

IN THE COURT OF APPEALS OF IOWA

FILED

APR 27 1982

CLERK SUPREME COURT

RED BARN SUPPER CLUB, LTD.,)

Plaintiff,)

vs.)

M. D. SEISER, Judge in and for the)
District Court of Boone County,)

Defendant.)

Filed April 27, 1982

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2-110

66957

Writ of certiorari from Boone District Court - M. D. Seiser, Judge.

Plaintiff challenges order of defendant judge finding plaintiff to be in contempt and imposing a fine. WRIT SUSTAINED.

George C. West and Steven C. Jayne, Des Moines, Iowa, for plaintiff.

Thomas J. Miller, Attorney General of Iowa, and Scott H. Nichols, Assistant Attorney General, for defendant.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiff, in an original certiorari proceeding, challenges order of defendant judge finding plaintiff to be in contempt and imposing a fine. For the reasons hereinafter stated, we sustain the writ.

The plaintiff is a corporation which operates a supper club in rural Boone County. Bruce Russell, owner of 49% of the stock in the corporation, performs the active management of the club on a day-to-day basis. In November of 1979, during the early stages of the Iranian hostage crisis, Russell displayed a small 8" x 0" ink cardboard sign reading "Iranians Not Welcome Here" on the supper club's front window. This act caused the Iowa Civil Rights Commission to seek a temporary injunction on the basis that the sign was a violation of section 01A.2(10), The Code, proscribing discrimination by public accommodations.

On April 6, 1981, a judge of the second judicial district other than the defendant judge, entered an order restraining the plaintiff corporation from hereinafter displaying any sign indicating in any manner that the patronage of Iranians is unwelcome, objectionable, not acceptable, or not solicited." Prior to the issuance of this injunctive order, the plaintiff had asserted that the effect of such an injunction, if granted, would be to proscribe speech by a proprietor of a public accommodation in violation of the first amendment. In apparent response to this contention, the court stated in the order for the injunction that:

[T]he Commission finds objectionable, primarily, the placing of the sign. The Court agrees. Mr. Russell can place the sign on his home and he will not commit an unfair practice. When he places that same sign upon the door of his public accommodation, he has problems.

On April 10, 1981, Russell held a press conference at the supper club at which he removed the cardboard sign from the front door, stating "We're removing this sign pursuant to the court order. However, we still feel the same." He then unveiled a new sign on the front lawn of his residence, which was located adjacent

to and was visible from the supper club.¹ The new sign, which also read "Iranians Not Welcome Here," measured four feet by twelve feet. This sign blew down in a wind storm on April 15, 1981, and was subsequently nailed to the front porch of Russell's residence.

On April 27, 1981, the Iowa Civil Rights Commission requested and received an order requiring the plaintiff corporation to show cause why it should not be found in contempt for failure to abide by the injunction order. After a hearing held on June 8, 1981, the defendant judge found the corporation was in contempt and, as punishment, imposed a fine of \$500 against the corporation.

The plaintiff argues before this court that the finding of contempt made by the defendant judge is not supported by clear, satisfactory and convincing evidence. The present case is before the court pursuant to section 665.11, The Code. Said provision reads as follows: "No appeal lies from an order to punish for contempt, but the proceedings may, in proper cases, be taken to a higher court for revision by certiorari."

Relief in certiorari is strictly limited to questions of jurisdiction or illegality of the trial court's ruling, where, as here, there is no applicable statutory exception to the provisions of Iowa R. Civ. P. 308. Wright v. Denato, 178 N.W.2d 339, 340 (Iowa 1970).

Contempt cases are an exception to the ordinary review by certiorari as previously articulated. Orkin Exterminating Co., Inc., (Ardwell Div.) v. Burnett, 160 N.W.2d 427, 431 (Iowa 1968). In contempt matters the court reviews the evidence and may give much weight to the trial court's findings of fact, but are not bound by them. Orkin Exterminating Co., Inc., (Ardwell Div.) v. Burnett, 160 N.W.2d 427, 431 (Iowa 1968).

¹ The property upon which the second sign was located was not owned by either Russell or the plaintiff corporation; however, Russell maintained his personal residence on said property.

Because contempt is treated as criminal or quasi criminal in nature, in the trial court the moving party has the burden to prove by clear, satisfactory and convincing evidence that the responding party willfully disobeyed the injunction. State v. Dist. Ct. in and for Polk County, 231 N.W.2d 1, 4 (Iowa 1975). In reviewing a contempt judgment, the appellate court examines the evidence, not de novo, but to assure itself that proof of contempt is clear and satisfactory. Lane v. Oxberger, 224 N.W.2d 245, 247 (Iowa 1974).

When the evidence is such that the mind readily reaches a satisfactory conclusion as to the existence or nonexistence of a fact in dispute, then the evidence is, of necessity, clear and satisfactory. American Security Benevolent Ass'n. v. District Court, 259 Iowa 983, 994, 147 N.W.2d 55, 62 (1966).

