

IN THE COURT OF APPEALS OF IOWA

No. 2-313 / 91-1984

FILED

SEP 29 1992

DONALD P. ERVIN and MIDWEST RESEARCH AND RECYCLING, INC. SUPREME COURT

Plaintiffs,

vs.

IOWA DISTRICT COURT FOR WEBSTER COUNTY,

Defendant.

Appeal from the Iowa District Court for Webster County,
Mark S. Cady, Judge. **WRIT GRANTED.**

C. Joseph Coleman, Jr. of Mitchell, Coleman, Perkins &
Enke, Fort Dodge, for plaintiffs.

Bonnie J. Campbell, Attorney General, and David R.
Sheridan and David L. Dorff, Assistant Attorneys General,
for defendant.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.
Habhab, J., takes no part.

OXBERGER, C.J.

The plaintiff, Donald Ervin, brings this certiorari proceeding in which he seeks reversal of the district court's decision finding him in contempt for failure to install fire lanes at his tire recycling facility.

Ervin founded Midwest Research and Recycling, Inc. for the purpose of developing and operating a tire reclamation plant in Otho, Iowa. He sought to develop a process to decompose the tires.

In March 1991, the State, through the attorney general, filed suit against Ervin and his corporation seeking civil penalties and injunctive relief based on Ervin's alleged violations of Iowa's solid waste laws and his alleged failure to comply with his Department of Natural Resources permit. In July 1991, the State filed an application for temporary injunction seeking to enjoin Ervin from accepting more tires and directing him to install fire lanes in compliance with DNR plans within ten days. The court allowed a temporary alternative if the DNR and the Otho fire department agreed.

On October 31, 1991, the State filed an application claiming contempt and a rule to show cause for Ervin's failure to comply with the September order.

Ervin was found in contempt of court and sentenced to six months in the county jail. The order provided for Ervin's release after twenty days, but required him to begin work on stacking tires to create fire lanes within

two days of his release. The court indicated if Ervin failed to begin compliance within two days, he would complete a six month jail sentence. Ervin then filed a petition for writ of certiorari.

Scope of Review

On petition for 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. Rausch v. Rausch, 314 N.W.2d 172, 174 (Iowa App. 1981).

I. Discussion

Ervin admits he has not complied with the court's order, but claims he is physically and financially unable to follow the court's order. Ervin claims the trial court erred in finding he was willful in his failure to comply with the court's order.

The temporary injunction which gave rise to these proceedings contained two basic requirements. First, Ervin was specifically prohibited from accepting additional tires. Second, he was required to install fire lanes within ten days of the filing of the order. There is no dispute regarding Ervin's compliance with the requirement he not accept additional tires. The central dispute involves the installation of fire lanes.

The contempt applicant establishes a prima facie case by proving the contemner's duty and the failure to perform

that duty. Lamb v. Eads, 346 N.W.2d 830, 832 (Iowa 1984). The burden then shifts to the contemner to show he could not perform the duty. Id. The contemner's burden is a burden of production on the defense of inability to perform the duty rather than a burden of persuasion. Skinner v. Ruigh, 351 N.W.2d 182, 185 (Iowa 1984). The burden of persuasion remains on the contempt applicant to show willfulness. Id. Proof of contempt must be established beyond a reasonable doubt. Phillips v. Iowa Dist. Court, 380 N.W.2d 706, 709 (Iowa 1986).

Only willful disobedience of a court order will justify a conviction for contempt. Lutz v. Darbyshire, 297 N.W.2d 349, 353 (Iowa 1980). Willful disobedience requires evidence of conduct which 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. When inability [to pay] is urged as a defense, the alleged contemner has the burden to produce evidence on that issue. Skinner, 351 N.W.2d at 185.

Because Ervin admits the fire lanes have not been installed the State has established a prima facie case of contempt. The burden then shifts to Ervin to produce evidence of his inability to comply with the court's order. The burden of persuasion remains with the State to show Ervin's noncompliance is willful.

A. Present Inability to Comply

Ervin contends he is unable to fully comply with the court's order. The evidence indicates installation of the fire lanes will require removal of 125,000 to 200,000 tires. Ervin contends he lacks the physical and financial resources to remove the tires necessary to install the fire lanes. We review the evidence provided by Ervin of his inability to remove the tires.

We find the testimony of Clayton Swanson, the DNR representative who investigated the site, most instructive. First, Swanson testified fire at the site, caused by lightning or arson, was the chief concern of the DNR. Swanson explained the higher the pile of tires the more likely the pile would attract lightning. He did not know whether a small increase in the tire pile heights would substantially increase the risk of a lightning strike, but testified stacking the piles higher would not "solve the problem". Illustrative of the gravity of the concern about lightning is Swanson's testimony that covered tire storage sites are not even required to obtain a permit since there is no real risk of a lightning strike.

Swanson testified the only two feasible alternatives for removing the tires were on-site shredding or use of semi trucks for transport to another facility. In fact, he testified no other means for removing the tires would be feasible. (emphasis supplied). Swanson acknowledged the

cost of a shredder to be in excess of four hundred thousand dollars and the cost to transport by semi would be about \$200,000. The district court found Ervin could utilize a conveyer belt currently at the site to stack the tires. Swanson's testimony was conflicting in this regard; on one hand he testified that was not a realistic alternative, yet he testified it could be used if necessary. However, he further testified the conveyer had no side rails, slackens between roller pulleys, and was 14 inches wide and three quarters of an inch thick. Swanson also acknowledged the desirability of the twenty-four hour guard at the site provided by Ervin.

