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IN THE COURT OF APPEALS OF IOWA

No. 8-171 / 97-1404

FILED
APR 24 1998
CLERK SUPREME COURT

ROBERT McFADDEN,

Plaintiff,

vs.

IOWA DISTRICT COURT FOR POLK COUNTY,

Defendant.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Plaintiff seeks certiorari review of the district court's finding he was in contempt for violating a protective order. **AFFIRMED AND WRIT ANNULLED.**

Barbara O. Hoffman, Des Moines, for plaintiff.

No appearance for defendant.

Considered by Sackett, P.J., and Streit and Mahan, JJ.

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MAHAN, J.

Robert McFadden seeks certiorari review of his sentence for contempt of court following violation of a protective order entered pursuant to Iowa Code chapter 236. Robert argues: (1) the trial court entered an over-inclusive protective order because one of the premises was an unoccupied residential home; (2) evidence at the contempt hearing was insufficient to establish he willfully violated the protective order; and (3) the sentence imposed by the trial court was capricious, based on facts not in evidence, excessive, and served no useful purpose. We affirm the trial court and annul the writ.

The trial court issued a permanent protective order in November 1996. The protective order required Robert to stay away from Crystal McFadden's residence at 1520 Tiffin in Polk County, her place of work, as well as Rochelle McFadden's school.

In February 1997 the trial court found Robert in contempt and sentenced him to thirty days in jail, all but five days suspended, with credit for five days already served. The trial court required Robert to contact EFR for an evaluation and to follow through with any recommended treatment. Any violation of the court's order or the permanent protective order was to result in imposition of the remaining twenty-five days of the sentence, plus the possibility of further contempt sanctions. The court also permanently amended the protective order to include 1213 East 37th Court in

Des Moines. Robert did not contest the amendment of the protective order in any fashion.

Robert was again brought before the trial court on July 16, 1997, for violation of the protective order. Crystal's affidavit alleged Robert parked in front of 1213 East 37th Court on March 28, 1997, while she was there with her father, and attempted to entice her father to come out and fight. The trial court found Robert in contempt and sentenced him to thirty days in jail to be served without any good time or reduction in sentence or early release without further order from the trial court.

On July 21, 1997, Robert filed a combined 179(b) motion and motion for reduction of sentence. Robert asked the trial court to reconsider its judgment and reduce the sentence. The trial court denied both of Robert's motions. Robert then filed a petition for writ of certiorari on August 5, 1997.

I. SCOPE OF THE PROTECTIVE ORDER. Robert alleges the amended protective order was over-inclusive because 1213 East 37th Court was not Crystal's residence, school, or workplace, as set forth in the original permanent protective order issued in November 1996. 1213 East 37th Court was added at the time of the amended protective order of February 11, 1997. Robert and Crystal were going through a divorce and neither resided there on a permanent basis. However, the trial court found the added protection was necessary.

Robert did not file a 179(b) motion or other action for relief after the amendment was ordered. Robert waited until July after the contempt sentencing to

challenge the scope of the amended protective order. Clearly, Robert's challenge of the scope of the February 11, 1997, amended protective order is untimely. Iowa R. App. P. 5. Therefore, we find Robert's assigned error on this issue to be without merit.

II. EVIDENCE OF CONTEMPT. Orders to punish for contempt may not be appealed, but the proceedings may be taken to a higher court for revision by certiorari. Iowa Code § 665.11 (1997). Certiorari is a procedure to test whether a lower board, tribunal, or court exceeded its proper jurisdiction or otherwise acted illegally. Iowa R. Civ. P. 306; *French v. Iowa Dist. Court*, 546 N.W.2d 911, 913 (Iowa 1996). Relief through certiorari is strictly limited to questions of jurisdiction or illegality of the challenged acts. Iowa R. Civ. P. 308, 316; *French*, 546 N.W.2d at 913. Therefore, our review of the district court's action is to correct errors at law. *French*, 546 N.W.2d at 913. We examine the evidence to insure that substantial evidence supports the judgment of contempt. *Matlock v. Weets*, 531 N.W.2d 118, 121 (Iowa 1995). Proof of contempt requires a showing the contemnor willfully violated the injunction. *Id.* at 123.

> A finding of willful disobedience 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 the known duty, or unauthorized, coupled with an unconcern whether the contemnor had the right or not.

Id. at 123-24. A finding of contempt must be established beyond a reasonable doubt. *Id.* at 124.

In his testimony, Robert admitted he stopped his truck in the street and talked to Crystal's father who was in the yard at 1213 East 37th Court. Robert never left his truck. Robert also admitted he got into a shouting match with Crystal's father and that Robert knew he had a protective order requiring him not to go to the residence. Robert claimed he was going to see a friend who lived nearby and never had any intention of stopping at 1213 East 37th Court. Crystal also testified Robert stopped his truck in the street and got into a shouting match with her father.

We find there is substantial evidence to support the trial court's finding of contempt beyond a reasonable doubt.

III. SENTENCE. Robert contends the sentence imposed by the trial court was capricious because it was based on facts not in evidence at the hearing, was excessive, and served no useful purpose. Our appellate courts grant trial courts wide discretion in the matter of sentencing for contempt. *Shedlock v. Iowa Dist. Court*, 534 N.W.2d 656, 660 (Iowa 1995). We will interfere only where that discretion has been clearly abused. *Id.* We will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Selestan*, 515 N.W.2d 356, 358 (Iowa App. 1994). In determining the sentence, the trial court considered the witnesses, mitigating factors, Robert's knowledge of the protective order, his prior violations, and his prior sentence. The trial court clearly considered the appropriate factors and acted with appropriate discretion. *See Shedlock*, 534 N.W.2d at 660.

For the reasons stated above, we affirm the decision of the trial court and annul the writ.

AFFIRMED AND WRIT ANNULLED.

Streit, J., concurs; Sackett, P.J., dissents.

SACKETT, J. (dissenting)

I dissent. I would sustain the writ, there not being substantial evidence that McFadden violated the order where he was only on the street in front of the address he was not allowed to frequent.