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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the South Carolina Supreme Court

APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS

JOHN C. HAYES, III, CIRCUIT COURT JUDGE

On Appeal from the
Court of Appeals of South Carolina
Opinion No. 2015-UP-414

Appellate Case No. 2015-002345

Christopher A. Wellborn.....Petitioner,

v.

The City of Rock Hill.....Respondent.

BRIEF OF RESPONDENT

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II. Given the discretionary recusal determination in trial court, the Court of Appeals correctly affirmed the circuit court affirmation and trial court decision.

III. Given the trial court's inherent authority regarding contempt matters, the Court of Appeals correctly affirmed the circuit court affirmation and trial court decision.

STATEMENT OF THE CASE

Appellant Christopher Wellborn represented David Cullen in reckless driving case before the Rock Hill Municipal Court. Anna Timothy-Miller represented the City of Rock Hill at trial. The Honorable Peter Lenzi presided over the trial on January 16, 2013. During the proceedings, Appellant was held in contempt on several grounds (to be discussed at "Statement of Facts"), which would later be reduced to writing by the trial judge. Mr. Wellborn requested and received a continuance until March 25, 2013 to obtain counsel to represent him at his Rule to show cause hearing. James Boyd appeared on behalf of Appellant and filed a Motion for Recusal, which was received by the trial court on Friday, March 22, 2013. The motion was addressed by the court at the contempt hearing on Monday, March 25, 2013. That motion was denied. The hearing convened. (Record on Appeal, pp. 72-80) Judge Lenzi considered and dismissed three allegations of contempt and found Appellant in contempt on the

remaining two of five. Judge Lenzi's Order of Contempt was issued on March 28, 2013. (Record on Appeal, pp. 14-16)

Appeal to the Court of Common Pleas followed. The Appellant's Notice of Appeal to the Circuit Court was mailed on April 10, 2013. The Return to Appeal was filed on May 1, 2013. The appeal was heard by Circuit Court Judge John C. Hayes, III, on August 27, 2013. James Boyd, Esquire, appeared for Appellant. Respondent was represented on appeal by City Solicitor Paula Knox Brown. Judge Hayes's Order affirming the trial court was filed on October 2, 2013. Appellant's Motion to Reconsider was forwarded to the court on October 9, 2013. City's Response to Motion to Reconsider was filed in the circuit court on October 25, 2013. Judge Hayes's Order denying the Motion to Reconsider was filed on November 13, 2013.

Notice of Appeal to the Court of Appeals followed. Appellant and Respondent submitted briefs for consideration. The Court of Appeals filed its Opinion affirming the circuit court on August 12, 2015, and its Order denying the Petition for Rehearing on October 23, 2015.

Petitioner sought review in the Supreme Court. A Petition for Writ of Certiorari was filed on November 13, 2015. A Return and Reply were filed with the Court on January 13, 2016, and February 12, 2016, respectively. The Supreme Court granted certiorari on January 17, 2017.

"A decision on contempt rests within the sound discretion of the trial court…. On appeal, a decision regarding contempt should be reversed only if it is without evidentiary support or the trial judge has abused his discretion." *Floyd v. Floyd*, 365 S.C. 56, 71-72, 615 S.E. 2d 465 (Ct. App. 2005), citing Fagan v. Timmons, 224 S.C. 286, 78 S.E.2d 628 (1953); Tirado v. Tirado, 339 S.C. 649, 530 S.E.2d 128 (Ct. App. 2000); Stone v. Reddix-Smalls, 295 S.C. 514, 516, 369 S.E.2d 840, 840 (1988)(citing Means v. Means, 277 S.C. 428, 288 S.E.2d 811 (1982). Where any evidence in the record supports the Court of Appeals' decision or where there has been no abuse of discretion, amounting to an error of law, the standard of review and our case law indicate that affirmation of the court below is appropriate.