The court's order must have been so definite and certain in terms as to be readily understood. Hargis v. Fleck, 251 Iowa 1031, 157 N.W.2d 103, 109 (1968). The court has said that an order, to serve as a basis for a contempt proceeding, must meet this test and failure to do so renders the order void and unenforceable. Lynch v. Uhlenhopp, 248 Iowa 68, 72-75, 78 N.W.2d 491, 494-95 (1956).

When the foregoing principles are applied to the evidence in the present case, we believe that there is an insufficient showing to sustain the finding of contempt. The defendant judge in the contempt proceedings below and in the written argument filed in support of his order in the appellate court places primary emphasis on whether the conduct is such as would be proscribed by the injunction as intended by the issuing court or interpreted by the court at the contempt hearing. In so doing, we believe that there is a failure to focus sufficiently on the question of whether the conduct in question, even if violative of the injunction as interpreted by (a) the issuing court, (b) the contempt hearing court, or (c) this court, was intended by plaintiff to violate the injunction. In our consideration of that matter, we find the evidence inadequate to establish that plaintiff intended to violate the injunction by the erection of the second sign. The

spontaneous statements made at the press conference when considered with the language of the injunction stating "Mr. Russell can place the sign on his home and he will not commit an unfair practice" suggests that Russell, either individually or in acting for the corporation, believed that the second sign was permitted at the location where it was erected and was relying on language in the injunctive order which he believed so provided.²

Defendant, in its brief and argument, concedes that the injunctive order contained at least "a modicum of uncertainty" as to whether the act claimed to be contemptuous was prohibited by the injunction. It attributes this uncertainty to the fact that the judge who issued the injunction was not aware that Russell's residence was adjacent to the location of the supper club. For purposes of determining whether there was a willful violation of the injunction by plaintiff, we must look to what was said in the order rather than what would have been said (or not said) had the court been aware of additional facts. Unlike those views expressed in the concurring opinion, we do not determine whether defendant, in erecting the second sign, has acted in violation of section 601A.2(10), The Code, or the injunctive order of April 6, 1981. We only hold that it has not been sufficiently established on the record in the present action that plaintiff's actions were contemptuous. The writ of certiorari is sustained.

WRIT SUSTAINED.

All judges concur except Donielson, J., who concurs specially.

² The defendant judge seemed to draw support for the finding of contempt in the fact that at the press conference Russell used the word "we" rather than "I" in describing the erection of the second sign. While we are not as persuaded as was the defendant judge that this establishes corporate action as opposed to individual action by Russell, we do not believe that this is significant. Even if we assume that corporate action is involved, the evidence strongly suggests that it was undertaken so as to assist Russell in expressing his personal views in a manner believed to be in compliance with the injunction.

DONIELSON, J. (specially concurring)

I concur with the majority opinion. However, I feel special emphasis should be placed upon the fact that Mr. Russell did not at any time violate the plain and unambiguous language of the injunction by placing a sign expressing his personal opinion on his private residence.

[T]he Commission finds objectionable, primarily, the placing of the sign. The Court agrees. Mr. Russell can place the sign on his home and he will not commit an unfair practice. When he places that same sign upon the door of his public accommodation, he has problems.

The appellee alleges that the appellant based his actions upon "a twisted reading of the order" and therefore should have asked the court for clarification of these words. The appellee's position that this is clear and satisfactory evidence to support a contempt finding, is untenable in my opinion.

I also disagree with the appellee's assertion that the press conference held by Mr. Russell shows clear and satisfactory evidence of contempt. It should be noted that at the press conference Mr. Russell indicated that his intention was to comply with the court order, but that he did not agree with the order. I certainly do not find this is evidence of contempt. It makes little difference to me whether the press conference was called to express either agreement or disagreement with the court order or to assert that he was going to comply or not comply. In my opinion, the actual act of complicity or noncompliance is the key factor to be considered. Great care should be exercised before the judicial system encroaches upon an individual's first amendment rights. The expression of agreement or disagreement with court orders seems to be quite properly within the protection of the first amendment, and most assuredly not clear and satisfactory evidence of contempt.

In conclusion, the trial court's finding of contempt was in error for two

reasons: First, the erection of the new sign was not a violation of section 601A.2(10), The Code, because it was not placed on a "public accommodation;" second, Mr. Russell's actions were entirely consistent with the unambiguous language of the injunction. Furthermore, I cannot agree with the defendant's argument that Mr. Russell was obliged to ask the court for a clarification of the so-called "dicta" in the injunction which in plain language authorized the very action taken by Mr. Russell. To hold otherwise under these facts would be a serious setback to the basic constitutional guarantee of free speech under both the federal and state constitutions.