COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Felton, Judges McCullough and Huff
Argued by teleconference

FELECIA AMOS

v. Record No. 1667-11-4

COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION[*] BY
CHIEF JUDGE WALTER S. FELTON, JR.
AUGUST 7, 2012

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY
Benjamin N.A. Kendrick, Judge

(Felecia Amos, *pro se*, on briefs). Appellant submitting on briefs.

Erin M. Kulpa, Assistant Attorney General (Kenneth T. Cuccinelli, II, Attorney General, on brief), for appellee.

Felecia Amos ("appellant") appeals from her conviction for contempt, in violation of Code § 18.2-456(1), following a summary proceeding in the Circuit Court of Arlington County ("trial court"). Appellant asserts the trial court erred by finding the evidence sufficient to sustain her conviction for contempt. She asserts the trial court erred by punishing her for summary contempt and that the summary proceeding violated her right to due process by failing to afford her notice of the charge against her, a full hearing, assistance of counsel, and the ability to confront witnesses. Because appellant failed to preserve her assignments of error for appeal, and because the ends of justice exception to Rule 5A:18 does not apply, we affirm.

I. BACKGROUND

By final order dated July 30, 2010, the trial court convicted Antonio Amos ("Antonio"), appellant's former husband, of assault and battery of appellant. The trial court sentenced him to

[*] Pursuant to Code § 17.1-413, this opinion is not designated for publication.

six months in jail, suspended for one year on the condition that he not have contact with appellant except for visitation exchanges of their child, and ordered that he not "harass" appellant.

On October 30, 2010, appellant wrote a letter to the Commonwealth's Attorney for Arlington County ("Commonwealth's attorney"), asserting that Antonio violated the terms of the trial court's final order.[1] Appellant asserted that, on two separate dates, Antonio "intimidate[d], harass[ed], and threaten[ed]" her during an exchange of their child for visitation at a fast-food restaurant. She asserted that Antonio repeatedly cursed and threatened her, that she had to ask an individual to escort her to her car because of Antonio's threatening behavior, that Antonio followed her in his vehicle after she left the restaurant with their son, and that he did not stop following her until she pulled over, forcing him to pass her. Appellant wrote that she feared for her life and was afraid that Antonio would harm her. She requested help from the Commonwealth's attorney, stating she did not "have the resources to prevent the continued harassment and threats."[2]

By memorandum dated November 4, 2010, the Commonwealth's attorney sent a copy of appellant's letter to the trial court, requesting that the trial court issue an order to show cause why Antonio's probation should not be revoked and a bench warrant for his arrest "based on the allegations in the attached letter." On December 3, 2010, the trial court issued its order for Antonio

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[1] Appellant indicated in her letter to the Commonwealth's attorney that she also mailed a copy of her letter to the trial court.

[2] Appellant wrote, in part:

> This constant communication and intimidation is causing so much stress for me. I want to believe that the ORDER is not just a piece of paper but carr[ies] the weight and authority as it was stated by the [trial court]--NO EXCEPTIONS. Please do not let my situation become some comment with a bad ending. I have done all that I know how to do. . . . I honestly believe that the threatening behavior is ESCALATING. Help me.

to appear and to show cause why his probation should not be revoked "for failure to comply with the terms of his general good behavior condition as ordered by the [trial] [c]ourt."

The show cause hearing was held on June 10, 2011. The Commonwealth's attorney stated at the hearing that appellant's letter "set[] out the reasons for" the show cause hearing before the trial court.

