IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-318

Filed: 6 December 2016

Cleveland County, No. 15 CRS 2159

STATE OF NORTH CAROLINA

v.

BARRY RANDALL REVELS, Defendant.

Appeal by defendant from order entered 23 September 2015 by Judge Lisa C. Bell in Cleveland County Superior Court. Heard in the Court of Appeals 7 September 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Keith Clayton, for the State.

Amanda S. Zimmer for defendant-appellant.

ENOCHS, Judge.

Barry Randall Revels ("Defendant") appeals from the trial court's order finding him in criminal contempt of court. On appeal, Defendant contends that the trial court erred by (1) finding him in both civil and criminal contempt based on the same conduct; (2) finding him in criminal contempt of court; (3) relying upon a fatally defective show cause order thereby depriving it of jurisdiction; and (4) failing to enter a finding of guilty with regard to its determination that Defendant was in criminal contempt of court. Defendant also asserts that he received ineffective assistance of counsel. After careful review, we affirm.

Factual Background

RST Global Communications, LLC ("RST") is a company located in Cleveland County, North Carolina which is in the business of installing and maintaining fiber optic networks and offering network communication services to third parties. Defendant is a 30% member and former head of day-to-day operations of RST. Defendant ran the company's daily operations from his home address located at 335 Magness Road in Shelby, North Carolina.

In early 2014, RST became aware that Defendant was improperly using company funds from RST's bank accounts for personal debts and expenditures. As a result, a meeting of RST's members was called by RST's Chief Executive Officer, Dan Limerick ("Limerick"). A series of unanimous resolutions were approved at the meeting including that (1) RST operations would be transferred to the company's headquarters at 1300 South Dekalb Street in Shelby, North Carolina; (2) Doug Brown ("Brown") would assume responsibility for RST's day-to-day operations; (3) Defendant would no longer be paid a salary; and (4) all company-issued credit and debit cards would be turned in and no longer used without the express authorization of RST's members.

Defendant refused to comply with these resolutions and retained RST records, data, and property at his personal residence. He also continued to communicate with other business entities on RST's behalf and refused to turn over his company issued credit and debit cards.

After several "actions without meetings" issued by Limerick and Brown demanding that Defendant (1) return items of RST's property including checkbooks, credit and debit cards, keys, lock combinations, account login and password information; (2) have all company mail being sent to his residence rerouted to the South Dekalb Street Office; and (3) remove himself from all company bank accounts, Defendant still refused to comply. As a result, RST filed a verified complaint and motion for a temporary restraining order ("TRO") against Defendant in Cleveland County Superior Court on 30 April 2015.

A hearing on RST's motion for a TRO was held before the Honorable Forrest Donald Bridges on 4 May 2015, and on 5 May 2015, Judge Bridges granted RST's motion and entered a TRO against Defendant.

Judge Bridges continued the matter until 6 May 2015 in order to give Defendant the opportunity to obtain counsel. Defendant did not attend the 6 May 2015 hearing, and the court issued a second TRO on 8 May 2015 incorporating the terms of the 5 May 2015 TRO and adding several additional provisions thereto.

At a subsequent hearing on 18 May 2015, RST moved for a preliminary injunction and submitted the sworn affidavit of Brown delineating Defendant's failure to return RST's property or otherwise cooperate with Judge Bridges' TRO. The court entered an order for Defendant to show cause and a preliminary injunction that same day.

On 8 June 2015, a hearing on the show cause order was held before the Honorable Lisa C. Bell. At the outset of the proceedings, Judge Bell informed Defendant that the hearing would determine whether he would be found in criminal or civil contempt. The case was ultimately continued several times until 23 September 2015.

At the 23 September 2015 hearing, RST presented evidence that Defendant had not complied with the TRO or the preliminary injunction. As a result, Judge Bell found Defendant in both civil and criminal contempt of court and entered corresponding orders on that same day. On 23 October 2015, Judge Bell entered a detailed order of criminal and civil contempt laying out findings of fact supporting her conclusion that Defendant was in both civil and criminal contempt of court. Defendant gave oral notice of appeal of the 23 September 2015 criminal contempt order in open court.

Analysis

I. Finding Both Civil and Criminal Contempt Based Upon the Same Conduct

Defendant first contends on appeal that the trial court found him to be in both civil and criminal contempt based upon the same conduct in violation of N.C. Gen. Stat. § 5A-12(d) (2015) and N.C. Gen. Stat. § 5A-21(c) (2015). We disagree.

