THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2008-CP-11-1038

Christopher Drye, d/b/a Drye's Auto Crushing . . . . . Respondent,

v.

Mike Gault and Mary T. Gault, d/b/a Gault's Used Cars, Total Inc., Edward Keith Potter individually and as President of Total Inc. . . . . .Defendants,

Of whom,

Mike Gault is . . . . . .Appellant.

INITIAL BRIEF OF APPELLANT

D. Alan Lazenby
Ginger D. Goforth
LAZENBY LAW FIRM, LLC
PO Box 6099
Spartanburg, SC 29304
(864) 804-5050

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF ISSUES ON APPEAL

I. The trial court erred in finding Appellant in contempt of court where Respondent did not prove that Appellant wilfully and purposely failed to comply with the subject discovery order.

II. Even if Respondent had produced evidence to support his Rule to Show Cause, the trial court applied an incorrect standard of review, and erred in imposing the criminal sanction of a ten day jail sentence without finding that Respondent proved beyond a reasonable doubt that Appellant violated the subject discovery order.

STATEMENT OF THE CASE

Christopher Drye d/b/a/ Drye's Auto Crushing ("Respondent" or "Drye") brought suit against Mike Gault ("Appellant" or "Gault") and Mary T. Gault, d/b/a/ Gault's Used Cars, Total, Inc., and Edward Keith Potter, individually and as President of Total, Inc., raising claims for breach of contract, civil conspiracy, and piercing the corporate veil. (Complaint). Drye agreed to dismiss the civil conspiracy claim with prejudice, and the claim for piercing the corporate veil was bifurcated. Thus, the case ultimately went to the jury on only the breach of contract action against Total, Inc. The jury returned a verdict against Total, Inc. in the amount of $49,869.20. (September 1, 2011 Order for Judgment).

On February 28, 2012, the trial court appointed Ben D. Kochenower as Receiver. Kochenower's job was to identify assets of Total, Inc. and apply them to satisfy Drye's judgment. (February 28, 2012 Order). This Order allowed Total, Inc. to continue to

conduct its business. Respondent thereafter filed a Motion for Contempt alleging that Gault thwarted the Receiver's efforts to collect on the judgment. An Amended Order to Appoint Receiver was filed on June 12, 2012. (June 12, 2012 Order). This Order found that Gault was not in contempt because he was conducting Total, Inc.'s normal business. The Amended Order removed the language from the Appointment that allowed Total, Inc. to continue to conduct its business.

On August 1, 2012, Drye filed another Motion for Contempt, again claiming that Gault was somehow interfering with the Receiver's identification of Total, Inc.'s assets. (August 1, 2012 Motion for Contempt). After a full hearing on the matter, the trial court ordered the Receiver to go to a warehouse located at 199 Speedway Road, take an inventory, and identify assets belonging to Total, Inc. (August 14, 2012 Order on Motion for Contempt). The trial court made no ruling on the contempt charge.

On May 22, 2013, Drye filed a Rule to Show Cause for Contempt. (May 22, 2013 Rule to Show Cause for Contempt). In this motion, Drye requested that Gault be held in contempt of court for allegedly "filing false and fraudulent answers to interrogatories to Plaintiff prior to the trial of this case." Gault had been directed to answer the interrogatories by order of the trial court upon a Motion to Compel. (June 15, 2011 Order).

The trial court heard this motion on June 19, 2013. At the conclusion of the hearing, the trial court ordered that Gault be locked up in the Cherokee County Detention Center for a period of ten days. Officers took him into custody in the court room and took him directly to jail. (June 19, 2013 Hearing Transcript p. 115). The trial court did

not prepare a written order at that time, but Gault's Booking Report bore the note "hold for contempt order per Judge Hayes." (Booking Report).

On June 21, 2013, Gault filed his Notice of Appeal and Emergency Petition for Writ of Supersedeas. (Notice of Appeal) (Writ of Supersedeas). On June 21, 2013, Judge Jasper M. Cureton issued an Order finding that Gault's criminal contempt sentence was automatically stayed by the filing of the Notice of Appeal. (June 21, 2013 Court of Appeals Order). The trial court issued an Order for Bond and Discharge on June 24, 2013. (Order for Bond and Discharge). On August 6, 2013, the trial court issued a formal Order, which counsel for Gault provided to the Court of Appeals at its request. (August 6, 2013 Order).

FACTS

This case has involved a pattern of overreaching by the Receiver, Ben Kochenower. He was authorized by virtue of the Amended Order to Appoint Receiver to seize and retain only property belonging to Total, Inc. (Amended Order to Appoint Receiver). Despite this limitation, Kochenower seized a number of items that did not belong to Total, Inc. These included the following items belonging to Gault individually: (a) a Millermatic 250 Welder, (b) a Mitsubishi Forklift, (c) a race car, and (d) a generator. (Affidavit of Mike Gault, October 24, 2012). Kochenower also seized property belonging to Mary Gault. Despite repeated demands, submission of affidavits of sale, and Kochenower's acknowledgment that the property did not belong to Total, Inc., he has refused to return the property. (Motion to Terminate Receivership and Return Personal Property, October 24, 2012)(June 19, 2013 Transcript p. 22). The trial court used Gault's

sworn affidavits of sale and ownership as a basis to hold in him in contempt in June, but will not rule on Gault's Motion to Return Property, which was heard on April 18, 2013.

