COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2890 **Cir. Ct. No. 02 CT 3993**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN THE MATTER OF FINDING OF CONTEMPT IN STATE V. MARSHALL L. DARDEN:

CHARLES COLLIER,

PETITIONER-APPELLANT,

V.

CIRCUIT COURT FOR MILWAUKEE COUNTY, HON. PATRICIA D. MCMAHON, PRESIDING,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Reversed and cause remanded with directions*.

¶1 SCHUDSON, J.[1] Charles Collier appeals from the circuit court order, following a contempt finding, requiring him to pay $100. He argues that he "committed no contumacious act" and, therefore, that the order must be vacated. This court concludes that while the record suggests that a succession of events led to the circuit court's understandable frustration with Collier's conduct, it does not establish the basis for a finding of summary contempt. Accordingly, this court reverses and directs that the contempt order be vacated.

I. BACKGROUND

¶2 On June 25, 2002, Assistant State Public Defender Collier was representing Marshall L. Darden, a defendant who had a misdemeanor case scheduled before the circuit court. As the parties agree, while the June 25 hearing establishes that prior events were closely connected to the court's increasing consternation with Collier, it is the June 25 hearing, essentially standing alone, on which this court must base its evaluation. (Indeed, the substantive appellate record consists of only the June 25 hearing.)

¶3 Almost in its entirety, the June 25 hearing follows:

> THE COURT: This is set for plea today. What's happening in this case?
>
> MR. COLLIER: Well, it was set for plea on 6-19. On 6-19, I was in your court in the morning. I was unaware Mr. Darden was here. Apparently, it was set for plea date on 6-7 in this court. I was not here.
>
> [Assistant State Public Defender] Dennis Gall approached me in the hall about this case, said he spoke to one of your bailiffs who indicated they [sic] told him my

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

client's across the hall in custody and I left, which is incorrect. I did read the notation in the file. Same thing is in the file. I want you to say that's not correct. That information is wrong.

THE COURT: The defendant's been in secure detention since June 7th. You haven't had contact with him.

MR. COLLIER: I didn't know he was here on the 7th. The FTA—

THE COURT: You're not listening to what I'm saying. You had no contact whatsoever with your client, otherwise, you'd know where he was.

MR. COLLIER: That's not what I'm saying. I didn't know he was here on the 19th.

THE COURT: *Mr. Collier, you are so rude and you were rude to my staff and, you know, it angers me.*

MR. COLLIER: Today you mean? I was not—

THE COURT: Mr. Collier, would you just be quiet?

MR. COLLIER: Okay. Sure. When you finish talking, I'm allowed to speak about your staff.

THE COURT: Oh? Mr. Collier, my comment to you was the defendant has been in secure detention since June 7th, and you have not had any contact with your client to know that your client was in custody[;] otherwise, you would have known that he was in custody.

MR. COLLIER: Correct.

THE COURT: Right. And you didn't know that, and we have been trying to track you down. We leave messages for you at your office telling you to be here, and we do have trouble finding you and getting you here when your client is here. Now, what is happening to Mr. Darden?

MR. COLLIER: What I'm saying is, I was here on two cases.

THE COURT: I don't care about that. What is happening to Mr. Darden?

MR. COLLIER: If you hear me, I was here on that morning. He had a revocation hearing scheduled for June 27th, so he's not going to resolve this case today with that new information to revoke him.

THE COURT: You left before the case was called so we didn't know what was happening on the case and what you were doing. If you leave before the case is called, we can't see what is happening.

MR. COLLIER: That's not the information I received. The bailiff said—he told me Mr. Darden was in custody and I failed to go across the hall and talk to my client[,] which is incorrect.

THE COURT: When did you talk to your client?

MR. COLLIER: I talked to my client today. He said on the 19th I checked in. He said Mr. Darden was across the hall and I refused to go talk to my client. That's the information he gave Dennis Gall. That information is incorrect. He told Judge Kremers I was not here yesterday.

THE COURT: On June 19th, did you or did you not talk to your client?

