[Cite as *Columbus v. Cicero*, 2013-Ohio-3010.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
		No. 12AP-407
v.	:	(M.C. No. 2012 TRD 126156)
Christopher T. Cicero,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 11, 2013

Columbus City Attorney, and *Mary Lynn Caswell*, Special Prosecutor, for appellee.

The Behal Law Group LLC, *John M. Gonzales*, *Robert J. Behal*, and *Jeffrey A. Eyerman*, for appellant.

APPEAL from the Franklin County Municipal Court

CONNOR, J.

{¶ 1} Defendant-appellant, Christopher T. Cicero ("appellant"), appeals from a judgment of the Franklin County Municipal Court finding him in contempt of court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On March 21, 2012, appellant was cited for speeding by the Ohio State Highway Patrol. He appeared before Judge Scott VanDerKarr for arraignment on March 22, 2012. Based upon representations appellant made to Judge VanDerKarr regarding a plea agreement, appellant was permitted to plead guilty to an equipment violation. Judge VanDerKarr asked appellant to prepare and submit a proposed judgment entry for his signature. Judge VanDerKarr subsequently signed the proposed

judgment entry submitted by appellant and the entry was forwarded to the clerk of court's office for journalization.

{¶ 3} However, on April 4, 2012, the clerk's office contacted Judge VanDerKarr to inquire about two omissions in the journal entry. First, the journal entry did not contain a disposition of the original charge. Second, the name of the prosecutor who offered the plea was not indicated. When Judge VanDerKarr's bailiff contacted appellant by telephone, appellant refused to provide him with the name of the prosecutor who had allegedly offered the plea deal. Judge VanDerKarr contacted appellant by telephone and he again refused to provide the name of the prosecutor. Judge VanDerKarr's recollection of the exchange between he and appellant was as follows:

> THE COURT: From 6:00 to 6:30, I basically screamed and yelled at Mr. Cicero for a half hour saying I wanted to know what name he gave me at the bench. He refused. I told him I was going to put a warrant for contempt out for his arrest because he either lied to me in 4C, or he wasn't coming clean with me who the assistant prosecutor was. Called him back about nine o'clock, and I said, Look, I'll take the warrant off if you give me the name; I'll give you a chance to talk to the assistant prosecutor in the morning before they are required to talk to their supervisor. We were disconnected. I could not get him back on the phone. I could not get him to return the phone call, tried over the next hour, left the warrant out all night.

(Apr. 5, 2012 Tr. 3.)

{¶ 4} Appellant turned himself in the next morning and he was brought before Judge VanDerKarr for a hearing. Present at the hearing were City Prosecutors Lara Baker and Bill Hedrick. Both prosecutors represented to Judge VanDerKarr that they had neither prior knowledge of the ticket nor of the alleged plea agreement. They also informed the judge that their office policy did not permit prosecutors to offer a plea to an equipment violation. When asked by Judge VanDerKarr to reveal the name of the prosecutor who offered him the plea, appellant again refused. Thereupon the judge issued the following order:

> THE COURT: Mr. Cicero, here's what I'm going to do. I'm going to allow you to post a $1,000 cash bond with the clerk, give you 24 hours. Tomorrow, if you don't give me a name,

> cash bond will be forfeited and you'll go to jail. And I will just keep bringing your back daily until I have a name.
>
> THE DEFENDANT: All right.
>
> THE COURT: Mike can take him down, let him post the bond with the clerk. Nine o'clock tomorrow morning back here.

(Apr. 5, 2012 Tr. 17.)

{¶ 5} At the proceedings held on April 6, 2013, appellant told Judge VanDerKarr that Brandon Shroy had offered him the plea deal on March 22, 2012. Prosecutor Baker was present at the hearing and informed Judge VanDerKarr that Shroy was no longer employed by the city prosecutor, but that he was employed on the week of March 22, 2012. She further related that she had contacted Shroy by telephone and that Shroy denied making any such offer to appellant. Prosecutor Baker then moved the court to vacate the judgment on the grounds of fraud.

{¶ 6} When Judge VanDerKarr asked appellant about the circumstances surrounding the alleged plea offer from Shroy, appellant refused to provide any further information. The transcript reveals the following exchange:

> THE DEFENDANT: Your Honor, at this point in time, this is where I am, you know. If I'm going to have to proceed any further based on what I've just said, then I would like to talk to somebody. But . . .
>
> THE COURT: The Court's going to continue this to Tuesday. Court's going to revoke the bond. Defendant's going to be taken into custody. That will be it. It will be 9 o'clock Tuesday.
>
> THE DEFENDANT: Okay.