Appellant appeared and testified in conformity with the allegations contained in her letter to the Commonwealth's attorney dated October 30, 2010. Antonio and United States Army Sergeant Jason Salinas testified in Antonio's defense.[3] Both men testified that Antonio did not speak to, curse at, harass, threaten, or follow appellant during the visitation exchanges in question, and both men confirmed that appellant was not aware that Salinas was a witness to the exchanges. Antonio testified that he videotaped one of the visitation exchanges about which appellant complained. He stated he used a camera mounted to the dashboard of his car. As to the second exchange to which appellant referred in her letter to the Commonwealth's attorney and testimony in court, Antonio testified that prior to entering the restaurant to pick up his son, he "wired" himself with a tape recorder. Sergeant Salinas testified that he was not aware that Antonio recorded the visitation exchanges to which he was a witness.[4]

At the conclusion of the hearing, the trial court dismissed the show cause order against Antonio, stating, "[t]here's no question that [Antonio] has not violated this [c]ourt's orders. But

[3] Antonio was a retired U.S. Army Colonel at the time of the show cause hearing. Salinas testified that his commanding officer asked him to observe Antonio's visitation exchanges with appellant on October 21 and 29, 2010. Salinas did not know Antonio prior to witnessing the visitation exchanges of the child, and Salinas was never under Antonio's command.

[4] The audio recording of the visitation exchange was played for the trial court. The recording did not contain any of the remarks or threats that appellant attributed to Antonio in her letter to the Commonwealth's attorney or in her testimony regarding the incident.

what we do have is a . . . situation that this [c]ourt does not take lightly." The trial court ordered appellant to the podium and stated:

> You have come into this court and made some serious accusations, and you have flat-out lied under oath. And it's very offensive to this [c]ourt, to every person in the legal community what you're doing. You're nothing but a vindictive woman towards this man.
>
> I can understand your dislike for whatever reason. But you will not, as far as this [c]ourt is concerned, use this process to further that vindictiveness.

The trial court then found appellant in summary contempt for "[m]isbehavior in the presence of the court or so near thereto as to obstruct or interrupt the administration of justice." The trial court stated, "I can't think of any more interruption of justice than what you have done deliberately in this courtroom." The trial court then sentenced appellant to ten days in jail and ordered that she be taken into custody immediately. Appellant did not raise any objection at that time to the trial court's ruling.

On June 27, 2011, seventeen days after the trial court found her in contempt, appellant filed a pleading entitled "Motion to Vacate Sentence and Object to This Honorable Courts [sic] Finding."[5] In that pleading, appellant asserted she testified truthfully about the events that took place during the visitation exchanges. She contended the trial court failed to give her an opportunity to "explain, respond and/or object to being held in contempt," to have counsel present, or to have notice and a hearing. She contended the trial court denied her "all her due process rights as afforded under The Constitution of the United States of America." Appellant asserted her conduct should not have been subject to summary contempt proceedings because "it

[5] "All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." Rule 1:1.

was not an open, serious threat to orderly procedure" and fell outside the "scope" of Code § 18.2-456(1).

Appellant did not seek a hearing to argue her motion to vacate, and the trial court never ruled on that motion.

II. ANALYSIS

Appellant asserts the trial court erred by finding the evidence sufficient to sustain her conviction for contempt. She asserts that, even if her testimony was perjured, "[p]erjured testimony, whether written or oral, is not a contemptuous act by itself." Appellant's Br. at 11. Accordingly, she asserts the trial court erred by punishing her for summary contempt and that the summary proceeding violated her right to due process by failing to afford her notice of the charge against her, a full hearing, assistance of counsel, and the ability to confront witnesses. Finally, appellant asserts the trial court "conspired with the Defense Counsel and the Commonwealth of Virginia to prevent [her] from receiving any notice of the potential outcome" and the trial court "should have recused himself" before ruling on her contempt charge. Id. at 16-17.

A.

Rule 5A:18 provides, in pertinent part, that "[n]o ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice."

"To preserve an issue for appeal, appellant must make a contemporaneous objection to the court's ruling." Sabol v. Commonwealth, 37 Va. App. 9, 20, 553 S.E.2d 533, 538 (2001).