MR. COLLIER: I did not know he was here. That's what I'm telling you. I was unaware Mr. Darden was here.

THE COURT: You know? I don't believe you, and I'll tell you flat to your face; I don't believe you.

MR. COLLIER: You know what? That information is incorrect.

THE COURT: Mr. Collier, because I remember that day, and we were trying—we left phone messages for you trying to get you to come back.

MR. COLLIER: I refused to deal with my client, that's what you're telling me? That information is incorrect.

THE COURT: You can have your position.

MR. COLLIER: This is the same bailiff who told Judge Kremers I was not here.

THE COURT: It is ten to noon now, and I think your action has been incredibly contemptuous.

MR. COLLIER: You won't let me talk.

THE COURT: I do—

MR. COLLIER: I'm trying to explain.

THE COURT: Every time I talk, you interrupt me, and I think that kind of conduct is totally contemptuous because of that. Do you have anything to say before I find you in contempt and impose a penalty?

MR. COLLIER: Yes. This is the same bailiff who told Judge Kremers I was not here yesterday afternoon. Judge Kremers yelled at me on the record. I had to come over here and talk to the bailiff. He said, you know Mr. Collier, you were right. I apologize. You were here. So he called Judge Kremers and told him he made a mistake. The same bailiff—it's the same bailiff June 19th who said I didn't talk to my client. Apparently, he doesn't know who I am.

BAILIFF: Judge—

THE COURT: This is not about what David did or didn't do. In fact, what your own comment is, he apologized for making a mistake, and that's what people do when they make a mistake[;] they apologize.

MR. COLLIER: He made two mistakes.

THE COURT: Mr. Collier, you keep telling me that I interrupt you, and once you've interrupted me—

MR. COLLIER: I apologize.

THE COURT: —and I am finding you in contempt. I gave you the right of allocution. I recall that day on June 19. And we have had trouble getting you to come in to appear for Mr. Darden, and I called Mr. Gall, and I just called him this morning, because we were having trouble having you come in and take care of the case with Mr. Darden. It's Mr. Darden's right to have an attorney to represent him and—

MR. COLLIER: But—

THE COURT: Mr. Collier, this is another time that you just interrupted me, so tell you what? You are going to pay a hundred dollar fine for contempt ….

(Emphasis added.)

II. DISCUSSION

¶4 As relevant to this appeal, WIS. STAT. § 785.01(1)(a) and (b) provide:

> **Definitions.** In this chapter:
>
> **(1)** "Contempt of court" means intentional:
>
> (a) Misconduct in the presence of the court which interferes with a court proceeding or with the administration of justice, or which impairs the respect due the court;
>
> (b) Disobedience, resistance or obstruction of the authority, process or order of a court;

WISCONSIN STAT. § 785.02 provides, "A court of record may impose a remedial or punitive sanction for contempt of court under this chapter." And, as relevant to this appeal, WIS. STAT. § 785.03(2) provides:

> SUMMARY PROCEDURE. The judge presiding in an action or proceeding may impose a punitive sanction upon a person who commits a contempt of court in the actual presence of the court. The judge shall impose the punitive sanction immediately after the contempt of court and only for the purpose of preserving order in the court and protecting the authority and dignity of the court.

¶5 Here, it is undisputed that the court utilized the summary contempt procedure under WIS. STAT. § 785.03(2). Contempt may be found under that procedure only if the following conditions are met:

> "(1) [t]he contumacious act must have been committed in the presence of the court; (2) the sanction must be imposed for the purpose of preserving order in the court; (3) the sanction must be imposed for the purpose of protecting the authority and dignity of the court; and (4) the sanction must be imposed immediately after the contempt."

Gower v. Marinette County Circuit Court, 154 Wis. 2d 1, 11, 452 N.W.2d 355 (1990) (citation omitted).

