[Cite as *Estate of Harrold v. Collier*, 2009-Ohio-2782.]

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

THE ESTATE OF RENEE HARROLD

Appellee/Cross-Appellant

v.

BRIAN S. COLLIER

Appellant/Cross-Appellee

v.

GARY HARROLD AND
CAROL HARROLD

Appellees/Cross-Appellants

C.A. Nos. 07CA0074
08CA0024

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 97-1440-PAR

DECISION AND JOURNAL ENTRY

Dated: June 15, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Brian Collier has attempted to appeal from two separate orders of the trial court. His first attempted appeal was assigned case number 07CA0074, and the second was assigned case number 08CA0024. This Court consolidated the two attempted appeals.

{¶2} This matter has a long and unfortunate history. It has now been before this Court four times and before the Ohio Supreme Court once. Two other attempts to get it before the Ohio Supreme Court failed. What makes this history particularly unfortunate is that this matter is a fight over visitation with a motherless girl who was two when it began and will soon turn twelve. Still, the battle rages on.

{¶3} After her mother died, the child lived with her maternal grandparents until her father, Mr. Collier, won custody. Since that time, there has been an on-going war over grandparent visitation. Leading to the current round, Mr. Collier repeatedly denied visitation until the trial court held him in contempt. The trial court sentenced him to twenty days in jail, but suspended the sentence on the condition that he not again violate the visitation order. Mr. Collier then filed his first notice of appeal. After he filed that notice of appeal, the trial court entered an order requiring him to pay attorney fees to the grandparents and to give them compensatory visitation time. Mr. Collier did not immediately appeal from that order. Rather, he moved the trial court to strike it and, when it refused, moved for findings of fact and conclusions of law. After the trial court again denied his motion to strike, Mr. Collier filed a second notice of appeal. In case number 07CA0074, this Court affirms the trial court's judgment because its conclusion that Mr. Collier was in contempt of court was not against the manifest weight of the evidence. This Court dismisses case number 08CA0024 because Mr. Collier failed to timely perfect an appeal from the trial court's order requiring him to pay attorney fees and give compensatory visitation time.

BACKGROUND

{¶4} Brian Collier was never married to Renee Harrold, but they were the parents of a daughter, B.C., who was born in July 1997. Ms. Harrold was B.C.'s residential parent, and Mr. Collier had limited, supervised visitation with the child. He also had child support obligations.

{¶5} Ms. Harrold lived with her parents, Gary and Carol Harrold, until she died of cancer in October 1999. At that time, the Harrolds were named B.C.'s temporary legal custodians.

{¶6} B.C. lived with the Harrolds and continued to see her father according to a visitation schedule until this Court affirmed the trial court's award of custody to Mr. Collier in July 2002. On the day this Court released its opinion, Mr. Collier abruptly took the five-year-old from her grandparents' home without any warning or transitional support. He then refused to allow any visitation with her grandparents, despite various court orders requiring it, culminating in his serving four days in jail for contempt. Finally, on Christmas Eve 2005, Mr. and Mrs. Harrold saw their then eight-year-old granddaughter for the first time since the day Mr. Collier took her from their home when she was five. Visitation with the Harrolds appears to have occurred according to schedule for the next six months. Then the current controversy began.

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{¶7} In June 2006, Mr. Collier refused to allow the Harrolds to take B.C. for a court-ordered five-week summer visit. The Harrolds moved the court to hold Mr. Collier in contempt, fine him, and sentence him to jail. They also requested attorney fees and costs associated with the motion, as well as an order for compensatory visitation time. The trial court continued the hearing on the contempt motion, but ordered an abbreviated three-week summer visit for the Harrolds. Mr. Collier complied with that order.

{¶8} Visitation then occurred on an alternating weekend schedule until November 2006, when Mr. Collier refused to allow a Thanksgiving visit. The Harrolds amended their motion for contempt at that time and again in December because Mr. Collier continued to refuse to make the child available for scheduled visits. Mr. Collier has admitted that he did not allow any visitation from November 2006 until April 2007, but has argued that he had concerns for his daughter's well-being that justified his defiance.

