IN THE COURT OF APPEALS OF IOWA

No. 3-174 / 12-0493
Filed March 27, 2013

STATE OF IOWA
EX REL ROSLYN MCCLURE
Plaintiff/Appellant,

vs.

LUKE MCCLURE, SR.,
Defendant/Appellee.

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

The State of Iowa, on behalf of Roslyn McClure, appeals the district court's dismissal of its application to show cause why Luke McClure, Sr. should not be held in contempt. **REVERSED AND REMANDED.**

James L. Ottesen of the Scott County Domestic Abuse Special Prosecution Program, Davenport, for appellant.

Robert H. Gallagher of Gallagher, Millage & Gallagher, P.L.C., Bettendorf, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

The State of Iowa, on behalf of Roslyn McClure, appeals the district court's dismissal of its application to show cause why Luke McClure, Sr. should not be held in contempt. Because we find the district court's factual findings are not supported by substantial evidence in the record, we reverse and remand for further proceedings consistent with this opinion.

***I. Background Facts and Proceedings*.**

Roslyn McClure filed for dissolution of her marriage to Luke McClure, Sr. in 2010.[1] The following year, on October 28, 2011, Roslyn filed her petition for relief from domestic abuse pursuant to Iowa Code chapter 236 (2011), alleging numerous incidents of abuse against her by Luke, spanning from 1991 to October 2011. That same day, the district court entered a temporary protective order pursuant to Iowa Code section 236.3, which ordered that Luke not commit acts or threats of abuse against Roslyn, and that he not have any contact with her. Additionally, the order set a hearing for November 9, 2011, to decide if a final protective order should be entered. That hearing date was continued to December 7, 2011, because there was "a pending criminal charge for domestic abuse" between the parties.

On December 6, the day before the scheduled hearing, the parties consented to the entry of a permanent protection order. The order was approved by the court and entered the same day. The pre-printed protective order by consent agreement (section 236.6 petition) restrained Luke "from committing

[1] The parties' marriage was dissolved by decree on December 22, 2011; however, the decree is not at issue in this case.

[word blacked out][2] acts of abuse or threats of abuse." Additionally, the order provided that Luke "shall not communicate with [Roslyn] in person or through any means including third persons. This restriction shall not prohibit communication through legal counsel." Because the parties worked in the same building at the same workplace, the order also provided that the parties were "not prohibited from contact as required by their employment."

A week later, on December 13, the State filed an application for an order to show cause, stating it had cause to believe Luke had violated the previously issued protective orders. Attached thereto were two affidavits by Roslyn asserting violations by Luke. The first stated Luke violated the temporary order of protection on November 16, 2011, when he raised his middle finger up at her in their work parking lot. The second affidavit stated Luke violated the consent agreement on December 8, when he again made the same gesture to her in their work parking lot. The same day, the district court order ordered Luke to appear and show cause why he should not be found in contempt of court, and set a date for hearing on the application.

On January 5, 2012, the State filed an amendment to its application adding an additional violation of the orders of protection by Luke. Attached thereto was a third affidavit from Roslyn stating Luke violated the order of protection on December 1, 2011, when he made "a third party, threatening

[2] An unaltered copy of the pre-printed order is not a part of our record. The "THE COURT HEREBY ORDERS" language of the pre-printed protective order by consent agreement appears to mirror the "THE COURT HEREBY ORDERS" language of the pre-printed temporary protective order. The pre-printed temporary order, which is a part of our record, restrains Luke "from committing further acts of abuse or threats of abuse. It would appear that the word stricken from the protective order by consent agreement was the word "further," but we would have to engage in speculation to so conclude.

communication by sending [an] email to [her] attorney at a time [Luke] was represented by counsel and knowing that counsel would be required to provide [the email] to [Roslyn]." The State explained in its application the alleged violation and attached affidavit were inadvertently omitted from the original filing.

A hearing on the application to show cause was held on February 1, 2012. Roslyn's dissolution attorney testified Luke had copied her in on an email Luke had sent to his dissolution attorney, which she felt obliged to provide to Roslyn. Roslyn also testified consistent with her affidavits. On Roslyn's cross examination, the following exchange took place:

> Q. . . . You're now divorced and the assets have been split. A. Correct.
>
> Q. Thank you. December 6th, I think it was, we did a mutual agreement on a consent order for a protective order, did we not? A. Correct.
>
> Q. Both one against you by consent, and one against Luke by consent. A. Correct.
>
> Q. And at that time we made some slight changes to the uniform order to indicate that there was no finding of any prior incidents. This was a clean consent order. They were moving forward; isn't that correct? A. I wasn't told that, sir.
>
> Q. You signed it, did you not? A. Yes, I did.
>
> Q. Okay. At that time you had—we had no incidents; we didn't raise any incidents. All these incidents that took place prior to that time have been raised since then; isn't that correct? A. I already talked to [my attorney] about it.
>
> Q. Okay. But they weren't raised at the time we did this consent. A. They were back in October. I raised all the issues.
>
> Q. So you file these affidavits back in October? A. Are you talking about for these three counts?
>
> Q. Yes. A. No. The three counts we filed in December.
>
> Q. Okay. They were filed after the consent order was entered? A. Correct.
>
> **[LUKE'S COUNSEL]:** Thank you. I have nothing further.
>
> **[SPECIAL PROSECUTOR]:** I have no redirect.

