NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ANDRES JALON, Appellant	:	No. 2132 EDA 2010

Appeal from the Judgment of Sentence June 29, 2010
In the Court of Common Pleas of Philadelphia County
Criminal Division No(s).: CP-51-MD-0008522-2010

BEFORE: PANELLA, OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: February 26, 2013

Appellant, Andres Jalon, Esq., appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas.[1] Appellant argues the evidence was insufficient to establish contempt of court. We affirm.

The following history is adduced from the contempt hearing transcript and the trial court's opinion. As the attorney of record for Marcus Brown ("the defendant") in a gun and drug possession case, Appellant was

* Former Justice specially assigned to the Superior Court.

[1] Appellant is represented by his law firm partner, Mariana Rossman, Esq.

scheduled to appear for a criminal trial on June 11, 2010.[2] On the date of trial, the Commonwealth was present and ready to proceed; however, Appellant did not appear. As a result, the trial court scheduled a rule to show cause hearing as to why Appellant should not be held in contempt for failure to appear. N.T. Contempt Hr'g, 6/29/10, at 4.[3]

At the contempt hearing on June 29, 2010, Appellant testified as follows. Although he was the attorney on record for the defendant, his law firm partner, Mariana Rossman, "was handling the matter from beginning to end, [and he] was doing the forfeiture aspect of it." ***Id.*** at 3. As to his whereabouts, Appellant stated: "[T]he day before [trial] I was on vacation in Maryland, and I believe the day before my paralegal sent a letter to [the court's] chambers." ***Id.*** at 4. The trial court responded, "I understand what you believe happened. I'm telling you it didn't happen like that. . . . [I]t was only faxed the day of [trial]." ***Id.*** When the trial court asked if he understood that in order to withdraw from representation, an attorney of record must file a motion to withdraw, Appellant replied: "Absolutely. . . . I believe [Ms. Rossman] filed a motion." ***Id.*** at 5. The court stated, "There was no motion to withdraw filed." ***Id.*** A brief recess then ensued to allow Appellant to call Ms. Rossman.

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[2] "No record exists for the hearing on June 11th, 2010 where [Appellant] failed to appear." Trial Ct. Op., 8/19/11, at 1.

[3] The cover and page headings of the transcript state the hearing was held on June 29, **2006**. However, the record indicates the correct year is 2010.

Ms. Rossman testified as follows. Despite learning approximately a week before trial that the defendant could not retain Appellant's services, she did not communicate with the court until the day before trial. ***Id.*** at 8-10. On June 10, 2010, she sent facsimiles to the court and assistant district attorney "advising the Court [they were] not retained to represent [the defendant] at trial . . . ." ***Id.*** at 10. On the morning of trial, she called the court "to follow up and touch base with regards to the letters [she] sent[,]" and was notified that if she or Appellant did not appear by 1:00 pm, the court would schedule a contempt hearing. ***Id.*** at 11. Unable to appear, Ms. Rossman then sent a second letter advising the court that neither she nor Appellant would be available for the scheduled trial. ***Id.*** at 12. She prepared a petition to withdraw from representation the day before the June 29, 2010 contempt hearing, but did not file it. ***Id.*** at 13-14.

The trial court made the following factual findings. On the day of trial, the court repeatedly attempted to contact Appellant, eventually speaking to Ms. Rossman, who "came to court several hours later and appeared on behalf of [Appellant], with a letter regarding his absence." Trial Ct. Op. at 1-2; ***see also*** N.T. at 17. The trial court "received no communication about [Appellant's] whereabouts until Ms. Rossman appeared." Trial Ct. Op. at 9. No motion to withdraw from the representation of the defendant was filed by Appellant or Ms. Rossman. N.T. at 16.

