

STATE OF MICHIGAN
COURT OF APPEALS

IN THE MATTER OF THE CONTEMPT OF
CHARLES FLANAGAN

SERGEANT CHARLES FLANAGAN,

Appellant,

v

RECORDER'S COURT JUDGE,

Appellee.

UNPUBLISHED

December 19, 1997

No. 196396

Recorder's Court

LC No. 00160228

Before: Jansen, P.J., and Fitzgerald and Young, JJ.

PER CURIAM.

Detroit Police Sergeant Charles Flanagan appeals by right from a summary contempt adjudication, and concomitant sentence of ten days in the county jail, inflicted upon him by Recorder's Court Judge M. John Shamo. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Sergeant Flanagan was summoned as a witness for the prosecution in the case of *People v Louis Akrawi*, Recorder's Court No. 94-011286. Akrawi was being tried by a jury, Judge Shamo presiding. From the generally inadequate record furnished to this Court, it appears that Flanagan was first called as a witness on July 10, 1996, and recalled on July 18, 1996, for further testimony. After completing his redirect and recross-examination testimony, the lawyers had no further questions for Sergeant Flanagan, and Judge Shamo excused him as a witness, although simultaneously instructing Sergeant Flanagan to remain in the courtroom.

The purpose of instructing Sergeant Flanagan to remain in the courtroom was so that Judge Shamo could serve him with a show cause order. Judge Shamo intended to charge Sergeant Flanagan and two attorneys with contempt of court for violating a pretrial gag order in the *Akrawi* case and speaking to the media. The record reflects that Judge Shamo intended to sign a show cause order that had been prepared for him by the Recorder's Court legal advisor.

Judge Shamo left the bench for a few minutes, and during his absence Sergeant Flanagan left the courtroom. Sergeant Flanagan did so with the apparent approval of the assistant prosecutor, who, when Judge Shamo resumed the bench, noted that he had not heard the instruction to remain in the courtroom addressed to Sergeant Flanagan. The prosecutor assumed that Sergeant Flanagan likewise had not heard the order. The prosecutor offered to personally serve the show cause order on Sergeant Flanagan by any means satisfactory to the court, including mail, facsimile, or hand delivery. None of these alternatives was acceptable to the court, which announced that Sergeant Flanagan was being held in contempt for violating the order to remain in the courtroom, and Sergeant Flanagan was then summoned back to the courtroom, apparently by being called on his pager. When he returned, without being given any opportunity to address the court, to retain counsel to represent him, to excuse or mitigate his conduct or allocute concerning sentencing, he was informed that he was being held in contempt and sentenced immediately to ten days in jail. The following day, this Court granted a motion for immediate consideration and motion for stay of the remaining nine days of the sentence in conjunction with Flanagan's filing of the present appeal as of right.

If the Recorder's Court had had jurisdiction to proceed against Sergeant Flanagan for contempt in conjunction with disobeying Judge Shamo's instruction to remain in the courtroom, reversal and remand for further proceedings would certainly be necessary. The summary contempt procedure could not be utilized where, as here, the alleged contempt was not committed in the immediate view and presence of the court. If contempt there was, it occurred while the court was not on the bench or in the courtroom. *In re Henry*, 32 Mich App 654; 189 NW2d 96 (1971). Elementary principles of due process under the Fifth, Sixth, and Fourteenth Amendments would in any event require the court to allow the alleged contemnor an opportunity, under these circumstances, before being adjudicated in contempt, to establish that his actions were not reflective of a culpable mental state. *People v Little*, 115 Mich App 662; 321 NW2d 763 (1982). The alleged contemnor would also be entitled to call other witnesses in his behalf, to be represented by counsel, and to enjoy a right of allocution before sentence is imposed. *In re Oliver*, 333 US 257; 68 S Ct 499; 92 L Ed 682 (1948).

However, further proceedings are unwarranted because contempt will not lie on these facts. Taking a view most favorable to the trial court, and therefore assuming that Sergeant Flanagan testified under subpoena, this common law writ, the *subpoena ad testificandum*, VIII Wigmore on Evidence, §2190, p 65, n 19 (McNaughton Rev, 1961); *United States v Keen*, 509 F2d 1273, 1275 (CA 6, 1975), is properly utilized only for the purpose of compelling the witness named therein to appear at a designated time and place to give evidence in a formal proceeding. Here, Sergeant Flanagan had fully honored the subpoena, and been excused from giving further testimony pursuant to that subpoena. Accordingly, the trial court's directive to him to remain in the courtroom was not addressed to him in his capacity as a witness, but at that point as a mere spectator, one having a Sixth Amendment right to attend a public trial or not to attend, and to leave the courtroom so long as that could be accomplished without disrupting the proceedings. Obviously, the proceedings were not disrupted because the trial judge had left the bench and the jury was not in the courtroom when Sergeant Flanagan departed. The trial court had no authority to order a mere spectator to remain in the courtroom merely for the court's convenience in serving criminal process. As the trial court had no jurisdiction to order Sergeant Flanagan to remain after his testimony was completed (there being no suggestion that Sergeant Flanagan

was ordered to remain with an expectation that he might be again recalled as a witness), the law is clear that a charge of contempt will not lie for disobeying an order which the court had no jurisdiction to make. *In re Mead*, 220 Mich 480, 483; 190 NW 235 (1922); *People v Hernandez*, 52 Mich App 56, 58; 216 NW2d 438 (1974).

Sergeant Flanagan's adjudication of contempt of court is reversed, and Sergeant Flanagan is ordered discharged. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ E. Thomas Fitzgerald

/s/ Robert P. Young, Jr.