> At the outset we note that contempt in this jurisdiction may be of two kinds, civil or criminal, although we have stated that the demarcation between the two may be hazy at best. Criminal contempt is generally applied

> where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties.
>
> A major factor in determining whether contempt is civil or criminal is the purpose for which the power is exercised. Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. The importance in distinguishing between criminal and civil contempt lies in the difference in procedure, punishment, and right of review.

O'Briant v. O'Briant, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985) (internal citations omitted).

Defendant is correct as a general proposition that a person cannot be found in both civil and criminal contempt for the same conduct. *See* N.C. Gen. Stat. § 5A-12(d) ("A person held in criminal contempt under this Article shall not, for the same conduct, be found in civil contempt under Article 2 of this Chapter, Civil Contempt."); N.C. Gen. Stat. § 5A-21(c) ("A person who is found in civil contempt under this Article shall not, for the same conduct, be found in criminal contempt under Article 1 of this Chapter."). However, where divergent and distinct conduct arising from the same underlying nucleus of facts would give rise to independent findings of both civil and criminal contempt, a trial court does not err by finding a person in criminal contempt

for certain conduct while also finding him in civil contempt for other separate and discrete conduct. *See, e.g.*, *Adams Creek Assocs. v. Davis*, 186 N.C. App. 512, 527, 652 S.E.2d 677, 687 (2007) ("Defendants argue that they were found in civil and criminal contempt for the same behavior, in violation of N.C. Gen. Stat. § 5A-21(c) and 5A-23(g), which prohibit finding a defendant in both civil and criminal contempt for the same behavior. . . . [D]efendants were found in civil contempt for failing to comply with the court's 2004 order, and were found in criminal contempt for their testimony threatening to disobey future orders of the court. Thus, defendants were found in civil and criminal contempt on the basis of different acts.").

Indeed, in *Adams Creek Assocs.*, the defendants were found in criminal contempt for continuing to trespass upon the plaintiff's property in defiance of the trial court's order. They then testified at trial that they intended to continue to trespass on the property in the future because they erroneously believed that the property was theirs. *Id.* Despite the overlapping nucleus of facts — to wit, trespass on the plaintiff's real property — the trial court also found them in civil contempt. *Id.* On appeal, the defendants argued "that they were found in civil and criminal contempt for the same behavior, in violation of N.C. Gen. Stat. § 5A-21(c) and 5A-23(g), which prohibit finding a defendant in both civil and criminal contempt for the same behavior." *Id.* In rejecting this argument, this Court emphasized that "defendants were found in civil contempt for failing to comply with the court's 2004

order, and were found in criminal contempt for their testimony threatening to disobey future orders of the court." *Id.* Therefore, both the civil and criminal contempt orders were based upon the defendants' trespass on the exact same piece of land, but were deemed distinguishable based on the diverging *conduct* and intent of the defendants — that is the disobedience of a past trial court order on the one hand accounting for one type of conduct, and the intention to continue to disobey the court's orders in the future as a separate type of conduct. *Id.*

This is in line with the *O'Briant* line of cases which emphasize that " '[a] major factor in determining whether contempt is criminal or civil is the *purpose* for which the power is exercised.' " *Watson v. Watson*, 187 N.C. App. 55, 61, 652 S.E.2d 310, 315 (2007) (quoting *Bishop v. Bishop,* 90 N.C. App. 499, 503, 369 S.E.2d 106, 108 (1988)).

> Criminal contempt is imposed in order to preserve the court's authority and to punish disobedience of its orders. Criminal contempt is a crime, and constitutional safeguards are triggered accordingly. On the other hand, when the court seeks to compel obedience with court orders, and a party may avoid the contempt sentence or fine by performing the acts required in the court order, the contempt is best characterized as civil.

Id. (internal citations omitted).

In the present case, the trial court's 23 October 2015 order of criminal and civil contempt was divided into two parts. In the first section, the trial court, applying the beyond a reasonable doubt standard, found that Defendant failed to (1) cause RST's

mail to be delivered to the Dekalb Street address in violation of the TRO; (2) deliver all of RST's equipment to the Dekalb Street address including but not limited to at least two phones as required by the TRO; (3) provide account login and password information in violation of the TRO; and (4) relinquish RST's credit and debit cards in violation of the TRO and preliminary injunction.

