STATE OF MICHIGAN

COURT OF APPEALS

PASQUALE F. GALBA, JR.,

Plaintiff-Appellant,

v

MACOMB COUNTY CIRCUIT COURT JUDGE,

Defendant-Appellee.

UNPUBLISHED
February 14, 1997

Macomb Circuit Court
No. 194185
LC No. 94-005535
ON REMAND

Before: Corrigan, P.J., and Sullivan* and T.G. Hicks,** JJ.

PER CURIAM.

Plaintiff appeals his sentence of contempt for failing to comply with the circuit court's order to submit a discovery dispute to a special master. This Court affirmed the circuit court's finding of contempt, although Judge White dissented and voted to grant leave (Docket No. 192086, order issued March 4, 1996). Our Supreme Court then remanded this case to this Court for plenary consideration (Docket No. 105780, order issued April 2, 1996). We reverse.

In the underlying action, *Buehler v Czerkis*,[1] the parties disputed discovery matters. On January 22, 1996, the court *sua sponte* ordered the parties to submit their discovery dispute to a special master and to pay the master $250 per hour. The court entered its order on January 24, 1996, and scheduled a proceeding before the master on January 26, 1996. Plaintiff, the attorney for the defendant in the underlying suit, immediately sought reconsideration on January 25, 1996. Essentially, plaintiff's motion for reconsideration was the first opportunity to challenge on the merits the court's *sua sponte* order. Plaintiff's motion pointed out that the court lacked any authority to submit the dispute to a master, much less to do so at an exorbitant hourly rate. The court did not consider the motion for reconsideration before the scheduled hearing in front of the master. At the hearing, plaintiff informed the master that he did not wish to proceed, that he believed the proceeding was improper, and that he had pending in circuit court a motion for reconsideration. The master adjourned the hearing and the parties immediately appeared before the court to present plaintiff's objections. The court stated that it would defer ruling on the motion for reconsideration. The following exchange then occurred:

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.
** Circuit judge, sitting on the Court of Appeals by assignment.

> *The Court:* I asked for a report from the master and, of course, I will make a decision based upon that. A master can't make certain decisions unless both parties agree to it and then it would be binding. I don't want the master to make a decision because he would usurp my authority in this matter. Certainly that's what I'm here for to make certain decisions.
>
> But that being the case, are you going to proceed today, yes or no?
>
> *Plaintiff*: I'm willing to proceed before the Court here.
>
> *The Court:* The Court holds you in Contempt of Court because of your failure to proceed pursuant to Order of this Court, and sentences you to a fine of $100.00 plus the weekend in jail.

The court then ordered plaintiff to be removed from the courtroom and confined in the Macomb County jail.

That same day, plaintiff filed a complaint for habeas corpus with this Court. After initially staying the detention and treating the complaint for habeas corpus as an appeal, this Court affirmed the finding of contempt in an unpublished order, with Judge White dissenting and voting to grant leave to appeal. Plaintiff thereafter sought leave from our Supreme Court, which remanded this case for plenary consideration.

Plaintiff argues that the court should not have convicted him of contempt for objecting to the invalid order. We agree.

Although a court may punish persons for contemptuous disobedience of the court, MCL 600.1701; MSA 27A.1701, that power is not unlimited or nonreviewable. *People v Matish*, 384 Mich 568, 571-572; 184 NW2d 915 (1971). "The power to punish for contempt is awesome and carries with it the equally great responsibility to apply it judiciously and only when the contempt is clearly and unequivocally shown." *Id.* A finding of contempt requires a showing of willful disregard or disobedience of the authority or orders of the court. *Id.* Moreover, a court cannot hold an attorney in contempt merely because he vigorously has asserted his client's interests. *In the matter of Meizlish*, 72 Mich App 732, 736; 250 NW2d 525 (1976). Indeed, to allow contempt in situations of vigorous advocacy would have a "chilling effect of the constitutional right to effective representation and advocacy." *People v Kurz,* 35 Mich App 643, 651; 192 NW2d 594 (1971). Additionally, although courts may punish contemptuous behavior summarily, such punishment is not favored because it does not allow for many of the procedural safeguards necessary for fundamental fairness. *Meizlish, supra* at 739.

