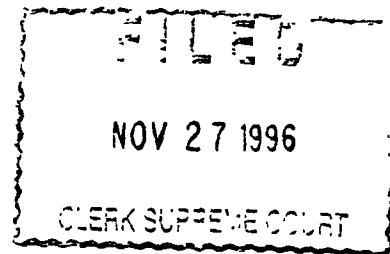


IN THE COURT OF APPEALS OF IOWA

No. 6-466 / 95-1455



ROBERT HESS,

Plaintiff,

v.

**IOWA DISTRICT COURT
FOR DUBUQUE COUNTY,**

Defendant.

Appeal from the Iowa District Court for Dubuque County, Randall J. Nigg,
Judge.

In this certiorari proceeding Robert has challenged the legality of the district
court's decision finding him in contempt of an Iowa Code chapter 236 no contact order.

WRIT ANNULLED.

Brian W. Peters, Dubuque, for plaintiff.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General,
Fred H. McCaw, County Attorney, and Mark Hostager, Assistant County Attorney, for
defendant.

Heard by Sackett, C.J., Huitink and Streit, JJ.

HUITINK, J.

Robert Hess was charged with domestic assault in February 1994 based on Gloria Hess' allegations of domestic abuse. As a result of these allegations, the district court issued a no contact order providing:

It is ordered that the defendant [Robert Hess] shall have no contact with the alleged victim, Gloria Hess and that the defendant shall not harass, intimidate or otherwise interfere with the alleged victim in anyway. . . .

The same order set out conditions for Hess' release from jail and scheduled further proceedings for a later date.

These contempt proceedings were initiated following Gloria's allegation that Robert violated the terms of the no contact order. In a voluntary statement to the police and in her subsequent testimony at the contempt hearing, Gloria claimed Robert followed her while both were driving in the same direction on Central Avenue in Dubuque. According to her version of these events, Robert stopped his vehicle beside hers while she waited at a traffic signal. After the signal changed, she states Robert began following her and duplicating her lane changes. Gloria also claimed she observed Robert glaring at her, and she felt intimidated by his presence. She further stated that Robert continued to follow her when she turned off of Central and drove around the block in an effort to evade him.

Robert acknowledges this encounter. He, however, claims he was driving north on Central Avenue because it is the most direct route to his home. He denies closely

following Gloria or making any facial gestures at her. Robert also denies turning off of Central and following Gloria around the block. He testified that Gloria turned off of Central Avenue in another direction a few blocks from his home and he, contrary to her claim, continued on his direct course home. According to Robert this encounter was purely coincidental, and he did not intend to violate the terms of the courts no contact order.

The district court concluded Robert intended to annoy Gloria by closely following her and making facial gestures at her. The Hess' pending dissolution and Robert's unresolved criminal charges were cited by the court as proof of Robert's motive for and intent to harass Gloria. The court expressly found that Robert was not honest in his testimony about this incident. Robert was held in contempt and sentenced to seven days in the county jail. *See Iowa Code* §236.8 (if held in contempt the defendant shall serve a jail sentence.)

This case reaches us on Robert's petition for a writ of certiorari granted by the supreme court. Robert argues the district court's judgment of contempt lacks sufficient evidentiary support. He also argues that the district court impermissibly relied on an unproven criminal charge in assessing his credibility.

Robert's challenge to the legality of the district court's action also includes his claim that the no contact order, as enforced, is void for vagueness. We, however, decline to address this argument because Robert failed to raise it in the district court.

See *State v. Wages*, 483 N W 2d 325, 326 (Iowa 1992); *State v. Lyon*, 223 N W 2d 193, 194 (Iowa 1974).

On a writ of certiorari, the standard of review is for errors at law. *Johnson v. Iowa Dist. Court*, 385 N.W.2d 562, 564 (Iowa 1986). A contempt adjudication cannot stand unless there is substantial support for the findings of the district court. *Palmer College of Chiropractic v. District Court*, 412 N.W.2d 617, 619 (Iowa 1987); *Rausch v. Rausch*, 314 N.W.2d 172, 174 (Iowa App. 1981).

The purpose of these contempt proceedings was to enforce the terms of a no contact order issued as a part of an Iowa Code Chapter 236 domestic abuse proceeding. Proof of contempt in this context requires a showing that an alleged violation of the no contact order was willful. *State v. Lipcamon*, 483 N.W.2d 605, 607 (Iowa 1992). Willfulness is “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 contemnor had the right or not.” *Lutz v. Darbyshire*, 297 N.W.2d 349, 353 (Iowa 1980). A finding of contempt must be established by proof beyond a reasonable doubt. *Phillips v. Iowa Dist. Court*, 380 N.W.2d 706, 709 (Iowa 1986).

After reviewing the record, we find substantial evidentiary support for the district courts findings. There is evidence indicating Richard closely followed Gloria with his vehicle while she was driving her car on the same street. There is also

evidence he made facial gestures she perceived as intimidating. Robert's claim that this encounter was coincidental is belied by Gloria's testimony he departed from his direct route home to follow her when she took evasive measures. The district court, as the trier of fact, was free to accept or reject any or all of Robert's testimony denying Gloria's version of these events. We accordingly affirm on this issue.

We also reject Robert's claim that the district court improperly considered the pending criminal charges against him. Our reading of the court's findings indicates any reference to pending criminal charges was limited to the intent or motive underlying Robert's actions. We are unable to find any express or implied relationship between this reference and the court's assessment of Robert's credibility. We accordingly annul the writ of certiorari.

WRIT ANNULLED.

Streit, J., concurs; Sacket, C.J., dissents.

SACKETT, C.J. (dissenting)

I dissent. Robert Hess on appeal contends the district associate judge should not have found him in contempt of court and sentenced him to jail for allegedly violating an order precluding him from contacting his estranged wife Gloria. Hess first contends that portion of the order he is accused of violating is too vague to allow him to reasonably anticipate what behavior could be contemptuous.

The order prohibited a number of things, including the challenged language which applies to Hess:

"[T]he defendant shall not harass, intimidate or otherwise interfere
...."

Hess contends this language is uncertain, indefinite, and ambiguous. He focuses particularly on the language ordering that he refrain from any behavior which would cause Gloria to be intimidated. He contends the order provides no clear definition of what would make Gloria feel intimidated and, therefore, it was not possible for him to obey the order. Hess's argument is well taken; but without addressing that issue, I do not find that Gloria's testimony she saw Hess glaring at her in the rear view mirror substantial evidence that Hess violated this portion of the order.

The evidence in the light most favorable to the finding is just after noon Hess pulled up behind Gloria, and when the light turned green, he changed lanes so he was behind her. Gloria changed lanes as they drove, and so did he. From looking in her rear view mirror, Gloria perceived Hess was glaring and snickering at her. She back

tracked and went a few blocks and Hess followed her for a short distance before she could not see him and she returned to work.

The question is whether this is substantial evidence Hess violated the order. I find it is not. Two people both living in a small town in Iowa are going to meet each other in daylight hours on the streets of the town. If the courts of this state are going to spend their time refereeing disputes about whether one car followed the other for several blocks on the same street where there is evidence of nothing more than a turn and lane change, we are not going to do anything to further the cause of domestic abuse victims.

Protection against domestic abuse is important, but the real issues of domestic abuse threaten to be overshadowed by cries of "wolf" or challenges to behavior as nebulous as this.

If the courts are called on to monitor this type of behavior between adults, the time will be spent refereeing, and the very essence of the law intending to prevent and deter dangerous behavior will not be enforced.

I would affirm the writ.