There was no further testimony from the parties concerning "some slight changes" included in the consent agreement "to indicate that there was no finding of any prior incidents."

Luke then testified, and he denied the allegations against him. Following Luke's testimony, the State made its closing statement requesting the court hold Luke in contempt for the three violations alleged. Immediately following the State's closing, the following exchange occurred:

> **THE COURT:** I only have one question for you.
> **[LUKE'S COUNSEL]:** Yes.
> **THE COURT:** As an officer of the court, were any of these allegations brought up at the time the consent agreement was entered into by the parties?
> **[LUKE'S COUNSEL]:** No, they were not, your honor, by any of the parties.
> **THE COURT:** Then the court finds that this—these three matters occurred prior to the consent order. It's more than a little disingenuous to have a negotiated consent agreement and then one week later file contempt actions on matters that occurred prior to the consent agreement. Based on that finding, the court would indicate that the consent agreement settled all matters prior to its date, which was December 6, 2011. These incidents occurred on November 16th and December 8th, and also the email was sent on December 1st. So therefore the court dismisses the contempt action.
> However, [Luke], I don't believe you. I think you did give obscene gestures to your ex-wife, and I want to caution you that should any further incidents occur in regard to that, then you will be held in contempt of court. Thank you.

The court then entered its order dismissing the contempt action "for failure of proof."

On February 13, 2012, the State filed an Iowa Rule of Civil Procedure 1.904(2) motion asserting the court erred in its factual findings. Specifically, the State argued the protective order by consent did not resolve the November 16 and December 1 alleged violations, for the order contained "no language relating

to any such finding or agreement." Additionally, the State maintained the December 8 alleged violation could not have been resolved by the protective order by consent agreement because the alleged act occurred two days after the consent order was filed. Luke resisted. The district court declined to change its previous ruling.

The State, on behalf of Roslyn, now appeals.[3] It argues the court erred in its factual findings for the same reasons it asserted in its rule 1.904(2) motion. Additionally, the State argues the court erred in failing to expand its findings to address the December 8th incident.

II. Contempt For Domestic Abuse.

Assault between separated spouses is addressed by the "Domestic Abuse Act," Iowa Code chapter 236. Iowa Code § 236.2(2)(b). Pursuant to chapter 236, the court may "grant a protective order or approve a consent agreement" requiring a "defendant cease domestic abuse of the plaintiff." *Id.* § 236.5(1)(b)(1). The enforcement of chapter 236 protective orders is now governed by Iowa Code chapter 664A.[4] *See id.* § 664A.2(2). A violation of a 236 protective order is a public offense, and if a defendant is found guilty of violating the order, the violation is punishable criminally as a simple misdemeanor. *See id.* § 664A.7(5). "*Alternatively*, *the court may hold* a person in contempt of court

[3] "When an application for contempt is dismissed, a direct appeal is permitted." *State v. Lipcamon*, 483 N.W.2d 605, 606 (Iowa 1992). Luke did not file an appellate brief.

[4] Prior to 2006, Iowa Code section 236.8, then entitled "Violation of order—contempt—penalties—hearings," governed the enforcement of orders entered under chapter 236. *See* Iowa Code § 236.8 (2005). In 2006, the legislature repealed section 236.8 and enacted chapter 664A, essentially combining into one chapter the enforcement of various types of no-contact and protective orders, including orders issued pursuant to chapters 232, 236, and 598, as well as providing punishments for violations of those types of orders. *See* 2006 Iowa Acts ch. 1101, §§ 5-11, 21.

for such a violation" as provided in Iowa Code section 664A.7(3).[5] *Id.* § 664A.7(5) (emphasis added); *see also id*. § 664A.7(1). Section 664A.7(3) then details the punishment for a person "held in contempt" for violating the order:

> [The contemnor] *shall be confined* in the county jail for a minimum of seven days. A jail sentence imposed pursuant to this subsection shall be served on consecutive days. No portion of the mandatory minimum term of confinement imposed by this subsection shall be deferred or suspended. A deferred judgment, deferred sentence, or suspended sentence shall not be entered for a violation of a . . . protective order and the court shall not impose a fine in lieu of the minimum sentence, although a fine *may be imposed in addition* to the minimum sentence.

(Emphasis added); *see also* § 664A.7(4) ("If convicted or held in contempt for a violation of a civil protective order referred to in section 664A.2, the person shall serve a jail sentence.").

Generally, "courts enjoy wide discretion in determining and punishing contemptuous behavior." *In re S.D.L.*, 568 N.W.2d 41, 42 (Iowa 1997).