The trial court found Appellant in direct criminal contempt,[4] and imposed a $500 fine. Appellant did not file a post-sentence motion, but filed a timely notice of appeal on July 27, 2010. He complied with the court's order to file a concise statement of errors complained on appeal on August 31, 2010, pursuant to Pa. R.A.P. 1925(b).[5]

Appellant's single issue on appeal is a challenge to the sufficiency of the evidence to establish that he "acted with the requisite wrongful intent." Appellant's Brief at 2. Appellant concedes that he was not present for trial, but argues he "did communicate with and inform the court of this in writing prior to the scheduled trial date."[6] ***Id.*** at 5. Additionally, Appellant contends that although he did not file a motion to withdraw, he "followed the prevailing practice when he sent a letter to the court in advance of [defendant's] trial advising of his unavailability and the fact that [the

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[4] 42 Pa.C.S. § 4132(2).

[5] The trial court's opinion incorrectly states that Appellant's 1925(b) statement was filed on September 1, 2010. Trial Ct. Op. at 2.

[6] Appellant relies on the facsimile "transmission verification report" and letters as proof that the letters were received by the court. Appellant's Brief at 2-3 & n.3. He attaches copies in his brief. However, the referenced facsimiles are not contained in the original certified record. If a document is not contained in the original record certified, the appellate court will not consider it, and may find any arguments based upon the document waived. ***Richner v. McCance***, 13 A.3d 950, 956 n.2 (Pa. Super. 2011) (refusing to consider alleged stay where certified record did not contain any information concerning disputed stay by trial court); ***Commonwealth v. Manley***, 985 A.2d 256, 263-64 (Pa. Super. 2009) (finding argument concerning photo array was waived because photo array was not in certified record).

defendant] had not been able to financially retain him." ***Id.*** at 7. In sum, Appellant argues that because he "advised the court of his unavailability," the trial court did not establish the requisite showing of wrongful intent. ***Id.*** at 8. We disagree.

Upon appeal from a contempt order, this Court has stated:

> [W]e place great reliance on the discretion of the trial judge. Each court is the exclusive judge of contempts against its process, and on appeal its actions will be reversed only when a plain abuse of discretion occurs. In cases of direct criminal contempt . . . an appellate court is confined to an examination of the record to determine if the facts support the trial court's decision.

Commonwealth v. Moody, 46 A.3d 765, 771 (Pa. Super. 2012) (citation omitted).

Contempt[7] pursuant to 42 Pa.C.S. § 4132(2), is codified in pertinent part as follows:

> **§ 4132. Attachment and summary punishment for contempts**
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> The power of the several courts of this Commonwealth to issue attachments and to impose summary punishments for contempts of court shall be restricted to the following cases:
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> * * *

[7] Contempt may be classified as civil or criminal, and "[c]riminal contempts are further subdivided into direct and indirect contempts." ***Moody***, 46 A.3d at 771-72 (citation omitted). Contempt is classified as direct criminal contempt where the "dominant purpose is to punish the contemnor for disobedience" of a court's order and where that disobedience or misbehavior occurs in the presence of the court or "so near thereto to interfere with its immediate business." ***Id.***

> (2) Disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court.
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> * * *

42 Pa.C.S. § 4132(2).

To sustain a finding of contempt pursuant to subsection (2), the evidence adduced must be sufficient to prove beyond a reasonable doubt that the following elements are established:

> (1) The [court's] order or decree must be definite, clear, specific and leave no doubt or uncertainty in the mind of the person to whom it was addressed of the conduct prohibited;
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> (2) The contemnor must have had notice of the specific order or decree;
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> (3) The act constituting the violation must have been volitional; and
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> (4) The contemnor must have acted with wrongful intent.

Commonwealth v. Zacher, 689 A.2d 267, 269 (Pa. Super. 1997) (citation omitted).