FACTS

David Cullen's case was docketed for trial on January 16, 2013, at 9:00am and was called for trial in Rock Hill Municipal Court on that day. (Verified Petition Alleging Contempt of Court, p.1, ¶2, L5, at Exhibit 1 to Return to Appeal; Return to Appeal, p.1, ¶1, L2). On the preceding Wednesday, January 9, 2013, Judge Lenzi conducted his customary docket call, which included a phone conference with Mr. Cullen's attorney, Mr. Wellborn, regarding the Cullen case. Over the phone's loudspeaker, "Mr. Wellborn spoke to the Judge, the Clerk, Solicitors Paula Brown, Anna Miller, and Kindle Johnson and

informed the Court that the Cullen case was a definite trial. The Solicitor, Anna Miller, concurred." (Verified Petition Alleging Contempt of Court, p.1, ¶3, Ls 1-3, at Exhibit 1 to Return to Appeal].

On the morning of trial, neither Appellant nor his client appeared for court. (Verified Petition Alleging Contempt of Court, p.1, ¶4 at #1.) The Court instructed Ms. Miller to contact Mr. Wellborn to find out why he was not in Court. (Id., p.1) Ms. Miller did as instructed. In the course of talking with Mr. Wellborn by phone, she learned that he was in Charlotte having his car serviced. Mr. Wellborn was advised that the court intended to strike his jury and proceed with the trial. (Affidavit of Anna Miller, p.1)

Once Appellant arrived and the trial began, Judge Lenzi addressed Mr. Wellborn's request to inform the jury why he and his client were late to court. Judge Lenzi specifically instructed Appellant to refrain from address those matters in any way in the jury's presence. After a warning from the court when he apologized to the jury for being late, Mr. Wellborn completed his opening. He then asked permission to check in the hallway for his client, who had not yet arrived. On his way out of the courtroom and while passing the jury to exit the courtroom, Mr. Wellborn remarked that he wanted to explain to

the jury why he and his client were late arriving. Judge Lenzi saw the remark as direct disobedience to his oral order.

Additionally, in a hallway near the courtroom, Judge Lenzi inquired why Mr. Wellborn was more than two hours late for court and reacted to Mr. Wellborn's response, "[G]iven the way the Rock Hill Municipal Court is run, I am never quite sure when I am suppose[d] to be here." The trial judge found contemptuous the direct disobedience to his order, along with other behaviors and comments during the trial and in the hallway, all of which were specifically addressed in Judge Lenzi's Verified Petition Alleging Contempt of Court.

The contempt hearing, an opportunity for Mr. Wellborn to show cause why he should not be held in contempt, was continued to allow Mr. Wellborn time to engage counsel and for counsel to prepare. The hearing was held on March 25, 2013, and resulted in a largely favorable result for Mr. Wellborn. Judge Lenzi held appellant in contempt on only two of the five grounds for contempt listed in his Verified Petition Alleging Contempt of Court. (¶4-5, Order, Record on Appeal, p.15). Appeals followed.

ARGUMENT

I. GIVEN THE SUFFICIENT RECORD BEFORE IT, THE COURT OF APPEALS CORRECTLY AFFIRMED THE CIRCUIT COURT AFFIRMATION AND TRIAL COURT FINDING OF CONTEMPT.

The trial court found Appellant's direct disobedience to the court's instruction to say nothing about his or his client's tardiness in front of the jury was "open and direct contempt to the court;" and, the Court of Common Pleas affirmed the lower court. (Circuit Court Order, p.5, L11 - p.6). The circuit court specifically referred to the record, the verified petition and order from the lower court (much like the circuit court must look to the judge's Return as the record in appeals from magistrate's and municipal courts, since summary courts are not courts of record in this State and, as such, there will rarely be a transcript of the proceedings from which a contempt allegation arises) before affirming the lower court on several grounds.