(Apr. 6, 2012 Tr. 6-7.)

{¶ 7} Appellant remained in jail through the long holiday weekend and appeared in court on April 10, 2012 with counsel. Appellant's counsel entered a plea of no contest to the traffic offense and offered an apology on appellant's behalf stating "[m]y client recognizes that his failure to answer the question delayed the court proceedings. A fundamental misunderstanding among my client, the prosecutor's office and the Court

occurred. He sincerely apologizes for the inconvenience, Your Honor." (Apr. 10, 2012 Tr. 3.) Thereupon, Judge VanDerKarr made the following statement for the record:

> THE COURT: There was discussion in the back of direct contempt and indirect contempt, and there's a lot of different case law, but the case law that the Court is applying is that if a certain behavior interrupts the other duties of the Court, meaning going forward on other cases and being able to proceed on those other cases is delayed, and I think that the prosecutor's office time was taken up as well in looking into what was discussed already on the record on Thursday and Friday. Based on that delay of the process, the Court will find the defendant in contempt.
>
> He has been in, by the Court's count, jail, five days, for the last five days since I had him taken out of the courtroom on Friday. The Court believes that five days of time in jail for what occurred is an appropriate sentence, so, in essence, that is time served. I will return the balance of the bond.

(Apr. 10, 2012 Tr. 3-4.)

{¶ 8} The court issued a judgment entry on April 10, 2012, finding appellant guilty of the speeding violation and fining him $150 plus costs. The entry provides further: "As to the contempt, defendant entered an admission and the Court finds five (5) days in jail as sufficient penalty for that contempt. The contempt is based on the delay to the judicial system as a whole."

II. ASSIGNMENTS OF ERROR

{¶ 9} Appellant has timely appealed and brings the following five assignments of error for our review:

> I. The trial court erred as a matter of law and violated Mr. Cicero's constitutional rights by summarily revoking his bond and incarcerating him without due process of law.
>
> II. The trial court erred as a matter of law and abused its discretion by summarily finding Mr. Cicero in contempt even though the court did not have personal knowledge of the allegedly contumacious act and even though the act did not constitute an immediate threat to the administration of justice.

> III. The trial court violated Mr. Cicero's constitutionally guaranteed due process rights when it erroneously found him to be in contempt and incarcerated him.
>
> IV. Judge VanDerKarr's refusal to assign Mr. Cicero's contempt case to an impartial judge was a violation of due process and reversible error.
>
> V. The trial court abused its discretion by summarily imposing an excessive and inappropriate jail sentence prior to erroneously finding Mr. Cicero in direct criminal contempt.

III. STANDARD OF REVIEW

{¶ 10} We review the trial court's decision whether to find a party in contempt under an abuse of discretion standard. *Williamson v. Cooke*, 10th Dist. No. 05AP-936, 2007-Ohio-493 The abuse of discretion standard is defined as "[a]n appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence." *State v. Gordon*, 10th Dist. No. 10AP-1174, 2011-Ohio-4208.

{¶ 11} This appeal involves two separate contempt orders. The first arises from a series of incidents beginning with appellant's telephone conversations with Judge VanDerKarr on April 4, 2012, continuing at the hearing held on April 5, 2012, and culminating in the order made by Judge VanDerKarr following the April 6, 2012 hearing. As a result of that order, appellant's bond was revoked and he was taken into custody. Judge VanDerKarr issued the second order on April 10, 2013.

{¶ 12} As a preliminary matter, appellee argues that the issues raised by the appeal are moot inasmuch as appellant has served his jail sentence. As a general rule, when the contemnor complies with the trial court's instructions for purging contempt, or serves his sentence and pays his fine, an appeal from the contempt charge is moot. *See State v. Berndt*, 29 Ohio St.3d 3 (1987); *see also Bank One Trust Co., NA. v. Scherer*, 10th Dist. No. 06AP-70, 2006-Ohio-5097. (An appeal is moot when contemnors, who could have moved for a stay of the trial court's contempt order did not, and instead paid their fines); *Epitropoulos v. Epitropoulos*, 10th Dist. No. 10AP-877, 2011-Ohio-3701, ¶ 34. (Because an appellate court's duty is to decide actual controversies, it may not decide the appeal of a contempt order once the contemnor has purged the contempt).

{¶ 13} An exception to the general rule exists where the evidence permits an inference that the contemnor may be subject to a collateral sanction as a result of the judgment. *See State v. McMullan*, 3d Dist. No. 17-05-09, 2005-Ohio-4442, citing *Berndt* at 4. The trial transcript permits the inference that appellant may be subject to an additional or enhanced disciplinary action as a result of the contempt order in this case.

