Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00450-CV

IN RE GRANDE GARBAGE COLLECTION CO., LLC, and Patricio Hernandez, Individually and doing business as Grande Garbage Collection Co., LLC

Original Mandamus Proceeding[1]

Opinion by: Jason Pulliam, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Jason Pulliam, Justice

Delivered and Filed: October 12, 2016

PETITION FOR WRIT OF MANDAMUS CONDITIONALLY GRANTED

On July 13, 2016, relators Grande Garbage Collection Co., LLC ("Grande") and Patricio Hernandez, individually and doing business as Grande Garbage Collection Co., LLC ("Hernandez"), filed a petition for writ of mandamus complaining of a trial court order finding Grande and Hernandez in contempt of court based on violations of an injunction and a temporary restraining order. We conditionally grant the writ of mandamus.

[1] This proceeding arises out of Cause No. DC-15-604, styled *BFI Waste Services of Texas, LP, d/b/a Allied Waste Services of Rio Grande Valley v. City of Rio Grande, Texas; Joel Villarreal, Hernan R. Garza, III, Rey Ramirez, and David Jones, in their official and individual capacities; Patricia Hernandez d/b/a Grande Garbage Collection Co.; and Grande Garbage Collection Co., L.L.C.*, pending in the 229th Judicial District Court, Starr County, Texas, the Honorable Migdalia Lopez presiding.

BACKGROUND

This proceeding arises out of a dispute involving a contract to provide solid waste disposal services to Rio Grande City, Texas. Real party in interest, BFI Waste Services of Texas, L.P. d/b/a Allied Waste Services of Rio Grande Valley ("Allied") had a contract with the City to be the exclusive provider of solid waste disposal services. After alleging that Allied breached its contract, the City contracted with Grande to provide solid waste disposal services. Hernandez owns Grande. Allied filed suit against the City and its elected officials, and obtained a temporary restraining order on October 12, 2015 that prohibited the City, its officers, "or any persons in active concert or participation with them who receive actual notice of the order, from taking any actions inconsistent with Allied's contract rights[.]" Following a hearing, the trial court issued a temporary injunction on November 10, 2015, which largely followed the terms set out in the temporary restraining order. After this order was issued, Grande intervened in the case.

The City, its elected officials, and Grande filed a notice of appeal to challenge the injunction. On February 19, 2016, the trial court issued a second temporary injunction order, which is the order at issue in this proceeding along with the TRO. The City, its elected officials, and Grande filed an amended notice of appeal to challenge this second injunction. The opinion on the appeal of the temporary injunction was issued by this court on September 21, 2016. *City of Rio Grande City, Texas v. BFI Waste Services of Texas, LP*, No. 04-15-00729-CV, 2016 WL 5112224 (Tex. App.—San Antonio, Sept. 21, 2016 no pet. hist.) (mem. op).

On April 6, 2016, while the appeal was pending, Allied filed a motion with the trial court seeking to have Grande and Hernandez held in contempt for allegedly violating the TRO and the second injunction order. After a hearing on May 10, 2016, the trial court signed a contempt order.[2]

[2] The trial court signed both a contempt order and an amended contempt order on May 10, 2016. Because the amended order replaced the initial order, we address the amended order.

In the amended contempt order, the trial court found both Grande and Hernandez in contempt for violating the TRO and the temporary injunction, but only imposed fines against Grande. The trial court found Grande in contempt for violating the TRO from October 16, 2015 through November 5, 2015 and imposed a fine of $500 per day for those twenty days for a total fine of $10,000. The trial court also found Grande was in contempt for violating the temporary injunction from February 22, 2016 through May 10, 2016 and imposed a fine of $500 per day. This time period included 78 days, for a total fine of $39,000. Because enforcement of interlocutory orders is reserved to the courts of appeals during the pendency of appeals from such orders, we hold the trial court abused its discretion in holding Grande and Hernandez in contempt based upon violations of the temporary injunction. We further hold the trial court abused its discretion by requiring Hernandez to testify over his assertion of his Fifth Amendment privilege against self-incrimination.

ANALYSIS

We will address the portion of the order based upon the amended temporary injunction order first, then the portion of the amended contempt order based upon the TRO.