Likewise, the Court of Appeals reviewed the Record on Appeal, which included a transcript of the circuit court proceedings, the circuit court order, and the verified petition and order of the trial court. The Court of Appeals cited *Curlee v. Howle*, 277 S.C. 377, 382, 287 S.E.2d 915, 918, and noted, "Contempt results from the willful disobedience of an order of the court, and before a person may be held in contempt, the record must be clear and specific as to the acts or conduct upon

which such finding is based." Id, p. 382. Specifically, "The circuit court properly found the municipal judge did not err in holding Wellborn in contempt for conduct not recorded in a trial transcript because the municipal judge's contempt order clearly and specifically stated how Wellborn's conduct violated a court order." In other words, applying the standard of review, the Court of Appeals found that the circuit court's decision was without legal error, as there was sufficient evidentiary support in the record before the Circuit Court, which included the Verified Petition and Order, for the circuit court's decision; and, the decision was not an abuse of discretion. The Court of Appeals' decision was proper and should be affirmed.

II. THE CIRCUIT COURT DID NOT ERR BY AFFIRMING THE TRIAL COURT JUDGE'S DISCRETIONARY DECISION TO PRESIDE OVER THE CONTEMPT MATTER OCCURING IN HIS COURT, RATHER THAN RECUSING HIMSELF.

Having unsuccessfully appealed his contempt order in the Circuit Court on the ground that the trial judge erred in failing to recuse himself, Appellant sought redress in the Court of Appeals. The crux of Appellant's argument was that Canon 3E(1)(d)(iv), Canons of Judicial Conduct, requires a Judge who is "likely to be a material witness in the proceeding" to recuse himself." Per the discussion on the record at the contempt hearing, Judge Lenzi contemplated the fact that he was to preside over a Rule to show cause hearing and considered Canon

3E(1)(d)(iv) in light of *State v. Kennerly*, 337 S.C. 617, 524 S.E.2d 837 (S.C. 1999) and *US v. Peoples*, 698 F.3d 185. Judge Lenzi did not recuse himself. (Record on Appeal, pp. 72-80)

Judge Lenzi did not agree that his recusal in a rule to show cause matter for conduct both occurring in his courtroom and observed by him was mandated by the canon any more than Judge Conrad in the *Peoples* case would have been required to do when presiding over a Rule to show cause hearing in his court for behavior that he observed. The same applies to Judge Currie in that case, although she exercised her discretion and decided to recuse herself. In *Peoples* Judge Currie tried the defendant on several charges and warned him on several occasions about being late for her court. She eventually told Peoples that he would need to show cause why he should not be held in contempt. Mr. Peoples, outside Judge Currie's physical presence uttered some comments, which were heard by a clerk and recorded by a court reporter and which led to additional contempt charges. Judge Currie decided to recuse herself and a judge from another court, Judge Conrad, handled the Rule to show cause hearing. Mr. Peoples arrived late for Judge Conrad's court and found himself facing yet another contempt charge. Unlike Judge Currie, Judge Conrad did not recuse himself from the proceedings. Although he was reversed on the contempt proceeding in the case that he initiated, it is critical to note

for purposes of this analysis that the court's reasoning had nothing to do with Judge Conrad's failure to recuse himself from the proceedings, nor did the Court say that Judge Currie would have been remiss had she decided to preside over the Rule to show cause hearing herself.

That notable silence on the recusal issue in the *Peoples* case is very important to this Wellborn analysis. The *Peoples* recusal issues arose in similar circumstances to those that we have here, a Rule to show cause hearing to give the contemnor an opportunity to show cause why he should not be held in contempt by the judge before whom the contemptuous conduct arose. Judge Currie decided not to conduct the rule to show cause hearing herself, while Judge Conrad decided to do so. The reviewing court took issue with neither determination, because the determination was within the judge's discretion to make.

