NO. COA09-184

NORTH CAROLINA COURT OF APPEALS

Filed: 6 October 2009

STATE OF NORTH CAROLINA

v. Stanly County
No. 08 CRS 1263

THEODORE J. WILLIAMS

Appeal by defendant from order entered 23 June 2008 by Judge Ripley E. Rand in Stanly County Superior Court. Heard in the Court of Appeals 1 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General Edwin Lee Gavin, II, for the State.

Richard E. Jester, for defendant-appellant.

CALABRIA, Judge.

Theodore J. Williams ("defendant") appeals an order finding him in indirect criminal contempt. We affirm.

I. FACTS

On 27 May 2008, the matter of *State v. Williams* was called for trial in Stanly County Superior Court. During the trial, as defendant cross-examined witnesses, he interrupted them as they attempted to answer his questions. The trial court ordered defendant not to engage in such actions. However, defendant repeated his behavior. In a summary contempt proceeding held

outside the presence of the jury, the trial court found defendant in direct contempt and ordered defendant to serve five days in the Stanly County Jail. The trial court further ordered defendant to comply with the Stanly County Sheriff's Department rules and regulations for jail inmates. Defendant received a copy of these regulations when he reported to the jail.

Section 216 of the Stanly County Sheriff's Department's rules and regulations for jail inmates prohibits:

> Obscene or abusive gestures, deliberate exposure of genitalia or breasts or open display of sexual mannerisms or verbally abusing any officer or making any obscene gestures to an officer in such a manner that the officer reasonably believes that the inmate is attempting to threaten or otherwise harass the officer, any use of vulgar, profane, racial or otherwise derogatory remarks or gestures.

On 31 May 2008, while serving his sentence, defendant became upset after the jail personnel denied his requests for certain personal items. Defendant then called Lieutenant Jodie D. Leslie ("Lt. Leslie"), the officer in charge of the jail, a "fucking whore." Defendant further stated, "If Jodie fucking Leslie wants to play fucking games with me, I'll fucking play games with her." Lt. Leslie overheard defendant's language on the intercom. Defendant's actions were recorded by video camera without sound.

In a show cause order dated 2 June 2008, the trial court ordered defendant to appear on 3 June 2008 and show cause why he should not be held in contempt for willfully disobeying a court order. On 3 June 2008, a Deputy Sheriff served a copy of the show

cause order by hand-delivery. A show cause hearing was held the next day on 4 June 2008. At the hearing, defendant represented himself *pro se* and denied contempt. He further requested permission from the trial court to look at the videotape of the 31 May 2008 jail incident. The trial court denied his request. At the conclusion of the hearing, the trial court entered an order finding defendant in indirect criminal contempt, ordered him censured and assessed a fine in the amount of $500.00. Defendant appeals.

II. STANDARD OF REVIEW

Defendant contends the trial court's findings of fact are not supported by competent evidence, and that such findings do not support its conclusions of law. We disagree.

"The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Eakes v. Eakes*, ___ N.C. App. ___, ___, 669 S.E.2d 891, 896 (2008). "The trial court's 'findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" *State v. Kilby*, ___ N.C. App. ___, ___, 679 S.E.2d 430, 432 (2009) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000)). "The trial court's conclusions of law are reviewed *de novo* by this Court." *State v. Troy*, ___ N.C. App. ___, ___, 679 S.E.2d 498, 501 (2009).

Defendant specifically takes issue with Finding of Fact 6 of the trial court's order, which states, "Section 216 of the Stanly County Sheriff's Department's rules and regulations for jail inmates prohibits the use of obscene or profane language or displays in the jail. [Defendant] was served with a copy of these regulations upon reporting to the Stanly County Jail." This finding is supported by competent evidence. At the contempt hearing, Lt. Leslie testified that she was working at the Stanly County Jail on 31 May 2008. She received a copy of the trial court's order of 29 May 2008, which stated that defendant was to comply with all jail rules. Defendant received a copy of these rules when he reported to the jail on 30 May 2008. Finally, the trial court read into the record Section 216 of the rules, stating:

> Let the record reflect that based on my review of the Stanly County Inmate Rules and Regulations, specifically Section 216 of those rules and regulations which reads the following,..."Obscene or abusive gestures, deliberate exposure of genitalia or breasts or open display of sexual mannerisms or verbally abusing any officer or making any obscene gestures to an officer in such a manner that the officer reasonably believes that the inmate is attempting to threaten or otherwise harass the officer, any use of vulgar, profane, racial or otherwise derogatory remarks or gestures"....

