

[Cite as *Strauss v. Strauss*, 2010-Ohio-6166.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94129

JULIE A. STRAUSS

PLAINTIFF-APPELLEE

vs.

MARC I. STRAUSS

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED, CONVICTION VACATED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. DR-06-311479

BEFORE: Jones, J., Gallagher, A.J., and Vukovich, J.*

RELEASED AND JOURNALIZED: December 16, 2010

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LARRY A. JONES, J.:

{¶ 1} Appellant Marc I. Strauss (“Marc”), appeals the trial court’s decision finding him guilty of criminal contempt of court. Having reviewed the arguments of the parties and the pertinent law, we hereby reverse the lower court and vacate the convictions.

STATEMENT OF THE CASE AND THE FACTS

{¶ 2} Marc and Julie Strauss (“Julie”) were married on March 31, 2001. During the course of their marriage, the parties had a son, Parker, born October 13, 2002. On July 13, 2006, Julie filed a complaint for divorce with motion for restraining order attached. The trial court issued an ex parte order that restrained Marc from annoying, physically or mentally abusing, molesting, or harassing Julie in any manner. On August 14, 2006, Marc answered the complaint, counterclaimed for divorce, and sought various restraining orders against Julie. The trial court also granted the restraining orders Marc sought.

{¶ 3} Beginning in June 2007, and continuing through October 2009, Julie filed several motions to show cause why Marc should be held in contempt for disregarding the trial court’s orders. Most pertinent to the instant appeal are the motions filed in July 2007. These generally involved Marc’s alleged violations of parental rights regarding holidays and vacation schedule, harassment of Julie, such as appearing at her place of employment, and Marc’s repeated failure to return the minor child to Julie in a timely manner.

{¶ 4} The trial court subsequently consolidated all the motions, and a hearing was conducted on October 20, 2009. After the hearing, the trial court issued a judgment entry, that stated in pertinent part as follows:

“* * * The Court further finds that Plaintiff proved beyond a reasonable doubt that Defendant has violated the Court’s orders in all of the following situations:

(I) going to the marital residence and entering into the house when he knew he was restrained from entering said residence;

(II) confronting and harassing Plaintiff in a parking lot and going to and entering the Plaintiff's place of employment, and

(III) intentionally keeping and failing to return the minor child, Parker, to the Plaintiff on a timely basis.”

{¶ 5} The trial court sentenced Marc to concurrent prison terms of 30 days for each violation as detailed above, but suspended 25 days of each sentence. Thereafter, Marc filed a notice of appeal of the trial court's judgment finding him guilty of criminal contempt and also moved this court for a stay of execution of the trial court's order.

ASSIGNMENT OF ERRORS

“I. The trial court erred in finding appellant guilty of criminal contempt and assessing an unconditional prison sentence without providing appellant the opportunity to purge himself in a civil proceeding where appellant only had reason to believe he was being questioned on issues of civil contempt;

“II. The trial court erred in finding appellant in indirect criminal contempt of court when it never addressed the issue of intent and the uncontradicted evidence showed that appellant's actions throughout were in good faith and appellant never intended any disobedience or disrespect;

“III. Appellant's conviction for contempt is void for want of filing of a charge of criminal contempt with the clerk of court prior to hearing and effecting service;

“IV. The trial court erred by permitting counsel for plaintiff, an interested party in the underlying domestic litigation, to

prosecute a contempt matter it found purely criminal and by assessing costs to appellant and reserving the issue of attorney fees in a criminal proceeding for a later hearing.”

{¶ 6} We will simultaneously address the first and second assigned errors because of their common basis in fact and law. The common thread running through both assigned errors is Marc’s contention that the trial court erred in finding him guilty of criminal contempt.

{¶ 7} Generally, we will not reverse a trial court’s decision in a contempt proceeding unless that court abused its discretion. *Oak Hill Banks v. Ison*, 4th Dist. No. 03CA5, 2003-Ohio- 5547, citing *State ex rel. Ventrone v. Birkel* (1981), 54 Ohio St.2d 461, 377 N.E.2d 780. An “abuse of discretion” connotes that the court’s attitude is unreasonable, arbitrary, or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140; *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028.

{¶ 8} “Contempt of court is defined as disobedience of an order of a court. It is conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions.” *Hueber v. Hueber*, 12th Dist. Nos. CA2006-01-004, CA2006-02-019, CA2006-02-020, 2007-Ohio-913, ¶16, citing *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, 271 N.E.2d 815, paragraph one of the syllabus.

{¶ 9} A court may find the offending party in contempt for either direct or indirect actions that constitute disobedience to an order. *Pirtle v. Pirtle*, 2nd Dist.

No. 18613, 2001-Ohio-1539. While a direct contempt occurs within the court's presence or with the court's personal knowledge of facts relating to the act, indirect contempt is "misbehavior that occurs outside the actual or constructive presence of the court." *Id.* One accused of indirect contempt is entitled to a "hearing on the charge, at which the court must investigate the charge, hear any answer or testimony that the accused makes or offers, and then determine whether the accused is guilty." *Id.*

{¶ 10} Although punishment is inherent in contempt, courts will categorize the penalty as either civil or criminal based on the character and purpose of the punishment. *In re J.M.*, 12th Dist. No. CA2008-01-004, 2008-Ohio-6763, citing *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 416 N.E.2d 610. While criminal contempt is characterized by an unconditional prison sentence, civil contempt is marked by remedial or coercive punishment, doled out for the "benefit of the complainant." *Id.*

{¶ 11} Initially, we note that the trial court found Marc guilty of indirect criminal contempt. Because all the complained-of conduct occurred outside the actual presence of the court and was not something that the court knew of through its first-hand account, the contempt was indirect. The contempt was criminal in nature in that the prison sentence was imposed to operate as punishment for the completed acts of disobedience designed to vindicate the authority of the court. *Brown*, *supra*.

