IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-370

Filed: 3 December 2019

Macon County, No. 18 CRS 509

IN THE MATTER OF: DAVIN ELDRIDGE, Contemnor.

Appeal by defendant from order entered 11 January 2019 by Judge William H. Coward in Macon County Superior Court. Heard in the Court of Appeals 15 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Teresa L. Townsend, for the State.

McKinney Law Firm, P.A., by Zeyland G. McKinney, Jr., for defendant-appellant.

BRYANT, Judge.

Where the trial court's actions would not cause a reasonable person to doubt his objectivity or impartiality, we affirm the trial court's ruling denying defendant's motion for recusal. Where defendant's actions gave rise to criminal contempt, we affirm the trial court's ruling finding him in criminal contempt. Where the trial court did not abuse its discretion by imposing specific conditions which were reasonably related to defendant's probationary sentence, we affirm the trial court's ruling.

On 29 November 2018, defendant Davin Eldridge, a frequent publisher for a Facebook page called "Trappalachia," entered the Macon County Courthouse. The officer working the metal detector saw defendant had a small tape recorder and

"advised [defendant that] he [could] not record inside the courtroom. Defendant acknowledged the officer's instruction and entered a courtroom. As he did so, defendant bypassed signs posted on the entranceways stating:

> BY ORDER OF THE SENIOR RESIDENT SUPERIOR COURT JUDGE: DO NOT use or open cell phones, cameras, or any other recording devices inside the courtrooms. Violations of this order will be contempt of court, subjecting you to jail and/or a fine. Your phone may be subject to seizure and search.

While in the courtroom, defendant was observed sitting on the second row with a cell phone, holding it "shoulder-chest level" towards the front of the courtroom. The officer went over to defendant and instructed him to put his phone away. Defendant replied, "I'm not doing anything." The Honorable William H. Coward, Superior Court Judge of Macon County, was presiding over a criminal matter at that time. Judge Coward was informed that a live posting of the hearing in session was streaming from a Facebook page. Based on that information, Judge Coward interrupted the hearing to issue a reminder that recordings of courtroom proceedings were prohibited by law. At the conclusion of the hearing, Judge Coward viewed the Facebook postings by defendant, which included footage of the inside of the courtroom and the prosecutor presenting his closing argument. The trial court ordered defendant to return to the courtroom later that day. Defendant failed to return as ordered.

On 3 December 2018, Judge Coward issued a show cause order for defendant to appear and show why he should not be held in criminal contempt. The show cause

order made it clear the notice of hearing was based on defendant's usage of a recording device inside the courtroom. The hearing was scheduled for 11 January 2019. Meanwhile, the North Carolina State Bureau of Investigation (SBI) made a preservation request to Facebook to preserve all information relevant to the specific date and time period of the incident. A search warrant was issued and signed by Judge Coward. Upon execution of the warrant, the agents seized defendant's Facebook account records and several messaging threads.

On 11 January 2019, immediately prior to the criminal contempt hearing, the defendant made an oral motion under N.C.G.S. § 5A-15 for Judge Coward to recuse himself, which was denied. A contempt hearing was held, and the trial court found defendant to be guilty of criminal contempt. Defendant was sentenced to jail for thirty days. The active sentence was suspended, and defendant was placed on probation for one year with certain conditions. Defendant gave oral notice of appeal in open court.

On appeal, defendant argues the trial court erred by: (I) denying his motion for recusal at the hearing for contempt, (II) finding him in criminal contempt of court, and (III) issuing a probationary sentence that was unsupported by law.

I

First, defendant argues Judge Coward erred by refusing to recuse himself from defendant's hearing. We disagree.

Disqualification and recusal of a presiding judge in plenary proceedings for contempt is governed by Canon 3 of the North Carolina Code of Judicial Conduct and, in criminal cases, section 5A-15 of the North Carolina General Statutes.

The Code of Judicial Conduct provides, in pertinent part, that a judge should recuse upon motion of any party or by the judge's own initiative if "impartiality may reasonably be questioned" including, *inter alia*, where "the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings." Code of Jud.Conduct, Canon 3C(1)(a) (2015).