In the second section of the order, the trial court, applying the greater weight of the evidence standard, found Defendant in civil contempt for (1) instructing third-parties to break RST's fiber optic cables and not to repair them until he got a new contract; (2) using RST's equipment and business connections to continue to appropriate business opportunities for his newly formed business; and (3) retaining RST's equipment detailed in the TRO and preliminary injunction.

Here, it is readily apparent that, in accord with *Adams Creek Assocs.*, the trial court found Defendant in civil contempt based on his continued conduct in violation of the TRO and preliminarily injunction in attempting to frustrate RST's business interests while simultaneously attempting to further his own at their expense, and found him in criminal contempt based upon his *past conduct*, that is, his refusal to obey the trial court's TRO and preliminary injunction in failing to adhere to their terms including the return of various company assets of RST. As a result, the trial court did not find Defendant in civil and criminal contempt for the same conduct, but

instead for distinctly separate and discrete conduct based on a partially overlapping nucleus of facts. Therefore, Defendant's argument on this issue is overruled.

II. Criminal Contempt

In a related argument, Defendant asserts that the trial court erred in finding him in criminal contempt because the punishment imposed upon him was civil in nature as opposed to the type of punitive punishment reserved for those found to be in criminal contempt. We disagree.

As noted above, the trial court is fully authorized to impose both civil and criminal contempt in the same proceeding as long as they are not imposed for the same conduct. Therefore, the trial court was within its authority to impose upon Defendant both (1) criminal contempt to punish Defendant's past conduct in failing to adhere to the TRO and preliminary injunction; and (2) civil contempt designed to compel Defendant to comply with its directives.

In the present case, the trial court ordered, in pertinent part, as follows:

> Effective immediately, Defendant will serve a 7-day active sentence in the Cleveland County jail of a total sentence of 30 days in jail for his willful criminal contempt of this Court. The remaining 23 days will be suspended, and Defendant will be on unsupervised probation for a period of 12 months.

This sentence was clearly punitive in nature and was imposed as punishment for Defendant's criminal contempt of court.

The trial court then further separately ordered the following: "Defendant will be and is indefinitely incarcerated in the Cleveland County jail for his willful civil contempt of this Court, which will begin immediately upon the conclusion, release, or other cessation of his 7-day active sentence until he complies with the following purge conditions . . . ." The trial court then imposed conditions that Defendant return RST's assets, complete a change of address causing RST's business mail to be sent to the Dekalb Street address instead of to his house, and surrender his company debit and credit cards to RST.

The latter portion of the trial court's order clearly imposes conditions for Defendant's release from imprisonment *after the conclusion* of his criminal contempt sentence. The punishment is indefinite and remedial in nature and designed to ensure compliance with the court's orders as opposed to a punishment for past violations of the TRO and preliminary injunction. As a result, both the sentence imposed for criminal contempt and the sentence imposed for civil contempt are consecutive in nature and do not overlap in the manner Defendant suggests. Consequently, Defendant's argument on this issue is without merit.

III. Jurisdiction

Defendant next argues that the trial court's show cause order failed to adequately allege that he was subject to being found in criminal contempt of court

with sufficient specificity so as to confer jurisdiction upon the trial court. We disagree.

N.C. Gen. Stat. § 5A-13(b) (2015) provides that "[a]ny criminal contempt other than direct criminal contempt is indirect criminal contempt and is punishable only after proceedings in accordance with the procedure required by G.S. 5A-15." N.C. Gen. Stat. § 5A-15(a) (2015) in turn provides, in pertinent part, that "[w]hen a judicial official chooses not to proceed summarily against a person charged with direct criminal contempt or when he may not proceed summarily, he may proceed 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." *See State v. Coleman*, 188 N.C. App. 144, 149, 655 S.E.2d 450, 453 (2008) ("For indirect criminal contempt proceedings in which a trial court is not allowed to proceed summarily, a show cause order is analogous to a criminal indictment and is the means by which the defendant is afforded the constitutional safeguard of notice." (internal footnote omitted)). That is precisely what occurred in the present case.

Moreover, our caselaw has consistently held that a show cause order is sufficient to confer jurisdiction on a trial court for finding a defendant in indirect criminal contempt where it incorporates by reference a prior court order that a defendant has failed to comply with.

