IN THE COURT OF APPEALS OF IOWA

No. 8-325 / 97-0536

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JEFFERY M. MAHLBERG,

Defendant-Appellant.

FILED
SEP 30 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, L.M. Goldblatt, Judge.

Defendant appeals from the district court's finding that he violated a protective order. **WRIT SUSTAINED.**

Donald B. Fiedler, Omaha, Nebraska, and Duane Hoffmeyer, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Lisa Krigsten, Assistant County Attorney, for appellee.

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

SACKETT, P.J.

Defendant-appellant Jeffery Mahlberg appeals following a finding he was in violation of a no-contact order and sentencing him to the Woodbury County jail for fifteen days. We sustain the writ.

This is a question of whether this is a misdemeanor charge or a finding of contempt of court for violation of a no-contact order. Both defendant and the State have treated it as a contempt finding. We will consequently do the same. Defendant filed an appeal rather than seeking a review by filing a petition for writ of certiorari. *See* Iowa R. App. P. 301. We treat the matter as though a petition for writ of certiorari had been filed. We proceed as directed by Iowa Rule of Appellate Procedure 304, as though the proper form of review had been sought. Certiorari is an action at law; we review on assigned error only. *See Shedlock v. Iowa Dist. Court for Polk County*, 534 N.W.2d 656, 658 (Iowa 1995).

Defendant was charged in a case numbered SRCR 034143 with criminal mischief in the fourth degree after he allegedly damaged a car owned by Patricia Green. At defendant's arraignment on April 9, 1996, the district court ordered defendant have no contact with Patricia Green or members of her family. On September 6, 1996, defendant's attorney sent him a copy of a letter to a Woodbury Assistant County Attorney which provided in relevant part:

> Enclosed please find the check in the amount of $125.00 made payable to Patricia L. Greene, which I understand is to pay her for her damages to her vehicle. When you receive this check, you are to dismiss the Criminal Mischief, SRCR 034143. Please send me a file-stamped copy of the Dismissal.

On September 18, 1996, defendant was charged with violating the no-contact order in SRCR 034143 for allegedly having been in contact with Green's family on September 17. On September 19, the criminal mischief case, SRCR 034143, was dismissed.

Trial on the contempt violation was set for October 30, 1996. It was continued once on the State's motion and once on defendant's motion. A trial was held on March 17, 1997, and defendant was found to have violated the no-contact order and sentenced to fifteen days in jail.

Defendant first contends to be convicted of the violation of a protective order, the State must show defendant had a specific intent to violate the order. He further alleged the district court did not find he had a specific intent to violate the order.

The State does not contest defendant's claim he preserved error on this issue. In *State v. Lipcamon*, 483 N.W.2d 605 (Iowa 1992), the court said:

> Proof of contempt requires a showing that the defendant willfully violated the no contact order. Even though section 236.8 does not mention willfulness, we have always held that a finding of contempt for a violation of a court order or an injunction must be willful.

Id. at 607.

This position has been consistently followed in *Henley v. Iowa Dist. Court for Emmet County*, 533 N.W.2d 199 (Iowa 1995), and *In re Marriage of Spears*, 529 N.W.2d 299 (Iowa App. 1994). Defendant contends no specific finding was made he intended to violate the order.

The State makes a series of arguments, including the State carried its burden by showing defendant had knowledge of the protective order and intentionally initiated contact with Green's daughter, who was a person protected by the order from contact by defendant.

The district court found at the time the event happened a protective order was in place. The district court found defendant violated the order. As defendant correctly advances, the district court did not find the order was willfully violated. Defendant's willfulness in allegedly violating the order was one of the contested issues at trial. Defendant advances his conduct was not willful because he concluded from the September 6 letter from his attorney the case had been dismissed and the no-contact order no longer was in place.

While the district court found the no-contact order was in place, it made no finding defendant knew it was yet in place. Defendant's knowledge the order yet existed is necessary to show his violation was willful. Absent a finding defendant willfully violated the no-contact order, the district court erred in finding him in contempt.

Having so decided, it is not necessary for us to address the other issues defendant raises on appeal. The writ is sustained.

WRIT SUSTAINED.