

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Bank One Trust Company, N.A.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-117
Ronald E. Scherer, Sr. et al.,	:	(Prob. No. 430379-C)
Defendants-Appellees;	:	(REGULAR CALENDAR)
James M. Wiles,	:	
Appellant.	:	

D E C I S I O N

Rendered on June 30, 2009

Zeiger, Tigges & Little, LLP, John W. Zeiger, Steven W. Tigges, and Stuart G. Parsell, for plaintiff-appellee.

Wiles, Boyle, Burkholder & Bringardner Co. L.P.A., Michael L. Close, and Dale D. Cook, for defendant-appellant.

APPEAL from the Franklin County Court of Common Pleas,
Probate Division.

BROWN, J.

{¶1} James M. Wiles, appellant, appeals from a judgment of the Franklin County Court of Common Pleas, Probate Division, in which the court ordered him to serve five days in jail for direct criminal contempt.

{¶2} This matter returns to this court after the trial court issued the current judgment pursuant to our remand in *Bank One Trust Co., N.A. v. Scherer*, 176 Ohio App.3d 694, 2008-Ohio-2952 ("*Scherer I*"). Many of the facts regarding the merits of the underlying action, as set forth more fully in *Scherer I*, are not germane to the present appeal. Bank One Trust Company, N.A. ("Bank One"), plaintiff-appellee, was the trustee for a trust agreement formed by Roger L. Scherer ("Roger"), who died in 1982. Pursuant to the trust agreement, Bank One formed three trusts: one for Roger's son, Ronald; one for Roger's daughter, Linda Scherer Talbott ("Linda"); and one for Roger's surviving spouse, Betty J. Scherer. The trusts held various monetary and business interests.

{¶3} On September 14, 2004, Bank One filed a declaratory judgment and final accounting action in the Franklin County Court of Common Pleas, Probate Division against Ronald, Linda, Betty, and several other parties, all of whom had interests in the trusts. A flurry of motions ensued, including numerous motions related to Ronald's and his attorneys' failure to cooperate with discovery. Wiles became counsel for Ronald on December 22, 2005. Subsequently, Ronald and several of his attorneys were found in contempt of court. See *Bank One Trust Co., N.A. v. Scherer*, 10th Dist. No. 08AP-288, 2008-Ohio-6910; *Scherer I*; and *Bank One Trust Co., N.A. v. Scherer*, 10th Dist. No. 06AP-70, 2006-Ohio-5097.

{¶4} On April 12, 2007, a hearing was held on issues not directly germane to the present case. At this hearing, an argumentative discourse took place between the trial court and Wiles, and the trial court found Wiles in direct criminal contempt of court. The trial court sentenced Wiles to ten days incarceration. Wiles served one and one-half hours of incarceration before being released pursuant to a stay of execution pending appeal. In *Scherer I*, this court affirmed the trial court's finding of direct criminal contempt of court

against Wiles, but we reversed that part of the trial court's judgment ordering Wiles to serve a ten-day jail sentence, finding that ten days in jail was excessive and not in proportion to Wiles' conduct or its effect on the proceedings.

{¶5} Upon remand, on July 2, 2008, the trial court sentenced Wiles to five days in jail. Wiles served approximately two hours of incarceration before being released pursuant to a stay pending appeal. The judgment was eventually journalized on January 30, 2009. An earlier premature appeal by Wiles was redocketed February 19, 2009. In his appeal, Wiles asserts the following assignment of error:

The Trial Court Abused Its Discretion In Imposing An Excessive And Inappropriate Jail Sentence On Mr. Wiles For Criminal Contempt.

{¶6} Wiles argues in his assignment of error that the trial court abused its discretion when it imposed an excessive and inappropriate jail sentence on him for direct criminal contempt. As explained in *Scherer I* at ¶47, while R.C. Chapter 2705 does not limit a court's authority to impose a sentence for direct contempt, Ohio courts have found that the punishment issued must be reasonable and in proportion to the contemptuous act. *Id.*, citing *Warren v. Satterlee*, 11th Dist. No. 2005-T-0010, 2006-Ohio-1460, ¶21, citing *State v. King*, 8th Dist. No. 80958, 2002-Ohio-7228, ¶12, and *State v. Sindell* (Apr. 4, 1979), 9th Dist. No. 2745. An appellate court will not reverse the punishment imposed by the trial court in a direct contempt proceeding absent an abuse of discretion. *Id.*, citing *State v. Kilbane* (1980), 61 Ohio St.2d 201, 207, and *Satterlee* at ¶21, citing *King* at ¶12.

