IN THE COURT OF APPEALS OF IOWA

No. 0-04 / 88-1608

FILED
JUN 26 1990
CLERK SUPREME COURT

GAYLORD MELVIN AUGUSTINE,

Plaintiff,

vs.

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IOWA ASSOCIATE DISTRICT COURT FOR JOHNSON COUNTY,

Defendant.

Writ of certiorari from the Iowa District Court for Johnson County, John R. Sladek, Associate Judge.

The plaintiff files this petition for writ of certiorari protesting the associate district court's action following his adjudication of contempt of court pursuant to Iowa Code section 665.2(1). **WRIT SUSTAINED.**

Raymond E. Rogers, State Appellate Defender; James F. Whalen, Assistant State Appellate Defender; for plaintiff.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; J. Patrick White, County Attorney; and Timothy Ross-Boon, Assistant County Attorney; for defendant.

Considered by Donielson, P.J., and Schlegel and Habhab, JJ.

SCHLEGEL, J.

The plaintiff, Gaylord Augustine, files this petition for writ of certiorari protesting the associate district court's action following his adjudication of contempt of court pursuant to Iowa Code section 665.2(1). Augustine contends that: (1) his appearance in court after consuming alcohol did not constitute contempt under section 665.2(1) in the absence of insolent or disruptive behavior; and (2) the sixty-day jail sentence imposed by the district court was excessive. We reverse.

On October 27, 1988, at approximately 9:30 a.m., Augustine appeared in court for sentencing of his convictions of second-offense OWI and fourth-degree criminal mischief. Following sentencing a deputy county sheriff noticed that Augustine had an odor of alcohol about him. Augustine was given a breath test which resulted in a reading of .208. At 10:50 a.m. that morning, Augustine returned to the court where he was arraigned on public intoxication. The court told Augustine that the purpose of the hearing was to determine whether he should be held in contempt. Testimony was then taken. Augustine was subsequently found in contempt and sentenced to serve a sixty-day sentence concurrent with the sentence imposed earlier that day for his criminal convictions.

Augustine subsequently filed a petition for a writ of certiorari. On appeal, Augustine contends that his court appearance after consuming alcohol did not constitute

contempt pursuant to the standards of Iowa Code section 665.2(1), since his behavior was not disruptive to judicial proceedings, and since no one was aware of his consumption of alcohol until after the sentencing hearing. Augustine points out that he did not consume alcohol immediately prior to the hearing but had been drinking the previous evening until the early hours of the morning. Augustine maintains he was able to speak clearly and was completely lucid. Augustine argues his behavior was not a willful attempt to be disrespectful to the court. Augustine lastly contends the sixty-day jail sentence imposed by the court was excessive.

The State, however, maintains that Augustine's behavior insulted the dignity of the court, and that any apology by Augustine would not purge him of contempt. The State argues that the contempt sanction is essential to aid the court in preserving decorum during its proceedings. The State lastly contends the sixty-day jail sentence imposed by the court was well within the statutory limits of Iowa Code section 665.4(2).

A petition for a writ of certiorari is an action at law, and our scope of review is limited to the determination of whether the district court properly applied existing law to the controversy before it. City of Des Moines v. Iowa Dist. Court for Polk County, 428 N.W.2d 292, 296 (Iowa 1988). We are therefore bound by the district court's findings of fact if they are supported by

substantial evidence Dickinson Co., Inc. v. City of Des Moines, 347 N.W.2d 436, 439 (Iowa App. 1984).

Pursuant to Iowa Code section 665.2, the following acts or omissions are considered contempts:

> 1. Contemptuous or insolent behavior toward such court while engaged in the discharge of a judicial duty which may tend to impair the respect due to its authority.
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> 2. Any willful disturbance calculated to interrupt the due course of its official proceedings.
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> 3. Illegal resistance to any order or process made or issued by it.
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> 4. Disobedience to any subpoena issued by it and duly served, or refusing to be sworn or to answer as a witness.
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> 5. Unlawfully detaining a witness or party to an action or proceeding pending before such court, while going to or remaining at the place where the action or proceeding is thus pending, after being summoned, or knowingly assisting, aiding or abetting any person in evading service or the process of such court.
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> 6. Any other act or omission specially declared a contempt by law.