> When issuing a criminal contempt citation, the presiding judge need only enter an order directing the

> person to appear before a judge and show cause why he should not be held in contempt of court. Unlike a citation for *civil* contempt, which requires the judge's order be accompanied by a sworn affidavit and a finding of probable cause, there is no requirement that the judge make a finding of improper conduct upon the issuance of a *criminal* contempt citation.
>
> In this case, [the trial court judge's] order directed [d]efendant to appear and show cause why he should not be punished for contempt. This language has been construed to have reference to criminal contempt. Indeed, [d]efendant refers to the order as one for criminal contempt in his own motion to dismiss. Furthermore, the order seeks to punish [d]efendant for interfering with the administration of justice, a function of criminal contempt, rather than compel obedience to an order entered to benefit a private party, a function of civil contempt. Accordingly, [the judge] was not required to make a specific finding of improper conduct, and [the court] properly denied [d]efendant's motion to dismiss.

State v. Pierce, 134 N.C. App. 148, 151, 516 S.E.2d 916, 919 (1999) (internal citations, quotation marks, and ellipses omitted); *see also Bennett v. Bennett*, 71 N.C. App. 424, 322 S.E.2d 439 (1984) (outstanding show cause order upon which no action had been taken satisfied statutory requirement of N.C. Gen. Stat. § 5A-15 that a contempt hearing be held on a show cause order).

Consequently, because the trial court entered a show cause order requiring Defendant to appear in court and explain why he had failed to comply with the TRO and preliminary injunction, it was fully authorized to find him in criminal contempt

of court. Defendant's argument that the trial court never gained jurisdiction over the criminal contempt proceedings should, as a result, be overruled.[1]

IV. Guilty Mandate

Defendant next argues that because the trial court never expressly used the term "guilty" in finding him in contempt of court, his conviction must be overturned. We disagree.

It is apparent in the present case that the trial court found Defendant guilty of both civil and criminal contempt. Its order clearly stated that "Defendant is in civil and criminal contempt of this Court[.]" The trial court based this conclusion upon application of the beyond a reasonable doubt standard to the evidence before it, which is supported by the record.

Our Supreme Court has held that "insubstantial technical errors which could not have affected the result will not be held prejudicial. The judge's words may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred." *State v. Alexander*, 279 N.C. 527, 538, 184 S.E.2d 274, 282 (1971) (internal citation omitted); *see State v. Keyes*, 56 N.C. App. 75, 79, 286 S.E.2d 861, 863-64 (1982) ("Mere

[1] Defendant also makes a brief argument that we should impute the requirements for a larceny indictment onto a show cause order alleging criminal contempt. Defendant has cited to no case law in support of this proposition and our research has revealed none. Consequently, this argument is without merit.

technical error is not sufficient to require the granting of a new trial. The error must be so prejudicial as to affect the result.").

Defendant's attempt to rely on this Court's decision in *State v. Phillips*, 230 N.C. App. 382, 750 S.E.2d 43 (2013), in arguing that the trial court's failure to state Defendant was "guilty" is misplaced. In that case, this Court found that the trial court's order was fatally defective because the trial court had failed to indicate that it had applied the beyond a reasonable doubt standard, thereby precluding this Court on appeal from being able to discern that it had actually done so in accordance with the law. *Id.* at 385, 750 S.E.2d at 45. Such is not the case here where the trial court — as set forth in the plain language of its order — correctly applied the beyond a reasonable doubt standard to the evidence before it and unambiguously determined that Defendant was, in fact, in criminal contempt of court. Defendant was then sentenced accordingly.

The fact that the trial court did not use the talismanic term "guilty" here does not affect the outcome of Defendant being found in criminal contempt of court. Defendant cannot show that "but for" the omission of such language, the trial court would have reached a contrary result. Consequently, Defendant cannot establish that he was prejudiced and his argument on this issue is overruled.

V. Ineffective Assistance of Counsel

Defendant's final argument on appeal is that he received ineffective assistance of counsel due to his trial counsel's failure to object to the criminal contempt proceedings. Defendant's argument is without merit.

> In order to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense.
>
> > Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Edgar, ___ N.C. App. ___, ___, 777 S.E.2d 766, 770-71 (2015) (internal citations and quotation marks omitted) (quoting *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006)).

Because, for the reasons stated above, Defendant cannot show that the trial court erred procedurally in finding him in civil and criminal contempt of court, it logically follows that he cannot demonstrate that his trial counsel's failure to object to the proceedings affected the outcome. Therefore, he cannot successfully establish an ineffective assistance of counsel claim.