¶6 A circuit court's finding that a person committed contempt of court will not be reversed by a reviewing court unless clearly erroneous. ***Oliveto v. Crawford County Circuit Court***, 194 Wis. 2d 418, 428, 533 N.W.2d 819 (1995). After all, contumacious courtroom conduct often will be inextricably connected to demeanor, tone or volume, all of which the circuit court is in the best position to appraise. *See* ***id.*** at 427 ("The question of whether or not an act or remark is a contempt of court is one which the circuit court has far better opportunity to determine than the reviewing court."). Whether contumacious conduct actually occurred in the presence of the court, however, and whether, therefore, "the circuit court proceeded under the proper provision of the contempt statute is a question of statutory construction" subject to *de novo* review. ***Id.*** at 429.

¶7 Further, this court reviews a circuit court's use of its contempt power to determine if the court properly exercised discretion. ***City of Wis. Dells v. Dells Fireworks, Inc.***, 197 Wis. 2d 1, 23, 539 N.W.2d 916, 924 (Ct. App. 1995). The circuit court's authority to enter a summary contempt order "is very limited," ***Gower***, 154 Wis. 2d at 10 (citation omitted). Indeed, a court should use summary contempt "only when compelling circumstances require immediate punishment." ***Oliveto***, 194 Wis. 2d at 437 (Abrahamson, J., concurring).

¶8 Here, neither Mr. Collier's conduct *in the presence of the court* nor the possibly "compelling circumstances requir[ing] immediate punishment," *see* ***id.***, are sufficiently clear to establish a factual basis for the circuit court's contempt finding.

¶9 This court is mindful of the limited conduct at issue. As the responsive brief of the Attorney General quite rightly acknowledges:

> In this case, the summary contempt procedure could not be used to address the fact that Collier failed to appear on June 7, 2002, that he left court before the case was called on June 19, 2002, that he did not speak to his client for the first time until June 25, 2002, that the court had trouble getting Collier to appear for the defendant on June 25, 2002 (so that the case was not heard until nearly noon), or that Collier had been rude to Judge McMahon and had been rude to the judge's staff in the past. This is because these acts were not committed "in the actual presence of the court" for purposes of the finding in this case.

(Citations omitted.) Thus, this court must focus on what, exactly, constituted Collier's contempt.

¶10 The Attorney General argues that Collier's contempt consisted of his "impertinence and constant interruptions." The Attorney General also contends that Collier's "constant interruptions" and his "rudeness to the court were the reasons articulated" by the circuit court for its finding. With substantial support in the record, however, Collier convincingly maintains that: (1) the record of his "interruptions" is far less "constant" than the Attorney General suggests; (2) as often as not, he was interrupted by the court, and even by the bailiff, during his attempts to offer explanations; (3) that while the Attorney General characterizes his *manner* as "flippant" and "impertinent," the record does not clearly reflect that; (4) "[w]hen individuals *converse*, as the judge and [he] did during this status appearance, one person occasionally speaks over another[] not out of rudeness, but because deciding when the speaker has concluded a thought and expects a response is not an exact science"; and, (5) even assuming that he interrupted all too often, nothing suggests that he did so with any intent to disrupt the proceeding, interfere with the administration of justice, or bring disrespect to the court.

¶11 This is a difficult case. This court fully appreciates the daily challenges a circuit court faces in managing a heavy caseload. This court is well aware of how a circuit court's best efforts can be undermined by attorneys who fail to provide conscientious and prompt attention to their clients and the courts. At the same time, however, this court also appreciates the professional consequences that may attend a judicial declaration of disbelief in an attorney's statements to a court, and of a contempt finding. And this court is ever mindful of the strict standards controlling the exercise of *summary* contempt authority, particularly where the record is "equivocal," *see* ***Oliveto***, 194 Wis. 2d at 437 (Abrahamson, J., concurring), and of the irreplaceable patience supporting circumspect courts as they respond to irritating conduct.

¶12 This court also appreciates the particularly strong feelings that may well be held by the parties to this appeal. And, in light of that, this court calls on the parties to recognize the very limited view of this case available on review. Indeed, if Mr. Collier's conduct has been chronically rude, as the circuit court implied, how would this court ever know? And if the circuit court's assertion of disbelief in Mr. Collier's statements was inaccurate and unfair, as Mr. Collier contended, how would this court ever know?