Likewise, the two lower reviewing courts in this matter, agreed that the determination was the trial judge's to make. Both the Circuit Court and the Court of Appeals had the benefit of reading the transcript of the Municipal Court Rule to show cause hearing, specifically the exchange between Judge Lenzi and Mr. Boyd, counsel for Petitioner, regarding the nature of the hearing. (Record, pp. 72-80) Judges are not called as witnesses in Rule to show cause hearings. Similar to the reviewing court in Peoples, neither the Court of Common Pleas nor the Court of

Appeals gave the recusal matter more than cursory attention, because it did not warrant more detailed discussion. Judge Lenzi was not a material witness in a Rule to show cause matter for behavior that he witnessed, and both courts affirmed the decision below as within the sound discretion of the judge before whom the contemptuous conduct occurred.

Judge Lenzi's discretionary determination was initially reviewed by the circuit court. Affirming the trial court's finding, Judge Hayes noted the following:

> The Trial Judge denied the Appellant's motion for recusal without elaboration. Implicit in his ruling is the judge's determination that he was not likely to be a material witness.
>
> As set forth below, a Trial Judge has the inherent power to hold one in contempt. This power resides with the Trial Judge, that is, the judge in whose presence a contemptuous act occurred or whose direct order has been disobeyed. Here, the Trial Judge, Judge Lenzi, was not obliged to recuse himself. (Circuit Court Order, p. 2)

Judge Hayes further stated:

> Neither a summary court judge nor any other members of the unified judicial system are to be prohibited from punishing conduct as contemptuous when it violates a direct order of the Court. A court without the authority to effectuate its orders by way of a finding of contempt is a neutered court. Requiring recusal in these instances would, as stated, neuter a court's ability to conduct the business of his/her courtroom. (Circuit Court Order, p.5, L18-L22)

The circuit court was, in turn, reviewed and was affirmed on this issue by the Court of Appeals.

Essentially, to say that Canon 3E(1)(d)(iv) dictates that a trial judge who finds a person in contempt in his court must recuse himself in that person's contempt rule to show cause hearing is tantamount to saying that a trial judge can never preside over a contempt hearing that he or she initiates in his or her court or that a trial judge must recuse herself or himself in favor another judge before any finding of contempt can be made in his or her courtroom for behavior that the trial judge witnesses. That would be ludicrous and is not dictated by our law. The Judicial Canons did not require that result in *Peoples;* and, they do not require that result here. (Respondent's Court of Appeals Brief, p. 8).

Noting the standard of review, Judge Hayes quoted *Floyd v. Floyd*, 365 S.C. 56, 615 S.E. 2d 465 (Ct. App. 2005): "a decision on contempt rests with the Trial Judge and is not subject to reversal unless the decision lacks evidentiary support or the Trial Judge abused his or her discretion." (Circuit Court Order, p. 2, L10-L12). The Circuit Court found neither basis for reversal. Likewise, the Court of Appeals' Order reflects no basis under this standard for reversal. Accordingly, both courts properly affirmed the lower court's

finding. The same standard applies in to this matter in this Court. The Court of Appeals' Order should be affirmed on this ground.

III. THE COURT OF APPEALS ERRED NEITHER IN AFFIRMING THE CIRCUIT COURT'S AFFIRMATION OF THE LOWER COURT'S FINDING OF CONTEMPT AS AN EXERCISE OF THE TRIAL JUDGE'S INHERENT AUTHORITY NOR IN DECLINING TO ADDRESS WHETHER THE CONTEMPTUOUS CONDUCT CAME WITHIN THE PURVIEW OF SECTIONS 22-3-950 AND 40-5-510.

The Court of Appeals affirmed the circuit court affirmation and trial court contempt determination. The trial judge determined that Mr. Wellborn was in contempt of court for his behavior in the courtroom. Mr. Wellborn appealed, citing §§22-3-950 and 40-5-510. The circuit court reasoned that the court had inherent authority to find Mr. Wellborn in contempt for his behavior in the courtroom. The Court of Appeals affirmed the decision and declined to address whether the behavior and determination were appropriate under §22-3-950 and 40-5-510.

A. Courts in South Carolina Have Inherent Powers of Contempt

As far back as 1888 the United State Supreme Court has recognized that courts have the inherent power of contempt. "[T]he courts of the United States, from the very nature of their institution, possess the power to fine for contempt, imprison for contumacy, enforce the observance of order, it was said that courts of justice are universally acknowledged to be

vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates." In re Terry, 128 U.S. 289, 302-303 (1888).

