

PATRICK M. ARCEMENT

*

NO. 2003-CA-1314

VERSUS

*

COURT OF APPEAL

CHERI LYNN CRUZ

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

*

*

APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 77-122, DIVISION "C"
Honorable Wayne Cresap, Judge

Charles R. Jones
Judge

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Charles R. Jones, and Judge Patricia Rivet Murray)

Sharon M. Williams
2008 Fazzio Road
P.O. Box 1654
Chalmette, LA 700441654

COUNSEL FOR PLAINTIFF/APPELLANT

Keith M. Couture
9061 West Judge Perez Drive, Suite 2A
P. O. Box 2291
Chalmette, LA 700442291

COUNSEL FOR DEFENDANT/APPELLEE

REVERSED

This appeal arises out of a fine imposed upon the Appellant, Patrick Arcement, in connection with a child custody case. For the reasons assigned, we reverse.

Mr. Arcement and the Appellee, Cheri Cruz, are the biological parents of Patrick Arcement, Jr. The parties have been involved in ongoing custody litigation since the matter was originally filed in 1995 in the 34th Judicial District Court for the Parish of St. Bernard. On January 29, 2003, Ms. Cruz filed a Motion for Status Conference, for the purpose of discussing the court ordered evaluations and other related matters. The status conference was held on February 20, 2003. The hearing was not transcribed; and, therefore, this Court relies on the statements of counsel to relay the events that transpired. At trial and for this appeal, Sharon Williams represented Mr. Arcement and Keith Couture represented Ms. Cruz.

At the beginning of the status conference, Judge Cresap indicated that he wished to be recused from the case because he knew Mr. Arcement through community and political affairs in which Mr. Arcement was very active. The facts surrounding the request for recusation are somewhat in

dispute.

Mr. Arcement maintains that Judge Cresap suggested that Ms. Williams prepare and file a Motion for Recusal. In response, Ms. Williams indicated to the judge that her client did not want the recusal. On the other hand, Ms. Cruz contends that Judge Cresap verbally recused himself and *ordered* Ms. Williams to file the recusal. Ms. Cruz further maintains that Judge Cresap instructed Mr. Couture to file the motion in the event that Ms. Williams did not do so.

Ms. Williams did not file the Motion for Recusal. Thereafter, Mr. Couture prepared and filed the motion, which included an ex-parte order that Mr. Arcement pay costs and attorney's fees in the amount of \$250 for Mr. Couture's having to prepare the motion. The order was signed on May 9, 2003; and the matter was reallocated to Judge Robert Buckley. No remedial motions were filed in the district court. Mr. Arcement thereafter filed a supervisory writ application with this court, which was denied on June 6, 2003. Arcement v. Cruz, 02-2533 (La. App. 4 Cir. 12/20/02), 836 So. 2d 314. On June 9, 2003, Mr. Arcement filed this suspensive appeal, not on the basis of the recusal itself, but rather on the basis assessed of the \$250 for costs and attorney's fees.

Mr. Arcement argues that the district court erred by imposing the fine

for costs and attorney fees. Specifically, Mr. Arcement submits that Judge Cresap did not orally recuse himself and did not order Ms. Williams to file the Motion for Recusal. Moreover, Mr. Arcement maintains that since there was no such order, there can be no disobedience to the order nor penalty for disobeying it.

Mr. Arcement further asserts that the only logical conclusion to be drawn from the imposition of the fine is that the Order was signed in error, or that it was a punishment for Ms. Williams' refusal to file the Motion to Recuse. If indeed the Order was signed as a punishment, Mr. Arcement argues that Ms. Williams' actions could not be considered either direct contempt nor constructive contempt pursuant to La. C.C.P. arts. 222 and 224. Accordingly, Mr. Arcement contends that the imposition of the fine by the district court was in error.

In response to this appeal, Ms. Cruz first argues that there has been no final judgment rendered and no interlocutory judgment entered which may cause irreparable injury; and, therefore, the judgment of the district court is not appealable. Ms. Cruz further maintains that the imposition of the fine was well within the discretion of the trial judge and that it must be presumed that the trial judge was fully aware of what he was signing.

At the outset, we must address the issue of whether the judgment is

final and appealable pursuant to La. C.C.P. art. 1915. Prior to the 1999 amendments to article 1915, a contempt judgment was considered an interlocutory decree, reviewable only on application for supervisory writs. However, La. C.C.P. art. 1915(A)(6) now specifically allows the appeal of a judgment that “[i]mposes sanctions or disciplinary action pursuant to article 191, 863, or 864.” La. C.C.P. art. 191 refers to the inherent powers of the courts, while La. C.C.P. arts. 863 and 864 refer to contempt arising from the signing of court pleadings. Thus, all contempt judgments are now considered final, and subject to immediate appeal. Therefore, appellate jurisdiction is proper in the instant case.

