NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
FEB 26 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JEFFREY S. SIIRTOLA, Appellant.	2 CA-CR 2007-0292 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200700602

Honorable Ann Littrell, Judge
Honorable Wallace R. Hoggatt, Judge

SPECIAL ACTION JURISDICTION ACCEPTED;
RELIEF DENIED; TRIAL COURT ORDER AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan
Tucson
Attorneys for Appellee

Law Office of Jeffrey S. Siirtola
By Jeffrey S. Siirtola
Sierra Vista
Attorney for Appellant

P E L A N D E R, Chief Judge.

¶1 Attorney Jeffrey Siirtola appeals from the trial court's order (by Judge Hoggatt) finding Siirtola guilty of contempt for violating the juvenile court's order (by Judge Littrell) to participate in a settlement conference in good faith. After a hearing on the contempt citation, the trial court fined him $250. On appeal, Siirtola contends there was insufficient evidence to support his conviction for criminal contempt. Finding that we lack jurisdiction of the appeal, in our discretion we treat the appeal as a petition for special action, accept special action jurisdiction, but deny relief.

Background

¶2 In October 2006, Siirtola represented a mother in a juvenile court dependency proceeding. The parties participated in settlement negotiations on October 20, 2006. When they failed to resolve the matter, they agreed to continue good-faith negotiations the following week. The parties had a contested guardianship hearing scheduled before the court on October 27, 2006. "In lieu of that," however, the parties agreed to meet again on that date to "negotiate in good faith" toward "a resolution that [they could] announce to the court." Pursuant to the parties' agreement, the juvenile court scheduled a "continued settlement conference" for October 27 at 1:30 p.m. It was from that order that this contempt proceeding arose.

¶3 Siirtola had two Motor Vehicle Division (MVD) hearings also scheduled on October 27 at 2:00 and 3:00 p.m. for a different client. Siirtola did not file in juvenile court a motion to continue or a notice of calendar conflict because, he later testified, "it would have created logistical difficulties" for the parties. On the afternoon of October 27, Siirtola

arrived for the juvenile court settlement conference. During the first break, apparently taken at Siirtola's request, he informed the other parties of his 2:00 MVD hearing, left the court to attend that hearing, and returned about fifteen minutes later. Before 3:00, he asked for a second break, told one attorney where he was going, left to attend the second MVD hearing, and was absent for thirty to forty minutes. The other parties left before he returned to juvenile court.

¶4 After counsel for the children involved in the dependency proceeding filed a petition to hold Siirtola in contempt, the juvenile court ordered him "to show cause why the Court should not hold him in contempt of the Court's order entered October 20, 2006." The contempt proceeding was reassigned to Judge Hoggatt, who held an evidentiary hearing in July 2007 at which Siirtola testified. He said he had not realized there was a scheduling conflict between the settlement conference and his MVD hearings until the weekend after October 20. Siirtola also testified he had intended to accommodate both of his clients by appearing at the MVD hearings while also representing the mother in the settlement negotiations in juvenile court.

¶5 The trial court found Siirtola had "willfully disobey[ed] a lawful order of the court to participate in good faith in the settlement conference on October 27, 2006."[1] At a later sentencing hearing, the court noted Siirtola had breached his "duty to make sure that he . . . ha[d] enough time to devote to a settlement conference to see it through to the end unless

[1]There were two other allegations of criminal contempt arising from Siirtola's failure to appear at a November pretrial hearing, but the trial court found him "not guilty" of those allegations.

excused by the judge who ordered the settlement conference or excused by agreement of all parties." The court then fined him $250, to be paid to the clerk of the court. This appeal followed.

I. Jurisdiction

¶6 We first address the state's argument that we lack jurisdiction because contempt orders under A.R.S. § 12-864 are not appealable.[2] *See Pace v. Pace*, 128 Ariz. 455, 456-57, 626 P.2d 619, 620-21 (App. 1981). In his reply brief,[3] Siirtola maintains we have jurisdiction because he was found guilty of criminal contempt pursuant to A.R.S. § 12-861. That statute, entitled "Criminal contempt defined," provides:

> A person who wilfully disobeys a lawful writ, process, order or judgment of a superior court by doing an act or thing therein or thereby forbidden, if the act or thing done also constitutes a criminal offense, shall be proceeded against for contempt as provided in [A.R.S.] §§ 12-862 and 12-863.

