IN THE COURT OF APPEALS OF IOWA

FILED
FEB 23 2000
CLERK SUPREME COURT

No. 9-691 / 98-0913
Filed February 23, 2000

CHRISTOPHER A. CLAUSEN,
Plaintiff,

vs.

IOWA DISTRICT COURT FOR MARSHALL COUNTY,
Defendant.

Appeal from the Iowa District Court for Marshall County, Timothy J. Finn, Judge.

Plaintiff petitioned for a writ of certiorari from a district court order holding him in contempt of court. **WRIT ANNULLED.**

Gail E. Boliver of the Boliver Law Firm, Marshalltown, for plaintiff.

Thomas J. Miller, Attorney General, and Bruce Kempkes, Assistant Attorney General, for defendant.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

MAHAN, J.

Christopher Clausen petitioned for a writ of certiorari from a district court order holding him in contempt of court for the late filing of a motion to continue a hearing and leaving town without contacting the court or opposing counsel, and for failing to appear at the hearing. We annul the writ of certiorari.

On May 9, 1997, Christine Woods filed an application for a rule to show cause why Michael Woods should not be held in contempt of court for failing to comply with terms of their divorce decree. On June 9, 1997, Michael completed an application for appointment of counsel. The court appointed Clausen, the attorney who represented Michael in the dissolution proceeding, to represent him in the contempt proceeding. The court scheduled the contempt hearing for June 23, 1997. Clausen received notice of the hearing on June 10 or 11, 1997. On June 12, 1997, Clausen sent Woods a letter indicating he needed to speak with him at his earliest convenience.

The Iowa Army National Guard scheduled Clausen for active duty/annual training from June 19, 1997, through June 28, 1997. Clausen was apparently aware of these orders before June 1997, but, at the very least, three weeks before the scheduled June 23, 1997 hearing.

Clausen met with Woods on June 16, 1997. On the same day, Clausen dictated a motion to continue, which he signed on June 17 or 18, 1997. Clausen attended a continuing legal education seminar in Des Moines on June 18, 1997. He left town early on June 19, 1997, and asked Gail Boliver to file the motion for him. Boliver filed the motion around 4:00 p.m. that day. It is undisputed Clausen did not take any steps to notify the court or opposing counsel of the situation.

On June 23, 1997, Christine and her counsel appeared for the scheduled hearing. No one from Clausen's office appeared, nor did Michael Woods appear. Opposing counsel requested the court find Michael in contempt of court for failing to appear. The court entered an interim order allowing Michael ten days to respond by filing a written statement. On its own motion, the district court found Clausen in contempt of court for filing a late motion to continue a hearing and leaving town before it was ruled on by the court and for failing to give any notice of the motion to the court and opposing counsel, and for failing to appear at the hearing.[1] The court's order provided Clausen with two options. He could either pay a sanction of $75 or request a hearing on the contempt.

Clausen filed a request for a hearing on July 1, 1997. Clausen filed motions to continue his contempt hearing on August 6, 1997, September 10, 1997, and December 1, 1997. The court granted the motions.

On April 20, 1998, the court held the contempt hearing. On May 4, 1998, the court entered an order finding Clausen in contempt for failing in his duty as an officer of the court. The court found Clausen had sufficient time to contact the court and inform opposing counsel he would be unavailable for the hearing, yet he failed to do so and did not show up for the hearing. The court imposed a sanction of $75. Clausen filed petition for writ of certiorari.

I. Standard of Review. Certiorari is the proper procedure for challenging a court's actions in a contempt proceeding. Iowa R. Civ. P. 306; *French v. Iowa Dist. Court for Jones County*, 546 N.W.2d 911, 913 (Iowa 1996). Available remedies are

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[1] It is clear neither the court nor opposing counsel was aware of the motion before this date.

limited to "questions of jurisdiction or illegality of the acts complained of." Iowa R. Civ. P. 308. Therefore, our review is at law. *Rolek v. Iowa Dist. Court for Polk County*, 554 N.W.2d 544, 547 (Iowa 1996).

II. Preservation of Error. Clausen alleges the district court exceeded its jurisdiction and acted illegally by: (1) finding him in contempt without a hearing in violation of his due process rights while he was on military leave; (2) violating Iowa Code section 29A.43, and 50 U.S.C. app. sections 510, 512, and 521; (3) raising new evidence at the contempt hearing; and (4) relying on insufficient evidence to support the contempt. The State alleges Clausen has not preserved error on any claim other than military leave because he failed to raise his claims before the district court. While we are inclined to find Clausen failed to preserve error by neglecting to challenge the notice provisions of Iowa Code chapter 665 (1997), we will consider his arguments.[2]

III. Jurisdiction. Clausen contends the district court exceeded its jurisdiction in failing to personally serve him with a rule to show cause before finding him in contempt of court. A contempt can be indirect or direct. *Arthur v. Iowa Dist. Court for Jasper County*, 553 N.W.2d 325, 326 (Iowa 1996). The acts or omissions

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[2] *See Huyser v. Iowa Dist. Court for Marion County*, 499 N.W.2d 1, 2 (Iowa 1993) (concluding contemner waived right to challenge procedural deficiencies when he attended hearing, but failed to challenge the absence of an affidavit deprived the court of subject matter jurisdiction); *Sharkey v. Iowa Dist. Court for Dubuque County*, 461 N.W.2d 320, 323 (Iowa 1990) (holding defendant waived his right to challenge the sufficiency of the notice he received where counsel appeared but failed to challenge the sufficiency of the notice); *Gibb v. Hansen*, 286 N.W.2d 180, 185 (Iowa 1979) (finding plaintiff waived right to raise constitutional challenge to Iowa Code chapter 665 by failing to raise the challenge before the district court and by failing to include challenge in petition for writ of certiorari).

giving rise to a direct contempt must occur in the presence of the court, whereas the acts or omissions giving rise to an indirect contempt occur outside the presence of the court. *Arthur*, 553 N.W.2d at 326; *Lutz v. Darbyshire*, 297 N.W.2d 349, 353 (Iowa 1980).