Section 5A-15 of the North Carolina General Statues provides that "[t]he judge is the trier of facts at the show cause hearing." N.C.G.S. § 5A-15(d) (2017). "If 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." *Id.* § 5A-15(a).

> While [a written] motion required by N.C. Gen. Stat. § 15A-1223 must be made in a criminal proceeding where either the state or the defendant alleges bias, close familial relationship, or absence of impartiality on the part of the presiding judge, the legislature specifically codified an exception to this requirement for criminal contempt proceedings [under N.C.G.S. § 5A-15] where the acts constituting the contempt so involve the judge issuing the show cause order that his objectivity could be reasonably questioned.

In re Marshall, 191 N.C. App. 53, 60, 662 S.E.2d 5, 10 (2008). Therefore, section 5A-15(a) "imposes a duty on the judge to acknowledge that his involvement in the acts allegedly constituting the contempt could reasonably cause others to question the judge's objectivity and, in such circumstance, to return the show cause order before a different judge *ex mero motu*." *Id*. at 60–61, 662 S.E.2d at 10.

In the instant case, at the beginning of the show cause hearing, defendant orally moved to recuse Judge Coward from the contempt proceedings—arguing there was an "appearance of impropriety" because Judge Coward was "in a situation where [he was] a witness as well as a trier of fact." In response, Judge Coward reasoned as follows:

> As to this motion, the Court respects [defense counsel's] argument as zealous counsel and in questioning my objectivity, but I'm going to deny the motion because I feel that I am objective and can be objective and could not be called as a witness.
>
> I feel that, as [defense counsel] pointed out, we could have had a hearing with or without [defendant's] presence on November 29th and given him, as you said, [defense counsel], limited due process.
>
> However, out of an abundance of caution and to insure that [defendant] receives all the constitutional protections to which he's entitled, I continued the matter to today to allow him time to hire counsel and to prepare for this hearing.
>
> I'm prepared to go forward with it at this time.

After carefully reviewing the record and defendant's arguments for Judge Coward's recusal, we disagree with defendant's assertion that Judge Coward's actions

or personal knowledge would cause a reasonable person to doubt his objectivity or impartiality. The colloquy between Judge Coward and defense counsel reflects that he considered his position as the trier of fact and determined that he was able to preside over the hearing in an objective, impartial manner. Thus, absent facts to suggest bias or impartiality toward defendant, we affirm Judge Coward's decision to deny defendant's motion for recusal.

II

Next, defendant argues the trial court erred by finding him in criminal contempt. Specifically, defendant argues his actions did not establish that he was in willful violation of the statute for criminal contempt. We disagree.

"If a trial court's finding is supported by competent evidence in the record, it is binding upon an appellate court, regardless of whether there is evidence in the record to the contrary." *State v. Key*, 182 N.C. App. 624, 627, 643 S.E.2d 444, 447 (2007).

"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." *Watson v. Watson*, 187 N.C. App. 55, 61, 652 S.E.2d 310, 315 (2007) (internal citation omitted).

Section 5A-11 of the North Carolina General Statues delineates a number of acts which constitute criminal contempt, including the following:

> (1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.

> (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.
>
> (3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

N.C.G.S. § 5A-11(a)(1)–(3) (2017).

Here, defendant challenges the trial court's findings of fact by arguing that his "actions did not disrupt the plea hearing in the ongoing criminal case nor were they calculated to do so." However, there is ample evidence presented at the hearing which showed that defendant knowingly carried a device and entered the courtroom with the intention of live streaming the courtroom proceedings, after being given express warnings, in violation of the court's rules.

Witness testimony from an officer established that prior to entering the courtroom on 29 November, defendant was observed walking through the metal detectors with a small tape recorder. He was issued a verbal warning by the officer not to operate recording devices inside the courtroom. The officer also testified that the day before, defendant "was [seen] sitting in the courtroom with a laptop." Another officer testified that defendant had his "cell phone in his hand and facing the courtroom," holding it at "shoulder-chest level" while court was in session. He was told by that officer inside the courtroom to put his phone away.