"A deliberate absence from a scheduled court proceeding, if established, would fall within the purview of the prohibition set forth under [42 Pa.C.S. § 4132(2)]." ***Commonwealth v. Marcone***, 410 A.2d 759, 764-65 (Pa. 1980). "When an attorney fails to appear or appears late for a court proceeding set by court order, there must be a showing that the failure to show or appear tardy was intentional." ***Zacher***, 689 A.2d at 269. A

reckless failure to appear in court on time may result in a finding of contempt, for such reckless conduct may be an indication of intent. ***Id.***

In ***McCusker v. McCusker***, 631 A.2d 645 (Pa. Super. 1993), the appellant-attorney was scheduled to appear for two hearings, a custody matter and a criminal matter, in two different courts on the same date and time. ***Id.*** at 646. A week before the hearings, the attorney filed a motion for continuance with the family court, which was denied. ***Id.*** On the date of the hearings, the attorney attended the criminal matter and was granted a continuance. As a result, the attorney was an hour and ten minutes tardy for the custody hearing. ***Id.***

On review of the trial court's contempt finding, this Court determined that the attorney's "failure to act sooner is attributed to an 'error' on his part **in permitting the passage of a week** without advising the [criminal] court of the [family] court's actions in denying his request for a continuance." ***Id.*** at 649 (emphasis original). This Court observed that a direct or subjective "intent is not necessary where a reckless disregard for the directions of the court can be proven." ***Id.*** This Court held that "[o]nce [the attorney] chose to attend the [criminal case] **and seek a continuance**, this eleventh-hour conduct was such that he acted with a substantial certainty that he would be tardy or with reckless disregard of such tardiness." ***Id.*** (emphasis original).

Finally, "once an appearance is entered, the attorney is responsible to diligently and competently represent the client until his or her appearance is

withdrawn." ***Commonwealth v. Librizzi***, 810 A.2d 692, 693 (Pa. Super. 2002) (citing Pa.R.P.C. 1.1 & 1.3). Pennsylvania Rule of Criminal Procedure 120(B) governs the withdrawal of representation:

> (1) Counsel for a defendant may not withdraw his or her appearance except by leave of court.
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> (2) A motion to withdraw shall be:
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> (a) filed with the clerk of courts, and a copy concurrently served on the attorney for the Commonwealth and the defendant; or
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> (b) made orally on the record in open court in the presence of the defendant.

Pa.R.Crim.P. 120(B)(1)-(2). This Court has stated, "[A]n appearance may be withdrawn only by leave of court." ***Librizzi***, 810 A.2d at 693.

In the instant matter, the trial court determined that Appellant's failure to appear on the day of trial, withdraw from the representation of the defendant, and inform the court of his planned absence prior to trial supported a finding of contempt of court. Trial Ct. Op. at 4. The trial court held that "wrongful intent" was established because Appellant acted with reckless disregard when he "went on vacation and did not communicate with the [c]ourt before the trial[,]" despite the fact that "he knew days before that he would no longer represent the defendant." ***Id.*** at 6.

We agree with the trial court that Appellant acted "recklessly," and thus contemptuously, by failing to appear for trial and withdraw from representation of the defendant, despite knowing a week prior to trial that

the defendant would not retain his services. ***See McCusker***, 631 A.2d at 649. Despite Appellant's argument that notice was faxed to the court the day before trial, the trial court did not receive it. Trial Ct. Op. at 1-2; N.T. at 17. Appellant conceded that the proper procedure for withdrawal was to file a motion, and he stated that he "believe[d Ms. Rossman] filed a motion" with the court. N.T. at 5-6. Yet, Ms. Rossman testified that a petition to withdraw was not even prepared until June 28, 2010, the day before the contempt hearing. Even if the court received a motion, Rule 120(B) and ***Librizzi*** make clear that an attorney of record must file a motion to withdraw his appearance and remains attorney of record until the court grants such motion. ***See*** Pa.R.Crim.P. 120(B)(1)-(2); ***Librizzi***, 810 A.2d at 693. Nevertheless, there is no indication on the record that the trial court received or granted a motion to withdraw. Thus, Appellant's claim, that he followed the prevailing practice when he sent a letter to the court the day before trial, is unsupported and without merit. The trial court's finding of contempt is supported by the record.

Judgment of sentence affirmed.