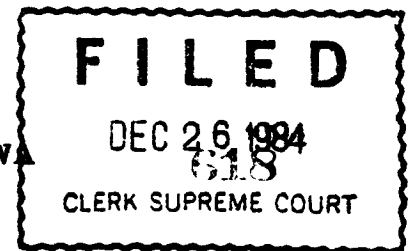


IN THE COURT OF APPEALS OF IOWA



WILMA WILLIAMS

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Filed December 26, 1984

Plaintiff,

)

vs.

)

4-422
84-18

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THE HONORABLE R.K. RICHARDSON, as
Judge of the Iowa District Court for
Sac County,

)

)

Defendant.

)

Appeal from the Iowa District Court for Sac County-R. K. Richardson,
Judge.

Plaintiff, Wilma Williams, challenges by certiorari a district court order
finding her in contempt of court and ordering her to spend seven days in jail.
WRIT ANNULLED.

Ned Stockdale of Blackburn, Stockdale & Brownlee, P.C., Ft. Dodge, and
Emil Trott, Jr., Des Moines, for plaintiff.

Thomas L. McCullough, Sac City, for defendant.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

SACKETT, J.

Plaintiff Wilma Williams and her husband Fred are parties to a dissolution action pending in Sac County. Wilma was found by defendant judge to be in contempt and sentenced to jail for failure to comply with a court order entered in her dissolution case. Wilma filed an original certiorai action seeking review of the ruling and sentence.

This action is the result of Wilma and Fred apparent failure to agree during the pendency of the dissolution on the use of their family home in Lytton. The district court originally entered an order determining that Wilma should have the home during the week and Fred should have the home on weekends. Wilma applied for a modification of the original order contending that Fred was not notifying her when he was not going to use the home, which resulted in her not being able to use it on certain weekends. She also complained that Fred construed the order literally by taking the home on Friday at 12 o'clock midnight and surrendering it Sunday at the same hour. On May 9, 1983 the order regarding possession was modified in accordance with Wilma's request to provide that Fred was to have the home from Friday at 6:00 p.m., to Sunday at 6:00 p.m. The order directed Fred to give oral notice of his intention to use the home before Thursday at 6:00 p.m. The notice was to be given without assistance of counsel, and the trial court urged Fred to notify Wilma in the presence of a disinterested witness.

The May 9, order also found Wilma in contempt of court for her activity with reference to certain calves owned by the parties. She was given a 20-day jail term, suspended in total, on the condition that she have no further intentional violations of orders of the district court.

On December 5, 1983, Fred filed an affidavit of contempt, alleging he had notified Wilma on two weekends that he would use the home and Wilma refused to allow him to do so. A rule to show cause was entered directing Wilma to appear on December 19, 1983. Wilma filed a resistance to the rule to show cause but

neither she nor her attorney appeared at the December 19, hearing. Fred appeared with counsel and testified that he notified his wife on three weekends that he wished to use the house and on two weekends she refused to let him do so.

The court found Wilma in contempt of court for her failure to abide by the May 9, order relative to the use of the marital residence. The court further ordered:

"...this matter be continued until 3 p.m., on Tuesday, January 3, 1984, at which time the court will again, if advised by counsel for the respondent that the petitioner has continued to refuse the respondent use of the marital residence as ordered by the Court heretofore, hold hearing; and the matter of petitioner's contempt will again be heard. If the Court is advised by counsel prior to the time of that hearing that petitioner has granted the use of the marital residence as heretofore ordered by the Court, then hearing would not be necessary and it would not be contemplated that such hearing will be held."

On December 23, 1983, the court entered an order stating the court wished to schedule a further hearing and scheduled a hearing for December 28, 1983. Both parties and their attorneys appeared at the December 28, hearing. Fred testified he contacted Wilma on December 21 and December 27, about using the house on December 21. She told him he was never going to get in the house, and on December 27 she told him about the same thing. Wilma admitted she told Fred on December 21 she was not going to get out but claimed to have in fact vacated the house on the weekend and not to have been in technical violation of the order. She testified she made no response to Fred's request on December 27, but she would get out of the house on the requested weekend, that being the weekend commencing December 30.

On January 6, 1984, Judge Richardson entered an order finding that on May 9, 1983, Judge James C. Smith entered an order finding Wilma in contempt, sentencing her to twenty days in jail but suspending that sentence providing that Wilma not intentionally violate any other orders of the district court. He further found that during November and December of 1983, Fred gave Wilma notice of his

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intention to occupy the marital home and she refused to give him possession during the latter part of December, that she refused to answer his calls concerning the use of the home, and despite the fact that she had told Fred when he made a timely call that she would not get out on December 23, 1983, she in fact did remove herself from the premises and when Fred attempted to call for the weekend of December 30, she hung up rather than advise him he could use the premises.

The court determined that Wilma acted in direct violation of a prior court order, and she was in contempt of court. The court also determined that the court found Wilma's demeanor at the hearing to be defiant and hostile and the court determined it did not believe Wilma understood the responsibility to abide by court orders. The court determined there was no way to impress her with the fact that she has an obligation to abide by the court rules other than to punish her. She was sentenced to serve seven days in the Sac County jail.