This Court has recognized and approved the language of In re Terry, when this Court held that "[t]here can be no doubt about the power of the courts of general jurisdiction in this State to punish for contempt. This power is not derived from any statute but from the common law which from its inception recognized this implied and necessary power, without which contumacious conduct could well destroy the authority of any Court." State v. Goff, 228 S.C. 17, 22-23, 88 S.E.2d 788, 790-791 (1955).

Mr. Wellborn was ordered by the trial court to say nothing about his or his client's tardiness in front of the jury. Mr. Wellborn chose to directly disobey the order in front of the trial court and jury. This type of direct violation of a court order in the presence of the court is inherently within the contempt powers of the court to protect against, otherwise "the administration of the law would be in continual danger of being thwarted by the lawless." State v. Goff, 88 S.E.2d 788, 791, 228 S.C. 17, 23, (1955).

B. §§40-5-510 and 22-3-950 apply in the context of this case

Additionally, Mr. Wellborn appeals the Court of Appeals' affirmation of the circuit court and trial court under §§40-5-510 and 22-3-950. Petitioner reasons that, when he addressed the issue of his and his client's tardiness in front of the jury, despite the court's admonition and warning to refrain from doing so, that address did not amount to an assault to the magistrate or constitute an undue disturbance to the proceedings under §22-3-950. That section states the following:

> Every magistrate shall have power to enforce the observance of decorum in his court while holding the same and for that purpose he may punish for contempt any person who, in the presence of the court, shall offer an insult to the magistrate or a juror or who is wilfully guilty of an undue disturbance of the proceedings before the magistrate while sitting officially. A magistrate shall have the power to punish for contempt of court by imposition of sentences up to the limits imposed on magistrates' courts in *Section 22-3-550.* §22-3-950, South Carolina Code of Laws, 1976, as amended.

It is an inherent under the facts of this case that direct disobedience of an order from the trial court in the presence of the trial court and the jury is an "insult" to the authority of trial court. Mr. Wellborn's actions and the trial court's subsequent response to handle the matter created a disturbance to the orderly nature of the trial. However, Appellant offers a tortured reading of Section 22-3-950 that essentially requires a fight inside the courtroom or a disturbance to the proceedings amounting to the functional equivalent to a fight in order to be in contempt of court.

Petitioner further suggests that the court should have considered his actions in light of §40-5-510, which reads as follows:

> Attorneys, solicitors and counselors may be removed or suspended and also, in aggravated cases, imprisoned, not exceeding twenty-four hours, by the several courts in which they have been admitted to practice, if, in the presence of such court, they are guilty of any disorderly conduct causing an interruption of business or amounting to an open and direct contempt to the court, its authority or person. §40-5-510, South Carolina Code of Laws, 1976, as amended.

However, this language is consistent with that in *Kennerly* and *Peoples*. Additionally, *State v. King*, 306 S.C. 335, 412 S.E.2d 375 (SC 1991) indicates that "[c]onduct which tends to bring authority and the administration of the law into disrespect constitutes contemptuous behavior." *Id.*, 338. Judge Lenzi expressed it on the record at the contempt hearing as follows:

> You know, my experience is criminal defense lawyers are always playing it close to the edge. They're going to push the envelope every time. But what I told him was not to make any comment in the jury's presence concerning that issue. I have to think that there was at least a potential tactical advantage to asking for permission to explain that, with some jurors being perhaps interested in such an answer and the big, mean judge saying, no, you can't do that. Mr. Wellborn doesn't follow my very specific simple, direct order. And I'm going to find that conduct is contemptuous. (In re Wellborn; 46:2-13)

Without question, attorneys are to vigorously defend and advocate for their clients, as in *State v. Harper*, 297 S.C. 257, 376 S.E.2d 272 (SC 1989) where the attorney's contempt conviction was reversed by the South Carolina Supreme Court for

standing to ask the court's permission to address the court as the court had ordered him to do before raising any objections or concerns to the seating of the jury. However, the behavior in this case was, in Judge Lenzi's observation, totally different.