Conclusion

For the reasons stated above, we affirm the trial court's criminal contempt order.

AFFIRMED.

Judge ZACHARY concurs.

Judge ELMORE dissents in a separate opinion.

ELMORE, Judge, dissenting.

I respectfully disagree with the majority's conclusion that the trial court found defendant in both civil and criminal contempt for "distinctly separate and discrete conduct." Defendant's same conduct—failing to return company property in willful violation of its orders—underlies both contempt adjudications, in direct violation of our general statutes. Accordingly, I respectfully dissent.

Because " '[d]efendant alleges a violation of a statutory mandate, and '[a]lleged statutory errors are questions of law[,]' " *State v. Reeves*, 218 N.C. App. 570, 576, 721 S.E.2d 317, 322 (2012) (quoting *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011)), we employ *de novo* review of defendant's challenge. *Id.*

Chapter 5A of our general statutes grants a court the power to punish a party for certain conduct by finding him or her in contempt of court, which comes in two forms: criminal contempt, governed by Article 1, *see* N.C. Gen. Stat. §§ 5A-11 to -17 (2105), and civil contempt, governed by Article 2, *see* N.C. Gen. Stat. §§ 5A-21 to -25 (2105). Under Article 1, N.C. Gen. Stat. § 5A-11(a)(1)–(10) enumerates conduct constituting criminal contempt, including "[w]illful disobedience of . . . a court's . . . order." *Id.* § 5A-11(a)(3). Under Article 2, N.C. Gen. Stat. § 5A-21(a) describes conduct constituting civil contempt and provides, in pertinent part:

> (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;

> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

Generally, a trial court imposes criminal contempt to " 'punish[ ] for acts already committed that have impeded the administration of justice,' " and civil contempt " 'to coerce disobedient defendants into complying with orders of court.' " *Ruth v. Ruth*, 158 N.C. App. 123, 126, 579 S.E.2d 909, 912 (2003) (quoting *Brower v. Brower*, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984)). However, by statute, a court cannot punish a party twice by imposing both criminal and civil contempt for the same conduct. *Compare* N.C. Gen. Stat. § 5A-12(d) ("A person held in criminal contempt under this Article *shall not, for the same conduct*, be found in civil contempt under Article 2 of this Chapter, Civil Contempt." (emphasis added)), *with* N.C. Gen. Stat. § 5A-21(c) ("A person who is found in civil contempt under this Article *shall not, for the same conduct*, be found in criminal contempt under Article 1 of this Chapter." (emphasis added)). Yet the trial court here did just this when it found defendant in civil and criminal contempt based in large part upon the same conduct—his failing to return company property in willful violation of its TRO and preliminary injunction orders.

The relevant provisions of both orders are identical except for paragraph subheadings. The relevant paragraphs of the TRO provide:

> h. Defendant shall . . . take the following actions . . . as stated below:
>
> . . . .
>
> v. That all company-issued credit cards will be turned in and will not be used until and unless authorized by the Managers.
>
> i. Defendant shall . . . tak[e] the following actions within 24 hours of the entry of this order:
>
> i. . . .[R]eturn to Company Headquarters . . . any and all [company] property, including . . . the items listed below:
>
> 1. All office and other equipment purchased by or for the use of the Companies, including computers, tablets, phones, drones, audiovisual equipment, etc.;
>
> 2. All hardcopy and electronic Company files;
>
> 3. Keys and lock combinations to access Company property and equipment, including the Shelby Headend, Kings Mountain Headend, Simulsat, all runs completed or in progress (such as Ballantyne, Wake Forest, etc.), and other assets;
>
> 4. All Company vehicles along with keys or fobs;
>
> 5. All checkbooks, credit cards, and debit cards; and

> 6. All account, login and password access information.
>
> . . . .
>
> iii. . . . [H]ave all mail currently being delivered to [defendant's] residential address or UPS or USPS boxes now be delivered to Company Headquarters[.]