Defendant's assertion on appeal that "[t]he more logical inference is that [he] accidently turned his phone on and captured the video" is refuted by the evidence in the record. The messages obtained from defendant's Facebook account reveal that defendant intended to livestream courtroom proceedings, notwithstanding prior warnings and the courtroom policy on recording devices. One relevant post was as follows: "Be prepared today for Trapp's FB Live event in court. . . . I'm prepared to go to jail for this by filming;" "If you can't get in touch [with me] today[,] it's because I was put in jail."

It is evident that defendant had a clear understanding of the courtroom policy, yet he willfully disregarded prior warnings and the posted policy by recording inside the courtroom. His actions supported the trial court's finding of criminal contempt, therefore, defendant's argument is overruled.

III

Lastly, defendant argues the trial court did not sentence him in accordance with the law.

"It has long been the accepted rule in North Carolina that within the limits of the sentence authorized by law, the character and the extent of the punishment imposed is within the discretion of the trial court and is subject to review only in cases of gross abuse." *State v. Goode*, 16 N.C. App. 188, 189, 191 S.E.2d 241, 241–42 (1972).

"[A]s is the case with all offenses of a criminal nature, the punishment that courts can impose therefor, either by fine or imprisonment, is circumscribed by law." *Brower v. Brower*, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984). Section 5A-12, indicates the trial court can censure, impose a sentence up to thirty days imprisonment, and/or a fine not to exceed $500.00. N.C.G.S. § 5A-12(a). However, "[t]he practice of suspending judgment upon terms prescribed has been sanctioned in our courts for a long time[.]" *State v. Everitt*, 164 N.C. 399, 402, 79 S.E. 274, 275 (1913).

> "[T]he [trial] courts have control of their judgments in criminal cases, so far as to suspend the execution thereof on sufficient reason appearing. And if such suspension be had upon application of defendant, it constitutes no error of which he can take advantage. The [trial] courts will be presumed to have exercised such discretion in a proper case."

Id. at 404, 79 S.E. at 276 (citation omitted).

Section 15A-1343 of the North Carolina General Statues ("Conditions of probation") allows the trial court to "impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." N.C.G.S. § 15A-1343(a). "The [trial] court has substantial discretion in devising conditions under this section." *State v. Harrington*, 78 N.C. App. 39, 48, 336 S.E.2d 852, 857 (1985). Additionally, subsection (b1) states that the trial court may require a defendant to comply with special conditions during probation including,

inter alia, "any other conditions determined by the [trial] court to be reasonably related to [their] rehabilitation." N.C.G.S. § 15A-1343(b1)(10).

Here, the trial court sentenced defendant to be confined in the Macon County Detention Center for thirty days. Defendant's sentence was suspended for twelve months, upon six specific conditions for him to meet during his probationary sentence: 1) serve an active sentence of 96 hours; 2) pay the costs of the action; 3) pay a fine of $500.00; 4) draft a 2,000-3,000 word essay on the following subject: "Respect for the Court System is Essential to the Fair Administration of Justice," forward the essay to Judge Coward for approval, and following approval, post the essay on all social media or internet accounts that defendant owns or controls or acquires hereafter during his period of probation and attributed to defendant, without negative comment or other negative criticism by defendant or others, during said period of probation; 5) not violate any order of Court or otherwise engage in further contemptuous behavior; and, 6) not attend "any court session in Judicial District 30A unless and until his essay has been approved and posted as required herein and he has fully complied with all other provisions of this order."

Despite defendant's argument that his sentence was "contrary to law," he cites to no authority in support of that argument. We also note that defendant does not argue that the trial court abused its discretion so as to require that his sentence be set aside. Nevertheless, we acknowledge the trial court's "substantial discretion" in

deciding whether special conditions reasonably fit within defendant's sentence. *See State v. Johnston*, 123 N.C. App. 292, 305, 473 S.E.2d 25, 33 (1996) (upholding a special condition prohibiting the defendant, convicted for disseminating obscene materials, from working in any retail establishment that sold sexually explicit material).