CONTEMPT FOR VIOLATIONS OF THE TEMPORARY INJUNCTION

"While an appeal from an interlocutory order is pending, only the appellate court in which the appeal is pending may enforce the order." TEX. R. APP. P. 29.4; *see also In re Sheshtawy*, 154 S.W.3d 114, 121 (Tex. 2004) (contrasting restriction on trial court's power to enforce temporary orders during pendency of appeal with trial court's authority pending appeal of a final judgment). The appellate court's power to "compel obedience of an injunction pending appeal [operates] to the exclusion of the district court that had originally entered the injunction." *Ex parte Barnett*, 600 S.W.2d 252, 255 (Tex. 1980).

In this case, the trial court issued a contempt order to enforce a temporary injunction which was the subject of an appeal pending before this court, and which was pending at the time the trial court issued the contempt order.[3] Because the power to enforce the temporary injunction was exclusively within the province of this court, the trial court lacked jurisdiction to hold Grande and Hernandez in contempt for violating the temporary injunction. Accordingly, the trial court abused its discretion by issuing an order finding Grande and Hernandez in contempt for violating the temporary injunction and assessing fines against Grande for its violation. TEX. GOV. CODE ANN. § 22.221(a) (West 2004) (each court of appeals is empowered to issue a writ of mandamus or other writ necessary to enforce its jurisdiction).

Unlike the temporary injunction, an appeal of the TRO was not pending before this court when the trial court held the contempt hearing and found Grande and Hernandez to be in contempt. In fact, a TRO is generally not appealable. *See In re Tex. Nat. Res. Conservation Comm'n*, 85 S.W.3d 201, 205 (Tex. 2002). Therefore, the trial court retained jurisdiction over alleged violations of the TRO. We now consider whether the petition for writ of mandamus raised issues showing a clear abuse of discretion by the trial court in holding Grande and Hernandez in contempt for violating the TRO.

CONTEMPT FOR VIOLATIONS OF THE TEMPORARY RESTRAINING ORDER

Grande and Hernandez contend that the trial court abused its discretion by: (1) forcing Hernandez to testify over his assertion of his Fifth Amendment privilege against self-incrimination; (2) denying Grande's request for a jury; and (3) applying a civil evidentiary standard and issuing a criminal contempt order not supported by proof beyond a reasonable doubt.

[3] Allied argues that this court implicitly granted the trial court permission to enforce the injunction in an order issued in the pending appeal which addressed issues related to supersedeas. Allied is incorrect. This court did not implicitly refer enforcement of the injunction to the trial court. *See* TEX. R. APP. P. 29.4 (allowing court of appeals to refer enforcement matters to trial court).

Contempt can be either civil or criminal. *Ex parte Werblud*, 536 S.W.2d 542, 545 (Tex. 1976). Civil contempt is "remedial and coercive in nature" with a goal of persuading the contemnor to obey some order of the court. *Id*. "Criminal contempt on the other hand is punitive in nature. The sentence is not conditioned upon some promise of future performance because the contemnor is being punished for some completed act which affronted the dignity and authority of the court." *Id*. In the instant case, Allied's motion, which was filed on April 16, 2016, sought to hold Grande and Hernandez in contempt for actions taken in October and November of 2015. Because the only possible purpose of the contempt hearing was to punish Grande and Hernandez for their completed acts, the only form of contempt for the trial court to consider was criminal contempt.

1. DID THE TRIAL COURT CLEARLY ABUSE ITS DISCRETION BY REQUIRING HERNANDEZ TO TESTIFY OVER HIS ASSERTION OF PRIVILEGE AGAINST SELF-INCRIMINATION?

A corporation has no privilege against self-incrimination. *U.S. v. White*, 322 U.S. 694, 699 (1944); *Super X Drugs of Tex., Inc., v. State*, 505 S.W.2d 333, 337 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ). However, an individual accused of criminal contempt is afforded many constitutional rights, including the privilege against self-incrimination. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444 (1911); *Werblud*, 536 S.W.3d at 547. An accused criminal contemnor who raises the privilege against self-incrimination has the privilege of refusing to be sworn at all. *Werblud*, 536 S.W.3d at 548.

Hernandez objected to testifying, specifically invoking his fifth amendment privilege against self-incrimination. The trial court denied his objections stating Allied had the right to proceed on the claims of civil contempt as to the corporation. The trial judge stated she would enforce Hernandez's right, but would allow questioning of Hernandez as Grande's representative. She further directed Allied to limit questioning to the corporation only. At the conclusion of the

hearing, the trial judge stated she was finding Hernandez "as the corporate rep [sic] or as the corporate owner or as the CEO of the corporation" in contempt. The court further stated it was not going to put Hernandez in jail "as a person." The order signed by the trial judge specifically states "[t]he Court finds Patricio Hernandez violated the [TRO]" and "Patricio Hernandez directed Grande Garbage Collection Company employees to violate the [TRO]." Thus, the trial court found Hernandez guilty of actions constituting criminal contempt.

