DISTRICT OF COLUMBIA COURT OF APPEALS

No. 00-CM-1438

ALASSANE BA, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the
District of Columbia
(M-5442-00)

(Hon. Tim Murphy, Trial Judge)

(Submitted May 9, 2002 Decided June 6, 2002)

William G. Dansie, appointed by the court, was on the brief for appellant.

Roscoe C. Howard, Jr., United States Attorney, and *John R. Fisher*, *Mary-Patrice Brown*, *Anne Park*, and *Susan H. Rhee*, Assistant United States Attorneys, were on the brief for appellee.

Before REID and GLICKMAN, *Associate Judges*, and KERN, *Senior Judge*.

REID, *Associate Judge*: Appellant Alassane Ba was convicted of violation of a civil protection order ("CPO") under D.C. Code §§ 16-1004, -1005 (2001) at a bench trial.[1] On

[1] D.C. Code § 16-1005 provides, in pertinent part:

> (d) A protection order issued pursuant to this section shall be effective for such period up to one year as the Family Division may specify, but the Family Division may, upon motion of any party to the original proceeding, extend, rescind, or modify the order for good cause shown.

(continued...)

appeal, he contends that his reconciliation with the complainant after the issuance of the order effectively vacated the CPO and provided him with a valid defense, or at least precluded a finding that he wilfully violated the order.

FACTUAL SUMMARY

The government's evidence presented in this case shows that on December 29, 1999, Ms. Lashance Howard obtained a consent CPO against her ex-boyfriend of four years, Mr. Ba. The CPO, which was effective for a twelve-month period, ordered Mr. Ba to stay at least 100 feet away from Ms. Howard, her home and her workplace and prohibited him from contacting her. In January 2000, Ms. Howard and Mr. Ba reconciled. Mr. Ba testified that they were at times living together during this period. In late March 2000, the renewed relationship ended, but the two occasionally had arguments over the telephone. Despite the termination of the renewed relationship, towards the end of March, Mr. Ba visited Ms. Howard at her workplace. She called the police.[2] From that time until May 13, 2000, there

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[1](...continued)

> (f) Violation of any temporary or permanent order issued under this subchapter and failure to appear as provided in subsection (a) shall be punishable as contempt.

[2] Apparently, no charges were filed relating to this encounter.

was no communication between Mr. Ba and Ms. Howard.[3]

On May 13, 2000, Ms. Howard received a phone call at approximately 2:20 a.m. The caller hung up without speaking. Ms. Howard's caller identification box informed her that the call came from a pay phone; she then called Officer Wayne David who had previously responded to her complaint about Mr. Ba. While she was waiting for Officer David, she looked out of a window of her residence and observed a car that resembled Mr. Ba's. Officer David arrived about thirty minutes later. Ms. Howard went outside, and told the officer that she thought she saw Mr. Ba's car, but "had heard nothing from him for the last 20 minutes or so."

After Officer David left, and as Ms. Howard "was putting the key in the gate" to re-enter, Mr. Ba appeared, approached and came "within six feet" of Ms. Howard. As Ms. Howard "tried to get in the door," Officer David returned and inquired whether the man standing near Ms. Howard was Mr. Ba. When Ms. Howard "replied yes," the officer "pulled out his weapon." At that time, Mr. Ba was about "ten feet, twelve feet" from Ms. Howard. Officer David arrested him.

Mr. Ba testified that he went to Ms. Howard's home on May 13, 2000, "just to talk to

[3] Mr. Ba attempted to vacate the CPO. He maintains that under advice from a clerk in the trial court, he sought and was granted a CPO against Ms. Howard. Ms. Howard testified that Mr. Ba obtained the CPO the day after he came to her workplace.

her . . . ." When he "walked toward her . . ., and . . . [said], how you can do this[,] . . . she started screaming." At that point, the officer intervened and arrested him.

