Affirmed, In Part, Dismissed, In Part, and Memorandum Opinion filed February 8, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00165-CV
NO. 14-10-00251-CV

ROXANNE DORSEY, Appellant

V.

HOUSTON HOUSING AUTHORITY, Appellee

On Appeal from the County Civil Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 952,721

MEMORANDUM OPINION

In these consolidated cases, Roxanne Dorsey appeals (1) a forcible detainer judgment, contending the trial court erred by refusing to require a subpoenaed witness to appear instanter during trial or show cause why he should not be held in contempt for failing to appear and (2) the court's post-trial order refusing to find the witness in contempt. We affirm the forcible detainer judgment. However, we lack jurisdiction to consider the post-trial order and therefore dismiss the appeal of that order.

I. BACKGROUND

Appellee, Houston Housing Authority ("HHA"), served Dorsey with an eviction notice for her leased premises. After Dorsey refused to vacate, HHA filed a forcible detainer suit in a justice court. The justice court signed an eviction order, awarding possession of the premises to HHA and directing Dorsey to vacate.

Dorsey appealed the order to the county civil court at law (the underlying trial court relative to the present appeal), which conducted a jury trial *de novo*. Dorsey subpoenaed Antonio Nichols, a former peace officer, as a trial witness, but he did not appear. During trial, Dorsey requested that the court issue a "capias" to require Officer Nichols to appear instanter or order him to show cause why he should not be held in contempt for failing to appear. The trial court refused this request. The jury found that Dorsey breached the lease and committed forcible detainer. On February 4, 2010, the trial court signed a judgment, awarding HHA possession of the premises, costs, and post-judgment interest.

After trial, Dorsey filed a motion for enforcement by contempt and request for sanctions against Officer Nichols. The trial court conducted a show-cause hearing at which Officer Nichols appeared and testified. The court orally announced it would not find Officer Nichols in contempt because he essentially attributed his disobeying the subpoena to health issues, conflicting medical appointments, and the influence of medication, but would require Officer Nichols to reimburse Dorsey's cost for procuring the subpoena because of his failure to provide notice he would not appear. Accordingly, on March 9, 2010, the trial court signed an order finding Officer Nichols had good cause for disobeying the subpoena but requiring that he pay Dorsey's $69.00 in costs.

II. ANALYSIS

Dorsey appeals both the forcible detainer judgment and the portion of the court's post-trial order refusing to hold Officer Nichols in contempt.

As a preliminary matter, HHA contends Dorsey's appeal is moot because she voluntarily vacated the premises after the court rendered judgment. However, Dorsey seeks to eradicate any record of a judgment against her due to potential adverse

consequences regardless of her later vacating the premises. Further, the portion of the judgment ordering Dorsey to pay HHA's costs would remain despite her later vacating the premises. Accordingly, we will consider the merits of her appeal.

A. Forcible Detainer Judgment

In her first issue, Dorsey challenges the forcible detainer judgment, contending the court erred by refusing during trial to require Officer Nichols to appear instanter in response to the subpoena or show cause why he should not be held in contempt for failing to appear. Before the parties presented evidence, the following exchange occurred:

> [DORSEY'S COUNSEL]: Your Honor, I have one matter; I have a gentleman that is subpoenaed who hasn't shown up, and I have a capias for you to sign, please.
>
> THE COURT: What do you mean? Sign a capias for his arrest?
>
> [DORSEY'S COUNSEL]: No. To bring him in to testify.
>
> THE COURT: No, ma'am.
>
> [DORSEY'S COUNSEL]: He's under subpoena.
>
> THE COURT: If he's under subpoena - -
>
> [DORSEY'S COUNSEL]: He's in contempt.
>
> THE COURT: No. I haven't made a finding he's in contempt, ma'am.
>
> [DORSEY'S COUNSEL]: Okay.
>
> THE COURT: I can't do that. You can issue a show cause but - - I'm not going to have a show cause hearing. If the subpoena is out there, I don't know what to tell you; but, no, I won't issue a capias for his arrest. I haven't found anybody to be in contempt yet. You have to do a show cause before I can issue a capias.
>
> [DORSEY'S COUNSEL]: That will delay the length of the case.
>
> THE COURT: No it won't.

[DORSEY'S COUNSEL]: No?

THE COURT: Not in civil court, ma'am. No. If your witnesses don't come, they don't come. I don't know what to tell you. I'm not going to stop a case because somebody is not coming. I would try to reach him now.

[DORSEY'S COUNSEL]: I will.

THE COURT: But, no. I don't issue capias. This isn't criminal.

