RENDERED: MAY 21, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001980-MR

ROGER SMITH;
LISA STAYTON;
and GARY BALL — APPELLANTS

v.

APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE DANIEL REID SPARKS, JUDGE
CIVIL ACTION NO. 02-CI-00115

NEW WAVE COMMUNICATIONS, INC.;
MOUNTAIN CITIZEN, INC.;
MARTIN COUNTY-TUG VALLEY
MOUNTAIN CITIZEN, INC.;
MARTIN COUNTIAN, INC.
and THE CITIZEN, INC. — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: GUIDUGLI, MINTON, and VANMETER, Judges.

MINTON, Judge: Roger Smith, Lisa Slayton, and Gary Ball appeal from an order of the Martin Circuit Court convicting them of indirect criminal contempt[1] for publishing the regular edition of

[1] The circuit court's order does not attempt to categorize its contempt finding; but since the purpose of the order is to punish for conduct that occurred outside the presence of the court, then the sanction is criminal contempt. Commonwealth v. Burge, Ky., 947 S.W.2d 805, 808 (1996).

a weekly newspaper on May 22, 2002, in violation of a restraining order issued *ex parte* on the preceding day. The circuit court punished Smith, Slayton, and Ball by fining each of them $500.00. Because we find that the restraining order, as written, did not clearly prohibit the appellants' conduct, we reverse.

For more than a decade before the underlying civil action arose, Slayton published and circulated a weekly newspaper in Martin County, Kentucky, displaying the name THE MOUNTAIN CITIZEN at the top of page one of the paper. During that same time, she used the corporate name "New Wave Communications, Inc." on another page somewhere inside the paper to identify the publisher, and listed the full name of the publication as THE MARTIN COUNTY-TUG VALLEY MOUNTAIN CITIZEN. Slayton was the sole shareholder of that corporation. Smith is identified in the record as a publisher of the paper and Ball as the editor.

On November 1, 2000, the Kentucky Secretary of State administratively dissolved New Wave Communications, Inc., because Slayton failed to file annual reports due the Secretary of State. Slayton maintains that she was oblivious to the administrative dissolution until May 2002 when she began efforts to restore its corporate status.

On May 7 and 8, 2002, John R. Triplett, a Martin County lawyer, who has been the target of the newspaper's

criticism in the past, incorporated several corporations, most of which are identified as appellees on appeal. Triplett named one of his new corporations "New Wave Communications, Inc.," which is, of course, the name of Slayton's dissolved corporate publisher. For other names, Triplett used variations on the newspaper's trade names. Neither Triplett nor any of his new corporations ever published or circulated a newspaper in Martin County.

On May 21, 2002, Triplett filed a petition in the Martin Circuit Court on behalf of his fledgling corporations seeking injunctive relief and damages. This petition, signed by Triplett as counsel, and his affidavit as incorporator were the only papers filed in connection with the request for injunctive relief. In essence, these filings simply asserted that Smith, Slayton, and Ball "were at one time identified with New Wave Communications, Inc.," that they published a newspaper called THE MOUNTAIN CITIZEN, and that their continuing to publish a newspaper using any of Triplett's new corporations' names would cause irreparable injury unless enjoined. Relying on these bare statements and lacking the certification required by Kentucky Rule of Civil Procedure (CR) 65.03 to ensure Triplett's efforts at notifying Smith, Slayton, or Ball of the hearing on the request for injunctive relief, the circuit court signed *ex parte*

the restraining order that Triplett drafted. The restraining order directed that

> [D]uring the pendency of this action, and until further orders of the Court, the Respondents, and all persons acting in concert with them, shall be and hereby are strictly restrained and enjoined from printing or publishing a newspaper under the names: New Wave Communications, Inc.; Mountain Citizen, Inc.; Martin County-Tug Valley Mountain Citizen, Inc.; Martin County Mercury, Inc.; Martin Countian, Inc.; or the Citizen, Inc. and are further strictly enjoined and restrained from doing any violent or illegal act.

On May 23, 2002, Smith, Slayton, and Ball removed the action to federal court and moved the federal court to dissolve the restraining order. Finding a lack of jurisdiction, the federal court remanded the action to the Martin Circuit Court by order entered June 4, 2002, without acting on the merits of the motion to dissolve the restraining order. On June 6, 2002, Smith, Slayton, and Ball moved the circuit court to dissolve the retraining order and scheduled the motion for hearing in the circuit court for June 13, 2002. On June 10, 2002, the circuit court, acting on its own motion, issued a show cause order for Smith, Slayton, and Ball to appear there on June 13, 2002, to explain why they should not be held in contempt of court for violating the restraining order, the circuit court "having learned that [Smith, Slayton, and/or Ball] did publish a newspaper under the name 'Mountain Citizen.'"

According to the Appellants' brief, which was the only brief submitted to this Court, the circuit court held an evidentiary hearing on June 19, 2002, at which Smith, Slayton, and Ball were present and represented by counsel. The appellants did not designate the record of the evidentiary hearing as a part of the record on appeal; therefore, we do not have for our review a videotape or a transcription of any of the evidence adduced at the show cause hearing.