Appellant did not object to the trial court's ruling at the summary proceeding.[6] She asserts that her motion to vacate her conviction preserved her arguments for appeal, notwithstanding the trial court's failure to rule on appellant's motion. However, as the Supreme Court recently held in Brandon v. Cox, 284 Va. 251, 726 S.E.2d 298 (2012):

> Brandon filed a motion for reconsideration with a supporting memorandum containing the argument she advances on appeal but . . . [she] failed to obtain a ruling on her motion to reconsider. . . . Nothing in the record indicates that the trial court was made aware that the motion for reconsideration and memorandum in support thereof were filed . . . . Because there is no evidence in the record that the trial court had the opportunity to rule upon the argument that Brandon presents on appeal, it cannot be said that the case can be heard in this Court upon the same record upon which it was heard in the trial court and, therefore, the purpose of Rule [5A:18] is defeated. Thus, we must hold that she has waived her argument by failing to preserve it.

Id. at 256-57, 726 S.E.2d at 301 (footnote omitted).

Because appellant failed to obtain a ruling on her motion to vacate her conviction while the trial court retained jurisdiction over her case, she has waived her arguments on appeal. Rule 5A:18; see also Ohree v. Commonwealth, 26 Va. App. 299, 308, 494 S.E.2d 484, 488-89 (1998) (argument barred from appellate consideration under Rule 5A:18 where appellant did not obtain a ruling from the trial court on post-trial motion to set aside court costs).

B.

To the extent appellant failed to present her arguments to the trial court, she asks that we consider them under the ends of justice exception to Rule 5A:18.

"Whether the ends of justice provision should be applied involves two questions: (1) whether there is error as contended by the appellant; and (2) whether the failure to apply the

[6] Appellant contends she was unable to object to the trial court's ruling because the trial court gave her no opportunity to speak and ordered that she be taken into custody immediately. However, the record on appeal fails to show that the trial court took any action to prevent her from objecting to its ruling prior to the sheriff's deputy taking her into custody.

ends of justice provision would result in a grave injustice." Gheorghiu v. Commonwealth, 280 Va. 678, 689, 701 S.E.2d 407, 413 (2010) (interpreting corollary Supreme Court Rule 5:25). Historically, "[w]e have applied the ends of justice exception of Rule [5A:18] in very limited circumstances including, for example, where the record established that an element of the crime did not occur; a conviction based on a void sentence; [and] conviction of a non-offense." Id. at 689, 701 S.E.2d at 414 (citations omitted).

Here, at the conclusion of the show cause hearing, the trial court convicted appellant of summary contempt for "[m]isbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice." Code § 18.2-456(1).[7] Contrary to appellant's assertion, the trial court did not convict appellant of "conduct (testifying), that was not a criminal offense." Appellant's Br. at 12. The trial court found that appellant "vindictive[ly]" instigated the court's revocation process against Antonio to obtain a baseless conviction against him, purposefully caused Antonio to appear before the trial court to respond to her knowingly false accusations, and disturbed the trial court's ability to effectively administer justice. The trial court found that the show cause order and hearing were entirely premised on appellant's calculated misuse of the judicial system, including her letter to the Commonwealth's attorney imploring his assistance to institute revocation proceedings of Antonio's probation and cause him to be incarcerated.

[7] The dissent, citing Taylor v. Hayes, 418 U.S. 488, 498 (1974), notes that "[s]ummary contempt is viewed with particular disfavor when a court delays punishing a direct contempt until the completion of trial." Infra at 12. We agree that "[t]he usual justification of necessity [of summary punishment] is not nearly so cogent when final adjudication and sentence are postponed until after trial." Taylor, 418 U.S. at 497. However, we note that the Court in Taylor held that, under "proper circumstances, . . . [summary punishment] may be postponed until the conclusion of the proceedings." Id. at 498; see also Scialdone v. Commonwealth, 279 Va. 422, 447, 689 S.E.2d 716, 730 (2010) ("Circumstances will undoubtedly arise when a trial court observes the essential elements of the contemptible conduct, but nonetheless needs to ask questions to clarify some detail.").

Moreover, appellant's "vindictive" misuse of the judicial system to compel her former husband to be brought, without legal justification, before the trial court to show cause why his probation should not be revoked, occurred openly and in the presence of the trial court. Appellant's letter to the Commonwealth's attorney, copied to the trial court, in which she knowingly falsely asserted that Antonio violated his probation, was misbehavior sufficiently near the presence of the trial court that the court could consider it as part of the misconduct that supported appellant's conviction for contempt, in a summary proceeding, pursuant to Code § 18.2-456(1).