We employ an abuse-of-discretion standard to review a trial court's refusal to attach a witness who was subpoenaed for trial but failed to appear.[1] *See Wilkinson v. Moore*, 623 S.W.2d 662, 665–66 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ dism'd); *Kieffer v. Miller*, 560 S.W.2d 431, 432 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.). Moreover, we construe Dorsey's complaint regarding the trial court's refusal to delay the trial to conduct a show-cause hearing as essentially a challenge to the manner in which the court conducted the trial. "[T]he discretion vested in the trial court over the conduct of a trial is great," including the broad discretion to "maintain control and promote expedition." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 240–41 (Tex. 2001). A trial court abuses its discretion only when it acts in an "arbitrary or unreasonable" manner or, stated differently, "without reference to any guiding rules and principles." *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991); *Mosk v. Thomas*, 183 S.W.3d 691, 696 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

HHA contends that the trial court's refusal to enforce Dorsey's subpoena was proper pursuant to Texas Rule of Civil Procedure 176.8, entitled "Enforcement of Subpoena," which provides, in pertinent part,

[1] A judge in a civil case may issue a writ of attachment to a properly subpoenaed witness who fails to appear for trial if the requirements of Texas Rule of Civil Procedure 176.8 are met whereas a "capias" is a writ issued in a criminal matter directing a peace officer to arrest a person accused of an offense and bring him before the court. *Compare* Tex. R. Civ. P. 176.8 *with* Tex. Code Crim. Pro. arts. 23.01–.18 (West 2009). Despite Dorsey's use of the term "capias" during trial, we construe her complaint as a contention that the trial court erred by refusing to attach the witness.

> A fine may not be imposed, nor a person served with a subpoena attached, for failure to comply with a subpoena without proof by affidavit of the party requesting the subpoena or the party's attorney of record that all fees due the witness by law were paid or tendered.

Tex. R. Civ. P. 176.8(b). During trial, Dorsey did not present an affidavit proving all fees due Officer Nichols had been paid or tendered, and the record does not reflect any such affidavit was on file at that time.

Dorsey suggests we may not uphold the court's decision on this ground because the court did not indicate this ground formed the basis for its decision. However, with respect to matters committed to the trial court's discretion, we must affirm when the court reaches the right result, regardless of its underlying reason. *See Donalson v. Barr*, 86 S.W.3d 718, 720 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Sanjar v. Turner*, 252 S.W.3d 460, 465 n.2 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Accordingly, we may affirm the trial court's refusal to require Officer Nichols's appearance on the ground that Dorsey had not presented the requisite affidavit, regardless of the reason stated on the record for the court's ruling. *See Kieffer*, 560 S.W.2d at 432 (recognizing trial court's refusal to issue writ of attachment for subpoenaed witness who failed to appear at trial could be upheld for sole reason that request for writ contained no affidavit averring all lawful fees had been paid or tendered to the witness).

Dorsey also suggests the court was hostile to her position and allowed her no opportunity to prove she had satisfied this prerequisite to obtaining the requested relief. However, during trial, Dorsey did not attempt to offer proof she had complied with this prerequisite, much less object to any refusal by the trial court to allow such proof. Two days after trial was concluded, Dorsey's attorney executed an affidavit averring that all fees due Officer Nichols had been paid or tendered and presented the affidavit with her post-trial motion for contempt and request for sanctions. This affidavit was not timely with respect to Dorsey's request during trial because, as we construe Rule 176.8, it requires that proof of payment be made before the court may attach the witness. *See* Tex. R. Civ.

P. 176.8(b). Therefore, the trial court did not abuse its discretion by failing to grant a request during trial when the prerequisite for obtaining the relief was not presented until after trial was concluded.

Finally, during trial, Dorsey did not inform the court of the anticipated substance of Officer Nichol's testimony. Because Dorsey did not demonstrate why the testimony was needed for her defense, we cannot conclude the court abused its discretion to promote expedition by refusing to delay trial to obtain the testimony. Accordingly, we overrule Dorsey's first issue.

B. Post-Trial Order

In her second issue, Dorsey appeals the portion of the court's post-trial order finding good cause for Officer Nichols's failure to appear at trial and thereby refusing to hold him in contempt. However, a court of appeals lacks jurisdiction to consider on direct appeal a trial court's contempt order, including a refusal to hold a party in contempt, because such an order is not a final, appealable judgment. *See Norman v. Norman*, 692 S.W.2d 655, 655 (Tex. 1985); *In re Office of Atty. Gen. of Tex.*, 215 S.W.3d 913, 915–16 (Tex. App.—Fort Worth 2007, orig. proceeding); *Chambers v. Rosenberg*, 916 S.W.2d 633, 634 (Tex. App.—Austin 1996, writ denied); *Pruett v. Pruett*, 754 S.W.2d 802, 803 (Tex. App.—Tyler 1988, no writ). This rule applies even when the contempt order is "'appealed along with a judgment that is appealable.'" *In re Office of Atty. Gen.*, 215 S.W.3d at 915 (quoting *Cadle Co. v. Lobingier*, 50 S.W.3d 662, 671 (Tex. App.—Fort Worth 2001, pet. denied)); *see In re S.R.O.*, 143 S.W.3d 237, 248 (Tex. App.—Waco 2004, no pet.). Contempt proceedings are not appealable because they "are not concerned with disposing of all claims and parties before the court, as are judgments; instead, contempt proceedings involve a court's enforcement of its own orders, regardless of the status of the claims between the parties before it." *In re Office of Atty. Gen.*, 215 S.W.3d at 915–16 (citing *Cadle*, 50 S.W.3d at 671). Accordingly, we lack jurisdiction to consider Dorsey's appeal of the post-trial order refusing to hold Officer Nichols in contempt.

We affirm the forcible detainer judgment and dismiss Dorsey's appeal of the post-trial order.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.