

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-1715

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

**IN RE THE FINDING OF CONTEMPT IN:
IN RE THE TERMINATION OF PARENTAL
RIGHTS OF CHRISTINA G., AND VALERIE G.,
PERSONS UNDER THE AGE OF 18:**

GREGG E. WATERMAN,

APPELLANT,

V.

**THERESA ROETTER, GUARDIAN AD LITEM,
CIRCUIT COURT OF LAFAYETTE COUNTY,
THE HONORABLE WILLIAM D. JOHNSTON,
AND LAFAYETTE COUNTY,**

RESPONDENTS.

APPEAL from an order of the circuit court for Lafayette County:
WILLIAM D. JOHNSTON, Judge. *Reversed.*

ROGGENSACK, J.¹ Attorney Gregg Waterman appeals an order of the circuit court holding him in contempt of court for violating court orders which denied the use of a videotape depicting his client's parenting skills from being shown during trial. We conclude that Waterman did not intentionally violate the circuit court's orders because the orders did not clearly and specifically prohibit questions about the videotape, which questions could have established a basis for its use or its reliability. Therefore, we reverse.

BACKGROUND

In 1997, Waterman represented Carolyn G. in a petition to involuntarily terminate her parental rights. On December 8, 1997, Waterman filed a motion to play a "day-in-the-life" video at trial, a thirty-six minute edited videotape produced by Waterman, for the purpose of showing Carolyn G.'s parenting skills. The court denied the motion, reasoning that the tape was unreliable because it violated the rule of completeness, § 901.07, STATS. Waterman then moved to be permitted to play the full three-hour videotape of Carolyn G.'s September 28, 1997 visitation with her children, from which most of the thirty-six minute videotape was taken. The court also denied that motion because:

Here the inherent unreliability comes from the fact that these were set, as I have indicated, under court order for visitation so that your psychologist could see this, have more time with them. These are not that pure as the usual day-in-the-life, which is just simply standing there with a camera and recording the activity.

¹ This appeal is decided by one judge pursuant to § 752.31(2)(h), STATS.

On December 15, 1997, the court reconsidered the motion to play the videotapes and again denied it.

The trial began on December 17, 1997. On the second day of trial, Dr. Marc Wruble, a psychologist who was Lafayette County's expert, testified that he had videotaped Carolyn G. and her children during his office examination. Dr. Wruble's tapes were not shown to the jury. On December 23rd, Dr. Sheila Fields, Carolyn G.'s psychologist, testified that she had viewed videotapes recorded during Carolyn G.'s visitation with her children. No objection was made to either witness's testimony.

On December 26th, Waterman, on cross-examination, asked Renee Gross, a parenting aide, if she had videotaped Carolyn G.'s September 28, 1997 visitation with her children. The County objected to the question as beyond the scope of direct examination, but neither the County, the guardian ad litem, nor the court asserted that the question violated any court order.

On December 27th, a juror submitted a written question for Terri Smyth, a testifying social worker, which referred specifically to the visitation videotapes. Neither the court nor counsel objected to the juror's question. The court read the juror's question to the witness who responded, and Waterman proceeded to question Smyth, without objection, about whether Dr. Wruble viewed any of the visitation videotapes.

Later on December 27th, Waterman called Gross to testify in Carolyn G.'s case in chief, even though Gross had previously testified in the County's case in chief. Waterman asked her a line of questions that focused on the September 28, 1997 visitation that had been videotaped by Waterman. After Waterman asked Gross if she had videotaped the September 28, 1997 visitation,

the court asked Gross if she was the only person who videotaped that visitation, and Gross answered that she was. Again, none of the parties objected to any of the questions concerning the visitation videotape.

Shortly thereafter, Waterman requested a sidebar and moved the court to show the videotape from the September 28, 1997 visitation shot by Waterman for the purpose of impeaching the parenting aide. The court denied the motion. As it explained in a later recess, the court denied the motion because it believed it was improper for Waterman to impeach his witness during direct examination without first having the witness declared adverse.

After the sidebar, Waterman asked Gross further questions about the September 28, 1997, visitation and whether it was videotaped. Gross then changed her testimony and said that Waterman also videotaped that visitation. This question prompted another sidebar after which the court admonished the jury to disregard the mention of the videotape. During the recess which followed, the guardian ad litem moved the court to hold Waterman in contempt of court for “willfully violating the pretrial order excluding the videotapes and for further violating the court’s order at sidebar when he approached to request to show the tapes and the court again indicated that its ruling was that the videos were excluded.” The court held the contempt matter in abeyance pending a formal motion. Five weeks later the guardian ad litem filed a contempt motion, seeking sanctions for Waterman’s asking Gross whether the visitation was videotaped.

At the contempt hearing, Waterman claimed that he did not believe that his questioning of Gross was improper. And, based on all the prior questioning and testimony of others about the visitation videotape, he believed the motion must be denied. The court restated its opinion that it was improper for

Waterman to attempt to impeach Gross without first having her declared adverse. The circuit court then concluded that Waterman violated court orders entered on December 8, 1997, and renewed on December 27, 1997,² which had decided that Waterman could not use the videotapes, and that Waterman's questioning of Gross concerning the videotapes violated SCR 20:3.4 and SCR 20:8.4(f) (West 1998). The court granted the motion for contempt and imposed a fine and the guardian ad litem's costs on Waterman. This appeal followed.