Accordingly, appellant cannot demonstrate, as she must to invoke the ends of justice exception to Rule 5A:18, that the trial court convicted her of conduct that was not a criminal offense.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court convicting appellant of contempt, in violation of Code § 18.2-456(1).[8]

Affirmed.

[8] Similarly, the record does not reflect any reason to invoke the good cause or ends of justice exceptions to Rule 5A:18 for appellant's assertion that the trial court conspired with Antonio's counsel and the Commonwealth's attorney to prevent her from receiving notice of the potential outcome of the June 10, 2011 revocation hearing.

McCullough, J., dissenting.

All too often, instead of a search for the truth, trials devolve into a revolting spectacle of transparent lies. In the face of testimony that reeks of perjury, it is understandable that a trial court would hold a witness in contempt. The power of direct contempt, however, is and should be narrowly circumscribed. In my view, summary contempt was not available here.[9] Furthermore, I would hold that appellant's arguments are not procedurally defaulted on these unusual facts.

I. AMOS'S ARGUMENTS ARE NOT PROCEDURALLY DEFAULTED.

Rule 5A:18 requires that a litigant timely object to an action by the trial court; failure to do so precludes the appellate court from considering the issue. The purpose of this contemporaneous objection rule "is to ensure that the trial court has the opportunity to rule intelligently on a party's objections and avoid unnecessary mistrials or reversals." Johnson v. Raviotta, 264 Va. 27, 33, 563 S.E.2d 727, 731 (2002).

The majority holds that Amos's argument is defaulted because she never obtained a ruling on her motion to vacate the contempt order. We have held in some circumstances that a litigant who fails to obtain a ruling at trial has forfeited the point for purposes of appellate review. See Ohree v. Commonwealth, 26 Va. App. 299, 308, 494 S.E.2d 484, 489 (1998). In Brandon v. Cox, 284 Va. 251, 256-57, 726 S.E.2d 298, 301 (2012), the Supreme Court of Virginia recently held that a motion for reconsideration was insufficient to avoid procedural default because no hearing was requested on the motion and neither was a ruling sought from the

[9] This is not to say that Amos cannot be held accountable. The Commonwealth's Attorney, the officer who bears the responsibility for prosecuting violations of the criminal laws of the Commonwealth in a given locality, can choose in his discretion whether the facts warrant charging Amos with perjury. Similarly, Amos might be held in indirect contempt following notice and the opportunity to be heard, as required by the Due Process Clause and precedent from the Supreme Court of Virginia.

trial court. Without such an additional step, beyond the mere filing of the motion for reconsideration, the Court concluded that the motion did not fall within the strictures of Code § 8.01-384(A). That statute provides in relevant part that "[n]o party, *after having made an objection or motion known to the court*, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court." (Emphasis added). In other words, in the wake of Brandon, merely filing a motion for the court to reconsider its ruling in time for corrective action is not sufficient if the reconsideration motion is the first time a litigant raises a particular argument or objection; an additional step must be taken to make sure that this motion is "known to the court."[10] Amos did not seek to place her motion on the docket or otherwise make it known to the trial court. At first blush, Brandon may appear controlling. In my view, that is not so, for two reasons.

First, Code § 8.01-384(A) provides that "if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal." The majority holds that the record does not show that Amos was prevented from speaking following the court's announcement that she was being held in contempt. I read the record differently.