Dave Shradler, a certified public accountant and manager of the West Des Moines branch of Schnurr and Company, testified the company was showing substantial losses and unpaid debt due to Ervin's early underpricing of his services. While the company grossed \$280,000, \$350,000 and \$201,000 in 1989, 1990, and the first six months of 1991, respectively, the final accounting showed a loss of \$15,000, \$94,000 and \$12,000 in those same years respectively. He testified those losses were not unusual with a new business, considering the high start-up costs. He also testified Ervin had not taken a salary from the company since June, 1991.

Perhaps even more significant was Shradler's testimony the Internal Revenue Service had conducted an investigation to determine whether unpaid taxes could be collected and

concluded no money was available. The IRS investigation also showed no money was being siphoned and the business records reconciled. Shradler testified his firm has been willing to work with Ervin even though they were not currently being paid because they believed the project was viable.

Mr. Ervin testified he collected \$610 in veteran's disability benefits and \$416 in unemployment compensation. He has no other source of income. He testified he has received an additional \$1200 to \$1400 from Hollis DeVoe, the company's new operator, and \$750 from the sale of tires. He testified he used that money to pay a \$260 electric bill, company truck insurance, company truck payments, and \$300-\$400 in back wages owed to employees. Ervin also testified the company is \$250,000 in debt.

Ervin is married and has two children at home. Ervin also claims he is physically unable to move the tires. The evidence is undisputed that Ervin is under a 60 percent military disability. He claims he has arthritis and has had his back broken several times. While we note the trial court did not find Ervin credible, no contradictory evidence was presented regarding his personal income and disability.

Ervin also testified he attempted to obtain a grant to get the shredder and had investors who would assist if the grant was given. He further testified the DNR denied the grant in August, 1991. He testified he has contacted

several companies in attempt to obtain assistance in moving the tires. Ervin testified he had given up any personal business interest in the company to DeVoe in the hope of getting the tires moved. He also testified he was "paying" the night watch person by trading a 1954 one ton pick-up truck. He also allows a person to use his shop in order to have another person present at the facility. He testified he was not refusing to comply with the court's order.

Sam Zierke, a business contact of Ervin's, testified Ervin contacted him requesting financial assistance to install the fire lanes. He indicated he had contacted several companies on Ervin's behalf, but was unable to assist him. He testified he contacted leaders in the industry and foreign investment companies to no avail. Zierke testified Ervin was very committed to finding a means to remove the tires.

The parties stipulated to the proposed testimony of Jeff Buehler, vice-president of Ida County State Bank, formerly Sun Bank of Fort Dodge. The parties stipulated Buehler would have testified the company had an account with them, that account had been in overdrafts status for most of the year, and there was a \$5000 outstanding debt which the bank had written off as not collectable.

The State also argued Ervin could hire a \$5.00 per hour employee to hand move the tires. The tires would have to be loaded on trucks to be hauled, since there is no room at the site to which the tires may be moved. This would

require Ervin to pay both the labor costs and the trucking costs. As noted, the testimony clearly indicates the company is insolvent. Ervin has no disposable income after he provides for the basic needs of his family. Neither the company nor Ervin personally have the resources to pay these costs.

B. Willful Disobedience

Ervin also claims the State has failed to establish he has been willful or acted with a bad or evil purpose in his failure to remove the tires necessary to install fire lanes. He claims his efforts to comply with the court order indicate he has not willfully disobeyed the court's order. We review the evidence of Ervin's efforts to comply with the court's order.

Ervin testified he arranged for the removal of 2,500 tires since the temporary injunction was issued. His testimony is undisputed. While we recognize 2,500 tires is not substantial in light of the total number of tires to be moved, we recognize this as a good faith showing in an effort to comply with the court's order.

Judge Schechtman acknowledged the installation of fire lanes may be "impossible/impractical" and allowed Ervin to negotiate a temporary alternative, provided it was acceptable to the DNR. Immediately following the issuance of the court's order, Ervin contacted the Department of Natural Resources to ascertain the steps necessary to comply with the court's order. The DNR indicated removal

of 200,000 tires over a seventeen day period would bring Ervin into compliance with the court's order. Allowing another week to comply cannot be construed as a reasonable temporary alternative to the construction of fire lanes, but we note Ervin's immediate contact with the DNR for purposes of negotiation.

In addition, Hollis DeVoe indicated he was actively attempting to purchase a shredder and hired a twenty-four hour guard to patrol the facility. He testified he and Ervin were pursuing acquisition of equipment to shred or "grind" the tires in order to install fire lanes. DeVoe indicated he is actively pursuing financing to purchase the equipment. He testified Ervin cooperated on all projects and conversed with DeVoe regularly. DeVoe's testimony indicates the significant steps taken to install the fire lanes and the good faith effort to comply with the court's order.

II. Conclusion

Undisputed testimony was presented to indicate only two realistic alternatives were available to remove the tires. Both methods cost in excess of \$200,000. The CPA for the company testified it was insolvent and even more convincing, the IRS has determined it will not be able to collect back taxes from the company. The IRS found no evidence of wrongdoing.

Ervin's removal of 2,500 tires, immediate contact with DNR regarding an alternate plan, and active participation

in attempts to purchase a shredder indicate Ervin's efforts to comply with the court order. This evidence negates the finding of willfulness which is necessary for a contempt conviction.

In light of the noted testimony, we hold the evidence strongly supports Ervin's claim he is presently unable to comply further with the court's order. As a result, we do not find his noncompliance willful. We grant Ervin's writ of certiorari.

WRIT GRANTED.