

NO. 12-10-00219-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE:

§

YAKOV ELMAKISS,

§

ORIGINAL PROCEEDING

RELATOR

§

MEMORANDUM OPINION ON REHEARING

After considering Yakov Elmakiss's motion for rehearing, we grant the motion, withdraw our opinion and judgment of June 20, 2012, and substitute this opinion and corresponding judgment in its place.

This is an original habeas proceeding in which Relator Yakov Elmakiss complains of certain actions taken by the trial court during a divorce proceeding. Specifically, Relator asserts in his habeas petition that (1) the trial court wrongfully withheld his passport from him after ordering that it be returned and that (2) Relator's confinement on two occasions after being found in contempt was the result of void actions by the trial court. We dismiss the petition in part and grant it in part.

BACKGROUND

The underlying proceeding is a divorce action between Relator and Ruth Marie Elmakiss.¹ Initially, the trial court ordered both parties to deliver their passports to the court. The parties complied, and the trial court later ordered that the passports be returned to the parties. Relator's passport was not returned to him because, according to email communications that are part of the mandamus record, he declined to pick up the passport in person as required by the court.

During the course of the divorce proceedings, Relator was held in contempt twice. The first contempt finding arose from Relator's failure to answer a question propounded by Ruth's counsel at

¹ The Honorable Randall L. Rogers, Judge of the County Court at Law No. 2, Smith County, Texas, presided over the divorce action. The parties are now divorced.

a review hearing. In response to counsel's questions, Relator testified that he lived in a camping trailer on the property of a friend near Henderson, Texas. But he declined to answer when he was asked for the property owner's telephone number. The trial court warned Relator of the consequences for failing to answer the question and instructed him to answer. Relator again refused. The trial court found Relator in contempt, ordered him confined in the county jail for sixty days, and announced that the hearing would resume "after 60 days."

The hearing resumed sixty-seven days after it was continued, but Relator did not appear. The trial court asked the bailiff to call Relator's name on the front steps of the courthouse. He stated further that Relator was given actual notice of the hearing when, "[a]s they hauled him off to jail, we told him here in open court what day we were going to come back." The bailiff did not locate Relator outside the courthouse, and the trial court found him in contempt a second time. A *capias* was issued, and Relator was arrested and jailed. He was released after posting a five thousand dollar appearance bond. Although Relator was notified of the date a contempt hearing would be conducted, that hearing did not occur. The divorce action was transferred to another trial court, and no further action was taken pertaining to the second contempt finding.

FAILURE TO RETURN PASSPORT

Relator first argues that the trial court's retention of his passport is an unconstitutional restriction on his freedom of movement and violates the court's own order. He requests that a writ of habeas corpus issue directing the trial court to return his passport to him.

The jurisdiction of appellate courts to issue writs of habeas corpus is limited. By statute, an appellate court's original jurisdiction to issue a writ of habeas corpus is limited to those cases in which a person's liberty is restrained because the person has violated an order, judgment, or decree entered in a civil case. *See* TEX. GOV'T CODE ANN. § 22.221(d) (West 2004). Here, the record does not reflect that the trial court ordered Relator to surrender his passport because he had violated an order, judgment, or decree entered in the divorce proceeding. Accordingly, we are without jurisdiction to address the merits of this complaint. *See id.*

CONTEMPT

Relator asserts that the order holding him in contempt for refusing to answer questions at a hearing is void because he received inadequate notice of the charges against him. He also argues, in

part, that the order of commitment pertaining to the second contempt is void because he never received notice of the charges against him and no contempt hearing was ever held by the trial court.

Habeas corpus is available to review a contempt order issued by a lower court confining a contemnor. *Ex parte Gordon*, 584 S.W.2d 686, 687–88 (Tex. 1979) (orig. proceeding). The function of a writ of habeas corpus is to secure release from unlawful custody. *In re Ragland*, 973 S.W.2d 769, 771 (Tex. App.–Tyler 1998, orig. proceeding). Its purpose is not to determine the ultimate guilt or innocence of the relator. *Ex parte Gordon*, 584 S.W.2d at 688. To be entitled to habeas corpus relief, a relator must establish that he was either “confined” or “restrained” unlawfully at the time the habeas petition was filed. See *State v. Collazo*, 264 S.W.3d 121, 126 (Tex. App.–Houston [1st Dist.] 2007, pet. ref’d). The terms “confinement” and “restraint” encompass incarceration, release on bail or bond, or any other restraint on personal liberty. *Id.*

In the first instance of contempt, Relator was sentenced to sixty days in jail. He does not assert in his habeas petition that he is still confined or restrained pursuant to this contempt finding. Moreover, it appears from the record that his confinement had ended at the time the petition was filed. Therefore, he has not invoked this court’s jurisdiction in connection with the trial court’s first contempt finding. See *Collazo*, 264 S.W.3d at 126; *Dahesh v. State*, 51 S.W.3d 300, 303 (Tex. App.–Houston [14th Dist.] 2000, pet. ref’d) (dismissing for want of jurisdiction because appellant was not confined or restrained in his liberty at time he filed habeas petition).