{¶9} The trial court held a hearing on the Harrolds' motion for contempt in May 2007. On May 24, 2007, the court held Mr. Collier in contempt of court, but delayed sentencing, ordering mediation in the interim. On September 18, 2007, the court mistakenly issued an entry sentencing Mr. Harrold, rather than Mr. Collier, to serve 20 days in jail for contempt. On September 19, 2007, the court issued a nunc pro tunc entry, sentencing Mr. Collier to serve 20 days in jail for contempt, "suspended on the condition [that he] not be again found in Contempt of Court for denial of visitation." On October 19, 2007, Mr. Collier appealed from the May 24th order holding him in contempt and the September 19th order imposing sentence. That appeal was assigned case number 07CA0074.

A FINAL, APPEALABLE CONTEMPT ORDER

{¶10} Article IV Section 3(B)(2) of the Ohio Constitution provides that courts of appeals "shall have such jurisdiction as may be provided by law to review . . . judgments or final orders. . . ." A judgment entry of contempt of court is not final "[u]ntil both a finding of contempt is made and a penalty [is] imposed by the court." *Keating v. Keating*, 9th Dist. No. 02CA007984, 2002-Ohio-3865, at ¶4.

{¶11} "Contempt of court is defined as the disregard for, or the disobedience of, an order of a court." *State v. Nelson*, 9th Dist. No. 03CA008242, 2003-Ohio-3922, at ¶5. "It is conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions." *Id*. (quoting *Windham Bank v. Tomaszczyk*, 27 Ohio St. 2d 55, paragraph one of the syllabus (1971)).

{¶12} Indirect contempt is committed outside the presence of the court. *Burt v. Dodge*, 65 Ohio St. 3d 34, 35 n.1 (1992). It may be classified as either criminal or civil depending on the "character and purpose of the punishment" imposed. *Brown v. Executive 200 Inc.*, 64 Ohio St.

2d 250, 253 (1980). The distinction is important because "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires." *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 826 (1994) (quoting *Hicks v. Feiock*, 485 U.S. 624, 632 (1988)).

{¶13} Criminal contempt "operates . . . as a punishment for the completed act of disobedience, and to vindicate the authority of the law and the court." *Brown*, 64 Ohio St. 2d at 254. On the other hand, punishment for civil contempt is "remedial or coercive and for the benefit of the complainant." *Id*. at 253. A term of imprisonment may be imposed as either a civil or criminal sanction for indirect contempt. Typically, civil contempt "involves confining a contemnor indefinitely until he complies with an affirmative command" to do something like testify or produce documents. *Bagwell*, 512 U.S. at 828. "Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies." *Id*. This type of civil sanction "makes sense only if the order requires performance of an identifiable act (or perhaps the cessation of continuing performance of an identifiable act). A general prohibition for the future does not lend itself to enforcement through conditional incarceration, since no single act (or cessation of no single act) can demonstrate compliance and justify release." *Id*. at 840-41 (Scalia, J., concurring). The distinction between criminal and civil contempt sanctions has also been described in terms of the effect of the punishment. "Punishment in criminal contempt cannot undo or remedy the thing which has been done, but in civil contempt punishment remedies the disobedience." *Id*. at 841 (Scalia, J., concurring) (quoting *In re Fox*, 96 F.2d 23, 25 (3d Cir. 1938)).

{¶14} Mr. Collier filed his first notice of appeal following the trial court's September 19, 2007, order sentencing him to 20 days in jail. That order also suspended the sentence, "on

the condition [that Mr.] Collier not be again found in Contempt of Court for denial of visitation." Mr. Collier was held in contempt for completed violations of the court's visitation order that could not be remedied by confining him to a jail cell. Furthermore, avoiding a future finding of contempt, as the suspension order demanded, required more than the simple performance of an identifiable act. It required ongoing future adherence to each term of the visitation order for every weekend, holiday, and vacation time affected. Although the trial court did not identify the type of contempt sanction, it imposed a criminal contempt sanction in the form of a definite sentence to punish the completed violations of the order. Regardless of the fact that the execution of the sentence was suspended, the court imposed sentence on September 19, 2007. Therefore, Mr. Collier's first notice of appeal was timely filed. See *Peterson v. Peterson*, 5th Dist. No. CT2003-0049, 2004-Ohio-4714, at ¶8; *Strong v. Strong*, 6th Dist. No. L-01-1464, 2002 WL 91291 at *1 (Jan. 23, 2002). It should be noted that imposition and suspension of a sentence as was done by the trial court in this case "can have no effect." *Forrer v. Buckeye Speedway Inc*., 9th Dist. No. 07CA0027, 2008-Ohio-4770, at ¶55 (quoting *Marden v. Marden*, 108 Ohio App. 3d 568, 571 (1996)).

