time, asserting that, as with his prior appeal, the district court failed to make specific findings regarding his indigency and his ability to pay. He further argues that the order

¹Although Michael did not object to the master's recommendation giving rise to the instant order on appeal, as explained below, the issues presented on appeal amount to constitutional violations such that this court may address his arguments. See *Levingston v. Washoe Cty.*, 112 Nev. 479, 482-83, 916 P.2d 163, 166 (1996) (concluding that constitutional issues may be addressed for the first time on appeal), *modified on rehearing on other grounds by Levingston v. Washoe Cty.*, 114 Nev. 306, 956 P.2d 84 (1998); *Barrett v. Baird*, 111 Nev. 1496, 1500, 908 P.2d 689, 693 (1995) (explaining that although the general rule is that the failure to object below precludes appellate review, the appellate courts have the power to address constitutional questions raised for the first time on appeal), *overruled on other grounds by Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 980 (2008).

entered after remand also failed to include a purge amount, making this a criminal, rather than civil, contempt order, and that he is entitled to appointed counsel. While the appellate courts generally review contempt orders for an abuse of discretion, we review constitutional issues de novo. *Lewis v. Lewis*, 132 Nev. 453, 456, 373 P.3d 878, 880 (2016).

Here, as the Nevada Supreme Court held in its order vacating in part and remanding, in Docket No. 69997, the district court's order after remand again failed to comport with due process requirements as it does not include specific findings as to Michael's indigency and his ability to pay. *See Rodriguez*, 120 Nev. at 809, 102 P.3d at 49. Thus, because the district court again failed to make specific findings as to Michael's ability to pay, we vacate the order and remand this matter to the district court for further proceedings.

Moreover, the order entered after remand fails to include a purge amount, such that it appears the district court changed the nature of the contempt proceeding from a civil contempt matter to a criminal contempt matter. *See Lewis*, 132 Nev. at 457, 373 P.3d at 880 (explaining that criminal sanctions are intended to punish and are unconditional, while civil contempt is intended to compel compliance with a court order and is conditional such that compliance will terminate the sanctions). Thus, on remand, the district court must clarify whether this matter is a civil or criminal contempt proceeding and proceed accordingly. Similarly, with regard to Michael's assertion that he is entitled to appointed counsel, the supreme court previously concluded that the district court should consider this issue in the first instance. *Foley v. Foley*, Docket No. 69997 (Order Denying Rehearing, September 20, 2019). Because the district court has yet to consider this argument in light of the specific findings the supreme

court instructed it to make regarding Michael's indigency, we likewise decline to address this question in the first instance. *See Rodriguez*, 120 Nev. at 804-13, 102 P.3d at 45-51 (explaining that the Sixth Amendment's right to counsel only applies to criminal proceedings, but even in civil contempt proceedings, a party may be entitled to counsel in some circumstances).

Accordingly, we

ORDER the judgment of the district court VACATED AND REMAND this matter to the district court for proceedings consistent with this order.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

²Although this court generally will not grant a pro se appellant relief without first providing the respondent an opportunity to file a response, the filing of a response would not aid this court's resolution of this case, and thus, has not been ordered. *See* NRAP 46A(c). Additionally, insofar as Michael raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Heidi Almase, District Judge, Family Court Division
Michael Foley
Patricia Foley
Clark County District Attorney
Eighth District Court Clerk