IN THE COURT OF APPEALS OF IOWA

No. 6-543 / 95-2122

MIKE KELLEY,

Plaintiff,

vs.

IOWA DISTRICT COURT FOR STORY COUNTY,

Defendant.

FILED
OCT 25 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Story County, Thomas R. Hronek, District Associate Judge.

Mike Kelley's petition for writ of certiorari from the district court's order finding him in contempt was granted. **WRIT ANNULLED.**

Timothy McCarthy, II, of Cook, Gotsdiner, McEnroe & McCarthy, Des Moines, for plaintiff.

Stephen H. Holmes, Assistant County Attorney, for defendant.

Considered by Sackett, C.J., and Habhab and Vogel, JJ.

HABHAB, J.

Michael Caddell previously held a temporary restricted driver's license issued to him conditioned upon his use of an approved ignition interlock device pursuant to Iowa Code section 321J.4(8). In March 1995, Story County District Associate Judge Thomas R. Hronek revoked Caddell's temporary restricted license finding he had tampered with or circumvented the installed ignition interlock device.

Mike Kelley is the president of Breath Detectors, Inc., a company that installs ignition interlock equipment. Kelley prepared an application for a temporary restricted license and a proposed court order for Caddell after his temporary restricted license was revoked. Caddell executed the petition. Kelley took Caddell to the Polk County Courthouse in Des Moines where he submitted the application and proposed order on Caddell's behalf to an Assistant Polk County Attorney. Although both the application and the proposed order were captioned "In the Iowa District Court for Story County," Kelley did not inform the Assistant Polk County Attorney an order revoking Caddell's privileges to a temporary restricted license had been issued in Story County. He also failed to inform her Caddell was a resident of Story County where the previous O.W.I. conviction had occurred.

The Assistant Polk County Attorney approved the application and a Polk County District Court Judge signed the order. Kelley then took Caddell to a Department of Transportation station in Des Moines and obtained a temporary restricted license for Caddell. The order issued in Polk County was subsequently

vacated and the Department of Transportation revoked Caddell's driving privileges and temporary restricted license.

In June 1995, the State filed a complaint against Kelley alleging he had committed contempt in violation of Iowa Code section 665.2(3). Following a September hearing, Kelley was found to have acted in an illegal manner to resist the order revoking Caddell's temporary restricted license. A judgment of contempt was entered November 21, 1995. Kelley filed a petition for writ of certiorari. The petition was granted by the supreme court on December 29, 1995.

Kelley argues the court erred in finding him in contempt because there was no evidence he intended to resist the Story County order. He notes there is no prohibition against filing an application for a temporary restricted license following the revocation of a temporary restricted license. He further notes the code change requiring an application for temporary restricted license be filed in the county of arrest or conviction was not effective until July 1, 1995. Kelley also complains the court considered evidence not in the record and should have recused itself.

The State argues, among other things, that Kelley has failed to preserve error on the issues of consideration of evidence not in the record and whether the court should have recused itself.

On a writ of certiorari, our review is for corrections of errors at law. *Des Moines v. Civil Serv. Comm'n*, 540 N.W.2d 52 (Iowa 1995). We will sustain a writ where the lower court has acted beyond its authority or jurisdiction or has otherwise

acted illegally. Iowa R. Civ. P. 306. An action for contempt of court is treated as a criminal proceeding and no person may be punished unless the contempt is established by proof beyond a reasonable doubt. *Bear v. Iowa District Court for Tama County*, 540 N.W.2d 439, 441 (Iowa 1995).

"[S]ubject matter jurisdiction exists over a charge of contempt brought against a nonparty for violation of an injunction or order." *Hutcheson v. Iowa District Court*, 480 N.W.2d 260, 264 (Iowa 1992). The question is whether substantial evidence supports the court's judgment. *McKinley v. Iowa District Court for Polk County*, 542 N.W.2d 822, 824 (Iowa 1996) (citation omitted). Contempt is defined as willful disobedience. *Id.*

> Willful disobedience requires evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the right of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemnor had the right or not.

Id.

The State must establish that a person who has allegedly violated the order had notice or knowledge of the order and either acted in concert or was in privity with a person to whom the order was directed. *Hutcheson*, 480 N.W.2d at 263.

Kelley contends he was not present when the trial court entered its order revoking Caddell's temporary restricted driver's license and he was not copied in on the trial court's order revoking the license. He admits, however, he was made aware that a revocation had taken place and Caddell wished to re-apply for a restricted

license. Kelley points out the Assistant Polk County Attorney accepted full responsibility for the order issued in Polk County. He argues there is no evidence to support the trial court's finding that he deliberately attempted to circumvent an established court order beyond a reasonable doubt.

We disagree. Upon review of the trial court's order, we find substantial evidence supports its findings and as such no error has occurred. Kelley attended at least part of Caddell's revocation hearing. Although Kelley argues the application and proposed order were submitted in Polk County only as a matter of convenience, substantial evidence establishes that when he submitted the application and order in Polk County he failed to disclose to the Assistant County Attorney that Story County had issued an order revoking Caddell's privileges to a temporary restricted license. He also failed to inform her the revocation was based on evidence of tampering with or circumventing a previous ignition interlock device, that Caddell was a Story County resident, and his O.W.I. conviction occurred in that county. We find substantial evidence in the record establishes that Kelley failed to make these disclosures so as to circumvent the order revoking Caddell's temporary restricted license.

Kelley asserts the trial court based its finding of contempt on unrecorded personal opinions of the court articulated in closing argument. Kelley maintains, as the trial court judge had personal knowledge of facts outside of the evidence, he had a duty to recuse himself. We disagree. There are no grounds for reversal when we

have no record upon which to judge the argument on its merits. *See State v. Belt*, 505 N.W.2d 182, 185 (Iowa 1993). A defendant claiming error has an obligation to provide the court with a record that discloses the error claimed. *State v. Ruiz*, 496 N.W.2d 789, 791 (Iowa App. 1992). We agree with the trial court that substantial evidence has established beyond a reasonable doubt that Kelley knowingly and intentionally acted in an illegal manner to resist the order of revocation of Caddell's temporary restricted permit executed by the Story County District Associate Court.

WRIT ANNULLED.