¶13 This court has, however, carefully studied the record and tracked the parties' arguments. This court could further dissect the record, parsing words and phrases along with the parties. Such effort, however, would be pointless. Did Collier interrupt the court? Yes. Did the court (and bailiff) interrupt Collier? Yes. Does the record reflect flippancy, impertinence or rudeness? Perhaps, but

the critical interruptions come from three voices, not one.[2] Clearly, the record reflects tension but, most importantly for this court's analysis, the record most clearly establishes that the tension *preceded* the June 25 hearing.

¶14 Reviewing the June 25 hearing, one cannot help but be struck by how quickly the court accused Collier of "not listening" and commented, "Mr. Collier, you are so rude and you were rude to my staff and, you know, it angers me." Apparently, the blood was boiling by that early point in the proceedings, and perhaps understandably so. But any fair reading of the full hearing establishes that the circuit court's impression of what had taken place *before* June 25 was absolutely critical to its contempt finding.

¶15 Might a court find an attorney in summary contempt for reasons *related* to events preceding the contumacious conduct in court? Of course. Here, however, those events are not reflected in the record (beyond the parties' less-than-definitive assertions about them on June 25), this court has no record of those events, and, as the Attorney General concedes, the contempt of June 25 rises or falls on the *facts of June 25*.

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[2] And in this regard, it may be significant that Collier was interrupted during his answer to the circuit court's question, "Do you have anything to say before I find you in contempt and impose a penalty?" *See* ***Oliveto v. Crawford County Circuit Court***, 194 Wis. 2d 418, 436, 533 N.W.2d 819 (1995) ("[T]he allocution requirement essentially provides a check on the heightened potential for abuse posed by the summary contempt power by providing an opportunity for the contemnor to apologize or to defend or explain the contumacious behavior[,]" and "the right of allocution is so fundamental that the whole summary procedure must be set aside for failure to afford allocution."); *see also* ***Currie v. Schwalbach***, 132 Wis. 2d 29, 44-45, 390 N.W.2d 575 (Ct. App. 1986) (Evaluating whether contemnor had been afforded "a meaningful opportunity" to exercise the right of allocution, the court stated, "It is essential that courts proceeding summarily must be meticulously careful to observe procedural safeguards."), *aff'd*, 139 Wis. 2d 544, 566, 407 N.W.2d 862 (1987) (holding that "an opportunity for allocution must be accorded in summary contempt proceedings").

¶16 The Attorney General never contends that the kind of interruptions that occurred in the June 25 hearing, standing alone, would ever result in a contempt finding. After all, the record reflects nothing about the tone or volume of Collier's voice, the demeanor accompanying his delivery, or anything else (aside from the court's early and repeated references to his "rudeness") in his behavior that would separate his comments, and his interruptions, from those of typical courtroom advocates. Indeed, the Attorney General, on appeal, never seriously suggests that Collier's conduct, absent his history with the circuit court, would ever have been any basis for a contempt finding.

¶17 This court is not unmindful that certain of Collier's comments were anything but diplomatic. Remarks such as "When you finish talking, I'm allowed to speak about your staff" and "If you hear me" are abrasive. Applying the supreme court's wise warning:

> As an officer of the court, [Collier's] courtroom demeanor should be above reproach. Lawyers should, by their conduct, set an example for others to follow. The *Rules For Professional Conduct For Attorneys* provide that a lawyer shall not "engage in conduct intended to disrupt a tribunal." SCR Rule 20:3.5(c). The Comment to this Rule provides in part: "An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."

Oliveto, 194 Wis. 2d at 429.

¶18 Thus, this court neither praises Collier's conduct nor criticizes the circuit court's insistence on courtesy or careful management of its calendar. Because, however, the record fails to establish that the circuit court found Collier in contempt for a "contumacious act … committed in the actual presence of the court" on June 25, the order of contempt must be vacated.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.