Slayton apparently testified at the contempt hearing; and she did not dispute that she and the others were aware of the restraining order when they circulated the weekly edition of THE MOUNTAIN CITIZEN on its next regular publication date, May 22, 2002. According to affidavits filed in the record, Smith, Slayton, and Ball were informed of the restraining order shortly before the paper went to press on May 21, 2002. Slayton's affidavit explained that when confronted with the impending press deadline and mindful of the newspaper's obligations to its subscribers and advertisers, the appellants thought that they could proceed with publication and satisfy the requirements of the restraining order by removing the corporate name "New Wave Communications, Inc." as the publisher of the paper and by avoiding reference to any of the other corporate names elsewhere in the paper.

In a memorandum opinion entered June 27, 2002, the circuit court acknowledged that it was not the intent of the restraining order to block the publication of the newspaper. However without identifying the actual intent of the restraining order, the court dismissed as disingenuous the appellants' efforts to comply in the May 22, 2002, edition. The circuit court commented that if the appellants were puzzled about conduct prohibited by the language of the order, they could have sought an emergency hearing in the circuit court or in the appellate court, or sought counsel from a lawyer before acting. The opinion concluded that Smith, Slayton, and Ball

> had sufficient knowledge of the surrounding circumstances to lead the Court to conclude that [they] knew, or with due diligence or by reasonable interpretation should have discovered, that the restraining order intended to prohibit the use of the name "Mountain Citizen" in its masthead, whether or not the "Inc." accompanied. For this reason, the Court finds that [Smith, Slayton, and Ball] violated the Court's restraining order by publishing the May 22, 2002 edition of the newspaper under the name of "Mountain Citizen" and [are] therefore in contempt of court.

The circuit court stated that it felt compelled to vindicate its own authority by punishing Smith, Slayton, and Ball for violating the order. The order concluded: "To condone the actions of [Smith, Slayton, and Ball] would be tantamount to promoting and fostering the disrespect and distrust of the

judicial system." The circuit court did not find Smith, Slayton, and Ball in violation for any of the later editions of the paper published under the same name while the restraining order was still in effect. Although the record does not contain a written order to this effect, the restraining order was apparently lifted following the hearing; and no further injunctive relief was granted to protect Triplett's corporations.

CR 65.02 requires that restraining orders "shall be specific in terms and shall describe in reasonable detail [] the act restrained or enjoined." "The rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possibility of the founding of a contempt citation on a decree too vague to be understood."[2] Since this is a criminal contempt case, it is necessary that all elements of the contempt be proven beyond a reasonable doubt in order to convict Smith, Slayton and Ball.[3] In this case, the elements are: the (1) willful (2) violation (3) of an "order specific in terms" and which describes in "reasonable detail [] the act restrained or enjoined." It is the third element that fails as a matter of law.

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[2] Fiscal Court of Jefferson County v. Courier-Journal & Louisville Times Co., Ky., 554 S.W.2d 72, 74 (1977).

[3] Commonwealth v. Pace, Ky.App., 15 S.W.3d 393, 396 (2000).

By its terms, the restraining order under consideration here clearly prohibited Smith, Slayton, and Ball from printing or publishing a newspaper under the corporate names listed in the order. As interpreted by Smith, Slayton, and Ball, the restraining order did not prohibit their use of the newspaper's long-established, non-corporate trade names. Such a reading is consistent with the actual text of the order. Nevertheless, in the contempt order, the circuit court insists that the spirit of its restraining order further communicated an inference that the use of the trade names was also prohibited conduct.[4] However, we agree with Smith, Slayton, and Ball's assertion that theirs was a plausible reading of the restraining order. Since the text of the restraining order does not support the prohibition against the use of any names beyond those identified, it cannot support a conviction for criminal contempt stemming from the use of other names.

As the circuit court correctly observes, those to be bound by an injunctive-type order should not be permitted to dodge criminal contempt by hair-splitting legalism. Therefore, the law provides that when the precise language of an injunction

[4] *But see* Galt House, Inc. v. Home Supply Company, Ky., 483 S.W.2d 107 (1972) (holding that the mere act of incorporation under a particular name by one who has no customers, conducts no real or substantial business and has never held its name out to the public in connection with any going business is not entitled to an injunction to have its corporate name protected against use as a trade name by another).

is unclear, it is appropriate to resort to the context within which the injunction was issued to see how much the parties to be bound knew or reasonably should have known concerning its object and its meaning. A source of background is the relief demanded in the pleadings.[5]

It is impossible to divine from the petition and affidavit filed in the underlying action what legitimate interests were being safeguarded by this restraining order. Moreover, it was issued apparently without notice to Smith, Slayton, and Ball and without any explanation as to the exigency that prevented their being notified ahead of its issuance. Consequently, the appellants were not privy to the discussion with the circuit court that culminated in the issuance of a restraining order that Triplett himself drafted.

Mindful of the power of the weapon of criminal contempt and in light of the peculiar circumstances under which the *ex parte* restraining order issued, we hold that the restraining order failed to satisfy the necessary element of specificity beyond a reasonable doubt to support a criminal contempt conviction. Accordingly, we reverse the circuit court's contempt order.

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[5] Wormald v. Macy, Ky., 349 S.W.2d 199, 201 (1961).

VANMETER, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS.

BRIEF FOR APPELLANTS:

David E. Fleenor
Lexington, Kentucky

NO BRIEF FILED FOR APPELLEES