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Wilma claims the defendant judge exceeded his jurisdiction or otherwise acted illegally by placing Wilma twice in jeopardy for the same conduct. This argument is predicated on the contention that the trial judge found Wilma in contempt for three instances of failure to vacate the premises at the December 19, hearing and then again found her guilty of contempt for those same acts at the December 28, hearing. Admittedly the trial court's orders could have been made with more clarity. However, we determine that the order of December 19, found Wilma in contempt and continued the matter to determine whether punishment was necessary. The December 28, order punished Wilma for the earlier contempt. Even if a different interpretation of the two orders should lie, Wilma did not advance her argument of double jeopardy in the trial court and has failed to preserve error. State v. Munz, 335 N.W.2d 576, 584 (Iowa 1984). See also Newby v. Woodbury County District Court. Where in rejecting plaintiff's claim that he

was illegally denied the essential elements of a criminal trial guaranteed by Federal and State constitutions, first made in the brief and argument in a certiorari action the Iowa Court said: "[A]n inferior tribunal does not act in excess of jurisdiction or otherwise illegally as to a matter not before it and courts will not review questions not presented to the so-called inferior tribunal." Where plaintiff voluntarily appeared before a commission and made no objection to the jurisdiction of the commission, the supreme court refused to review the jurisdiction issue because it was not presented to inferior tribunal. O'Connor v. Youngblade, 250 Iowa 808, 814, 96 N.W.2d 457, 461 (1959).

II.

Wilma contends there was no clear, satisfactory and convincing evidence that she was guilty of contempt. Contempt proceedings are commonly treated as criminal in nature even when they find their origin in civil cases. Lutz v. Darbyshire, 297 N.W.2d 349, 352 (Iowa 1980). Crary v. Curtis, 199 N.W.2d 319, 322 (Iowa 1972). Only willful disobedience of a court order will justify a conviction for contempt. Lane v. Oxberger, 224 N.W.2d 245, 247 (Iowa 1974). In this context a finding of disobedience pursued "willfully" requires evidence 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. Huston v. Huston, 255 Iowa 543, 548, 122 N.W.2d 892, 896 (1963).

Wilma contends that the record does not show that she was personally aware of the December 19, order. When Fred called her on December 31, and she told Fred he was never going to get into the house, she claimed she had not yet been informed by her attorney of the December 19, order. What Wilma would like to have us believe is that Fred was seeking rights established under the December 19, order. That is hardly the fact. When Wilma told Fred he was not going to get the house she was manifesting her intention not to obey the May 9, order setting forth

requirements for use of the home. Wilma was well aware of the dictate of the May order. It was straight forward and easy to understand. It had been modified to require Fred to give Wilma notice of use at Wilma's request. The order was definite and clear. Rights and duties must be readily understandable by the parties. See Copic v. Ia. Dist. Ct. for Polk Co., 356 N.W.2d 223, 226 (Iowa 1984). Whether Wilma had seen the December 19, order or not, she knew that an application to have her found in contempt had been filed. Wilma didn't need her attorney to tell her the May 9, order told her she had to vacate the house. Wilma also contends she was not in contempt because she vacated the house after talking to her attorney, even though she told Fred she was not going to vacate the house.

Even if she did vacate the house after talking to her attorney, and the fact that she did vacate it is not without dispute in the record, Wilma admittedly made no attempt to advise Fred that she would in fact give him possession of the house despite her prior statement that she would not.

The supreme court said in Orkin Exterminating Co., Inc. v. Burnett, 160 N.W.2d 427, 431 (Iowa 1968) "In deciding whether a defendant is in contempt of court for violating an injunctive order, we take into consideration the spirit as well as the letter of the injunction to determine if its intent has been honestly and fairly obeyed. No artful attempt to evade it will be allowed to succeed, if the act in fact constitutes a substantial violation of the injunction." Carr v. District Court, 147 Iowa 663, 672 126 N.W. 791, 794 (1910), "[C]ourts will not permit the violation of an injunctional order by any device or subterfuge if that device is a substantial violation of the injunction." The facts here clearly establish that Wilma was in contempt beyond a reasonable doubt. In Skinner v. Ruigh, 351 N.W.2d 182, 185 (Iowa 1984) the supreme court discussed the fact that their prior cases had required clear and satisfactory proof and that decisions from other courts had suggested that proof beyond a reasonable doubt is required in contempt

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proceedings but did not address the issue of whether proof must be beyond a reasonable doubt. See also Copic v. Iowa Dist. Court for Polk Co., 356 N.W.2d 223, 226.

III.

Wilma claims the trial court erred and acted illegally in admitting certain telephone transcripts. The exhibit in question was a typewritten statement purporting to be a transcript of six calls made by Fred to Wilma. The statement was typed from notes made by two secretaries of Fred's attorney who listened on an extension phone while the calls were being made. Wilma claims that the transcripts were written hearsay and should have been excluded from the court's consideration. We agree that the statements are hearsay. Iowa R. of Evid. 801(c), (d) (1983).

The admission of hearsay evidence over a proper objection is presumed to be prejudicial error unless the contrary is affirmatively established. See State v. Brown, 341 N.W.2d 10, 15 (Iowa 1983). The contrary is established when the record shows that the challenged evidence did not impact on the fact finder's finding of guilt. See State of Iowa v. Nims, ___ N.W.2d ___ (1984) filed 11-14-84, 83-784.

The trial court had already made a determination that Wilma was guilty of contempt with reference to the first four calls. Wilma herself admitted to telephone conversations substantially in accord with the other two transcribed conversations. The case against Wilma even without the challenged transcripts was clearly proven by both her testimony and Fred's. Any error was harmless.

IV.

Wilma claims her punishment was excessive. This court can reduce a sentence that it finds excessive. Criswell v. Hendrickson, 344 N.W.2d 255, 257 (Ia. App. 1983). We do not find the sentence imposed by the trial court to be excessive.

WRIT ANNULLED.