The May 22, 2013 Rule to Show Cause that gave rise to this appeal came before the trial court on the narrow question of whether Gault filed false and fraudulent answers to interrogatories prior to trial. In support of this motion, Respondent submitted Gault's July 11, 2011 discovery responses, as well as his October 24, 2012 Affidavit. (May 22, 2013 Motion and Attachments). On July 11, 2011, Gault through his attorney provided detailed discovery responses. Gault listed his possessions as follows: "Mike Gault Personal Property Owned – Clothes, Shoes, TV, DVD player, DVDs, Bedroom Furniture, Refrigerator, Microwave." (May 22, 2013 Motion and Attachments). Gault also provided Respondent's counsel access to nine banker's boxes of documents. (June 19, 2013 Hearing Transcript pp. 10-11, 13).

Questioned at length, Gault's trial counsel testified that he was "quite immediately" responsive to counsel's requests for information and documentation, that he never had any trouble getting information from Gault, and that nothing in his dealings with Gault would lead him to believe that Gault was withholding information. (June 19, 2013 Hearing Transcript, p.13).

Gault testified that when he provided counsel with information to answer the discovery responses, he listed everything that he could think of at the time. He also provided counsel with several boxes of documents for opposing counsel to review. Gault testified that he answered the interrogatories to the best of his ability, and that he had no intent to withhold information. He admitted that he did inadvertently neglect to list three items: the forklift, which did not run and was sitting in the back of a shop; a 20 year old

welder that he only remembered when he saw it in the Receiver's photograph; and a generator that he had had "forever," but was worth very little. Gault estimated these items to be worth a total of possibly $500. (June 19, 2013 Hearing Transcript, pp. 68-74). Drye submitted no evidence as to the value of the items. The race car (Gault testified that he owned the chassis, but not the motor) put into issue by Drye was purchased on April 20, 2012, some nine months after the discovery responses were served. Gault provided an invoice for the race car. (June 19, 2013 Hearing Transcript, pp. 45-46, 78). Drye submitted no evidence to challenge this fact.

ARGUMENT

I. The trial court erred in finding Appellant in contempt of court where Respondent did not prove that Appellant wilfully and purposely failed to comply with the subject discovery order.

A determination of contempt is a serious matter, and should be imposed sparingly. While the decision is generally within the sound discretion of the trial court, the Court of Appeals will reverse a finding of contempt if it is without evidentiary support or if the trial court abused its discretion. Ex Parte Cannon, 385 S.C. 643, 685 S.E.2d 814, 823 (Ct. App. 2009).

A party can be held in contempt for willful violation of a lawful court order only if the record clearly and specifically reflects the contemptuous conduct. Wilson v. Walker, 340 S.C. 531, 532 S.E.2d 19 (2000); Widman v. Widman, 348 S.C. 97, 557 S.E.2d 693, 705 (Ct. App. 2001). "A willful act is one . . . done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific

intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." Ex Parte Lipscomb, 398 S.C. 463, 730 S.E.2d 320, 323 (Ct. App. 2012); Miller v. Miller, 375 S.C. 443, 652 S.E.2d 754, 759–60 (Ct. App. 2007). Most important, "[a] good faith attempt to comply with the court's order, even if unsuccessful, does not warrant a finding of contempt." Id. at 324.

The Court of Appeals on October 30, 2013 decided a case on point. In Ward v. Washington, 2013 WL 5819537 (Ct. App. 2013), the mother was held in contempt for failing to comply with the parties' visitation order. Specifically, the mother denied the father Labor Day visitation, citing her understanding of the language of the order. The order did not in fact prohibit the father from choosing Labor Day visitation. In finding the mother in contempt, the lower court acknowledged that the mother could interpret the order the way she did, but nonetheless looked "at the totality of the circumstances," including emails between the parties and other information, in deciding that the mother had wilfully disobeyed the order.

The Court of Appeals reversed. Despite the trial court's reliance on "the totality of the circumstances," the Court of Appeals held that the mother testified to her good faith belief that she was complying with the order. Because she could have reasonably believed that she was complying, there was no proof of willfulness.

In Wilson v. Walker, 340 S.C. 531, 532 S.E.2d 19 (2000), the Court held that the lower court erred in holding a party in contempt for a failure to "fully" respond to discovery requests. The lower court had ordered the husband to respond by a certain date. He responded one day late, and with responses that left out certain requested

information. The court held that the fact that the husband responded, even if only partially, was sufficient to defeat the element of willfulness necessary for a contempt finding. Id. at 22; see also, Willis v. Duke Power Co., 229 S.E.2d 191, 199 (N.C. 1976) (holding that the lower court's finding that party was in contempt of court based on its incomplete answer to an interrogatory was in error because "there is no competent evidence in the record to support a finding that the defendant wilfully refused to answer this interrogatory."); Bank One Trust Co., N.A. v. Scherer, 893 N.E.2d 542 (Ohio Ct. App. 2008)(a ten day jail sentence for direct criminal contempt for purposely obstructing discovery was excessive and out of proportion to the conduct or its effect on the proceedings); Diamond v. Diamond, 715 A.2d 1190, 1196 (Pa. 1998) (holding that in order to hold a party in criminal contempt for failure to comply with a discovery order, the contemnor must have purposefully acted with wrongful intent. Proof of noncompliance alone is not sufficient).