{¶7} After a review of the record, we find the trial court abused its discretion in sentencing Wiles to five days of incarceration. The details of behavior before the court may be found in more specificity in *Scherer I*. In determining the ten-day jail sentence for

contempt was unreasonable and an abuse of discretion, we found in *Scherer I* that, under the facts at issue, the sentence was excessive and not in proportion to Wiles' conduct or its effect on the proceedings. In support of our decision, we cited three cases: *State v. Wilson* (1972), 30 Ohio St.2d 312; *Satterlee*; and *In re Gilbert* (Dec. 16, 1993), 8th Dist. No. 64299. In *Satterlee*, the attorney repeatedly interrupted the trial court, impeded the court's attempt to reschedule a trial, made repeated outbursts, and showed disrespect for the court. The trial court found the attorney in contempt and ordered him to serve three days in jail and to pay a \$500 fine. Although the court of appeals found the trial court's finding of contempt against the attorney was proper, it found the three-day jail sentence issued as punishment was excessive. *Id.* at ¶22. The court found that, while appellant's conduct was disruptive, it did not merit a three-day jail sentence. Rather, it found, the trial court's monetary fine of \$500, standing alone, would have been sufficient punishment for appellant's contemptuous conduct. *Id.*

{¶8} In *In re Gilbert*, during trial, defense counsel objected to a question posed to a witness by the assistant prosecuting attorney and then covered the prosecutor's mouth with his hand. The trial court found defense counsel in contempt of court and ordered him to pay a \$1,000 fine and serve five days in jail. On appeal, the court found defense counsel's conduct was very unbecoming, brought disrepute to the profession, and held the profession to ridicule before the public eye, while noting that the stress and frustrations brought about by case trials cannot be used as an excuse to encourage wild-west duels between lawyers in an attempt to prove a point. However, the court concluded that, in light of the totality of the circumstances that led to the "unfortunate fiasco," it considered the five-day jail term and \$1,000 fine excessive. The court reduced the defense attorney's fine to \$500 and vacated his jail sentence.

{¶9} In *Wilson*, the defense attorney, during cross-examination by the assistant prosecuting attorney, interrupted with a request to see a document handed to the witness and interrupted the judge before a ruling on the request. *Id.* at 313. The trial court denied the request until "the proper time." *Id.* The defense attorney renewed his request for an examination of the papers after the next question. *Id.* The trial court again denied the request until the proper time. *Id.* Defense counsel then asked to address the bench, but was told to wait until the proper time. *Id.* He asked twice again to address the bench, and the judge ordered him to sit down. *Id.* When the witness identified her signature on the document, defense counsel objected and again requested examination of the document, and he was ordered to sit down. *Id.* Defense counsel asked for a continuing objection and was again ordered to sit down. *Id.* Defense counsel made three more objections to the questioning, all of which were overruled, and made another request to examine. *Id.* He was ordered three more times to sit down. *Id.* A side bar then commenced at which the court charged the defense attorney with contempt. *Id.* at 313-14. The defense attorney interrupted the court and was ordered to sit down four more times. *Id.* at 314. Prior to the last time, and in a loud voice, defense counsel moved for a mistrial and again objected to the use of the statement. *Id.* When the trial resumed, the defense attorney was ordered to sit down three more times. At the close of cross-examination, defense counsel finally received the exhibits, examined them, and excused the witness without further questions. *Id.* The trial court fined the attorney \$500 and sentenced him to five days imprisonment. On appeal, the court affirmed the fine, but suspended the jail sentence.

{¶10} On appeal to the Supreme Court of Ohio, the court found the record showed that defense counsel unnecessarily repeated objections and requests for

examination of the record, and showed a constant disregard for the court's orders to sit down, all of which amounted to disrespect for the court, disruption of quiet and order, and actual interruption of the court in the conduct of its business. *Id.* at 314. The court affirmed the court of appeals' judgment upholding the fine, but suspending the jail sentence.

{¶11} After reviewing Wiles' conduct in the present case, we conclude an appropriate penalty for Wiles' behavior is the jail time already served plus a fine of \$1,000. The three to four hours Wiles spent incarcerated, plus a monetary fine, is sufficient punishment for Wiles' contemptuous conduct. Comparing Wiles' conduct to the conduct at issue in the above three cases, we find Wiles' conduct to be deserving of a fine larger than the fine in those cases. A monetary fine of \$1,000 plus time served is adequate punishment for the conduct at issue and a deterrent for further obstreperous conduct. Therefore, we sustain Wiles' assignment of error insofar as the trial court's sentence of five days of incarceration should be vacated, minus time already served, but we modify the punishment and impose a fine of \$1,000.

{¶12} Accordingly, Wiles' assignment of error is sustained in part and overruled in part. We reverse that part of the judgment of the Franklin County Court of Common Pleas, Probate Division, ordering appellant to serve five days of incarceration, minus time already served, and modify the judgment to impose a fine of \$1,000 plus time served. The trial court is ordered to issue a new judgment consistent with this decision.

*Judgment affirmed in part and reversed in part;
cause remanded with instructions.*

KLATT and CONNOR, JJ., concur.