---

[2]Section 12-864 provides:

> Contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, and contempts committed by failure to obey a lawful writ, process, order, judgment of the court, and all other contempts not specifically embraced within this article may be punished in conformity to the practice and usage of the common law.

[3]In his opening brief, Siirtola failed to state the basis for this court's jurisdiction, as Rule 31.13(c)(1)(iii), Ariz. R. Crim. P., requires. In his prior "Memorandum Establishing Appealability of Order," filed in October 2007 at this court's request, Siirtola asserted, without citing any authority, that he had "a right to direct appeal" because "this case involves criminal contempt/conviction issues." As discussed below, that assertion is incorrect.

Section 12-863(D) provides for direct appeal from criminal contempt orders "as in criminal cases." Although the trial court apparently found Siirtola guilty of criminal contempt,[4] we conclude the order is not appealable under § 12-863(D).

¶7 Generally, there are two categories of contempt—civil and criminal. *State v. Cohen*, 15 Ariz. App. 436, 440, 489 P.2d 283, 287 (1971). If the act at issue "obstruct[s] the administration of justice or tend[s] to bring the court into disrepute," and if "punishment is inflicted for the primary purpose of vindicating public authority," then the contempt order is considered criminal in nature. *Id.*; *see also Korman v. Strick*, 133 Ariz. 471, 474, 652 P.2d 544, 547 (1982); *Hirschfeld v. Superior Court*, 184 Ariz. 208, 211, 908 P.2d 22, 25 (App. 1995). But if the citation results from one's "failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party," and if the primary purpose of the contempt order is remedial in nature—to coerce a party's compliance with a court order—then it is considered civil contempt. *Cohen*, 15 Ariz. App. at 440, 489 P.2d at 287; *see also Shillitani v. United States*, 384 U.S. 364, 369-70 (1966). Here, because the trial court's imposition of a fine was purely punitive in nature, rather than coercive or remedial, and because Siirtola was unable to purge himself or otherwise avoid the fine by performing some future act, the order in question may be categorized as one for criminal contempt. *See Karman*, 133 Ariz. at 473-74, 652 P.2d at 546-47; *Hirschfeld*, 184 Ariz. at 211, 908 P.2d at 25.

---

[4]The trial court eventually ruled that Siirtola "willfully disobeyed a lawful order of the [Juvenile] Court to participate in good faith in the Settlement Conference on October 27, 2006, in violation of A.R.S. §§ 12-861 and 12-863[,] a Class 2 misdemeanor." *See* n.6, *infra*.

¶8 Not all criminal contempt orders, however, are appealable under § 12-863(D). *See State v. Mulligan*, 126 Ariz. 210, 216, 613 P.2d 1266, 1272 (1980). Rather, "[i]f a contempt is criminal, but not within the bounds of [§] 12-861, i.e., the contemptuous act is not a criminal offense by itself, the provisions of Rule 33, [Ariz. R. Crim. P.,] are applicable." *Riley v. Superior Court*, 124 Ariz. 498, 499, 605 P.2d 900, 901 (App. 1979). In other words, "[i]n order for § 12-861 to apply, the allegedly contemptuous conduct not only must violate a court order, the conduct also must constitute a crime in itself." *Ottaway v. Smith*, 210 Ariz. 490, ¶ 7, 113 P.3d 1247, 1249 (App. 2005) (citation omitted); *State v. Verdugo*, 124 Ariz. 91, 94, 602 P.2d 472, 475 (1979); *see also* Ariz. R. Crim. P. 33.1 cmt. (rule "applicable to all types of contempt except the comparatively narrow class of direct criminal contempts covered by . . . §§ 12-861 to -863").