{¶ 14} During the April 5, 2012 proceedings, Judge VanDerKarr made the following comment to appellant:

> THE COURT: You're ready to give up your career over it when all they are going to do is go to that prosecutor and say, Don't do this again; but you're ready to give your career up? Because you've got to be skating on the thinnest ice that there is on any pond already. You know, I'm not standing here in a vacuum, and you're not standing here in a vacuum. We all know you already have issues and you add one more . . .

(Apr. 5, 2012 Tr. 13.)

{¶ 15} The transcript also contains the following:

> THE COURT: The - - We have discussed this in chambers with lawyers from both sides who - - obviously, there are ethical issues, and the Court and the prosecutor's office is under an obligation to pass this on to the ethics commission. Because of that, the prosecution nor the Court is going to be able to grant interviews because, plain and simple, the Court, court employees, other individuals could end up being witnesses in that ethics procedure. So I think it would be inappropriate for the State or the Court to grant interviews. We're not trying to hide anything from you. We're just trying to follow the process appropriately and protect everyone's rights, so we won't be granting interviews. But the transcripts from all three proceedings will be - - the transcripts will be passed on to the disciplinary council.

(Apr. 10, 2012 Tr. 4-5.)

{¶ 16} Judge VanDerKarr's statements in the record support a finding that appellant may be subject to a collateral sanction as a result of the contempt order in this case. Thus, the appeal is not moot.

{¶ 17} Turning to the merits of the appeal, contempt of court is defined as the disregard for, or the disobedience of, an order of a court. *In re Contempt of Morris,* 110 Ohio App.3d 475, 479 (8th Dist.1996). 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. *Furlong v. Davis*, 9th Dist. No. 24703, 2009-Ohio-6431, ¶ 33. Contempt may also consist of "an act or omission substantially disrupting the judicial process in a particular case." *In re Morris.*

{¶ 18} In his second assignment of error, appellant argues that it was an abuse of discretion for Judge VanDerKarr to consider information outside of his own personal knowledge in support of the order of contempt. The court disagrees.

{¶ 19} Contempt of court is classified as either direct or indirect. *In re Purola*, 73 Ohio App.3d 306, 310 (3d Dist.1991). R.C. 2705.01 defines direct contempt as follows: "A court, or judge at chambers, may summarily punish a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice."

{¶ 20} The record establishes that appellant refused to provide Judge VanDerKarr with the name of the prosecutor who allegedly offered him the plea deal when requested to do so in a telephone conversation on April 4, 2012. He continued to defy the court at the hearing held on April 5, 2012. Appellant subsequently purged the contempt by revealing the name of the prosecutor at the April 6, 2013 hearing, and the court imposed no punishment. However, appellant subsequently refused to answer Judge VanDerKarr's queries regarding the circumstance of the alleged plea deal. Thus, the evidence that was most damaging to appellant was his own persistent refusal to answer relevant inquiries from Judge VanDerKarr. Appellant's contumacious conduct occurred either in telephone conversations with Judge VanDerKarr or in court. Thus, the contempt is direct.

{¶ 21} Appellant counters that Judge VanDerKarr erred by considering information he received from the prosecutor and from his own bailiff in assessing appellant's culpability. As noted above, the prosecutor informed Judge VanDerKarr that the alleged plea deal was a violation of office policy, and that none of her current or former prosecutors, including Shroy, admitted offering such a plea to appellant. Judge VanDerKarr's bailiff related that appellant earlier told him that there was no plea deal. Appellant responded that the bailiff misunderstood him.

{¶ 22} In the opinion of this court, the record shows that the conduct that formed the basis of the contempt order was within Judge VanDerKarr's personal knowledge. Moreover, to the extent that the April 6, 2012 contempt order was based upon information that became known to Judge VanDerKarr from sources other than appellant, such information was obtained from court officers, either in chambers or at the April 6, 2012 hearing. Accordingly, appellant's second assignment of error is overruled.

{¶ 23} In appellant's first and third assignments of error, appellant contends that Judge VanDerKarr abused his discretion by summarily revoking his bond and incarcerating him for contempt without first conducting an evidentiary hearing pursuant to the rules of evidence, and affording him the right to legal counsel. The court disagrees.