INDIRECT CRIMINAL CONTEMPT

{¶15} Mr. Collier's sole assignment of error is that the trial court's finding that he was in contempt of court for denial of visitation was against the manifest weight of the evidence. Specifically, he has argued that his actions were justified by legitimate concerns about his daughter's safety and well-being. In order to evaluate a manifest weight of the evidence claim in a criminal proceeding, this Court "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest

miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶16} Before this Court can weigh the evidence, however, it must determine that there is evidence to weigh. *Whitaker v. M.T. Automotive Inc.*, 9th Dist. No. 21836, 2007-Ohio-7057, at ¶13. Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. This Court must determine whether, viewing the evidence in a light most favorable to the Harrolds, it could have convinced the trial court of Mr. Collier's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991).

{¶17} Indirect criminal contempt must be proven beyond a reasonable doubt. *Brown v. Executive 200 Inc.*, 64 Ohio St. 2d 250, syllabus (1980). The opposing party has the burden to prove the existence of a valid court order, the alleged contemnor's knowledge of the order, and a violation of it. *State v. Komadina*, 9th Dist. No. 03CA008325, 2004-Ohio-4962, at ¶11. Criminal, indirect contempt also requires a showing that the alleged contemnor intended to defy the court. *Midland Steel Prods. Co. v. U.A.W. Local 486*, 61 Ohio St. 3d 121, 127 (1991). "A contemnor is presumed to intend the reasonable, natural, and probable consequences of his acts." *State v. Daly*, 2d Dist. No. 2007 CA 26, 2007-Ohio-5170, at ¶51 (quoting *In re Olivito*, 7th Dist. No 04 MA 42, 2005-Ohio-2701, at ¶32).

{¶18} The record reflects that the trial court issued a new visitation schedule in December 2005. At the hearing on the Harrolds' contempt motion, Carol Harrold testified that, on June 23, 2006, Mr. Collier refused to allow her to pick up B.C. to begin a scheduled five-week visit. Approximately one month later, after an emergency hearing, the trial court ordered

an abbreviated three-week visit. According to Mrs. Harrold, Mr. Collier complied with that order. She further testified, however, that Mr. Collier refused to comply with the visitation order at Thanksgiving 2006. According to her, she called her attorney and the local police, but Mr. Collier refused to comply with the trial court's order. Mrs. Harrold testified that she did not see her granddaughter again until the following April.

{¶19} Mr. Collier testified that he was aware of the December 22, 2005, judgment entry outlining the visitation schedule. He recalled that the order was largely the same as the prior visitation order, including five consecutive weeks of summer visitation for the Harrolds. Mr. Collier acknowledged that the order was not stayed or suspended at any time relevant to the allegations against him. He admitted that he refused to allow the Harrolds to take B.C. at the beginning of the scheduled five-week summer visit in June 2006. He admitted that "it wasn't until th[e trial c]ourt [o]rdered . . . visitation to resume as of July 28, 2006," that he allowed the Harrolds to see B.C. again.

{¶20} After that, Mr. Collier complied with the visitation order until November 22, 2006, when he refused to permit the Harrolds to take B.C. for a Thanksgiving visit. Mr. Collier admitted that he continually refused to provide the Harrolds their court-ordered visitation from Thanksgiving 2006 through April 20, 2007. According to Mr. Collier, the trial court issued an order in April 2007 requiring limited visitation and Mr. Collier complied. Mr. Collier's own testimony provided sufficient evidence that he knew of the terms of the visitation order and intended to violate the order by refusing to allow the Harrolds to visit with B.C.

