NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DIANA L. IREY Appellee v. ROBERT J. IREY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1031 WDA 2012

Appeal from the Order June 1, 2012
In the Court of Common Pleas of Washington County
Civil Division at No(s): 2008-3379

BEFORE: LAZARUS, J., OLSON, J., and COLVILLE, J.*

MEMORANDUM BY LAZARUS, J. **FILED DECEMBER 17, 2013**

Robert J. Irey ("Husband") appeals from the June 1, 2012 order of the Court of Common Pleas of Washington County, holding him in contempt of the court's prior order dated December 17, 2010.[1] Upon review, we affirm.

The extensive procedural history of this matter is set forth in Judge DiSalle's opinion, filed on January 23, 2013, and will not be repeated herein. In short, the parties entered into various Marriage Settlement Agreements ("MSA"), the original of which was incorporated into their Divorce Decree for enforcement purposes only. In the years since the entry of the decree on

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* Retired Senior Judge assigned to the Superior Court.

[1] The consent order at issue in this matter was actually filed of record on December 20, 2010. However, the parties and the court refer to it as being dated December 17, 2010, the date on which it was signed. Accordingly, to avoid confusion, we will refer the order using the earlier date.

August 15, 2008, Diana L. Irey ("Wife") has on numerous occasions sought enforcement by the court due to Husband's failure to comply with various terms of the MSA. Several times, the parties resolved Wife's enforcement proceedings by renegotiating the terms of the MSA.

One of the orders forming the basis for this appeal was entered pursuant to a petition for contempt filed by Wife on March 8, 2012, in which Wife alleged continuing violations of the MSA. Also on March 8, 2012, Husband filed a motion to recuse and transfer venue, alleging that there was an "appearance of impropriety" on the part of the trial court due to the Wife's involvement in county politics. By order dated March 8, 2012, the court denied this motion.

After a hearing on Wife's contempt petition, the court entered an order on June 1, 2012, finding Husband in contempt and requiring him to make numerous payments, including attorney's fees and sanctions. Husband filed the instant appeal of the March 8 and June 1, 2012 orders on June 29, 2012. Husband filed a court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal on September 11, 2012, and the trial court issued its Rule 1925(a) opinion on January 23, 2013.

On appeal, Husband raises the following issues for our review:

> 1. Did the trial court abuse its discretion by denying [Husband's] motion for recusal and transfer of venue[?]
>
> 2. Did the trial court abuse its discretion by finding [Husband] in contempt of the December 17, 2010 order[?]

Brief of Appellant, at 5.

Husband first claims that the trial court abused its discretion by refusing to recuse itself[2] and transfer venue "because the appearance of impropriety clearly existed." Brief of Appellant, at 17.

We review the denial of a motion to recuse for an abuse of discretion. ***In re S.H.***, 879 A.2d 802, 808 (Pa. Super. 2005). This Court presumes judges of this Commonwealth are honorable, fair and competent and, when confronted with a recusal demand, have the ability to determine whether they can rule impartially and without prejudice. ***Commonwealth v. Druce***, 848 A.2d 104, 109 (Pa. 2004). The party who asserts that a trial judge should recuse bears the burden of setting forth specific evidence of bias, prejudice, or unfairness. ***Commonwealth v. Harris***, 979 A.2d 387, 392 (Pa. Super. 2009) (citations omitted).

> As with all questions of recusal, the jurist must first make a conscientious determination of his or her ability to assess the case in an impartial manner, free of personal bias or interest in the outcome. The jurist must then consider whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This is a personal and unreviewable decision that

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[2] We note that Judge DiSalle has since recused himself "due to recent events within Washington County unrelated to this case" in which the court "witnessed efforts of the county commissioners to attempt to influence the Judiciary." Trial Court Opinion, 1/23/13, at 13. Although Judge DiSalle does not elaborate, it is posited by Wife that the "events" referenced by the court concern a dispute between the Washington County Commissioners and Washington County Children and Youth Services. ***See*** Brief of Appellee, at 15-16.

> only the jurist can make. Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice, that decision will not be overruled on appeal but for an abuse of discretion.