Given defendant's questionable and intentional conduct, his frequent visits to the courtroom, and his direct willingness to disobey courtroom policies, we discern no abuse of discretion in the trial court's decision to impose conditions on defendant's probationary sentence. Such conditions are reasonably related to the necessity of preventing further disruptions of the court by defendant's conduct, and the need to provide accountability without unduly infringing on his rights. Thus, because there is sufficient evidence that the trial court properly exercised its authority, we overrule defendant's argument. The trial court's order is

AFFIRMED.

Judge TYSON concurs.

Judge BROOK concurs in part, dissents in part, with separate opinio

BROOK, Judge, concurring in part and dissenting in part.

I fully join the portions of the majority opinion holding that the trial court did not abuse its discretion in denying Defendant's motion for recusal and that competent evidence supported the trial court's finding that Defendant was in criminal contempt of the court's orders against using recording devices in the courtroom. However, I respectfully dissent from the portion of the majority opinion finding no error in the sentence imposed by the trial court. The probation condition imposed by the trial court requiring Defendant to write and publish an essay about respect for the courtroom on his social media and internet accounts *and* to delete any negative comments made by third-parties on this essay bears no reasonable relationship to Defendant's rehabilitation or to his crime and raises serious First Amendment concerns.

Generally speaking, a sentencing judge "may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." N.C. Gen. Stat. § 15A-1343(a) (2017). "In addition to the regular conditions of probation[,] . . . the court may, as a condition of probation, require that during the probation the defendant comply with one or more . . . special conditions[.]" *Id.* § 15A-1343(b1). A sentencing judge enjoys "substantial discretion" to devise and impose special conditions of probation, *State v. Harrington*, 78 N.C. App. 39, 48, 336

S.E.2d 852, 857 (1985), but these conditions must still be "reasonably related to [the defendant's] rehabilitation," N.C. Gen. Stat. § 15A-1343(b1)(10). As this Court has observed,

> [t]he extent to which a particular condition of probation is authorized by N.C. Gen. Stat. § 15A-1343(b1)(10) hinges upon whether the challenged condition bears a reasonable relationship to the offenses committed by the defendant, whether the condition tends to reduce the defendant's exposure to crime, and whether the condition assists in the defendant's rehabilitation.

State v. Allah, 231 N.C. App. 88, 98, 750 S.E.2d 903, 911 (2013). Finally, "any condition which violates defendant's constitutional rights is *per se* unreasonable and beyond the power of the trial court to impose." *State v. Lambert*, 146 N.C. App. 360, 369, 553 S.E.2d 71, 78 (2001).

Our review of an invalid special condition of probation is preserved by statute. Under N.C. Gen. Stat. § 15A-1342(g), "[t]he failure of a defendant to object . . . at the time such a condition is imposed does not constitute [] waiver of the right to object at a later time[.]" N.C. Gen. Stat. § 15A-1342(g) (2017). Although the Supreme Court has interpreted the phrase "at a later time" in N.C. Gen. Stat. § 15A-1342(g) to "refer to the revocation hearing," rather than extending to challenges "for the first time at the appellate level," *State v. Cooper*, 304 N.C. 180, 183-84, 282 S.E.2d 436, 439

(1981),[1] our Court has held that where the defendant challenges the validity of a special condition of probation on direct appeal from the ensuing judgment, prior to any revocation hearing, N.C. Gen. Stat. § 15A-1342(g) preserves the challenge, *Allah*, 231 N.C. App. at 96, 750 S.E.2d at 910.