{¶ 12} In cases of criminal contempt, it must be shown that the contemtor intended to defy the court. *In re Estate of Lanning*, 7th Dist. No. 00 CA 110, 2003-Ohio-1438, citing *Midland Steel Prods. Co. v. U.A.W. Local 486* (1991), 61 Ohio St.3d 121, 573 N.E.2d 98, paragraph two of the syllabus. In addition, the offending conduct must constitute an imminent threat to the administration of justice. *Oakwood Village v. Brown*, Cuyahoga App. Nos. 89135 and 89786, 2008-Ohio-3151, citing *Cleveland v. Heben* (1991), 74 Ohio App.3d 568, 599 N.E.2d 766.

{¶ 13} In the instant case, it is undisputed that Marc violated the trial court's order by engaging in conduct that formed the basis of the trial court's contempt findings. However, we conclude from our review of the record that it has not been proven beyond a reasonable doubt that in engaging in the complained-of conduct that Marc intended to defy or impugn the dignity so as to constitute indirect criminal contempt.

{¶ 14} At the hearing on the motion to show cause, after the trial court pronounced his findings of contempt, Marc stated in pertinent part as follows:

“Defendant/Husband: Your Honor, I have sat here and listened to the testimony, I have listened to what you have to say this afternoon, and I want to apologize to the Court for my behavior, and I want to apologize to Julie. I want to apologize to everyone who has been involved in this action or as a result of my actions. The Court has spoken. I am an attorney. I understand what the Court has found. I have done my best fruitfully throughout these proceedings to do what I believe is to protect my family and to protect my son in those circumstances. The incidents that the Court is

referring to, the ones that I have been found in contempt, Your Honor, happened in 2006 and 2007. While we are here in 2009, and I don't believe that the Court found me in contempt of any incidents in 2008 or in this year 2009 * * *. I have been in therapy. I have complied with the court orders. I am continuing to go to therapy. I take medication for my blood pressure. I have three children that I am responsible for. I have three children that I provide loving homes for, and I have a business that I take care of 22 families and the employees of that.” Tr. 163-164.

{¶ 15} As gleaned from the excerpt above, the findings of contempt involved conduct that occurred in 2006 and 2007. The hearing on Julie's consolidated motions to show cause was held in October 2009, approximately two to three years after the complained-of incidents. The record does not contain any evidence that Marc's behavior has continued in the same vein.

{¶ 16} Further, given that the complained-of conduct, occurred outside the presence of the trial court and occurred almost three years removed from the date of the hearing, said conduct does not constitute an imminent threat to the administration of justice. *Oakwood Village*, supra. Consequently, we conclude on the totality of the record before us that the complained-of conduct does not rise to the level of indirect criminal contempt.

{¶ 17} Finally, we conclude that Marc's conduct constituted civil contempt as opposed to indirect criminal contempt. Civil contempts are those violations that are on the surface offenses against the party for whose benefit the order was made. *Ford v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 05AP-357, 2006-Ohio-

2531, citing *In the Matter of Cox* (Dec. 23, 1999), 11th Dist. Nos. 98-G-2183 and 98-G-2184.

{¶ 18} Here, given that Marc's conduct constituted civil contempt because he violated orders that were made for the benefit of Julie, the punishment should have been remedial or coercive in nature. *Lakhi v. Healthcare Choices & Consultants, LLC*, 10th Dist. No. 06AP-806, 2007-Ohio-4127. See, also, *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 555, 2001-Ohio-15, 740 N.E.2d 265, citing *Shillitani v. United States* (1966), 384 U.S. 364, 370, 86 S.Ct. 1531, 16 L.Ed.2d 622. Moreover, any sanction for civil contempt must allow the party who is in contempt an opportunity to purge the contempt. *Ohio Child Support Enforcement Agency ex rel. Sutich v. Segedi*, Cuyahoga App. No. 94309, 2010-Ohio-5360, citing *Carroll v. Detty* (1996), 113 Ohio App.3d 708, 712, 681 N.E.2d 1383.

{¶ 19} In this case, although we conclude that Marc's conduct constituted civil contempt as opposed to indirect criminal conduct, as previously stated, the record does not indicate that said conduct was ongoing at the time the hearing on Julie's motion to show cause was held. As such, at the October 2009 hearing, it became unnecessary to coerce Marc's compliance with orders that were the subject of Julie's 2007 motions to show cause.

{¶ 20} In accordance with the foregoing, we sustain Marc's first and second assigned errors, reverse the trial court's order, and vacate the convictions.

{¶ 21} Our disposition of the first and second assigned errors, renders the remaining assigned errors moot. App.R. 12(A)(1)(C).

Judgment reversed and conviction vacated.

It is ordered that appellant recover from appellee the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, A.J., and
JOSEPH J. VUKOVICH, J., * CONCUR

(*Sitting by assignment, Judge Joseph J. Vukovich, of the 7th District Court or Appeals.)