Rohm & Haas Co. v. Lin, 992 A.2d 132, 149 (Pa. Super. 2010), quoting ***Overland Enterprise, Inc. v. Gladstone Partners, LP***, 950 A.2d 1015, 1021 (Pa. Super. 2008).

Here, Husband asserts that Judge DiSalle should have recused himself and transferred venue because "Wife is a Washington County Commissioner and friend of the Washington County Judiciary." Brief of Appellant, at 21. Husband further alleges that the trial court continuously denied Husband and his counsel access to the record in this matter, which had been sealed pursuant to a motion filed by Wife. Husband also claims that Judge DiSalle created an appearance of impropriety when he granted an earlier contempt petition filed by Wife despite Wife's alleged failure to provide Husband or his counsel with proper notice of the presentation of the petition.

Upon review, we are unable to conclude that the trial court abused its discretion in denying Husband's motion for recusal. Husband's claims regarding Wife's political activities consist solely of bald allegations essentially asserting that, because Wife is involved in county politics, Judge DiSalle, as an elected official in the county, would be unable to preside in an impartial manner. Husband has presented no specific evidence, or even

allegation, that Wife maintains any sort of personal or political relationship whatsoever with Judge DiSalle.[3] ***Harris***, ***supra***.

Similarly, Husband's claim regarding his alleged inability to access the record is devoid of any specific allegations or facts that Judge DiSalle in any way impeded counsel's access to the case file. Indeed, the only specific instances referenced in Husband's brief concern two unsuccessful attempts to obtain the record from the Prothonotary, not from Judge DiSalle. When Husband finally filed a petition to unseal the record and allow his counsel access, Judge DiSalle immediately signed an order authorizing counsel to obtain and review the file. While Husband admits in his brief that "counsel never did specifically accuse Judge DiSalle of intentionally obstructing [counsel's] attempts at viewing the record," he goes on to claim that he "does not need to make specific allegations of obstruction in order to support the argument that the appearance of impropriety exists." Brief of Appellant, at 25. However, "specific evidence" is precisely what the case law requires. ***Harris***, 979 A.2d at 392 ("The party who asserts that a trial judge should recuse bears the burden of setting forth specific evidence of bias, prejudice, or unfairness.").

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[3] With regard to Husband's claim that the county commissioners set judicial salaries, this Court takes judicial notice of the fact that the salaries of all judges in this Commonwealth are set by the state legislature and not on a county-by-county basis by local elected officials.

Nor does the court's entry of the June 1, 2011 order support a finding that Judge DiSalle should have recused himself. The order was entered by the court after Husband had again defaulted on his obligations under the MSA. Approximately two weeks earlier, Wife had been prepared to present a petition for contempt. After Husband represented to Wife's counsel that he was in possession of funds to make the necessary payment, counsel agreed to temporarily refrain from filing. However, when Husband failed to pay, counsel proceeded with the filing for contempt on May 27, 2011. A notice of presentation was attached, indicating that a copy was sent to Husband on May 27, 2010. At the time, Husband had informed Wife's counsel that he was no longer represented, as he had failed to pay his attorney. However, counsel had not formally withdrawn. Believing Husband to be unrepresented, counsel mailed the notice directly to Husband. Husband disputes that he ever received the notice and, accordingly, failed to appear in court on the date given in the notice.

When neither Husband nor his counsel appeared at the hearing, the court entered an order evicting Husband from the former marital residence and turning over possession to Wife. Husband appealed the order to this Court, but subsequently withdrew his appeal by agreement of the parties. As a result of the agreement, the June 1, 2011 order was vacated by the court.

On appeal, Husband attempts to portray the entry of the June 1, 2011 order as evidence of bias on the part of the trial court. We disagree. The record clearly reflects that Husband had, prior to that time, engaged in a pattern of repeatedly defaulting on his obligations under the MSA. Although there appears to be a genuine dispute as to whether Husband received proper notice of the contempt hearing, there is no evidence that the court was aware of that fact at the time the order was entered. Moreover, Husband has since waived all claims related to the entry of the June 1, 2011 order by entering into the Settlement Agreement dated December 2011 and, pursuant thereto, withdrawing his appeal and consenting to the vacation of the June 1, 2011 order.