> Our cases impose a special standard of review of the facts in contempt cases. If it is claimed that a ruling is not supported by substantial evidence, we examine the evidence, not de novo, but to assure ourselves that proper proof supports the judgment. The exact extent to which we may go in deciding questions of fact from the record is vaguely defined; it lies in a shadowland, a "twilight zone", whose boundaries do not admit of definite charting. The finding of contempt must be established by proof beyond a reasonable doubt.
>
> Our review of the trial court's conclusions of law follows traditional lines. We are not bound by the trial court's conclusions of law and may inquire into whether it applied erroneous rules of law that materially affected its decision.

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[5] We note the language of section 664A.7(5) quoted is similar to the language previously set forth in 236.8(1), which stated: "A person commits a simple misdemeanor *or the court may hold a person in contempt* for a violation of an order or court-approved consent agreement entered under this chapter . . . ." *See* Iowa Code § 236.8 (2005), repealed by 2006 Iowa Acts ch. 1101, § 21.

State v. *Lipcamon*, 483 N.W.2d 605, 606-07 (Iowa 1992) (internal citations and quotation marks omitted). However, where a statute affords the district court discretion in determining whether to hold a party in contempt for violation of its order, the court's decision will stand unless the court "grossly abused" its discretion. *See id.* at 607. Additionally, under a statute permitting the court discretion, the "court is not required to hold a party in contempt even though the elements of contempt may exist." *In re Marriage of Swan*, 526 N.W.2d 320, 327 (Iowa 1995) (comparing *Barber v*. *Brennan*, 119 N.W. 142, 143 (1909) (where the relevant statute provided that any violation "shall be punished as a contempt") *with Lipcamon*, 483 N.W.2d at 607 (where the relevant statute provided that for violations of a court's order, the court "may hold a party in contempt")). In deciding whether to impose punishment for contempt in a particular case, the "court may consider all the circumstances, not just whether a willful violation of a court order has been shown." *Id.*

III. District Court's Findings of Fact.

The State first argues the district court erred in finding the entry of the protective order by consent agreement disposed of the three alleged violations by Luke of the protective orders. Essentially, the State claims that the court's finding was not supported by substantial evidence, and accordingly, we must "examine the evidence, not de novo, but to assure ourselves that proper proof supports the judgment." *Lipcamon*, 483 N.W.2d at 606. Upon our examination of the evidence, we find substantial evidence does not support the district court's factual findings concerning the protective order by consent agreement.

Here, the only agreement set forth in the protective order by consent agreement in record is that the parties "each consented to entry of [the] order." Luke's attorney in his cross-examination of Roslyn alluded to the inclusion of "some slight changes to the uniform order to indicate that there was no finding of any prior incidents," suggesting the parties were "moving forward" with a clean slate. The protective order by consent agreement makes no indication of a formal finding of previous abuse. Paragraph (3) of the court's findings, which states "If checked, the respondent committed a domestic abuse assault against the protected party," is not checked. The fact that paragraph 3 was not checked, may be an indication of an agreement that no finding of domestic abuse would be formally entered. However, this indication does not automatically absolve Luke of the November 18 and December 1 alleged violations. Given that we find no evidence in the record that the protective order by consent agreement "settled all matters prior to its date, which was December 6, 2011," the district court's finding in that regard is not supported by substantial evidence.

Furthermore, we find the alleged December 8 violation could not possibly have been settled by way of the entry of the protective order by consent agreement, because the alleged December 8 incident would have occurred *after* the entry of that order. Given that we find no evidence in the record that the protective order by consent agreement disposed of the December 8 violation, the district court's finding in that regard is not supported by substantial evidence.

Accordingly, the district court erred in dismissing the State's application "for failure of proof" for the reason that the consent agreement settled all the violations alleged in the State's amended application to show cause.

III. District Court's Post-dismissal Statement.

The State next argues the district court found that Luke violated the order of protection when the court stated, after dismissing the contempt action, that it did not believe Luke and thought he "did give obscene gestures to [Roslyn]." The State equates that statement to a finding of contempt necessitating a jail sentence under Iowa Code section 664A.7(4). We disagree.

Even if the court's language could be construed as finding Luke violated the protective orders, the court did not make any finding as to willfulness. Our supreme court has "always held that a finding of contempt for a violation of a court order or an injunction must be willful." *Lipcamon*, 483 N.W.2d at 607 (finding the same regarding prior enforcement statute Iowa Code section 236.8 (1991)). The court has explained:

> In this context a finding of disobedience pursued "willfully" requires evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not.

Id. (quoting *Lutz v. Darbyshire*, 297 N.W.2d 349, 353 (Iowa 1980)). Without a finding of willfulness, the court's comments cannot be construed to be a finding of contempt.

IV. Conclusion.

We find the district court's factual findings concerning the protective order by consent agreement were not supported by substantial evidence in the record, and as a result, the district court erred in dismissing the State's application. We therefore reverse and remand for further proceedings in the district court to determine whether Luke's alleged conduct violated the protective orders, and if

the court so finds, whether Luke should be held in contempt of court. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.