{¶21} Mr. Collier admitted to repeatedly withholding court-ordered visitation from the Harrolds, but he testified that his defiance was justified by concerns for B.C.'s welfare. He testified that his concerns in the summer of 2006 arose from out-of-court conversations he had

had with B.C. The guardian ad litem testified that she spoke with B.C. about comments she had made to her father about Mr. Harrold having driven her home after drinking alcohol at a family-night karaoke function at a Polish club. The guardian ad litem was not able to confirm whether Mr. Harrold had ever consumed alcohol before driving B.C. home. The guardian also testified about concerns raised by B.C.'s teacher in November 2006. She testified that she spoke with B.C.'s guidance counselor regarding a writing assignment B.C. had completed regarding her grandparents. The guardian ad litem explained that school personnel were concerned not about how B.C. felt about her grandparents or the care she received from them, but how she was coping with the animosity between them and her father.

{¶22} Mr. Collier testified that he violated the court order due to these concerns and that he also moved the court for an in camera interview with B.C. and later moved to suspend visitation for the same reasons. Mr. Collier's motion for an in camera interview of B.C. was not filed until July 18, 2006, three weeks after he refused to allow the Harrolds to begin the extended summer visit. The motion was promptly denied, and Mr. Collier complied with the visitation order from late summer until Thanksgiving. The record reflects that, approximately two weeks after he refused to allow a Thanksgiving visit, Mr. Collier moved the court to suspend visitation until an in camera interview could be conducted with the child. The court scheduled the interview, but denied the motion. Nevertheless, Mr. Collier continued to refuse all visitation with the Harrolds until the court issued another order in April 2007.

{¶23} The trial court's holding that Mr. Collier was in contempt of court for violating the visitation order was not against the manifest weight of the evidence. He admitted that, after his motion to suspend visitation was denied, he "unilaterally took it upon [himself] to prohibit [the Harrolds] from visiting with their granddaughter." The trial court pointed out that Mr.

Collier failed to immediately move the court to modify visitation when his concerns about B.C.'s safety first arose. The court noted that, "Mr. Collier is no stranger to legal actions, motions and court intervention . . . [so] it is interesting that he took the issue of visitation into his hands . . . [and] failed to bring the matter to the attention of the Court until resorting to self-help." Furthermore, the court noted that Mr. Collier did not call either B.C.'s teacher or her guidance counselor to testify at the contempt hearing regarding the nature of their concerns. Mr. Collier's own testimony supported a finding, beyond a reasonable doubt, that he knew of the terms of the visitation order and intended to violate the order by refusing to allow the Harrolds to see his daughter for a month in the summer and another five consecutive months beginning in late November 2006. Mr. Collier failed to prove any legitimate excuse for his admittedly contemptuous acts. Mr. Collier's sole assignment of error is overruled.

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{¶24} A few days after the trial court issued the nunc pro tunc sentencing entry, the Harrolds moved the trial court for a decision regarding the issues raised in their contempt motion that had not been addressed by the trial court: attorney fees and compensatory visitation time. On December 7, 2007, the court issued an order granting the Harrolds three additional weeks of summer visitation in 2008 and $1971.75 in attorney fees. In response to a request for clarification, the court issued another order on December 13, 2007, indicating that Mr. Collier had until March 31, 2008, to pay the attorney fee award. Mr. Collier did not appeal the December orders.

{¶25} Instead, he moved to strike the December orders regarding attorney fees and compensatory visitation time. The trial court denied his motion to strike, and Mr. Collier moved for findings of fact and conclusions of law. On April 24, 2008, the trial court ruled on that

motion, holding that the "October 16, 2007," order was not final because it did not dispose of all pending issues. Despite the date included in the entry, it appears the court was referring to the sentencing order of September 19, 2007. The court went on to hold that Mr. Collier's October notice of appeal did not divest it of jurisdiction because the matter was not yet ripe for appeal. The court again denied Mr. Collier's motion to strike the December entries. On May 5, 2008, Mr. Collier attempted to appeal from the April 24, 2008, entry. That attempted appeal was assigned case number 08CA0024.

{¶26} Under Section 2505.04 of the Ohio Revised Code "[a]n appeal is perfected when a written notice of appeal is filed . . . ." "Once a case has been appealed, the trial court loses jurisdiction," *In re S.J.*, 106 Ohio St. 3d 11, 2005-Ohio-3215, at ¶9, except insofar as its continuing jurisdiction is "not inconsistent with the court of appeals' jurisdiction to reverse, modify, or affirm the judgment." *Yee v. Erie County Sheriff's Dep't*, 51 Ohio St. 3d 43, 44 (1990) (quoting *In re Kurtzhalz*, 141 Ohio St. 432, paragraph two of the syllabus (1943)). A trial court does not have jurisdiction to consider whether the appellant has validly invoked the jurisdiction of the appellate court. *In re S.J.*, 2005-Ohio-3215, at ¶10 (citing *In re Terrance P.*, 124 Ohio App. 3d 487, 489 (1997)).

