NO. COA09-1209

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

IN THE MATTER OF THE DISCIPLINE

OF

DAVID CAMPBELL SUTTON,
ATTORNEY AT LAW,
CONTEMNOR.

Pitt County
No. 09 CRS 5244

Appeal by Contemnor from an order entered 11 June 2009 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 24 February 2010.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for Contemnor.

BEASLEY, Judge.

David Campbell Sutton (Contemnor) appeals from the trial court's finding that he acted in a wilfully contemptuous manner on 8 June 2009. Because the trial court failed to provide Contemnor with an opportunity to respond to the charge of contempt, we reverse.

On 8 June 2009, the case of *State v. Vonzeil Adams* was called before the Pitt County Superior Court. Attorney David Campbell Sutton, Contemnor, represented the defendant in the action. During pre-trial motions, an evidentiary question arose. Contemnor

explained to the trial court: "I will be using the statements that the witnesses for the State made during the first trial of my client, and . . . I don't see any problem with *not* telling the jury . . . that there was a hung jury the first time." (emphasis added). The trial court responded: "[I]t's not going to happen. And if it's mentioned by you in this courtroom, you can be found in contempt of court." Thereafter, the following colloquy between the trial court and Contemnor occurred.

> [CONTEMNOR]: Your Honor, so that I don't get held in contempt, if I ask them about their prior testimony at the first trial, how am I supposed to - -
>
> THE COURT: You are not going to ask them that. You are going to say - - have you made at a previous hearing in this case - - or have you made at a previous time under oath this - - a statement? And if you ask them the way you just proposed, you are going to find yourself in trouble.
>
> [CONTEMNOR]: Your Honor, I asked you how did you propose that I do it. I didn't tell you that I was going to do it different than what you did.
>
> THE COURT: Please don't - -
>
> [CONTEMNOR]: Is there - -
>
> THE COURT: Please don't - -
>
> [CONTEMNOR]: - - a problem with me - -
>
> THE COURT: Please don't - -
>
> [CONTEMNOR]: - - asking how?
>
> THE COURT: Please don't argue with me.
>
> [CONTEMNOR]: I'm not arguing.
>
> THE COURT: Mr. Sutton, do not come back at the Court the way you've just done.

> [CONTEMNOR]: Your Honor, I've asked the question - - you said I couldn't mention a mistrial - -
>
> THE COURT: Mr. Sutton - -
>
> [CONTEMNOR]: - - I've got all these sworn statements - -
>
> THE COURT: Mr. Sutton?
>
> [CONTEMNOR]: Yes, Your Honor?
>
> THE COURT: The Court finds beyond a reasonable doubt that you have held this Court in contempt by your arguing with this Court after being warned, and you are sentenced to 30 days in the custody of the Sheriff of Pitt County. He's in your custody, Mr. Sheriff.
>
> [CONTEMNOR]: I guess we won't be having a trial.
>
> THE COURT: And add a $500 fine to that.
>
> [CONTEMNOR]: Okie doke.
>
> THE COURT: All right. Call your next case. Get him out of here.

On 9 June 2009, the trial court reduced its contempt ruling to a written order. The trial court's written contempt order essentially recounted the events as they occurred on 8 June 2009. The trial court concluded that "[t]he conduct of contemnor constituted willful behavior committed during the sitting of a Court in its immediate view and presence and directly tended to impair respect due the authority of the Court." The trial court also found that "[t]he conduct of contemnor constituted willful disobedience of and resistance to or interference with a Court's lawful direction and order." On 11 June 2009, the trial court entered an amended contempt order finding, in pertinent part, that

Contemnor had displayed hostility and anger toward the trial court on several occasions in the past.

Contemnor appeals the trial court's order, arguing that the trial court erred by (1) holding Contemnor in criminal contempt through a summary proceeding without affording him the required notice and opportunity to be heard; (2) adjudicating him in criminal contempt where the evidence was manifestly insufficient to show that he acted in a willfully contemptuous manner; and (3) imposing an unreasonably harsh sentence. We address only the first argument, that the trial court failed to give Contemnor the required notice and opportunity to be heard. Because we conclude that notice and opportunity to respond were not afforded Contemnor, we need not address Contemnor's remaining arguments.

> Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt.

N.C. Gen. Stat. § 5A-14(b) (2009).

Citing the comments to an earlier version of the contempt statute our Court noted that the contempt statute does not "require a hearing, or anything approaching a hearing. Instead, the requirements of the statute are meant to ensure that the individual has an opportunity to present reasons not to impose a sanction." *In re Owens*, 128 N.C. App. 577, 581, 496 S.E.2d 592, 594 (1998)

(citing N.C. Gen. Stat.§ 5A-14 (1986)), *aff'd per curiam*, 350 N.C. 656, 517 S.E.2d 605 (1999).

In *State v. Verbal*, an attorney was held in criminal contempt of court after returning to the courtroom eighteen minutes late from a lunch break. 41 N.C. App. 306, 306, 254 S.E.2d 794, 795 (1979). Our Court found that the trial court's decision to hold the attorney in contempt was erroneous partially because "[n]othing in the record before us indicates that the alleged contemnor was given any opportunity to be heard." *Id.* at 307, 254 S.E.2d at 795. Our Court noted:

> We think that it is implicit in this statute that the judicial official's findings in a summary contempt proceeding should clearly reflect that the contemnor was given an opportunity to be heard, along with a summary of whatever response was made and that judicial official's finding that the excuse or explanation proffered was inadequate or disbelieved.

Id.

In *Peaches v. Payne*, an attorney was held in contempt for disrespecting the trial court. 139 N.C. App. 580, 585, 533 S.E.2d 851, 853 (2000). The trial court continued the case, and the attorney was taken into the custody of the sheriff, without being afforded an opportunity to respond to the charge of contempt. *Id.* at 587, 533 S.E.2d at 855. Overruling the trial court's contempt order, we held that "[t]rial judges must have the ability to control their courts. However, because a finding of contempt against a practitioner may have significant repercussions for that

lawyer, judges must also be punctilious about following statutory requirements." *Id*.

We first note that the colloquy noted above between the trial court and the Contemnor started with a misunderstanding. The trial court incorrectly understood that Contemnor said that he *would* tell the jury that his client's first trial ended in a hung jury, yet actually Contemnor said that he would ***not*** tell the jury this. We realize that we have the benefit of a written transcript which clearly shows the source of the confusion, while the trial court did not have this advantage. Unfortunately, the misunderstanding was never resolved.

Here, Contemnor was not afforded a real "opportunity to present reasons not to impose a sanction." After being interrupted several times, the trial court summarily held Contemnor in contempt of court. However, the only warning or notice of possible contempt that the trial court gave Contemnor was the admonition not to mention that his client's first trial had ended in mistrial. Specifically, the trial court stated "if it's mentioned by you in this courtroom, you can be found in contempt of court." As noted above, the Contemnor did not mention the prior mistrial, nor did he ever indicate that he would do so. Although the trial court's perception that Contemnor was arguing with the court is understandable, given the miscommunication between Contemnor and the trial court, Contemnor had in fact agreed with the trial court.

The State argues that "Contemnor was not immediately forced to exit the courtroom, and was able to respond to the trial court."

However, while not being immediately forced to exit the courtroom, Contemnor had already been held in contempt before being taken into custody. Essentially, the State contends that to enforce the rights afforded to him under N.C. Gen. Stat. § 5A-14(b), Contemnor would have to continue his "contemptuous" behavior.

Accordingly, we hold that the trial court's order finding Contemnor guilty of criminal contempt was erroneous.

Reversed.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).