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CLERK, SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

GEORGE SELIG,	)	
Plaintiff,	)	Filed December 30, 1981
vs.	)	
HONORABLE DALE S. MISSILDINE, as Judge of the District Court of Iowa in and for Polk County,	)	1-360 2-65669
Defendant.	)	

Appeal from Polk District Court - Dale S. Missildine, Judge.

Via certiorari, plaintiff challenges the district court order finding him in contempt for failure to honor a subpoena. He asserts on appeal that: (1) his failure to honor the subpoena was not willful; (2) the court lacked jurisdiction when the contempt was pursued as part of a criminal proceeding that had been dismissed; (3) the subpoena was ineffective due to improper return of service; (4) contempt should not have been found in the absence of an affidavit showing the nature of the transaction; and (5) the imposition of a thirty-day jail term was unreasonable and an abuse of discretion. AFFIRMED.

Jaki K. Samuelson and Timothy J. Walker of Whitfield, Musgrave, Selvy, Kelly & Eddy, Des Moines, for plaintiff.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for defendant.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Via certiorari, plaintiff challenges the district court order finding him in contempt for failure to honor a subpoena. He asserts on appeal that: (1) his failure to honor the subpoena was not willful; (2) the court lacked jurisdiction when the contempt was pursued as part of a criminal proceeding that had been dismissed; (3) the subpoena was ineffective due to improper return of service; (4) contempt should not have been found in the absence of an affidavit showing the nature of the transaction; and (5) the imposition of a thirty day jail term was unreasonable and an abuse of discretion. We affirm.

Generally, findings of fact are not reviewable on certiorari. However, when a judgment of contempt is challenged, while our review is not de novo, we will examine the evidence to assure ourselves that proof of contempt is clear and satisfactory. Lane v. Oxberger, 224 N.W.2d 245, 247 (Iowa 1974).

I.

Plaintiff was the state's primary witness in a criminal action against George Dunn and Willis Lane. Dunn and Lane were charged with second degree robbery and assault in connection with a robbery at a Git-N-Go store where plaintiff was the attendant. Plaintiff appeared by subpoena for a deposition on January 3, 1980, but his appearance was secured only after the prosecutor and investigator went to his home to pick him up. On the same date, an assistant county attorney personally served plaintiff with a subpoena requiring that he appear to testify at the trial of Dunn and Lane which was scheduled for January 21, 1980. No return of service was made or filed.

On the morning of January 21, 1980, the trial date, plaintiff was in Indiana where his car was broken down with starter problems. Plaintiff called his brother on January 20, 1980, who in turn called the assistant county attorney to inform him that plaintiff was "broke down out of town" on January 21, 1980, shortly before trial. Plaintiff's only contact with the assistant county attorney was indirectly through his brother, and did not indicate either where plaintiff could be reached, or when plaintiff could be expected to return to Des Moines. We note that the subpoena was directed to the defendant and not to friends or relatives of the defendant. A properly served subpoena, as here, is the personal obligation of the defendant, not anyone else.

On January 22, 1980, a bench warrant was issued for plaintiff's arrest and the prosecution was given until 9:00 a.m. January 23, to produce plaintiff as a witness. The

criminal charges against Dunn and Lane were dismissed on January 23, 1980, when plaintiff was not produced. Plaintiff did not return to Des Moines until mid-August. He was arrested in late September pursuant to the warrant issued on January 22, 1980. After his return, no contact was made at anytime with the county attorney's office or the court. The defendant simply ignored the subpoena until arrested. A contempt hearing was held and plaintiff testified that his car had broken down in Indiana on January 19 and that he had been unable to either repair it or obtain other transportation back to Des Moines. Without an affidavit showing the nature of the transaction, the court found plaintiff in contempt and sentenced him to jail for thirty days. Certiorari was granted and the sentence was stayed during the pendency of the case.

II.

Plaintiff asserts that the trial court's finding that plaintiff was in contempt was not supported by clear, satisfactory, and convincing evidence that plaintiff willfully disobeyed the subpoena. Contempt is justified only when the trial court finds willful disobedience of a court order. Lutz v. Darbyshire, 297 N.W.2d 349, 353 (Iowa 1980). Willful disobedience consists of "conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not." Id. We find that the evidence in this case was clear, satisfactory, and convincing. By going to Indiana shortly before the trial date without sufficient financial resources, plaintiff voluntarily placed himself in a position contrary to his known duty to comply with the subpoena. His failure to inform the prosecutor of where he could be contacted or when he would return to Des Moines is indicative of a person unconcerned with the consequences his actions might have on others. His failure to make contact before his arrest when he returned to Des Moines, when added to the other facts, is quite convincing evidence of his cavalier attitude with regard to his legal responsibilities. We affirm the trial court's finding of contempt.

III.

Plaintiff next asserts that the procedures involved in the contempt action did not comply with Chapter 665, The Code 1979. We disagree and affirm the trial court for the following reasons.

First, we find the trial court did have jurisdiction over plaintiff despite the fact that the criminal case out of which plaintiff's contempt arose had been dismissed. It

was not necessary to serve plaintiff with a rule to show cause under section 665.7, The Code 1979, because the warrant issued for plaintiff's arrest was sufficient to serve as notice of the charge against him under the rationale of Knox v. Municipal Court of City of Des Moines, 185 N.W.2d 705, 710 (Iowa 1971). Second, we consider the fact that there was no return of service made or filed on the subpoena served to plaintiff. We find the service was sufficient to impose a duty to obey upon the contemnor. Coutts v. District Court in and for Poweshiek County, et al., 149 Iowa 297, 302-03, 128 N.W. 362, 364 (1910). Third, by his failure to appear as required by the subpoena, plaintiff's conduct "comes officially to [the court's] knowledge" within the meaning of section 665.6, The Code 1979, and no affidavit was required. Knox, 185 N.W.2d at 709.

IV.

Plaintiff's final assertion is that the trial court abused its discretion by sentencing plaintiff to thirty days in the county jail. We disagree. The sentence imposed in this case was not an abuse of discretion because it was not so "palpably and grossly violative of fact and logic that it evidences not exercise of will but perversity of will, not evidence of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." State v. Noonan, 246 N.W.2d 236, 237 (Iowa 1976). In the absence of an abuse of discretion as specified by Noonan, we affirm the trial court's sentence.

AFFIRMED.

All judges concur, except Oxberger, C.J., and Snell, J., who dissent.

OXBERGER, C.J., (dissenting).

I dissent. The issue in this case is whether the victim's conduct is such that he should go to jail. The alleged assailant did not go to jail as his case was dismissed. I do not believe the victim's conduct was legally willful. Though negligent and irresponsible, there is no dispute that the victim was stranded in Indiana without funds to return to testify. He telephoned his brother the day before the trial asking him to notify the county attorney of his situation. This does not indicate a person with a bad state of mind.

Snell, J., joins in this dissent.