As to the second instance of contempt, a *capias* was issued and Relator was jailed. He was released when he posted a five thousand dollar appearance bond in compliance with the provisions of the *capias* issued by the trial court. A person is considered restrained or in custody when he has been required to post an appearance bond. See *Ex parte Armes*, 582 S.W.2d 434, 437 (Tex. Crim. App. 1979). Relator alleges that the bond is still in effect. Therefore, Relator showed the requisite restraint to invoke this court’s jurisdiction. See *id.*

A violation of a court order outside the presence of the court, including the failure to appear for a hearing, is constructive contempt. *Ex parte Alloju*, 907 S.W.2d 486, 487 (Tex. 1995) (orig. proceeding); *Ex parte Cooper*, 657 S.W.2d 435, 437 (Tex. Crim. App. 1983) (orig. proceeding). Due process of law requires that the constructive contemnor be given “full and complete notification” and a reasonable opportunity to meet the charges by way of defense or explanation. *Ex parte Gordon*, 584 S.W.2d at 688. Consequently, the court must issue a valid show cause order or equivalent legal process apprising the contemnor of the accusation. *Id.* Due process also requires a court, before restraining a person for violating an earlier order, to sign a written judgment

or order of contempt and a written commitment order. *Ex parte Shaklee*, 939 S.W.2d 144,145 (Tex. 1997). The record reflects that the trial court scheduled a contempt hearing for a date after Relator's release from jail, but no show cause order was issued, no hearing was ever conducted, and no written contempt judgment was signed.

The bonding company acknowledges that no further action has been taken relating to the second contempt finding. Nevertheless, Relator's appearance bond remains in effect. Consequently, we conclude that Relator is restrained. See *Ex parte Armes*, 582 S.W.2d at 437. Moreover, this restraint violates Relator's due process rights because the trial court did not issue a show cause order, conduct a hearing, and issue a written contempt judgment. See *Ex parte Shaklee*, 939 S.W.2d at 145; *Ex parte Armes*, 582 S.W.2d at 437. Accordingly, we grant Relator's petition for writ of habeas corpus insofar as it pertains to the second contempt finding.

CONCLUSION

For the reasons set forth above, we have held that this court lacks jurisdiction to consider the merits of Relator's complaints pertaining to the trial court's failure to return his passport and the court's first contempt finding. We have held, however, that Relator's complaint about the second instance of contempt is meritorious. Accordingly, we *grant* Relator's petition for writ of habeas corpus insofar as it pertains to the second contempt finding. We order that the appearance bond posted by Relator be released and that Relator be released from all further obligations under the bond.

BRIAN HOYLE
Justice

Opinion delivered September 28, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(PUBLISH)



COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

SEPTEMBER 28, 2012

NO. 12-10-00219-CV

YAKOV ELMAKISS,
Relator
v.
HON. RANDALL L. ROGERS,
Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the original habeas proceeding filed by **YAKOV ELMAKISS**, who is the relator in Cause No. 05-1172-F, pending on the docket of the County Court at Law #2 of Smith County, Texas. Said petition for writ of habeas corpus having been filed herein on July 12, 2010, and the same having been duly considered, because it is the opinion of this Court that this court lacks jurisdiction to consider the merits of Relator's complaints pertaining to the trial court's failure to return his passport and the trial court's first contempt finding, the writ of habeas corpus should not issue, it is therefore **CONSIDERED, ADJUDGED and ORDERED** that these complaints in said petition for writ of habeas corpus be, and the same are, hereby **DISMISSED FOR WANT OF JURISDICTION**. Further, it being the opinion of this court that Relator's complaint relating to the trial court's second contempt finding is meritorious, we **grant** that portion of the petition for writ of habeas corpus. It is therefore **CONSIDERED, ADJUDGED and ORDERED** that bond number 185793 issued by **JOHNNY BEDDINGFIELD DBA BEDDINGFIELD BAIL BONDS** be released and that Relator **YAKOV ELMAKISS** be released from all further obligations under the bond.

Brian Hoyle, Justice

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.