{¶ 24} One of the important distinctions between direct and indirect contempt is that the court has authority to summarily punish contempt which takes place in its presence, without the need for a hearing. *State v. Local Union 5760, United Steelworkers of Am.*, 172 Ohio St. 75, 79 (1961). Where the contempt is committed directly under the eye or within the view of the court, it may proceed "upon its own knowledge of the facts, and punish the offender, without further * * * proof, and without issue or trial in any form." *Cooke v. United States*, 267 U.S. 517, 535 (1925). [1]

{¶ 25} As the court has previously determined, the contumacious conduct that formed the basis of the trial court's April 6, 2012 order occurred in the presence of the court and is punishable as direct contempt. Consequently, the trial court was empowered to make a finding of contempt and to impose punishment without the need for a formal trial, the formal presentation of evidence or the need for legal counsel.

{¶ 26} Appellant insists, however, that the trial court did not have the authority to summarily punish him for direct contempt without proof that his conduct created an "imminent threat to the administration of justice." Appellant argues that this elevated

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[1] Prior to imposing a punishment for indirect contempt, the contemnor must be afforded certain procedural safeguards, including a written charge, entry on the court's journal, an adversary hearing, and an opportunity for legal representation. R.C. 2705.03; *Xenia v. Billingham*, 2d Dist. No. 97-CA-124 (Oct. 9, 1998), citing *State ex rel. Seventh Urban, Inc. v. McFaul*, 5 Ohio St.3d 120 (1983).

standard is required whenever the court summarily imposes a jail sentence for contempt. *See In re contemnor Caron*, 110 Ohio Misc.2d 58 (C.P.2000).

{¶ 27} As noted above, appellant's own conduct in refusing to respond to relevant inquiries from the court is proof beyond doubt of appellant's disobedience of a lawful court order. Appellant's continued refusal to provide information to Judge VanDerKarr, in the face of his efforts to determine a fraud has been committed, represents an imminent threat to the administration of justice. Accordingly, based upon the totality of the evidence, even if the court were to apply the elevated standard suggested by appellant, the court did not abuse its discretion in finding appellant in direct contempt of court and summarily imposing a jail term. Accordingly, appellant's first and third assignments of error are overruled.

{¶ 28} In appellant's fourth assignment of error, appellant contends that Judge VanDerKarr violated his constitutional right to a fair and impartial tribunal.

{¶ 29} An allegation of judicial bias must be asserted at the earliest available opportunity, absent extraordinary circumstances. *In re Disqualification of Pepple*, 47 Ohio St.3d 606 (1989). Appellant, who is an attorney, never asked Judge VanDerKarr to recuse himself nor did he ever move for his disqualification. Moreover, while this case involves direct contempt of court, there were no harsh words or insults exchanged, and there is no evidence of prior ill will. In short, the record does not reveal evidence of a bias or prejudice on the part of Judge VanDerKarr. Accordingly, appellant's fourth assignment of error is overruled.

{¶ 30} In his fifth assignment of error, appellant argues that the five-day jail term constitutes excessive punishment and an abuse of discretion.

{¶ 31} The distinction between civil and criminal contempt centers on "the purpose and character of the punishment which is imposed upon the contemnor by the trial court." *Newcomer v. Newcomer*, 6th Dist. No. L-10-1299, 2011-Ohio-6500, ¶ 45, citing *Cleveland v. Geraci*, 8th Dist. No. 64075 (Dec. 16, 1993). The purpose of civil contempt proceedings is to encourage or coerce a party in violation of active court orders to comply with those orders for the benefit of the other party. *Rowell v. Smith*, 10th Dist. No. 12AP-262, 2012-Ohio-4667, citing *Pugh v. Pugh*, 15 Ohio St.3d 136, 139 (1984); *State v. Kilbane*, 61 Ohio St.2d 201, 204-05 (1980). A sanction for civil contempt must allow

the contemnor the opportunity to purge herself of the contempt prior to imposition of any punishment. *Rowell,* citing *Burchett v. Miller*, 123 Ohio App.3d 550, 552 (6th Dist.1997). As such, the contemnor is said to carry the keys of his prison in his own pocket, since he will be freed if he agrees to do as ordered. *In re Nevitt*, 117 F. 448, 461 (8th Cir.1902).

{¶ 32} On the other hand, criminal contempt involves a punitive sanction designed to vindicate the authority of the court. *McRae v. McRae*, 1st Dist. No. C-110743, 2012-Ohio-2463. A criminal contempt is an unavoidable punishment for past affronts to the court. *Flowers v. Flowers*, 10th Dist. No. 10AP-1176, 2011-Ohio-5972.