After the contempt proceeding, the trial court entered an order finding defendant in both civil and criminal contempt simultaneously for his willful noncompliance with its orders. In the criminal contempt section of its order, the trial court made the following findings regarding defendant's conduct:

> a. Defendant failed to cause the Plaintiffs' mail to be delivered to Plaintiffs' headquarters . . . as required by paragraph (i)(iii) of the TRO and [an identical paragraph] of the Preliminary Injunction;
>
> b. *Defendant failed to deliver . . . equipment to Plaintiffs' headquarters* . . . including but not limited to at least two phone devices . . . as required by paragraph (i)(i)(1) of the TRO and [an identical paragraph] of the Preliminary Injunction;
>
> c. *Defendant failed to provide all account, login and password access information* . . . as required by paragraph (i)(i)(6) of the TRO and [an identical paragraph] of the Preliminary Injunction; and,
>
> d. *Defendant failed to relinquish the Plaintiffs' credit card and debit cards* as required by paragraphs (i)(i)(5) and (h)(v) of the TRO and [identical paragraphs] of the Preliminary Injunction.

(Emphasis added.) Based upon these findings, the trial court held defendant in criminal contempt for willful noncompliance with the TRO and preliminary

injunction:

> At all times relevant to this proceeding Defendant had the ability to comply with these provisions of the TRO and Preliminary Injunction and has willfully failed to do so in criminal contempt of this Court as set forth in N.C.G.S. § 5A-11(a).

In the civil contempt section of its order, the trial court made the following findings regarding defendant's conduct:

> a. Defendant's instruction to third parties to break Plaintiffs' fiber optic cables and re-splicing them upon renewal of a contract as illustrated in Plaintiffs' Exhibit 12;
>
> b. Defendant's actions in establishing through the North Carolina Secretary of State an LLC known as RST Wireless without the Plaintiffs' knowledge and the engaging in both the purchase of equipment as well as exploration of utilizing Plaintiffs' existing networks in Wake Forest, North Carolina in order to provide wireless communication services; and,
>
> c. *Defendant's failure to return certain of Plaintiffs' equipment (as listed in Plaintiffs' Exhibit 12) as required by paragraphs (i)(i) of the TRO and (j)(i) of the Preliminary Injunction.*

(Emphasis added.) Based upon these findings, the trial court held defendant in civil contempt for willful noncompliance with the TRO and preliminary injunction:

> At all times relevant to this proceeding Defendant had the ability to comply with these provisions of the TRO and Preliminary Injunction and has willfully failed to do so in civil contempt of this Court as set forth in N.C.G.S. § 5A-21 . . . .

As shown, the trial court's order establishes that it found defendant in civil

and criminal contempt for willful noncompliance with its orders based upon, in large part, defendant's same exact conduct—failing to return company property. Yet the trial court punished defendant twice by imposing both civil and criminal contempt sanctions. Although willful noncompliance with a court order may constitute *either* criminal contempt under section 5A-11(a)(3), or civil contempt under section 5A-21(a), a contemnor shall not be punished under *both* statutes based upon the same conduct. *See* N.C. Gen. Stat. §§ 5A-12(d), -21(c). Accordingly, I agree with defendant that, in violation of sections 5A-12(d) and 5A-21(c), the trial court improperly found him in both criminal and civil contempt, and I would vacate the entire order.

The majority, however, relies on our decision in *Adams Creek Associates v. Davis*, 186 N.C. App. 512, 652 S.E.2d 677 (2007), to hold that the trial court here properly punished defendant twice by imposing both forms of contempt for "distinctly separate and discrete conduct." I disagree with the majority's expansive reading of our holding in *Adams Creek Assocs.* and its application of the reasoning in that case to support its holding in this case. The majority attaches significance to the fact in that case that the contempt orders were "based upon the defendants' trespass on the exact same piece of land," rather than the more relevant fact that the orders were based upon separate, contemptible acts.

In *Adams Creek Assocs.*, we affirmed a trial court's simultaneous civil and criminal contempt adjudications against two trespassers over the exact same piece of

land only because the defendants committed independently contemptible acts: (1) willfully violating the court's orders by continuing to live and otherwise trespass on the property; and (2) displaying disparaging behavior during the contempt proceeding by testifying that they intended to continue trespassing regardless of court orders directing them otherwise. *Adams Creek Assocs.*, 186 N.C. App. at 527, 652 S.E.2d at 687. In that case, the defendants were "charged with contempt of court for their continued trespass on [particular] property following the entry of several court orders directing them not to trespass thereon," *id.*, and, after the contempt proceeding, the trial court entered two orders finding them in both civil and criminal contempt. *Id.* at 520, 652 S.E.2d at 683.