While I agree with the majority that the sentencing judge's decision to require Defendant, who violated multiple court orders by recording and livestreaming courtroom proceedings on social media, to write an essay about respect for the courtroom and publish this essay on his social media and internet accounts bears a reasonable relationship to Defendant's criminal contempt of court, and to his rehabilitation for this crime, I do not agree that requiring Defendant to monitor comments made on this essay by third-parties and delete any comments the court might consider critical bears a reasonable relationship to Defendant's crime or to *his* rehabilitation, as N.C. Gen. Stat. § 15A-1343 requires. "[T]rial courts have the discretion to devise and impose special conditions of probation other than those specified in N.C. Gen. Stat. § 15A-1343(b1)," however, "N.C. Gen. Stat. § 15A-1343(b1)(10) 'operates as a check on the discretion available to trial judges' during

[1] The Supreme Court's observation in *Cooper* about the meaning of the phrase "at a later time" in N.C. Gen. Stat. § 15A-1342(g) was made in the context of an appeal from a probation revocation where the challenge to the condition was not raised at the revocation hearing but was instead being raised for the first time on appeal from the revocation hearing. *Cooper*, 304 N.C. at 183, 282 S.E.2d at 439 ("[D]efendant cannot relitigate the legality of a condition of probation unless he raises the issue no later than the hearing at which his probation is revoked."). *Cooper* thus simply stands for the proposition that collateral attack of a special condition of probation on appeal from a violation of probation where the special condition is not challenged at the revocation hearing is not statutorily preserved by N.C. Gen. Stat. § 15A-1342(g).

that process." *Id.* at 98, 750 S.E.2d at 911 (quoting *Lambert*, 146 N.C. App. at 367, 553 S.E.2d at 77). Although the decision of a sentencing judge to impose a special condition of probation is reviewed for an abuse of discretion, *id.*, "statutory errors regarding sentencing issues . . . are questions of law, and as such, are reviewed *de novo*." *State v. Allen*, ___ N.C. App. ___, ___, 790 S.E.2d 588, 591 (2016) (internal marks and citation omitted). As noted previously, whether the reasonable relationship requirement under N.C. Gen. Stat. § 15A-1343(b1)(10) is met depends on "whether the [] condition bears a reasonable relationship to the offense[] committed . . . [or] assists in the defendant's rehabilitation." *Allah*, 231 N.C. App. at 98, 750 S.E.2d at 911.

The condition imposed by the sentencing judge requiring Defendant to monitor comments made on the essay and delete any the court might consider critical is not reasonably related to Defendant's willful violation of the court's orders against using recording devices in the courtroom, nor does it bear a reasonable relationship to his rehabilitation from his past willful disobedience of court orders. It holds Defendant responsible for what is essentially the behavior of others; and while there is some truth to the adage that we are only as good as the company we keep, the relevant community in this context is incredibly diffuse, extending through cyberspace. The lack of reasonable relationship between Defendant's crime and his rehabilitation to the requirement that he monitor comments made on the essay and

delete any critical comments violates the statutory requirement contained in N.C. Gen. Stat. § 15A-1343(b1)(10). My vote therefore is to vacate this condition of his probation.

Our Court has a "settled policy" of avoiding constitutional questions "when a case can be disposed of on appeal without reaching the constitutional issue[.]" *Lambert*, 146 N.C. App. at 368, 553 S.E.2d at 77. Because I vote to vacate the condition of probation requiring Defendant to delete negative comments on the essay, I do not delve deeply into what I consider deeply troubling constitutional problems with this condition of probation. Although we generally do not review constitutional questions that have not first been raised in the trial court, *see State v. Goldsmith*, 187 N.C. App. 162, 167, 652 S.E.2d 336, 340 (2007), suffice it to say that the sentencing judge has not only compelled Defendant to speak within the meaning of the First Amendment, he has compelled Defendant to then continue speaking by censoring the viewpoints of others expressed in response to speech compelled by the court. This compelled speech silencing third-party viewpoints expressed in response to compelled speech raises serious First Amendment concerns.

Thus, while I join the portions of the majority opinion holding that there was no abuse of discretion by the trial court in denying the motion to recuse and that competent evidence supported the court's finding of criminal contempt, I vote to vacate the condition of Defendant's probation requiring him to delete negative

comments made by others on social media and the internet. I otherwise find no error in the sentence imposed by the trial court.