DISCUSSION

Standard of Review.

We review the circuit court's use of its contempt power to determine whether the court properly exercised its discretion. *Wisconsin Dells v. Dells Fireworks, Inc.*, 197 Wis.2d 1, 23, 539 N.W.2d 916, 924 (Ct. App. 1995). We will not set aside the circuit court's findings of fact which bottom a contempt order unless they are clearly erroneous. Section 805.17(2), STATS. However, the determination of whether contempt has occurred ultimately involves statutory and court order interpretation, both of which are questions of law reviewed *de novo*. *Wisconsin Dells*, 197 Wis.2d at 23, 539 N.W.2d at 924; *Patients Comp. Fund v. Lutheran Hosp.*, 216 Wis.2d 49, 52-53, 573 N.W.2d 572, 574 (Ct. App. 1997).

² The circuit court's order states: "Attorney Waterman violated such orders by pursuing admission of previously excluded evidence and questioning witness Renee Gross about the excluded evidence in front of the impaneled jury immediately following the Court's renewal of the prior exclusionary ruling."

Contempt.

The circuit court has statutory and inherent authority to impose contempt sanctions to obtain compliance with its orders. Section 785.02, STATS; *In re Paternity of D.A.A.P.*, 117 Wis.2d 120, 126, 344 N.W.2d 200, 203 (Ct. App. 1983). However, contempt requires that the person has intentionally violated a court order which clearly and specifically prohibited the challenged behavior. Section 785.01(1), STATS.; *State v. Dickson*, 53 Wis.2d 532, 540, 193 N.W.2d 17, 21 (1972); *Stotler & Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir. 1989); *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 460 (7th Cir. 1993).³ Therefore, we examine the scope of the court orders to determine whether Waterman intentionally violated them when he questioned Gross about the visitation videotape.

The circuit court order entered on December 8, 1997, and renewed on December 27, 1997, specifically denied Carolyn G.'s efforts to show any videotapes; however, the order did not forbid any mention of the excluded evidence, as the court had ordered in *Gainer v. Koewler*, 200 Wis.2d 113, 546 N.W.2d 474 (Ct. App. 1996). The order did not mention testimony concerning the videotape and the court allowed such testimony on several occasions. For example, prior to the allegedly contemptuous conduct, both of the psychologists testified about videotapes, a juror asked a question about the visitation videotape, which the court then asked the witness, and the court, itself, asked Gross, "Were

³ The circuit court concluded that Waterman's behavior violated SCR 20:3.4 and SCR 20:8.4(f) (West 1998). SCR 20:3.4(c) states: "A lawyer shall not ... *knowingly* disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists" (emphasis added). SCR 20:8.4(f) states: "It is professional misconduct for a lawyer to ... violate a ... supreme court rule" Therefore, a finding of professional misconduct based on a violation of the supreme court rule on disobeying a court order requires an element of intent, just as a finding of contempt requires intent.

you the only one with a video camera at that session?” Waterman’s question to Gross about the visitation videotape was very similar to previous questions and testimony;⁴ therefore, he could have reasonably believed that his question was not in violation of a court order. In order to commit contempt of court by contravening a court order, the actor must intentionally disregard the clear terms of the order. *See Dickson*, 53 Wis.2d at 541, 193 N.W.2d at 22. There is nothing in the record to support a finding that Waterman intentionally did so.

Furthermore, the court’s initial, pretrial order excluded the visitation videotape for the purpose of demonstrating Carolyn G.’s parenting skills, but it did not preclude trying to obtain permission to use it for another purpose. Waterman’s later questions were an attempt to establish a foundation to show the visitation videotape to demonstrate the inaccuracies in Gross’s testimony about the September 28, 1997 visitation. It is not a contempt of court for an attorney to try alternate routes for the admission of evidence he believes is important to his client’s case, unless a court orders that no mention of the evidence may be made before the jury. That was not done here.

Because there was no court order which prohibited Waterman from asking questions about the videos, nor was there any order which prohibited any witness from mentioning them, Waterman did not violate a court order. Therefore, we conclude he did not commit a contempt of court.

⁴ Waterman’s allegedly contemptuous question to Gross was: “Were those incidents you just testified to all recorded on videotape that day?”

CONCLUSION

Waterman did not knowingly or intentionally violate court orders that prevented him from playing a visitation videotape at trial, for the purpose of showing Carolyn G.'s parenting skills, because the orders did not clearly and specifically prohibit mentioning the videotape. The circuit court improperly interpreted the scope of its order and failed to consider the element of intent required by § 785.01(1), STATS., and SCR 20:3.4(c) (West 1998); therefore, it did not apply the correct legal standard and its conclusion that Waterman committed contempt of court was an erroneous exercise of discretion. Accordingly, we vacate the order holding Waterman in contempt and reverse the judgment against him.

By the Court.—Order reversed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4., STATS.