¶9 Here, Siirtola's failure to participate in good faith in the settlement conference did not itself "constitute[] a criminal offense." § 12-861.[5] Thus, §§ 12-861 through 12-863 do not apply.[6] *See Ottaway*, 210 Ariz. 490, ¶ 7, 113 P.3d at 1249. Rather, § 12-864 and Rule

---

[5]In a footnote in his reply brief, Siirtola suggests for the first time his conduct "could certainly be considered a criminal offense pursuant to A.R.S. § 13-2810[(A)(1)]." But that argument is waived because Siirtola failed to raise it in his opening brief. *See Nelson v. Rice*, 198 Ariz. 563, n.3, 12 P.3d 238, 242 n.3 (App. 2000). In addition, the record does not clearly reflect that Siirtola's conduct here satisfied the requisite elements of § 13-2810(A)(1); nor does he adequately develop any such argument. *See State v. Moody*, 208 Ariz. 424, n.11, 94 P.3d 1119, 1154 n.11 (2004).

[6]After Siirtola had filed his appeal, the trial court amended its final order to state that Siirtola was "guilty of the offense of having violated the Court's order[] of October 20, 2006 . . . in violation of A.R.S. §§ 12-861 and 12-863." But that statement does not provide this court with jurisdiction when Siirtola did not commit a criminal offense separate from the contempt finding. *See Ottaway*, 210 Ariz. 490, ¶ 7, 113 P.3d at 1249.

33.1 are applicable. *See Verdugo*, 124 Ariz. at 94, 602 P.2d at 475; *Riley*, 124 Ariz. at 499, 605 P.2d at 901; *see also Van Baalen v. Superior Court*, 19 Ariz. App. 512, 513, 508 P.2d 771, 772 (1973) (criminal contempt order for attorney's failure to appear at trial governed by § 12-864 and not appealable). And this court generally lacks jurisdiction over appeals from contempt orders falling within § 12-864.[7] *See Riley*, 124 Ariz. at 499, 605 P.2d at 901; *Haggard v. Superior Court*, 26 Ariz. App. 162, 163, 547 P.2d 14, 15 (1976) (appellate court lacked jurisdiction over appeal from contempt judgment and fine imposed for attorney's failure to appear at scheduled hearings); *Van Baalen*, 19 Ariz. App. at 513, 508 P.2d at 772.

¶10 Citing *Ong Hing v. Thurston*, 101 Ariz. 92, 416 P.2d 416 (1966), Siirtola argues "'an act' can invoke the provisions" of both §§ 12-861 and 12-864. And, he contends, because party litigants initiated the contempt proceedings in this case, the trial court's finding of contempt "is governed as a criminal appeal." *See Ong Hing*, 101 Ariz. at 97-98, 416 P.2d at 421-22 (§§ 12-861 through 12-863 and 12-865 apply when party litigant initiates contempt proceeding). But, as our supreme court later clarified, even when the act can be categorized as both civil and criminal contempt, § 12-861 is limited to criminal contempts that are also crimes. *Verdugo*, 124 Ariz. at 93-94, 602 P.2d at 474-75. Thus, § 12-861 only applies to "an act forbidden by court order which also constitute[s] a criminal offense." *Van Baalen*, 19 Ariz. App. at 513, 508 P.2d at 772.

---

[7]Unlike the situation presented in *Green v. Lisa Frank, Inc.*, No. 2 CA-CV 2008-0028, 2009 WL 303787 (Ariz. Ct. App. Jan. 20, 2009), the contempt order at issue here did not constitute a final, statutorily appealable judgment, *id.* ¶¶ 15-16, in which one party's liability and claims were "finally determined." *Id.* ¶ 17.

¶11 In addition, despite the trial court's finding that Siirtola violated § 12-861, he did not actually commit an act forbidden by a court order here. Rather, he failed to comply with the juvenile court's order to participate in a settlement conference. For all of these reasons, we lack jurisdiction over this appeal. *See Haggard*, 26 Ariz. App. at 163, 547 P.2d at 15; *Van Baalen*, 19 Ariz. App. at 513, 508 P.2d at 772; *In re Anonymous*, 4 Ariz. App. 170, 171, 418 P.2d 416, 417 (1966) (no jurisdiction over appeal from contempt order for attorney's failure to appear at hearing).