The record reflects that the evidence is legally insufficient to support a finding of contempt. Contempt is a willful act that tends to impair the authority of a court. *Pontiac v Grimaldi*, 153 Mich App 212, 215; 395 NW2d 47 (1986). The violation must be shown clearly and unequivocally. We will affirm the findings of the lower court if competent evidence supports them. Criminal contempt

requires a standard of proof beyond a reasonable doubt. *Id.* The proofs do not show that plaintiff was in contempt of court clearly and unequivocally beyond a reasonable doubt. Plaintiff properly appeared at the hearing, which the master adjourned because of plaintiff's objections. Later, the court permitted plaintiff to state his client's position and then merely asked if plaintiff was willing to proceed. When plaintiff replied, the court held him in contempt.

The court never clearly stated that it intended to enforce its order and to require the proceeding to go forward immediately despite plaintiff's objections. It did not advise the parties about what would occur in light of the objections. The judge stated that he would take plaintiff's motion for reconsideration under advisement. Nonetheless, the court expected plaintiff to proceed before the master although the court did not explicitly communicate that expectation. The court's statements on the record were contradictory. The evidence does not show beyond a reasonable doubt that plaintiff attempted willfully to violate a court order. Rather, the record reveals that plaintiff attempted to proceed in the face of two internally inconsistent orders – one taking the motion challenging the court's authority under advisement, the other directing the parties to proceed.

Moreover, the court had no authority to appoint a special master to decide the discovery dispute. *Carson, Fischer, Potts & Hyman v Hyman*, ___ Mich App ___ (Docket No. 174351, issued November 15, 1996). Under Const 1963, art 6, §27, the trial court could not delegate its function of regulating proceedings. *Id.* Masters may be appointed only where specific statutory authority permits such an appointment. See *Lindhout v Ingersoll*, 58 Mich App 446, 453; 228 NW2d 415 (1975). No statute or court rule authorizes the court's appointment of a special master in this case. The parties did not consent to the appointment. The selection of a special master thus was not harmless error under the circumstances. *Id.* at 452-453.

Additionally, summary conviction was improper under the circumstances. After the court held plaintiff in contempt, plaintiff had no opportunity to move for a stay of the proceedings pending appeal of the order appointing the master. Immediate corrective action was not required to "vindicate the court's dignity or authority." *Kurz, supra* at 656. Plaintiff's conduct was not a threat to the administration of justice such that immediate punishment was necessary. *Smith v Common Pleas Court of Detroit*, 106 Mich App 621, 624-625; 308 NW2d 586 (1981). Plaintiff's actions did not interfere with a trial and it appears that no one aside from the parties witnessed the occurrence. Immediate action to restore order in the court was not necessary because the courtroom did not become disorderly at any time. *People v Warriner*, 113 Mich App 549, 554; 317 NW2d 681 (1982). Under the circumstances, summary proceedings were unnecessary.

Next, we reject the claim that plaintiff improperly expanded the record on appeal. We hold that he did not. On the date that plaintiff was imprisoned, his attorney filed a complaint for writ of habeas corpus in this Court. Attached to that complaint were the affidavits of plaintiff and that of his senior partner, who had attempted to negotiate his release from jail. The judge asserts that those affidavits should not have been included for consideration in this appeal because they were not before the lower court. Moreover, the judge contends that plaintiff improperly referred to, and this Court improperly considered, the transcripts from the underlying action in the contempt appeal because the transcripts

pertained to the underlying case, not the contempt case. We disagree. No lower court record for this case exists because the proceeding occurred summarily. Therefore, to review plaintiff's claim, this Court must consider the affidavits and transcripts surrounding the contempt citation. Under these unusual circumstances, inclusion of the affidavits and transcripts from *Buehler v Czerkis* does not improperly expand the record. Were we to hold otherwise, we would have no information upon which to make a ruling.

In view of our resolution of the above issues, the remaining issues are moot.

Reversed.

/s/ Maura D. Corrigan
/s/ Joseph B. Sullivan
/s/ Timothy G. Hicks

[1] The parties ultimately stipulated to dismiss the appeal in *Buehler v Czerkis* (Docket No. 193234, order of dismissal issued December 4, 1996).