At the end of the trial, Mr. Ba was found guilty beyond a reasonable doubt of violation of the CPO, and sentenced to ninety days in jail. In finding Mr. Ba guilty, the trial judge said, in part:

> The Court finds that at the date and time in question you did in fact violate the protective order. The Court was very sympathetic to the situation right up to the March date, it might very well have not been convinced beyond a reasonable doubt. [Ms. Howard's] conduct is not very commendable, nor is yours, although I, the Court credits her testimony . . . . The Court is satisfied that going at the time of night to establish a relationship or conduct after six weeks so egregious so that it shows a willful violation of the order and finds you guilty as charged.

ANALYSIS

Mr. Ba primarily contends that Ms. Howard consented to the violation of the CPO when they reconciled shortly after the CPO was issued against him. Thus, he asserts, the CPO no longer had legal effect when he entered her property in May. Furthermore, he maintains that Ms. Howard's consent is a valid defense to all subsequent violations of the December 29, 1999, CPO. The government in essence argues that this court should conclude that reconciliation does not void a CPO because to hold otherwise "would undermine the

court's authority in the issuance of [CPOs] and render enforcement of the orders impossible."

Under D.C. Code § 16-1005 (f) and (g), violation of a CPO is punishable as criminal contempt. We may not reverse the trial court's findings of criminal contempt "'unless they are without evidentiary support or plainly wrong.'" *Jones v. Harkness*, 709 A.2d 722, 723 (D.C. 1998) (quoting *In re Vance*, 697 A.2d 42, 44 (D.C. 1997) (internal quotation marks and other citation omitted)). "'[W]e must view the evidence in the light most favorable to sustaining the judgment.'" *Id*. However, "[w]hether the acts in which the defendant was found to have engaged constitute criminal contempt . . . is a question of law, and we review the trial court's resolution of that question *de novo*." *Fields v. United States*, 793 A.2d 1260, 1264 (D.C. 2002) (citing *Brooks v. United States*, 686 A.2d 214, 219 (D.C. 1996)). To establish the elements of criminal contempt, the government must present evidence proving beyond a reasonable doubt that defendant engaged in: "'(1) willful disobedience (2) of a court order (3) causing an obstruction of the orderly administration of justice.'" *Fields, supra*, 793 A.2d at 1264 (quoting *Swisher v. United States*, 572 A.2d 85, 89 (D.C. 1990) (per curiam) (other citation omitted)); *Jones*, *supra*, 709 A.2d at 723.

The purpose of the CPO proceeding is to protect the moving party, rather than to punish the offender. *Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. 1991). From this premise, as the trial court recognized, Mr. Ba arguably had a valid defense of consent when

he and Ms. Howard reconciled between January and March 2000.[4] Ms. Howard testified that there were times when she would stay at Mr. Ba's residence after the CPO was entered. Thus, arguably, Mr. Ba and Ms. Howard temporarily reconciled and that reconciliation was voluntary.

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[4] Criminal Jury Instructions for the District of Columbia, No. 5.18 (1993) provides:

> Evidence has been introduced that the complainant may have consented to the defendant's actions. If the complainant voluntarily consented to [the act] [description of the act], or the defendant reasonably believed the complainant was consenting, the crime of [_____] has not been committed.
>
> The complainant may express consent in words, or the complainant's actions or inaction may imply consent.
>
> The government must prove beyond a reasonable doubt that the complainant did not consent to the acts, or that the complainant's consent was not voluntary. If the government fails to prove there was no voluntary consent, you must find the defendant not guilty.

In addition, the Model Penal Code provides, in pertinent part:

> The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or *precludes the infliction of the harm or evil sought to be prevented by the law defining the offense*.

Model Penal Code § 2.11 (1) (Proposed Official Draft 1962) (emphasis added).

The Model Penal Code also specifically provides that the defense of consent is inappropriate where: "[consent] is given by a person whose improvident consent is sought to be prevented by the law defining the offense. . ."

Model Penal Code § 2.11 (3) (c).

However, consent during the January to March 2000 period does not demonstrate consent after late March 2000. Indeed, the evidence establishes, beyond a reasonable doubt, that Ms. Howard revoked her consent to violation of the CPO. As of late March, Ms. Howard and Mr. Ba had no consensual contact. In fact, according to the undisputed evidence, Mr. Ba tried to approach Ms. Howard at work and she reacted by calling the police. At this point, Ms. Howard's consent to the violation of the CPO was effectively revoked.