We now address the main issue presented on appeal: whether the imposition of the fine was proper or an abuse of discretion on the part of the district court. The judgment appealed does not specify under what Code of Civil Procedure article the district court was acting, and there is no transcript from the status conference where the trial judge ordered Mr. Arcement’s counsel to prepare the recusal motion. The only evidence in the record that indicates that the costs and attorney’s fees were assessed against Mr. Arcement as a result of Ms. Williams’ refusal to prepare pleadings as ordered by the court, is the motion and order prepared by Mr. Couture, and signed by the trial judge,.

We pretermitted a remand for clarification as to whether the signing of the judgment was accidental or intentional in the interest of judicial efficiency and economy, and thus, proceed to discuss whether an intentional imposition of costs was correct.

Our law provides for direct and constructive contempt of court. La. C.C.P. art. 221. "A direct contempt of court is one committed in the immediate view and presence of the court and of which it has personal knowledge, on a contumacious failure to comply with a subpoena or summons, proof of service of which appears of record." La. C.C. P. art. 222. We find no direct contempt in this case.

LA. C. C. P. art. 224 defines constructive contempt as "any contempt other than a direct one." The article lists ten instances, which constitute constructive contempt. We find the second and last enumerated instances relevant to this case. Those two provisions define constructive contempt as:

(2) Willful disobedience of any lawful judgment, order, mandate, writ, or process of the court;

(10) Any other act or omission punishable by law as a contempt of court, or intended to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority, and which is not a direct contempt.

To find a person guilty of constructive contempt for violating a court's order, it must be shown that the violation was committed on purpose, was intentional, and without justifiable excuse. Reeves v. Westley Willie Thompson d/b/a Oasis Bar & Restaurant, et al., 95-0321 (La. App. 4 Cir. 12/11/96), 685 So.2d 575. Proceedings for contempt must be strictly construed, and the law does not favor extending their scope. Pittman Construction Co, Inc. v. Pittman, 96-1079 (La. App. 4 Cir. 3/12/97), 691 So. 2d 268; Estate of Graham v. Levy, 93-0636, (La. App. 1 Cir. 4/8/94), 636 So.2d 287.

Considering the limited record provided on appeal, this Court concludes that the district court found Mr. Arcement, through his counsel, guilty of constructive contempt for the refusal to prepare the Motion for Recusal.

La. C.C.P. art 225 sets forth the procedure for punishment in a constructive contempt case. It provides:

- A. Except as otherwise provided by law, a person charged with committing a constructive contempt of court may be found guilty thereof and punished therefor[e] only after the trial by the judge of a rule against him to show cause why he should not be adjudged guilty of contempt and punished accordingly. The rule to show cause may issue on the court's own motion or on motion of a party to the action or proceeding and shall state the facts alleged to constitute the contempt. A person charged with

committing a constructive contempt of a court of appeal may be found guilty thereof and punished therefore after receiving a notice to show cause, by brief, to be filed not less than forty-eight hours from the date the person receives such notice why he should not be found guilty of contempt and punished accordingly. The person so charged shall be granted an oral hearing on the charge if he submits a written request to the clerk of the appellate court within forty-eight hours after receiving notice of the charge. Such notice from the court of appeal may be sent by registered or certified mail or may be served by the sheriff. In all other cases, a certified copy of the motion, and of the rule to show cause, shall be served upon the person charged with contempt in the same manner as a subpoena at least forty-eight hours before the time assigned for the trial of the rule.

- B. If the person charged with contempt is found guilty the court shall render an order reciting the facts constituting the contempt, adjudging the person charged with contempt guilty thereof, and specifying the punishment imposed.

After a thorough review of the record, we conclude that the district court did not adhere to the requirements of the Code of Civil Procedure as set forth above. To find a person guilty of constructive contempt, the district court must find that the party's violation was willful, meaning that the party must have intentionally, knowingly and purposely acted or failed to act.

Waters v. Department of Social Services, 02-1425 (La. App. 4 Cir. 6/4/03),

849 So. 2d 734. A court may not hold a party in contempt unless it finds that the party's reasons for violating the order were without justifiable excuse. Id. We recognize that the trial court is vested with great discretion when making a determination of contempt. DeGruy v. DeGruy, 98-1416 (La. App. 4 Cir. 1/27/99), 728 So. 2d 914. However, in the present case, there has been no showing that Ms. Williams violated a court order intentionally or without justifiable reasons. Accordingly, we find that the record does not support the penalty imposed by the district court.

Decree

For the reasons set forth herein, the ex-parte issuance of a fine for an attorney's failure to prepare a Motion for Recusal, when the attorney made it clear to the court that her client did not wish to seek such a recusal, is an abuse of

discretion and manifestly erroneous. Accordingly, the judgment of the district court, imposing the fine of \$250 on Mr. Arcement is hereby reversed.

REVERSED