This evidence is sufficient to support the trial court's finding.

Defendant argues that the trial court's conclusions of law finding him in contempt are not supported by its findings of fact and violate defendant's rights under the First Amendment. The

trial court's conclusions of law are adequately supported by the court's findings of fact.

Defendant was ordered to "comply with all inmate rules and regulations of the Stanly County Jail while serving his [direct] contempt sentence." Additionally, defendant was served with a copy of these regulations upon reporting to the Stanly County Jail. Once in jail, defendant called Lt. Leslie a "fucking whore" and said, "If Jodie fucking Leslie wants to play fucking games with me, I'll fucking play games with her." These facts show defendant willfully violated a court's lawful order and therefore he was properly found guilty of contempt charges. Defendant's assignments of error on this issue are overruled.

III. REASONABLE NOTICE

Defendant argues the trial court failed to give him sufficient prior notice of the show cause hearing. We disagree.

A defendant in a criminal contempt case is "entitled to the benefits of all constitutional safeguards." *O'Briant v. O'Briant*, 313 N.C. 432, 435, 329 S.E.2d 370, 373 (1985). In actions for indirect criminal contempt, "principles of due process require reasonable notice of a charge...before punishment is imposed." *Id.* In determining the appropriate procedure for a hearing on indirect criminal contempt, the trial court may proceed against the contemnor "by an order directing the person to appear before a judge at a reasonable time specified in the order and show cause

why he should not be held in contempt of court." N.C. Gen. Stat. § 5A-15(a) (2007).

Defendant argues that eighteen hours is not reasonable notice for him to appear and answer a charge of indirect criminal contempt. The record shows that defendant was served with a show cause order at 3:44 p.m. on 3 June 2008. The order was dated 2 June 2008, and it directed defendant to appear for a hearing on 3 June 2008. (R p. 2-3). The court held the hearing at 10:30 a.m. on 4 June 2008. Defendant relies on *O'Briant* to support his argument that he was not given reasonable notice.

The *O'Briant* Court found that an order by the trial court compelling the plaintiff to appear before a hearing on "all outstanding issues" in a child custody case did not give the plaintiff reasonable notice because the order was unclear that the plaintiff's alleged criminal contempt was an "outstanding issue." *O'Briant* at 441, 329 S.E.2d at 376. The Court also found that the order in that case was "not specific about which of plaintiff's acts were deemed contemptuous." *Id*. at 440, 329 S.E.2d at 375. Further, there was nothing in the record showing the plaintiff received a copy of the show cause order to answer for her alleged criminal contempt. *Id*. at 440, 329 S.E.2d at 376.

In the instant case, the record clearly shows that on 3 June 2008, defendant received a copy of the trial court's show cause order. The order directed defendant "to appear...to show cause, if any there be, why [he] should not be punished for contempt for willfully disobeying a [previous] court order." In the show cause

order, the trial court specifically stated that the defendant's contemptuous acts "caused a disruption in the jail by yelling at an employee of the jail, Lt. Leslie, saying, 'Fuck Lt. Leslie! If she's going to play games, then I'm going to play back! I need a fucking grievance form!' and by calling Lt. Leslie a 'fucking whore.'" The trial court then concluded the defendant's conduct not only violated Section 216 of the jail regulations but also violated the previous court order. Unlike the plaintiff in *O'Briant*, defendant received a copy of the show cause order, the show cause order specifically denoted the defendant was to answer for contempt, and described defendant's contemptuous acts. Therefore, *O'Briant* is not applicable.

Defendant correctly asserts that there is no North Carolina case interpreting the "reasonable time" requirement in N.C. Gen. Stat. § 5A-15(a) (2007). However, other courts have confronted this issue. These cases provide guidance on what constitutes "a reasonable time."

Federal courts require that in a hearing on criminal contempt, the defendant receive notice that "allow[s] the defendant a reasonable time to prepare a defense...." 3A Charles Alan Wright, Nancy J. King & Susan R. Klein, *Federal Practice and Procedure: Criminal* § 701 (3d ed. 2004) (quoting F.R. Crim. P. 42(a)(1)(b) (2004)). "At least sufficient time must be accorded a party cited for criminal contempt to engage an attorney of his choice, to weigh the merits of the charge, to evaluate possible defenses and to marshal the evidence deemed necessary to proceed." *In re Weeks*,

570 F.2d 244, 247 (8th Cir. 1978). The court will not apply a bright-line rule but instead looks to the facts and circumstances of the case. *In re Brummitt*, 608 F.2d 640, 643 (5th Cir. 1979). A period of 24 hours has been held sufficient to satisfy the "reasonable time" requirement. *In re Timmons*, 607 F.2d 120, 125 (5th Cir. 1979).