A court may act on a direct contempt immediately, however, special procedural protections apply to an indirect contempt. Iowa Code § 665.7. Summary adjudication of indirect contempts is prohibited. *United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 833, 114 S. Ct. 2552, 2560, 129 L. Ed. 2d 642, 655 (1994).[3] Before finding an indirect contempt, the contemner must be personally served with a rule to show cause, or by a warrant. Iowa Code § 665.7

While the district court's interim order is not captioned as a rule to show cause, the order recognizes Clausen's right to a hearing. This is further illustrated by the court's final order, which states the purpose of the hearing was to provide Clausen with an opportunity to show cause why he should not be held in contempt of court.

The requirements of section 665.7 allow for minor deviations. *Lutz*, 297 N.W.2d at 354 (citing *Manderscheid v. District Court of Plymouth County*, 69 Iowa 240, 242, 28 N.W. 551, 552 (1886), *aff'd sub nom. Eilenbecker v. Dist. Court*, 134 U.S. 31, 10 S. Ct. 424, 33 L. Ed. 801 (1890)). While the alleged contemners *Manderscheid* were served with an ordinary notice signed by the attorneys for the

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[3] *Bagwell* discusses the differences between criminal and civil contempts. *Bagwell*, 521 U.S. at 833, 114 S. Ct. at 2560, 129 L. Ed. 2d at 655-56. The court finds certain indirect contempts are appropriate for civil proceedings, including failure to comply with discovery, which "while occurring outside the court's presence, impede the court's ability to adjudicate the proceedings before it and thus touch upon the core justification of the contempt power." *Id.*

other party, the court found the contemners appeared, attempted to show cause and were not prejudiced by the irregularity. *Manderschied*, 69 Iowa at 242, 28 N.W. at 552.

The district court afforded Clausen an opportunity to show cause before finding him in contempt, therefore he was not prejudiced by the court's failure to caption the interim order as a rule to show cause. *See Criswell v. Hendrickson*, 344 N.W.2d 255, 257 (Iowa App. 1983) (finding notice provision satisfied when petitioners were personally present at the show cause hearing).

IV. Alleged Illegalities

Military Leave Provisions. Clausen contends the court acted illegally by finding him in contempt for actions, which occurred as result of active military service. Military personnel may not be discriminated against because of their military membership. Iowa Code § 29A.43. The court held Clausen in contempt for failing to adhere to his duties as an officer of the court, not for attending to his military duties. While federal law provides a court overseeing a proceeding with the discretion to stay an action pending before it when the plaintiff or defendant is a person in military service, there is no requirement the court stay the proceedings. 50 App. U.S.C. § 521 (1994).

New Information. Clausen contends the court illegally raised new evidence outside the first hearing in the second hearing. The district court's interim order fairly apprises Clausen of the district court's concern with his behavior. *See* Iowa Code § 665.7. At the contempt hearing the court discussed its concerns with Clausen's repeated behavior. The court states, "this was not an isolated, one-time occurrence. This Court has and continues to have difficulties with Mr. Clausen

requesting continuances. Indeed, this file reflects he has filed five motions to continue hearings since the Court Order of June 30, 1997." This information merely supplements the court's prior findings.

Sufficiency of the Evidence. We must determine whether substantial evidence supports the contempt judgment. *Matlock v. Weets*, 531 N.W.2d 118, 121 (Iowa 1995). A contempt may include (1) "any willful disturbance calculated to interrupt the due course of [a court's] official proceedings;" and (2) "illegal resistance to any order or process made or issued by it." Iowa Code § 665.2. Sufficient evidence exists when an act or omission is willful. *Rater v. Iowa Dist. Court for Polk County*, 548 N.W.2d 588, 590 (Iowa App. 1996). Contempt proceedings are quasi-criminal in nature, therefore, a finding of contempt must be established beyond a reasonable doubt. *Ervin v. Iowa Dist. Court for Webster County*, 495 N.W.2d 742, 744 (Iowa 1993). While the burden of persuasion on willfulness remains with the contemnee, the burden of production for a defense falls on the contemner. *McKinley v. Iowa Dist. Court for Polk County*, 542 N.W.2d 822, 824 (Iowa 1996).

Iowa Rules of Civil Procedure 182 and 183 govern the procedure for requesting a continuance. Rule 183 provides a continuance "shall be allowed if all parties so agree and the court approves." Iowa R. Civ. P. 183.

Clausen had Boliver file a late motion to continue, the day he left for his training, without contacting the court or opposing counsel. He also failed to attend the scheduled hearing. Clausen contends he could not attend the hearing because he was involved in active military duty. Clausen had the burden of producing evidence in support of his defense, yet he failed to do so. The only evidence he presents to explain his conduct is "I had no intention of offending, upsetting or

showing disrespect towards any Court." The district court rejected this excuse, finding Clausen's behavior caused a hardship on the court, court personnel, and opposing counsel. Clausen also argued he had no opportunity to speak with the district court about the continuance before the hearing. We disagree. It is absurd under this record for Clausen to maintain he had no opportunity to speak with the court or opposing counsel prior to leaving for his military duty. The evidence supports the finding of contempt beyond a reasonable doubt. We annul the writ of certiorari.

WRIT ANNULLED.