

FILED

04/19/2023

Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
January 11, 2023 Session

SARAH BOREN v. DAVID WADE, JR.

**Appeal from the Circuit Court for Shelby County
No. CT-005064-06 Jerry Stokes, Judge**

No. W2022-00194-COA-R3-CV

This is a post-divorce criminal contempt case. The trial court found Appellant guilty of one count of criminal contempt based on Appellant's alleged violation of the trial court's order. Because Appellant's actions do not, in fact, violate the plain language of the trial court's order, we reverse.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Reversed and Remanded**

KENNY ARMSTRONG, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and CARMA DENNIS MCGEE, J., joined.

Abigail D. Hall and Elizabeth W. Fyke, Memphis, Tennessee, for the appellant, David Wade, Jr.

Charles W. McGhee and Semmes H. Bobo, Memphis, Tennessee, and Monica A. Timmerman, Bartlett, Tennessee, for the appellee, Sarah Boren.

OPINION

I. Background

Appellee Sarah Boren ("Mother") and Appellant David Wade, Jr. ("Father") were married in August 2004. Their child, Madeline Wade, was born in December 2004. Following protracted and contentious litigation, the parties were divorced in late 2017. Since the divorce, the parties have engaged in prolific, post-divorce litigation in the Circuit Court for Shelby County ("trial court"). As such, this is not the first appeal in this case. In *Boren v. Wade*, No. W2020-01560-COA-R3-CV, 2022 WL 17072370 (Tenn. Ct. App. Nov. 18, 2022) ("*Boren I*"), we reviewed the trial court's October 12, 2020 order, which was entered on Mother's post-divorce petition to modify the parties' parenting plan. In its

October 12, 2020 order, the trial court: (1) held that Father’s parenting time would be suspended pending his cooperation with the Rule 35 examination; (2) suspended the counseling requirements involving Madeline and Father; (3) denied Father’s petition for contempt against Mother; (4) ordered Father to cease and desist communication with or about the child’s school; and (5) awarded Mother attorney fees and costs. *Id.* at *2. In *Boren I*, Father appealed only those portions of the October 12, 2020 order involving his visitation, and we vacated those portions of the trial court’s order based on the trial court’s failure to make best interest findings in compliance with Tennessee Rule of Civil Procedure 52.01, and Tennessee Code Annotated sections 36-6-404(b) and 36-6-106(a). As such, the trial court’s order requiring Father to cease and desist communication with the child’s school remained undisturbed. This portion of the October 12, 2020 order gives rise to the instant appeal as Father was held in criminal contempt for alleged violation of the portion of the order enjoining Father from certain communications with the child’s school.

While the *Boren I* appeal was pending in this Court, on September 23, 2021, Mother filed a petition for criminal contempt against Father. On November 5, 2021, Mother filed an amended petition for criminal contempt, wherein she alleged fourteen acts of contempt against Father based on posts he made on his Facebook page. Mother pursued twelve of the fourteen counts at trial on January 27 and 28, 2022. By order of February 18, 2022, the trial court found Father guilty of one count of criminal contempt for violation of its October 12, 2020 order concerning communication with the child’s school. Father was sentenced to 10 days of jail time. He appeals.

II. Issues

Father raises the following issues for review:

1. Whether the Circuit Court of Shelby County, Tennessee committed reversible error to the extent that it found Father guilty of criminal contempt.
2. Whether Father should have been awarded attorney fees and suit expenses at trial and whether Father should be awarded attorney fees and suit expenses on appeal.

Mother asks for attorney’s fees and costs on appeal.

III. Standard of Review

As this Court has explained:

A person charged with criminal contempt is “presumed innocent and may not be found to be in criminal contempt in the absence of proof beyond a reasonable doubt that they have willfully failed to comply with the court’s

order.” *Long v. McAllister-Long*, 221 S.W.3d 1, 13 (Tenn. Ct. App. 2006) (citing *Black v. Blount*, 938 S.W.2d 394, 398 (Tenn. 1996); *Thigpen v. Thigpen*, 874 S.W.2d 51, 53 (Tenn. Ct. App. 1993)). If the defendant is found guilty by the trial court, the defendant has the burden on appeal of illustrating why the evidence is insufficient to support the verdict of guilt. *Black*, 938 S.W.2d at 399. When the sufficiency of the evidence in a criminal contempt case is raised in an appeal, this court must review the record to determine if the evidence in the record supports the finding of fact of guilt beyond a reasonable doubt, and “if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt” we are to set aside the finding of guilt. See Tenn. R. App. P. 13(e) (directing that “findings of guilt in criminal actions shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt”).

Pruitt v. Pruitt, 293 S.W.3d 537, 545-46 (Tenn. Ct. App. 2008).