The Ohio Court of Appeals also considered the "reasonable time" requirement in the context of contempt hearings in *Pease Co. v. Union*, 59 Ohio App.2d 238, 393 N.E.2d 504 (1978). The *Pease* court considered a number of factors. Specifically, the court considered whether the charges against the defendant were complex, whether the charges "involved the same type of alleged contemptuous acts," and whether the defendant had an opportunity to consult an attorney during the delay. *Id.* at 240, 393 N.E.2d at 506.

In the instant case, we find that the delay between the issuance of the show cause order and the hearing was not an unreasonable one. Defendant had an opportunity to seek counsel but voluntarily waived his right to do so. In addition, the charges against defendant were neither complex nor lengthy. The show cause order specifically stated the language defendant directed toward Lt. Leslie. Under these limited facts, defendant had adequate time to prepare a defense. Defendant's assignment of error is overruled.

IV. RECUSAL

Defendant next contends the trial court erred in failing to recuse itself from presiding at the contempt hearing on 4 June 2008. We disagree.

Issues of law are reviewable *de novo*. *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 185 N.C. App. 566, 573, 649 S.E.2d 410, 415 (2007). N.C. Gen. Stat. § 5A-15(a) (2007) states in relevant part, "[i]f the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge." Defendant relies on *State v. Fie*, 320 N.C. 626, 359 S.E.2d 774 (1987), to support his contention the trial court should have recused itself. However, *Fie* is distinguishable from the instant case.

In *Fie*, prior to trial, the two defendants moved to recuse the trial judge. *Id.* at 626, 359 S.E.2d at 775. In support of their motion, the defendants included a copy of a letter written by the judge to the district attorney asking a grand jury to consider charges against the defendants. *Id.* The judge based his request on evidence presented at another trial over which he presided. *Id.* At that trial, the judge heard testimony that indicated the defendants in *Fie* might be implicated in criminal activity. *Id.* In ordering a new trial for the defendants, our Supreme Court found that the trial judge "initiated the criminal process against the two defendants," which created a perception in the mind of a reasonable person that the trial judge "thought the defendants were guilty of the crimes with which they were charged and that it would

be difficult for the defendants to receive a fair and impartial trial" before that judge. *Id.* at 628, 359 S.E.2d at 776. The acts of the trial judge in *Fie* clearly show he was "so involved" that his objectivity could reasonably have been questioned.

In the case *In re Marshall*, this Court found that "the criminal contempt with which Respondent was charged was based upon acts so involving [the trial court judge] that [the judge's] objectivity may reasonably have been questioned." 191 N.C. App. 53, 63, 662 S.E.2d 5, 11 (2008). In *Marshall*, the respondent, an attorney, failed to appear for calendar call and was summoned to court to explain his absence. *Id.* at 62, 662 S.E.2d at 11. The respondent appeared the next day and after a brief exchange, the trial court judge had a bailiff escort the respondent from the courtroom. *Id.* The following day, the judge issued a show cause order against the respondent for failure to appear at calendar call and failing to return to the court with a copy of legal authority the court requested. *Id.* at 62-63, 662 S.E.2d at 11. After a hearing, the judge found the respondent not to be in contempt. *Id.* at 63, 662 S.E.2d at 11. The respondent then moved for the judge to recuse himself from the respondent's underlying criminal trial, and after a contentious hearing and a number of heated exchanges, the judge denied the respondent's motion. *Id.*

In the instant case, the facts clearly do not support the proposition that the trial court was so involved with the acts before it that its objectivity could reasonably be questioned. The trial court found that defendant's actions toward the jail

personnel, not the trial court, were the bases for the contempt. Therefore, defendant's assignment of error is overruled.

V. CONCLUSION

Defendant asserts for the first time on appeal that his comments directed toward Lt. Leslie are protected by the First Amendment to the United States Constitution. "However, a constitutional question which has not been raised and determined in the trial court will not be considered on appeal." *Greene v. Royster*, 187 N.C. App. 71, 77, 652 S.E.2d 277, 281 (2007). *See also State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981); N.C. R. App. P. 14(b)(2) (2009).

The order of the trial court finding defendant in indirect criminal contempt is affirmed.

Affirmed.

Judge ELMORE concurs.

Judge WYNN concurs in the result only.

Report per Rule 30(e).