At the conclusion of the hearing, the trial court dismissed the rule to show cause filed by the Commonwealth. The court then stated that it was "not through." The court summoned Amos to come up and noted that "what we do have is a . . . situation that this Court does not take

[10] On one reading, Code § 8.01-384(A) assumes that the act of filing objections or a motion for reconsideration, without more, makes the objection or motion known to the trial court. The statute provides that "[a]rguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts *shall, unless expressly withdrawn or waived, be deemed preserved* therein for assertion on appeal." (Emphasis added). The statute does not expressly require a litigant to place the motion or objection on the docket to make it known to the trial court. Such a reading of the statute, however, is foreclosed by the holding in Brandon.

lightly." In an uninterrupted monologue, the court chided Amos because she had "flat out lied under oath" and the court stated that it would not tolerate Amos using the court process to further her vindictiveness toward her former husband. The court found that Amos had engaged in "[m]isbehavior in the presence of the court or so near thereto as to obstruct or interrupt the administration of justice." The court then stated that:

> I can't think of any more interruption of justice than what you have done deliberately in this courtroom.
>
> And the Court finds you in contempt of court. You're sentenced to jail for ten days.
>
> Remand her into custody, Sheriff.
>
> THE COURT: Call the next case.
>
> (Whereupon, the proceedings at 11:00 a.m. were concluded).

Unsurprisingly, Amos did not object at the time. As I read this record, and applying the plain language of Code § 8.01-384(A), Amos had "no opportunity to object to a ruling or order at the time it is made," and, therefore, "the absence of an objection shall not thereafter prejudice [her] . . . on appeal." Neither Brandon nor Ohree address that portion of the statute and, therefore, do not control.

Applying procedural default in this circumstance is problematic for a second reason. We expect lawyers or *pro se* litigants to come to court prepared and to be aware of the rules. An adversarial system of justice requires as much to function properly. Therefore, if a *party* does not object, that failure to timely object ordinarily will foreclose appellate review of the issue for which there was no timely objection. Here, Amos was a witness, not a party. To expect parties to come to court prepared to timely object is sensible enough. To expect *a witness* to master the nuances of due process and summary contempt versus indirect contempt is to expect the impossible. Rule 5A:18 presupposes that the person who is expected to object is an attorney or a *pro se* litigant rather than a witness and, consequently, the procedural bar does not apply here.

II. SUMMARY CONTEMPT WAS NOT APPROPRIATE BASED ON THE TESTIMONY OF A WITNESS, EVEN IF THAT TESTIMONY IS PERJURED.

The exercise of the contempt power "'is a delicate one and care is needed to avoid arbitrary or oppressive conclusions.'" Scialdone v. Commonwealth, 279 Va. 422, 442, 689 S.E.2d 716, 727 (2010) (quoting Cooke v. United States, 267 U.S. 517, 539 (1925)). Summary contempt is reserved for "exceptional circumstances . . . such as acts threatening the judge or disrupting a hearing or obstructing court proceedings." Vaughn v. City of Flint, 752 F.2d 1160, 1167 (6th Cir. 1985). The United States Supreme Court has held that holding a witness in contempt based on that witness' testimony alone violates due process. In re Oliver, 333 U.S. 257, 284 (1948); see also Ex parte Hudgings, 249 U.S. 378 (1919) (court lacks the power to hold a witness in summary contempt based on untruthful testimony; the individual held in contempt must also harbor an obstructive intent). Summary contempt is viewed with particular disfavor when a court delays punishing a direct contempt until the completion of trial. See Taylor v. Hayes, 418 U.S. 488, 498 (1974). In that situation, "it is much more difficult to argue that action without notice or hearing of any kind is necessary to preserve order and enable [the court] to proceed with its business." Id. It is clear from the record that the trial court held Amos in contempt based on her testimony, testimony that the court believed (not without reason) was perjured. On these facts, holding Amos in summary contempt was error. I would, therefore, reverse the judgment below.[11]

Accordingly, I respectfully dissent.

[11] The fact that Amos impelled the Commonwealth to file a show cause does not change the answer. Summary contempt applies when the conduct in question occurs "'in open court, in the presence of the judge . . . where all of the essential elements of the misconduct [were] actually observed by the court.'" Scialdone, 279 Va. at 444, 689 S.E.2d at 728 (quoting In re Oliver, 333 U.S. at 275). Amos's drafting and mailing of a letter to the Commonwealth Attorney, with a copy to the court, in which she detailed the allegations against her former husband, did not occur in the presence of the court.