On appeal, we rejected the defendants' argument that the trial court erred by finding them in civil and criminal contempt for the same behavior because, in fact, the sanctions were based upon separate, contemptible conduct. *Id.* at 526–27, 652 S.E.2d at 686–87. We observed that, during the contempt proceeding, the defendants testified they "had in fact been living on the subject property or otherwise trespassing on it" and "would not follow future court orders directing them to vacate the property." *Id*. at 527, 652 S.E.2d at 687. Thus, we explained, the "defendants were found in civil contempt for *failing to comply with the court's [previous] order*, and were found in criminal contempt for their *testimony threatening to disobey future orders* of the court." *Id*. (emphasis added). Because the defendants "were found in civil and

criminal contempt on the basis of different acts," we rejected the defendant's argument and affirmed the trial court's contempt adjudications. *Id.*

To be sure, although the *Adams Creek Assocs.* decision does not specify which criminal contempt ground enumerated in N.C. Gen. Stat. § 5A-11(a) applied to the defendants, we can glean insight from the *Adams Creek Assocs.* Court's discussion addressing the trial court's "misnomer" in finding the defendants in indirect, rather than direct, criminal contempt:

> In the instant case, defendants testified in the trial court's presence, constituting direct criminal contempt. However, the trial court mistakenly held them in indirect criminal contempt:
>
> > The testimony of the Defendants stating that they are not going to obey the orders of the court is disrespectful and disparages the respect due to the court and its orders.

Id. at 528, 652 S.E.2d at 687; *see also* N.C. Gen. Stat. § 5A-11(a)(2) ("Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority."). Based on this discussion, it is apparent that the defendants in *Adams Creek Assocs.* were being held in criminal contempt not for willful noncompliance with a court order, as here, but for their disparaging testimony. Thus, the contempt adjudications were based upon two independently contemptible acts.

Yet the majority relies on *Adams Creek Assocs.* to support its conclusion that

defendant here was found in criminal and civil contempt for "distinctly separate and discrete conduct based on a partially overlapping nucleus of facts." In reaching this conclusion, the majority points out that "both the civil and criminal contempt orders were based upon the defendants' trespass on the exact same piece of land" and reasons that the defendants' conduct differed in that one act was "the[ir] disobedience of a past . . . order" and another act was "th[eir] intention to continue to disobey the court's orders." Thus, in applying *Adams Creek Assocs.*, the majority concludes:

> Here, it is readily apparent that, in accord with *Adams Creek Assocs.*, the trial court found Defendant in civil contempt *based on his continued conduct in violation of the TRO and preliminary injunction* in attempting to frustrate RST's business interests while simultaneously attempting to further his own at RST's expense, and found him in criminal contempt *based upon his past conduct, that is, his refusal to obey the trial court's TRO and preliminary injunction* in failing to adhere to their terms including the return of various company assets of RST.

(Emphasis added.) I disagree with this expansive reading of *Adams Creek Assocs.* *Adams Creek Assocs.* held that a contemnor simultaneously may be found in civil and criminal contempt at the same proceeding, provided he or she is punished for different conduct. In my view, the emphasis should not be that both orders were "based upon the defendants' trespass on the exact same piece of land," but that both orders were based upon independently contemptible conduct—willful disobedience with a court order and disparaging testimony threatening to disobey future court orders.

Here, unlike the defendants in *Adams Creek Assocs.*, defendant neither

testified that he intended to retain plaintiffs' property nor that he would disobey future orders of the court. Unlike in *Adams Creek Assocs.*, the record here does not reveal two forms of contemptible conduct. Rather, the trial court's order indicates that it imposed both forms of contempt against defendant for willful noncompliance with its orders, basing its decision, in large part, upon defendant's failure to return company property, *see* N.C. Gen. Stat. § 5A-11(a)(3) ("Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution."), which I believe runs afoul of our general statutes.

Furthermore, the majority's holding effectively nullifies the statutory mandates that a party "shall not, for the same conduct" be punished for both civil and criminal contempt, *see* N.C. Gen. Stat. §§ 5A-12(d), -21(c), as every party charged with willful noncompliance of a court order whose only conduct was leaving uncorrected a single directive in that order would nonetheless be subject to both criminal and civil contempt, on the basis that past and continued violations of that order constitute separate, contemptible conduct.

Because the trial court here punished defendant twice by imposing both civil and criminal contempt sanctions against him based, in large part, upon the same exact conduct—violating its orders by failing to return company property—I believe the trial court violated the statutory mandates prohibiting it from finding a party in both forms of contempt for the same conduct. Therefore, I respectfully dissent.