An action for contempt of court is treated in the nature of a criminal proceeding. Amro v Iowa Dist. Court for Story County, 429 N.W.2d 135, 140 (Iowa 1988). No person may be punished for an alleged contumacious act unless the actions have been established by proof beyond a reasonable doubt. Id. Contempt is sufficient if some of the conduct was willful. Id. Willful disobedience requires evidence of conduct that is intentional and deliberate with a bad purpose, or in wanton or reckless disregard of the rights

of others, coupled with an unconcern whether the contemner had the right or not. Lutz v. Darbyshire, 297 N.W.2d 349, 353 (Iowa 1980). Our inherent power to punish contempt is a delicate one and requires care to avoid arbitrary or oppressive conclusions. Knox v Municipal Court of City of Des Moines, 185 N.W.2d 705, 707 (Iowa 1971).

The Iowa Supreme Court has not heretofore been called upon to determine whether a defendant's intoxication, standing alone, is sufficient to sustain a finding of contempt. Few courts of other jurisdictions have been asked to address this question. The small number of jurisdictions which have addressed this appear to be in accord that intoxication, without any resulting disruptive behavior, does not rise to a level punishable by contempt.

In Neely v State, 98 Miss. 816, 819, 54 So. 315, 316 (1910), the Mississippi Supreme Court held that direct contempt consists of conduct or language which interferes with the orderly administration of justice, and that unless the trial judge was conscious of a defendant's intoxicated state, there could be no finding of contempt. In Commonwealth ex rel. Falwell v. Di Giacinto, 324 Pa. Super. 200, 471 A.2d 533 (1984), the Pennsylvania Superior Court addressed a similar question. In Di Giacinto, the defendant was found in contempt for being in court inebriated, upon the trial court's observation that she at times spoke incoherently and smelled of alcohol. 324 Pa. Super. at 204, 471 A.2d at 534-35. The defendant admitted

to having drunk four beers before the hearing. Id. The trial court sentenced the defendant to three months in prison, but that the contempt would be purged upon completion of an alcohol treatment program. Id. The superior court, however, held that under the Pennsylvania statute providing for contempt, "merely being under the influence of liquor will not by itself constitute contempt." Id. The Di Giacinto court ruled that "[t]he drunkenness must be such that it obstructs the administration of justice, which means that it must interfere with or disrupt the orderly process of the court." Id. at 208, 471 A.2d at 537.

We have also recognized that certain actions, though not to be condoned, do not rise to the level of contempt pursuant to section 665.2. In Hicks v Stigler, 323 N.W.2d 262 (Iowa App. 1982), we held that false statements not made under oath are not contempts. We held that in order for a false swearing to fall within a strict construction of section 665.2, the court must have actual knowledge of the falsity, and the falsity must have obstructed the performance of a judicial function. Hicks, 323 N.W.2d at 263.

From the foregoing discussion, we conclude that Augustine's conduct in the present case does not fall within a strict construction of either sections 665.2(1) or 665.2 (2). The record reveals that Augustine had not been drinking immediately prior to the hearing, but had been

drinking the night before. Augustine showed up on time for the hearing. He appeared polite and was able to properly complete necessary paper work. There is no evidence in the record suggesting that Augustine had trouble talking or walking. The State does not point to any evidence that as a result of his intoxication, the administration of justice was somehow interrupted or that the court was insulted. Quite the contrary, the record reveals that the sentencing court was completely unaware that Augustine was intoxicated until a deputy informed the court that Augustine's blood alcohol content had been tested at .208, after the hearing had already been completed. Under these facts, we cannot say that Augustine's apparent intoxication was a willful attempt to insult the dignity of the court, absent some type of insulting or disruptive behavior of which the court has judicial knowledge.

By so holding, however, we do not wish to be understood to condone such behavior. Our holding is restricted to those circumstances as involved in the present case, namely where the court is unaware of the intoxication and the particular defendant has in no way impeded the judicial process. Had Augustine in the present case been unable to speak coherently or walk without assistance, or had used abusive language or otherwise impeded the judicial process, we would likely have achieved a different result. In such cases the integrity of the courts must be protected.

Because of our holding, we need not address the remaining issues presented by the parties.

WRIT SUSTAINED.