In his opinion, Judge DiSalle concluded that "[a]t no point in time . . . did this [c]ourt feel that it could not preside in an impartial and fair manner." Trial Court Opinion, 1/23/13, at 14. Our review of the record leads us to conclude that Judge DiSalle's impartiality cannot reasonably be questioned on the basis of Husband's appellate claims. As such, the trial court did not abuse its discretion in declining to recuse itself.

In his second issue on appeal, Husband challenges the court's exercise of discretion in finding him in contempt for his continued failure to abide by the terms of the MSA and the December 17, 2010 order. Husband asserts that his disobedience of the court's order was not willful, as he was financially unable to comply with the terms of the agreement.

We begin by noting:

> When considering an appeal from an [o]rder holding a party in contempt for failure to comply with a court [o]rder, our scope of review is narrow: we will reverse only upon a showing the court abused its discretion. The court abuses its discretion if it misapplies the law or exercises its discretion in a manner lacking reason. To be in contempt, a party must have violated a court [o]rder, and the complaining party must satisfy that burden by a preponderance of the evidence.

Harcar v. Harcar, 982 A.2d 1230, 1234 (Pa. Super. 2009), quoting ***Hopkins v. Byes***, 954 A.2d 654, 655-56 (Pa. Super. 2008) (internal citations omitted).

Here, it is clear from the record that Husband has repeatedly failed to comply with numerous orders of the court, as well as the terms of the MSA. Following previous failures by Husband to make required payments, Wife agreed to renegotiate the MSA on numerous occasions, generally to her own financial detriment. Nevertheless, Husband continued his pattern of non-compliance.

Husband asserts that the court's finding of contempt was inappropriate, as it is financially impossible for him to comply with his obligations. He cites the decision of this Court in ***Wetzel v. Suchanek***, 541 A.2d 761 (Pa. Super. 1988), for the proposition that "[a] showing of non-compliance with a court order is insufficient in itself to prove contempt. If the alleged contemnor is unable to perform and has in good faith attempted to comply with the court order, contempt is not proven." ***Id.*** at 762. However, ***Wetzel*** is both factually distinguishable and inapposite.

In ***Wetzel***, the contemnor was sued for child support. Because he was unemployed, the court imposed no monetary obligation, but required him to demonstrate a diligent search for gainful employment. The contemnor failed to make a good faith effort to find work and was jailed for civil contempt; in order to purge his contempt, contemnor was required to find a job.

In reversing the order of the trial court, this Court concluded that the court had violated the rules of civil contempt by, essentially, requiring contemnor to perform an impossible act, i.e., obtaining employment while incarcerated, in order to purge himself of contempt. The Court noted:

> the use of the court's civil contempt power to enforce compliance with a court order is to be exercised with the objective of compelling performance, and not inflicting punishment; thus, a court may not convert a coercive sentence into a punitive one by imposing conditions that a contemnor cannot perform and thereby purge himself of contempt.

Id. at 763, citing ***Barrett v. Barrett***, 368 A.2d 616 (Pa. 1977).

Here, the trial court did not sentence Husband to a period of incarceration in order to coerce compliance with its order and the MSA. Rather, the court sanctioned him and ordered him to take action to satisfy his pre-existing obligations. The action of the trial court did not, as in ***Wetzel***, render Husband's performance impossible.

Moreover, the trial court specifically found that Husband had:

> continuously and adamantly proposed numerous ways in which he intended to obtain the funds to meet his obligations, yet none of his representations have ever materialized. Despite his

> significant education, engineering degree, and work experience, involving owning and operating various businesses, Husband has failed to obtain gainful employment of any kind over the past four years.

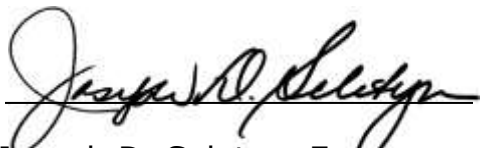
Trial Court Opinion, 1/23/13, at 16.

Our review of the contempt hearing transcript, and the record as a whole, confirms that Judge DiSalle's findings are fully supported by the record. Accordingly, we find that the trial court did not abuse its discretion by holding Husband in contempt for failure to comply with his obligations under the MSA and the order of court filed December 17, 2010.

Order affirmed.

OLSON, J., concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/17/2013