Judge Lenzi specifically told Mr. Wellborn to make no comments about his and his client's tardiness to the jury. (In re Wellborn, 45:7-16) Mr. Wellborn completed his opening statement with only one additional warning from the court after he (Mr. Wellborn) apologized to the jury for being late. (In re Wellborn, 30: 24-25 and 31:1-15) He then requested and received permission from the court to go to the adjoining hallway to check for his client. On the way out of the room and while passing the jury on the way, Mr. Wellborn remarked that he wanted to explain to the jury why he and his client had been late in arriving. (In re Wellborn, 45:17-25 and 46:1; Order—Contempt of Court, 2)

"Courts repeatedly have found that offensive words directed at the court may form the basis for a contempt charge." US v. Peoples, 698 F.3d 185 (4th Circ, 2012) Although the contemptuous statements in *Peoples* were not directly heard by Judge Currie, being uttered while she was outside the courtroom, the Court found that "Peoples' outburst was both threatening and directed at the court, and thereby constituted misbehavior…" Peoples, pg 8. Because Peoples' outburst "caused Judge Currie and court

personnel to spend time participating in the subsequent investigation of the outburst…" and "required court personnel to cease their regular duties and tend to the outburst," it was deemed to obstruct the administration of justice or to be disorderly. Peoples, p.9. It was not great, but it need not be. Peoples, p.9.

Here, Court personnel, including Judge Lenzi have expended quite a bit of time and effort in addressing Mr. Wellborn's behavior, thereby obstructing the orderly administration of justice, as described in *Peoples*. Further, Judge Lenzi found Mr. Wellborn in contempt for "conduct which tends to bring authority and the administration of the law into disrespect", such conduct constituting contemptuous behavior. He did so because of Mr. Wellborn's decision to make comments that cast the court in a suspect light in front of the jury and, in doing so, failing to follow Judge Lenzi's "very specific simple, direct order." (Respondent's Circuit Court Brief, p.). In other words, even if considered in light of §§40-5-510 and 22-3-950, Mr. Wellborn's actions would have been considered contemptuous of Rock Hill Municipal Court and Judge Lenzi.

Mr. Wellborn's appeal was denied on this §§40-5-510 and 22-3-950 ground. Circuit Court found that Judge Lenzi had the inherent authority to hold Mr. Wellborn in contempt for behavior that he observed. In affirming the trial court, Judge Hayes did

not abuse his discretion; and, his decision was not without evidentiary support. The Court of Appeals affirmed the circuit court regarding the court's inherent authority to address contempt issues, but the Court declined to address the §§40-5-510 and 22-3-950 issue. Both decisions were firmly supported by the record. The Court of Appeals' Order should, therefore, be affirmed on this ground.

CONCLUSION

The lower courts correctly affirmed the findings in this matter. The Circuit Court did not err in affirming the trial court's finding of contempt. The Court of Appeals, like the circuit court before it, did not err in affirming the trial court judge's discretionary decision to preside over the contempt matter occurring in his court, rather than recusing himself. The Court of Appeals, like the circuit court before it, did not err in affirming the trial court judge's finding of contempt, whether Sections 22-3-950 and 40-5-510 apply in this case or not. The Court of Appeals' decision was without legal error, was without abuse of discretion, and was supported by the evidence in the record. The Court of Appeals' decision should,

therefore, be affirmed.

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April 7, 2017
Rock Hill, SC

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CERTIFICATE OF SERVICE

I, Paula Knox Brown, hereby certify that I served the *Brief of Respondent* on Counsel for Appellant, James Boyd, Esquire, by depositing a copy of the document in the United States mail, with sufficient postage affixed, on the 2nd day of October, 2014. The envelope was addressed as follows:

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