Here, Appellant did not fail to obey the trial court's order to respond to discovery. He responded in a timely manner through his attorney after the trial court compelled him to answer. His response may have been inaccurate, but the only competent evidence in the record shows that he attempted to comply with the order in good faith. His testimony reflects that he inadvertently left three items (that he did not encounter on a daily basis) off of the list of his possessions. The only evidence in the record is that these items were old and/or in disrepair and were of very little value. The only evidence in the record concerning the race car shows that it was purchased nine months after the discovery responses were made, and could not have been included Gault's responses.

Drye, who bore the burden of proving contempt, offered nothing to dispute this evidence beyond the conclusory comments and conjecture of his counsel that Gault was lying. Further, there is no basis in the record for the trial court's bare assertion that the assets listed by Gault lacked value, or were somehow less valuable than the assets he simply forgot about. (August 6, 2013 Order, p. 2).

As in Ward, the trial court erroneously looked to the "totality of the circumstances," rather than holding Drye to his obligation to produce evidence that Gault wilfully violated the Order. The record and Order reflect that the trial court did not like the fact that Gault came into possession of a race car after the case was concluded, or the fact that he participates in a racing venture financed by sponsors. Still, none of this testimony is relevant to Drye's May 22, 2013 Rule to Show Cause, which asked the trial court to hold Gault in contempt for failing to list three items of property on his interrogatory responses. Gault presented evidence of his good faith cooperation with his attorney in providing responses to discovery, and his inadvertent omission of the three items.

The trial court's conclusion that Gault purposely hid the identity of the three items is too great a leap, goes beyond the trial court's sound discretion, and is not supported by the evidence presented at the hearing.

II. Even if Respondent had produced evidence to support his Rule to Show Cause, the trial court applied an incorrect standard of review, and erred in imposing the criminal sanction of a ten day jail sentence without finding that Respondent proved beyond a reasonable doubt that Appellant violated the subject discovery order.

In its June 21, 2013 Order, the Court of Appeals acknowledged that Gault's contempt sentence constituted a criminal punishment. The distinction between civil and criminal contempt is crucial, because the imposition of a criminal contempt sentence triggers additional constitutional safeguards. While civil contempt must be proved by clear and convincing evidence, criminal contempt must be established beyond a reasonable doubt. Ex Parte Cannon, 385 S.C. 643, 685 S.E.2d 814, 824 (Ct. App. 2009) (citations omitted).

In its August 6, 2013 Order, the trial court characterizes Gault's sentence as one for civil contempt. It is not.

The purpose of civil contempt is to require a party to do the thing required by an order. A civil contempt sentence is remedial, and the contemnor can absolve himself of contempt by complying with the order. The purpose of criminal contempt is to punish for disobedience of an order. A criminal contempt sentence is to preserve the court's authority and punish for disobedience. An unconditional penalty is considered criminal contempt because it is solely and exclusively punitive in nature. Poston v. Poston, 331 S.C. 106, 502 S.E.2d 86, 88-89 (1998); Ex Parte Jackson, 381 S.C. 253, 672 S.E.2d 585, 587 (Ct. App. 2009).

The trial court acknowledged in its Order that it sentenced Gault to "10 days of incarceration in the local detention center." This was not a remedial sentence. There was no provision by which Gault could end his ten day sentence early. The sentence was punitive, and constituted a criminal contempt sanction.

In its Order, the trial court states only that it considered "the totality of the circumstances." This standard was expressly rejected by the Court of Appeals in Ward. Even looking, in fairness, to the oral ruling from the hearing transcript, the trial court stated that it was evaluating the motion based upon a clear and convincing evidence standard. (June 19, 2013 Transcript, p. 116). The trial court sentenced Gault to a criminal sanction under the incorrect standard of review.

CONCLUSION

The trial court applied an incorrect standard of review to the criminal sanction it imposed. Further, under no standard of review did Respondent prove that Appellant willfully and purposely violated a court order. The only evidence of record relative to the discovery responses at issue shows that Appellant responded in good faith. Because of this documented effort, he cannot be held in contempt simply because the responses were incomplete. For the reasons set forth herein, Appellant respectfully submits that the Court of Appeals must reverse the trial court's decision.

November 15, 2013

D. Alan Lazenby, Esq.
Ginger D. Goforth, Esq.
LAZENBY LAW FIRM, LLC
PO Box 6099
Spartanburg, SC 29304
Phone: (864) 804-5050
Fax: (864) 804-5051

ATTORNEYS FOR APPELLANT