¶12 In his reply brief, Siirtola alternatively urges us to accept special action jurisdiction. The state acknowledges this court may treat the appeal as a special action but does not address whether we should. In our discretion, because Siirtola has no "equally plain, speedy, and adequate remedy by appeal," Ariz. R. P. Spec. Actions 1(a), we do so and accept jurisdiction here. *See Danielson v. Evans*, 201 Ariz. 401, ¶ 35, 36 P.3d 749, 759 (App. 2001) (treating appeal from civil contempt order as petition for special action and accepting jurisdiction); *Hirschfeld*, 184 Ariz. at 209, 908 P.2d at 23; *Riley*, 124 Ariz. at 499, 605 P.2d at 901 (accepting special action jurisdiction of criminal contempt order under § 12-864).

II. Sufficiency of the evidence

¶13 Siirtola argues there was insufficient evidence to support a finding of proof beyond a reasonable doubt that he violated the juvenile court's order regarding the continued settlement conference. Rule 33.1, Ariz. R. Crim. P., provides in relevant part, "Any person who wilfully disobeys a lawful writ, process, order, or judgment of a court by doing or not

doing an act or thing forbidden or required . . . may be held in contempt of court." "Noncompliance with a court order to appear at a given time is not in itself criminal contempt unless the failure to appear was wilful." *Hamilton v. Municipal Court*, 163 Ariz. 374, 377, 788 P.2d 107, 110 (App. 1989); *see also Riley*, 124 Ariz. at 499, 605 P.2d at 901 ("To be judged guilty of criminal contempt, it must be found that a defendant acted in a wilful manner."). And, "[t]he burden of proof, both as to the act committed and the intent, is that of proof beyond a reasonable doubt." *Riley*, 124 Ariz. at 499, 605 P.2d at 901; *see also Cohen*, 15 Ariz. App. at 440, 489 P.2d at 287.

¶14 We do not reweigh the evidence presented below "but merely . . . decide whether substantial evidence exists to support the decision of the trial court." *Hamilton*, 163 Ariz. at 378, 788 P.2d at 111. "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980); *see also State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). "We will reverse a conviction based upon insufficiency of the evidence only when there is a complete absence of probative facts to support it." *State v. Marshall*, 197 Ariz. 496, ¶ 30, 4 P.3d 1039, 1047 (App. 2000).

¶15 Siirtola claims the evidence did not support the trial court's finding that he wilfully or intentionally impeded the settlement negotiations because he had advised all parties of his first MVD hearing and his testimony established that he had intended to

accommodate all of the parties. Siirtola was the only witness who testified at the evidentiary hearing. As the state points out, however, "[t]he trial court is not bound to accept as true the uncontroverted testimony of an interested party." *Hamilton*, 163 Ariz. at 377, 788 P.2d at 110; *see also Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, ¶ 12, 9 P.3d 314, 318 (2000).

¶16 When the juvenile court accepted the parties' agreement and ordered them to continue their settlement discussions on October 27, the parties had agreed to return and "negotiate in good faith." In its finding of contempt, the trial court noted that a hearing on the afternoon of October 27 in the dependency proceeding had been scheduled long before and that Siirtola had had an opportunity in September to move to continue either the MVD hearings or the October 27 dependency hearing but had failed to do so. Additionally, Siirtola admitted he had realized there was a conflict one or two days after October 20. That gave him five business days to inform the other parties of his conflict or move for a continuance. He failed to do either. And, according to Siirtola, he left the settlement negotiations twice, once for fifteen minutes and the second time for thirty minutes. Although he had informed the parties about the first MVD hearing, he only told one attorney about the second one, hoping that she would communicate the reason for his absence to the others. From this evidence, the trial court could reasonably conclude beyond a reasonable doubt that Siirtola acted wilfully in failing to fully participate and negotiate in good faith at the settlement conference. *Cf. Hamilton*, 163 Ariz. at 377-78, 788 P.2d at 110-11 (court's finding of contempt upheld when attorney failed to resolve scheduling conflict between trials).

Disposition

¶17 Treating this appeal as a petition for special action and accepting jurisdiction of it, we deny Siirtola's request for relief and affirm the trial court's contempt order.

¶18

_____
JOHN PELANDER, Chief Judge

CONCURRING:

_____
JOSEPH W. HOWARD, Presiding Judge

_____
PHILIP G. ESPINOSA, Judge