The court erred by finding Hernandez guilty, individually, of violating the TRO, after denying Hernandez's constitutional right to be free of the risk of self-incrimination. This error involves a constitutional right and, therefore, is subject to harm analysis under Texas Rule of Appellate Procedure 44.2(a). *See Bustamante v. State*, 109 S.W.3d 1, 6 (Tex. App.—El Paso 2002, no pet.) (op. on remand) (holding any error involving a violation of the privilege against self-incrimination contained in the Fifth Amendment to the United States and Article I, § 10 of the Texas Constitution is subject to harm analysis of Texas Rule of Appellate Procedure 44.2(a)).

Under Rule 44.2(a), "the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a). "This standard 'should ultimately serve to vindicate the integrity of the fact-finding process rather than simply looking to the justifiability of the fact-finder's result.'" *Friend v. State*, 473 S.W.3d 470, 482 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd) (quoting *Snowden v. State*, 353 S.W.3d 815, 820 (Tex. Crim. App. 2011)). A constitutional error may not be "deemed harmless simply because the reviewing court is confident that the result the [fact-finder] reached was objectively correct or that, in any event, the [fact-finder] could have reached the same result no matter how much the error may have facilitated that resolution." *Snowden*, 353 S.W.3d at 819. An appellate court should "focus, not upon the perceived accuracy of the conviction or punishment, but upon the error itself in the context of the

trial as a whole, in order to determine the likelihood that it genuinely corrupted the fact-finding process." *Id.* "At bottom, an analysis for whether a particular constitutional error is harmless should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether 'beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment.'" *Id.* at 822 (quoting TEX. R. APP. P. 44.2(a)).

We begin our analysis by reviewing the evidence presented to establish Grande and Hernandez violated the TRO. At the hearing, Allied called three witnesses: (1) Eloy Garcia, Sr., the district clerk for Starr County; (2) Jon Deicla, the general manager for Allied; and (3) Hernandez. Mr. Garcia testified he lives in Rio Grande City, and when Allied stopped collecting his trash, Grande started collecting trash. Deicla testified Grande began providing garbage services to the City of Rio Grande after Allied was "kicked out" and Grande did not comply with the TRO in October and November, 2015. Hernandez testified Grande began providing garbage collection services to Rio Grande City in October, 2015, although he could not recall the exact date. He further testified the TRO prevented him from "collecting trash in Rio Grande City." Hernandez answered a question about whether he was still collecting garbage in Rio Grande City by averring "I have a contract."

In addition to Hernandez's testimony, he was also used as a witness to authenticate (1) Grande's contract with the City to provide solid waste disposal services; (2) a verified pleading stating that the TRO was extended after a hearing on October 22, 2015; and (3) an October 16, 2015 letter from Allied's counsel to Hernandez advising of the existence of the TRO and requesting Hernandez "refrain from providing solid waste services to Rio Grande City." Hernandez was the only source of evidence that Grande was aware of the TRO. Several times during his testimony, Hernandez testified he could not recall dates or even the general timing of various events.

Based upon our review of the record, we cannot conclude beyond a reasonable doubt that the error in requiring Hernandez to testify did not contribute to the trial court's ruling that Hernandez violated the TRO. The amended contempt order specifically cites the verified pleading raised in Hernandez's testimony as evidence that Hernandez and Grande had notice of the TRO and continued to provide solid waste disposal services. We hold the trial court abused its discretion by requiring Hernandez testify after asserting his Fifth Amendment privilege against self-incrimination and this error was harmful.

2. ADDITIONAL ISSUES RAISED BY THE PETITION FOR WRIT OF MANDAMUS.

We do not address the other issues raised by Grande because the first issue is dispositive. TEX. R. APP. P. 47.1

CONCLUSION

Because the trial court was without jurisdiction to enforce the temporary injunction while it was pending on appeal, and because the trial court abused its discretion by requiring Hernandez testify over his assertion of his Fifth Amendment privilege against self-incrimination, we conditionally grant mandamus and order the trial court to vacate its amended contempt order of May 10, 2016 finding Grande and Hernandez in contempt for violating the temporary injunction and TRO. Mandamus will issue only if the trial court fails to do so.

Jason Pulliam, Justice