{¶27} The Harrolds moved the trial court for a finding of contempt with a jail sentence, fine, attorney fees, court costs, and compensatory visitation time under Section 3109.05.1(K) of the Ohio Revised Code. The trial court granted the motion, finding Mr. Collier in contempt and ordering a jail sentence, but it did not address the other requests. A trial court ruling on the outstanding requests for additional forms of relief would have been inconsistent with this Court's jurisdiction to rule on the finding of contempt. That is, the trial court's determination that the Harrolds were entitled to compensatory visitation and attorney fees was based upon the very

contempt finding that Mr. Collier sought to have reversed in his first appeal. Therefore, the notice of appeal Mr. Collier filed in October 2006 divested the trial court of jurisdiction to consider the requests that remained outstanding after Mr. Collier was sentenced. See R.C. 2505.04; *In re S.J.*, 2005-Ohio-3215, at ¶9-10.

{¶28} "If a trial court lacks jurisdiction, any order it enters is a nullity and is void." *Fifth St. Realty Co. v. Clawson*, 9th Dist. No. 94CA005996, 1995 WL 353722 at *2 (June 14, 1995). This Court construes Mr. Collier's motion to strike as a motion to vacate a void judgment. See *Van DeRyt v. Van DeRyt*, 6 Ohio St. 2d 31, 36 (1966) ("A court has inherent power to vacate a void judgment because such an order simply recognizes the fact that the judgment was always a nullity.").

{¶29} Mr. Collier failed to timely perfect an appeal of the March 24, 2008, entry denying his motion to strike. Instead, he moved for findings of fact and conclusions of law under Rule 52 of the Ohio Rules of Civil Procedure. A motion under Rule 52 for findings of fact and conclusions of law tolls the time for the filing of a notice of appeal. App. R. 4(B)(2). But, a Rule 52 motion is only appropriate "[w]hen questions of fact are tried by the court without a jury." Civ. R. 52. The trial court's March entry denying Mr. Collier's motion to strike was not a general judgment rendered after questions of fact had been tried without a jury. Therefore, Rule 52 did not apply, and findings of fact and conclusions of law were not necessary.

{¶30} Mr. Collier's Rule 52 motion did not toll the time for filing an appeal from the March 24, 2008, entry denying his motion to strike. Therefore, this Court does not have jurisdiction to consider Mr. Collier's attempted appeal in case number 08CA0024 because his notice of appeal was not timely filed. See App. R. 4(A); *State ex rel. Pendell v. Adams County Bd. of Elections*, 40 Ohio St. 3d 58, 60 (1988) ("Where a notice of appeal is not filed within the

time prescribed by law, the reviewing court is without jurisdiction to consider issues that should have been raised in the appeal."). Nothing in this opinion prohibits the trial court from following the requirements of Section 3109.05.1(K) on remand. See R.C. 3109.05.1(K) (providing that, if the court holds a party in contempt for violation of a visitation order, the court "shall assess all court costs arising out of the contempt proceeding . . . and require the person to pay any reasonable attorney's fees of any adverse party . . . , and may award reasonable compensatory . . . visitation . . . if such . . . is in the best interest of the child.").

CONCLUSION

{¶31} Regarding case number 07CA0074, the judgment of the Juvenile Division of the Wayne County Common Pleas Court is affirmed because the holding that Mr. Collier was in contempt of court was not against the manifest weight of the evidence. Case number 08CA0024 is dismissed for failure to timely perfect an appeal under Rule 4(A) of the Ohio Rules of Appellate Procedure.

Affirmed in part,
dismissed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant/cross-appellee.

CLAIR E. DICKINSON
FOR THE COURT

BELFANCE, J.
CONCURS

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶32} Respectfully, while I agree with the ultimate resolution of this case, I concur in judgment only.

APPEARANCES:

GREGORY L. HAIL, attorney at law, for appellant/cross-appellee.

RENEE J. JACKWOOD, attorney at law, for appellees/cross-appellants.