{¶ 33} As discussed above, the record supports a finding by the court of direct contempt based upon appellant's continued and persistent refusal to answer questions put to him by Judge VanDerKarr. The record reveals that Judge VanDerKarr informed appellant during the hearing on April, 5, 2012, that he would not impose a jail term or a fine for contempt if appellant would agree to disclose the name of the prosecutor who allegedly offered him a plea. The transcript of the April 5, 2012 hearing on the matter shows that Judge VanDerKarr allowed appellant an additional 24 hours to reconsider his silence provided he post a $1,000 cash bond. Thus, it is clear that Judge VanDerKarr treated appellant's contumacious conduct as civil contempt. The sentence imposed was conditional and for the expressed purpose of compelling appellant's cooperation in the proceedings.

{¶ 34} When appellant returned to court on April 6, 2012, he purged the contempt by providing the prosecutor's name, and he received no punishment for that offense. However, appellant resumed his course of contumacious conduct by refusing to provide Judge VanDerKarr with any further information regarding the circumstances of the plea. The information sought by Judge VanDerKarr was necessary for him to rule upon the prosecutor's motion to vacate the prior judgment based upon the asserted grounds of fraud.

{¶ 35} In reviewing the sanction imposed by Judge VanDerKarr, the court is mindful that the jail term in this case served the dual purpose of compelling compliance with the lawful command of the court and as punishment for his continued disruption of

the proceedings.[2] Thus, the contempt in this case is neither strictly civil nor strictly criminal. For this reason, the cases cited by appellant in support of his assignment of error are distinguishable. *See, e.g, Bank One Trust Co., N.A., v. Wiles*, 10th Dist. No. 09AP-117, 2009-Ohio-3241; *Bank One Trust Co., N.A., v. Sherer*, 10th Dist. No. 08AP-494, 2009-Ohio-6192.

{¶ 36} Similarly, while appellant criticizes the length of the sentence handed down by Judge VanDerKarr, the fact of the matter is that April 6, 2012 was a Friday and the following Monday was a holiday. Based upon Judge VanDerKarr's admonition at the prior hearing, appellant knew that his continued refusal to answer questions from Judge VanDerKarr might result in a jail term that would span the long weekend. As an attorney, appellant also knew that he could seek an immediate stay of that jail sentence but he chose not to do so. *See Wiles*; *Sherer*. Thus, the unusual circumstances surrounding Judge VanDerKarr's order mitigate the harshness of the sentence.

{¶ 37} Moreover, appellant never did provide Judge VanDerKarr with a response to his queries regarding the plea deal. Instead, he withdrew his plea and entered a plea of no contest to the traffic offense. Judge VanDerKarr opted to refund appellant's cash bond and sentence him to time served. Thus, he received no additional sanction. Under the circumstances, this court does not believe that Judge VanDerKarr abused his discretion.

{¶ 38} Appellant's final argument is that Judge VanDerKarr's April 10, 2012 judgment entry provides an insufficient justification for a five-day jail sentence. As noted above, the entry dated April 10, 2012 cites "a delay to the judicial system as a whole" as the reason for the sanction. However, this court will not confine its review to the four corners of the entry in determining whether there has been an abuse of discretion. Rather, the court must necessarily examine the totality of the evidence presented.

{¶ 39} The record establishes that appellant's conduct significantly delayed the judicial system as a whole. Judge VanDerKarr was required to conduct four separate

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[2] Judge VanDerKarr set forth his intentions with respect to a potential jail sentence at the April 5, 2012 hearing: "Tomorrow, if you don't give me a name, cash bond will be forfeited and you'll go to jail. And I will just keep bringing your back daily until I have a name." (Apr. 5, 2012 Tr. 17.)

proceedings in order to resolve a case that commenced as a simple traffic citation. The record also demonstrates that the prosecutor's office was required to conduct an internal investigation into appellant's claim that a plea deal was offered. That investigation spanned several days and necessitated interviews with both current and former employees. Even Judge VanDerKarr's bailiff became embroiled in the controversy created by appellant's contumacious conduct. The information received by Judge VanDerKarr from his bailiff and the prosecutor, combined with appellant's persistent refusal to provide relevant details regarding the alleged plea, caused him to suspect a fraud upon the court. Although the court did not make a finding of fraud in this case, the potential for fraud constitutes a serious threat to the administration of justice.

{¶ 40} Ohio courts have found that R.C. Chapter 2705 does not expressly limit a court's authority to impose a sentence for direct contempt so long as the sanction issued is reasonable and in proportion to the contemptuous act. *Wiles* at ¶ 6. Based upon the totality of the evidence, and in light of the unusual circumstances of this case, we hold that Judge VanDerKarr did not abuse his discretion by incarcerating appellant for a period of five days for direct contempt of court. Accordingly, appellant's fifth assignment of error is overruled.

IV. CONCLUSION

{¶ 41} Having overruled each of appellant's five assignments of error, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

TYACK and SADLER, JJ., concur.

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