Relying upon decisions in the Washington Supreme Court and a New Jersey intermediary court, the government argues that consent can never be a defense to a violation of a CPO. These cases, however, involve court orders that explicitly provided that consent cannot be a defense. *State v. Dejarlais*, 969 P.2d 90 (Wash. 1998) (en banc); *State v. Washington*, 726 A.2d 326 (N.J. Super. Ct. Law Div. 1998). In *Dejarlais*, the court noted that the applicable statute itself precluded the defense of consent. *Dejarlais*, 969 P.2d at 92 (ruling that "allowing consent as a defense . . . would undermine . . . [the Legislature's] intent.");[5] *cf., Washington, supra* (noting that court order eliminated defense of consent).[6] In

[5] The relevant statute in *Dejarlais* provided, in pertinent part:

> The order for protection form shall include, in a conspicuous location, notice of criminal penalties resulting from violation of the order, and the following statement: "*You can be arrested even if the person or persons who obtained the order invite or allow you to violate the order's prohibitions. The respondent has the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application.*"

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this case, neither the legislative history nor the express language of the statute precludes the defense of consent. *See Russell v. United States*, 698 A.2d 1007, 1013 (D.C. 1997).[7] Furthermore, the text of the CPO was similarly silent on the defense of consent.[8]

The government also warns that a defense of consent would undermine the court's authority in issuing such orders.[9] However, the court's authority, in these matters, extends

[5](...continued)

Id. at 92 (quoting RCW 26.50.035 (1)(c)) (emphasis in original).

[6] The restraining order in the New Jersey case stated: "THIS ORDER CANNOT BE CHANGED BY EITHER PARTY WITHOUT OBTAINING A WRITTEN COURT ORDER. IF YOU WISH TO CHANGE THE TERMS OF THIS ORDER, AND/OR RESUME LIVING TOGETHER THE PLAINTIFF MUST APPEAR BEFORE THIS COURT FOR A REHEARING." *Washington*, 726 A.2d at 329 (emphasis in original).

[7] In *Russell*, *supra*, we said:

> [W]e think the Supreme Court made it quite clear that when a defendant raises an affirmative defense, and evidence has been presented by either the defendant or the government which is relevant to that defense, the [factfinder] must be free to consider that evidence, unless the legislature has properly provided otherwise, in connection with its determination whether the government has proven the elements of the offense beyond a reasonable doubt.

Id. at 1013.

[8] The court order provides: "ANY AND EVERY FAILURE TO COMPLY WITH THIS ORDER IS PUNISHABLE AS CRIMINAL CONTEMPT AND/OR AS A CRIMINAL MISDEMEANOR . . . ." (Emphasis in original).

[9] We do agree that an informal reconciliation by the parties does not, by itself, operate to void or abrogate a CPO. The CPO is a court order that remains in effect according

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only as far as the legislature allows in D.C. Code §§ 16-1002, -1005 (2001). In addition, when both of the involved parties frustrate the purpose of a CPO, inference of a legislative mandate to enforce the order may not be warranted.

Nonetheless, Mr. Ba's contention that there was insufficient evidence to establish his violation of the CPO is unpersuasive under the circumstances of this case. Therefore, we need not decide the precise issue presented by the government, whether consent is a defense to violation of a CPO. Here, the trial court found that notwithstanding the earlier reconciliation, Mr. Ba's conduct in violation of the CPO on the night of May 13, 2000, was willful, thus causing an obstruction of the orderly administration of justice. *See Fields, Jones, supra*. Consequently the trial court's findings are not "without evidentiary support or plainly wrong." *Bethard v. District of Columbia*, 650 A.2d 651, 654 (D.C. 1994) (per curiam).

Accordingly, for the foregoing reasons, we affirm the judgment of the trial court.

So ordered.

[9](...continued)
to its terms unless the court formally modifies or terminates it. D.C. Code § 16-1005 (d) (2001).