IV. Analysis

A. Contempt

Tennessee Code Annotated section 29-9-102 authorizes courts to “inflict punishments for contempts of court” for, *inter alia*, “[t]he willful disobedience or resistance of any . . . lawful writ, process, order, rule, decree, or command of such courts[.]” Tenn. Code Ann. § 29-9-102(3). A person can violate a court order ““by either refusing to perform an act mandated by the order or performing an act forbidden by the order.”” *In re Samuel P.*, No. W2016-01665-COA-R3-JV, 2018 WL 1046784, at *8 (Tenn. Ct. App. Feb. 23, 2018) (quoting *Overnite Transp. Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507, 510-11 (Tenn. 2005)). “There are three essential elements to criminal contempt: ‘(1) a court order, (2) the defendant’s violation of that order, and (3) proof that the defendant willfully violated that order.’” *Pruitt*, 293 S.W.3d 537, 545 (Tenn. Ct. App. 2008) (citing *Foster v. Foster*, No. M2006-01277-COA-R3-CV, 2007 WL 4530813, at *5 (Tenn. Ct. App. Dec. 20, 2007)). In addition, the party moving for contempt must show the following four elements: (1) the order allegedly violated was lawful; (2) the order was clear and unambiguous; (3) the individual charged did in fact violate the order; and (4) the individual acted willfully in so violating the order. *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 354–55 (Tenn. 2008).

There is no dispute that the trial court’s October 12, 2020 order is a lawful order. Although this Court vacated certain portions of that order in *Boren I*, the portion of the order that forms the basis for the contempt in this appeal was left undisturbed. As such, we turn to the second criterion for a finding of contempt. When, as in the instant case, a court makes a finding of contempt based on the contemnor’s disobedience of a court order, ““the order alleged to have been violated must be clear, specific, and unambiguous.”” *In re*

Samuel P., 2018 WL 1046784, at *8 (quoting *Konvalinka*, 249 S.W.3d at 354). Furthermore, as this Court has explained:

Unlike breach of contract cases, we cannot go beyond the four corners of the order in contempt cases to clarify an ambiguity. See [*Konvalinka*, 249 S.W.3d.] at 359. To the contrary, we can only look to the order being enforced to ascertain whether a party willfully violated a lawful and unambiguous order. See *id.* As our courts have explained, “[l]itigants are entitled to rely on the reasonable interpretation of orders, and the use of the ‘plain and ordinary meaning’ standard to interpret orders assures that litigants will be treated fairly.” *Id.*

Scobey v. Scobey, No. M2016-00963-COA-R3-CV, 2017 WL 4051085, at *(Tenn. Ct. App. Sept. 13, 2017), *perm. app. denied* (Tenn. Jan. 18, 2018).

Here, the portion of the trial court’s October 12, 2020 order that Father was found guilty of violating reads as follows:

This Court orders that Father cease and desist communicating with SBA[, *i.e.*, the Child’s school] or the Catholic Diocese regarding any matter concerning the minor child, Madeline Wade, including sending emails and making posts on social media.

Father contends that the trial court’s order is not clear and unambiguous as required under the holding in *Konvalinka*. This Court has explained that

[t]he clarity element requires that “the order expressly and precisely spells out the details of compliance in a way that will enable reasonable persons to know exactly what actions are required or forbidden.” [*Konvalinka*, 249 S.W.3d.] at 355. The determination of “whether an order is sufficiently free from ambiguity to be enforced in a contempt proceeding is a legal inquiry that is subject to de novo review.” *Id.* at 356. Moreover, “[o]rders alleged to have been violated should be construed using an objective standard that takes into account both the language of the order and the circumstances surrounding the issuance of the order, *including the audience to whom the order is addressed.*” *Id.* (Emphasis added).

Tomes v. Tomes, No. M2020-00833-COA-R3-CV, 2021 WL 2808822, at *5 (Tenn. Ct. App. July 6, 2021).

From the plain language of the foregoing section of the October 12, 2020 order, Father was prohibited from “communicating” with either the Child’s school or with the Catholic Diocese. Such prohibited communication included emails and social media posts;

however, the prohibited communication was limited to matters “concerning the minor child.” This language, “concerning the minor child,” is limiting insofar as it addresses only communications that concern Madeline. In common parlance, synonyms for “concerning” include, *inter alia*, “about,” “regarding,” “in relation to,” “on the subject of,” and “pertaining to”. So, under the plain language of the October 12, 2020 order, for Father to be held in criminal contempt of the order, any posts to social media, emails, or correspondence must be made to the school or the dioceses and must be about, regarding, in relation to, on the subject of, pertaining to, or concerning Madeline. Had the trial court meant to prohibit Father from communicating with or about the child’s school and the Catholic Diocese, it could have simply omitted the language, “concerning the minor child.” Although the phrase, “concerning the minor child,” does not create an ambiguity, it adds another criterion to the prohibited behavior. Therefore, with the inclusion of this language, the question remains whether Father violated the order.

The trial court’s finding of contempt is based on the following post Father made to his Facebook page. As set out in Trial Exhibit 4, Father’s post was as follows:

Superintendent Sondra Morris weaponized attorneys against me when I reached out to her about child abuse I witnessed at her school. #OurCatholicCoverupCulture Best Quote from this article “. . . the more parents that ask more questions, the harder it will be for schools to retaliate against a lot of parents.”
AMEN

The post also contains a link to the “article” referenced in the post. In finding that Father’s social media post violated the foregoing section of the October 12, 2020 order, the trial court reasoned:c

17. The court finds that Exhibit 4 is a post on social media, it talks about Sondra Morris, and it is known that she is the principal of SBA. The evidence is that Madeline goes to school there, the post doesn’t speak broadly of Memphis Catholic Schools. The only school it could be referring to is SBA, when it describes “the child abuse that I witnessed at her school”

19. The court finds the Order was violated by alleging Sondra Morris tolerates child abuse. Sondra Morris is the very face of SBA, Sondra Morris has been and still is today Principal of SBA, notwithstanding a short period where she also acted as temporary Superintendent of Catholic Schools.

20. The court finds that the Defendant put this post on social media for all to see, all teachers, principals, parents, and students at SBA. Specifically,

the posts were there for Sondra Morris to see. The court finds that the action by the Defendant, was calculated and willful. The court see no grey area of the Defendant's actions. It was aimed at the very person or persons or school where Sondra Morris is the principal, and where his daughter still attends school.

21. The court finds that these actions are calculated to cause harm to his very own child. Due to the conduct of Defendant, Principal Morris testified in the next seven days or so they will determine whether Madeline will be invited back to attend the school and enjoy her senior year, the school that she has attended for years.¹

From our reading, Father's post does not concern Madeline. As found by the trial court, Father's post "talks about Sondra Morris." Although the post may have violated certain portions of the prohibiting language in the trial court's October 12, 2020 order, *i.e.*, it was a "post[] to social media," and it reasonably could be construed as Father's attempt to "communicat[e] with SBA or the Catholic Diocese," it does not involve "any matter concerning the minor child. . . ." In reviewing the trial court's decision, we must give effect to the entire section of the order that forms the basis for the finding of contempt. Here that task includes giving effect to the clause, "concerning the minor child" As such, we conclude that the trial court erred in finding Father in contempt of the foregoing portion of its October 12, 2020 order.

B. Attorney's Fees

In his appellate brief,

Father submits that based on the testimony and evidence submitted at trial, he should have been the prevailing party and as such seeks an award of costs, including discretionary costs, as provided by Tenn. R. Civ. Pro. 54.04, in the underlying action as well as attorney fees and costs on appeal

"Rule 54.04 of the Tennessee Rules of Civil Procedure does not provide for the award of attorney fees[, and]. . . attorney fees are only awarded if provided for by contract, statute, or a recognized ground of equity." *Austin Powder Co. v. Thompson*, No. 03A01-9607-CV-00229, 1996 WL 718291, at *2 (Tenn. Ct. App. Dec. 16, 1996) (citing *State v. Thomas*, 585 S.W.2d 606 (Tenn.1979)). In fact, the Tennessee Supreme Court has noted that trial courts are not allowed to award attorney fees under Rule 54.04. *Lock v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 809 S.W.2d 483 (Tenn.1991). Rather, Rule 54.04 contemplates discretionary costs.

¹ There is no indication that Madeline was expelled or suspended from SBA.

In support of her request for attorney’s fees and costs, Wife cites Tennessee Code Annotated section 36-5-103(c), which provides:

A prevailing party may recover reasonable attorney’s fees, which may be fixed and allowed in the court’s discretion, from the non-prevailing party in any criminal or civil contempt action or other proceeding to enforce, alter, change, or modify any decree of alimony, child support, or provision of a permanent parenting plan order, or in any suit or action concerning the adjudication of the custody or change of custody of any children, both upon the original divorce hearing and at any subsequent hearing.

This Court recently explained that,

[w]hen considering a request for appellate attorney's fees under § 36-5-103, we consider three nonexclusive factors: (1) “the ability of the requesting party to pay his or her own attorney's fees”; (2) “the requesting party’s success on appeal”; and (3) “whether the requesting party has been acting in good faith.” *Shofner v. Shofner*, 181 S.W.3d 703, 719 (Tenn. Ct. App. 2004) (citing *Parchman v. Parchman*, No. W2003-01204-COA-R3-CV, 2004 WL 2609198, at *6 (Tenn. Ct. App. Nov. 17, 2004)).

Emch v. Emch, No. M2021-00139-COA-R3-CV, 2022 WL 3972749, at *10 (Tenn. Ct. App. Sept. 1, 2022). Having reversed the trial court’s finding of contempt against Father, Mother is not a prevailing party. As such, she is not entitled to attorney’s fees under the plain language of Tennessee Code Annotated section 36-5-103, *i.e.*, “[a] **prevailing party** may recover reasonable attorney’s fees . . .” (emphasis added).

Turning to Father’s request for appellate attorney’s fees, applying the factors set out in *Emch*, and in the exercise of our discretion, we conclude that Father’s posts to social media, although not rising to the level of criminal contempt, did evidence a lack of good faith on his part in following the trial court’s order. Accordingly, we deny Father’s request for attorney’s fees.

V. Conclusion

For the foregoing reasons, we reverse the trial court’s order finding Father in criminal contempt. The parties’ respective requests for attorney’s fees are denied, and the case is remanded for such other proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are assessed to the Appellee, Sarah Boren, for which execution may issue if necessary.

s/ Kenny Armstrong
KENNY ARMSTRONG, JUDGE