

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e) (1).

Nos. 1-09-1296 & 1-09-1600 consolidated

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

YOLANDA Y. MALCOLM,)	Appeal from the
)	Circuit Court of
Plaintiff,)	Cook County.
)	
v.)	
)	
THOMAS R. CRUMP,)	No. 02 D 20298
)	
Defendant-Appellee)	
)	
(Nancy C. Murphy,)	
)	The Honorable
Contemnor-Appellant).)	Mark Joseph Lopez,
)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
JUSTICES Hoffman and Rochford concurred in the judgment.

O R D E R

HELD: The evidence was insufficient to support the trial court's finding of direct criminal contempt beyond a reasonable doubt where the contemnor merely failed to follow the court's directive to include specified language and only that language in a draft order. The trial court's finding of direct criminal contempt was reversed.

Contemnor, attorney Nancy Murphy, appeals from an order finding her in direct criminal contempt of the court. Murphy

1-09-1296, 1-09-1600 cons.

represented Yolanda Malcolm in the underlying divorce proceedings. On appeal, Murphy contends the trial court did not have a sufficient basis to find her in contempt and that the trial court violated her due process rights in so finding. Based on the following, we reverse.

We note that Thomas Crump, the respondent in the underlying divorce proceedings, has not filed an appellate brief. Because the error claimed on appeal is relatively straight forward, we may consider Murphy's contentions despite the lack of a reply brief. *First Capital Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133, 345 N.E.2d 493 (1976) (a reviewing court may decide the merits of an appeal where the record is simple and the claimed error is such that a decision can be made without the aid of an appellee's brief).

FACTS

Petitioner, Malcolm, and respondent, Crump, were married on February 22, 1991. On December 31, 2002, petitioner filed a petition for dissolution of the parties' marriage. On October 8, 2003, the trial court entered a judgment for the dissolution of the parties' marriage based on the parties' marriage settlement agreement and joint parenting agreement. Pursuant to the marriage settlement agreement, respondent was ordered to pay \$295.26 biweekly as child support. The parties agreed to split

1-09-1296, 1-09-1600 cons.

all child care and miscellaneous child-related expenses.

On May 12, 2004, petitioner filed a *pro se* motion for increased child support. The *pro se* motion claimed that respondent had moved out of the state without leaving forwarding information, and petitioner was left as the sole provider of the children's education-related expenses. The record does not contain evidence that the motion was heard.

On August 20, 2004, petitioner filed a *pro se* motion for reimbursement of medical expenses. The motion was granted and respondent was ordered to pay \$710.33.

On October 5, 2004, petitioner filed a *pro se* motion for sole custody because respondent had abandoned his children when he moved out of state and failed to provide medical and life insurance. Petitioner requested "reimbursement for all expenses per divorce decree." The Illinois Department of Public Aid filed a motion to intervene on December 14, 2004, as to the issues of child support and health insurance. The motion noted that petitioner had been receiving services under the Child Support Enforcement Program. On January 26, 2005, the trial court entered an order advising respondent that a *prima facie* case of indirect civil contempt had been established based on his failure to pay \$295.26 biweekly in child support pursuant to the dissolution judgment. The order noted that respondent was

1-09-1296, 1-09-1600 cons.

allegedly in arrears \$8,561.54 as of November 22, 2004. On March 16, 2005, respondent filed a response claiming that he complied with his support obligations except for a "few missed child support payments" and denying that he was in arrears \$8,561.54. The parties entered an agreed order whereby respondent tendered \$2,120.00 in exchange for petitioner dismissing her petition for rule to show cause. The parties modified the dissolution judgment allowing for a maximum contribution by respondent of \$1000.00 per child per year in extra curricular activities.

On May 4, 2007, respondent filed a petition for partial abatement of child support during a period of unemployment. The petition was granted and respondent was ordered to pay 28% of his unemployment compensation toward his child support obligations.

On May 22, 2008, petitioner filed a *pro se* petition for a rule to show cause against respondent for failure to comply with the dissolution order. In particular, petitioner requested that respondent be found in indirect civil contempt for failing to contribute \$22,086.52 in child support and one half of the children's extra-curricular and medical expenses, in addition to failing to provide proof of life insurance on behalf of the children. After respondent's failure to appear, the trial court entered an order on July 2, 2008, ordering respondent to pay \$420 biweekly in child support or 28% of his biweekly income,

1-09-1296, 1-09-1600 cons.

whichever was greater, based on his employment at the time; finding respondent was responsible for \$11,725.30 in arrearage for medical expenses and extracurricular activities; and finding respondent in contempt for failing to provide documentation of life insurance for the parties' children.

On July 3, 2008, respondent filed a motion to vacate the court's July 2, 2008, order. On August 15, 2008, respondent filed a motion to supplement his motion to vacate the July 2, 2008, order, attaching a summary of payments he had made toward his child support and extracurricular obligations between November 2003 and August 6, 2008. On August 22, 2008, respondent filed a petition to reduce his child support obligations as a result of reduced income. Respondent attached an affidavit to his petition alleging that his weekly income had been reduced to \$520. On September 2, 2008, the trial court granted respondent's motion to vacate the July 2, 2008, order. Thereafter, petitioner filed a motion to reconsider the September 2, 2008, order and a motion to strike and dismiss respondent's petition to reduce child support.

On November 5, 2008, the trial court was scheduled to hear arguments on petitioner's petition for rule to show cause, respondent's petition to reduce support, and petitioner's motion to reconsider the court's September 2, 2008, order. An order

1-09-1296, 1-09-1600 cons.

memorializing the trial court's ruling from November 5, 2008, was not completed on that date.

On December 22, 2008, the trial court entered an order advising the parties' attorneys to attend a scheduled court date on January 21, 2009, instructing that "any issues properly pled and unresolved regarding this matter and proposed order left in November 2008 shall be heard or argued."

On January 21, 2009, the trial court entered an order drafted by Murphy. The order provided:

"1. The Motion to Reconsider the September 2, 2008 order/vacate it is granted in part and denied in part. (This Court finds that Mr. Crump had notice of the July 2, 2008 [c]ourt date) The July 2, 2008 Order is not vacated (and is reinstated) *nun pro tunc* [sic] but is modified as follows:

Thomas Crump has an opportunity to show any payments he has made toward the arrearage.

(Thomas has not made any support payments since on or about September 11, 2008). Child support ordered July 2, 2008 remains in full force and effect.

2. Child support was \$420 biweekly from July 2, 2008 to August 15, 2008; child support retroactive to

1-09-1296, 1-09-1600 cons.

August 15, 2008 is \$295.26 biweekly.

3. This matter is continued to December 17, 2008 at 10 a.m. The parties are excused to see what counsel for Mr. Crump has subpoenaed. ***.

4. The current arrearage from 7/2/08 to 8/15/08 is \$366 owed to Ms. Malcolm by Mr. Crump to be added to final arrearage.

5. No further child support has been received since 9/12/08.

6. The arrearages *** and accounting is currently \$21,309.50. The burden is on Thomas Crump to show payments to reflect a lesser amount (accounting as of 9/11/08).

7. The parties may attempt to work out any settlements prior to the next court date.

8. This order is entered *nunc pro tunc* to November 5, 2008."

Paragraph 8 in the order was drafted and appears to be initialed by the trial judge.

On February 26, 2009, petitioner filed an amended petition for rule to show cause and for a finding of indirect civil contempt against respondent.

On March 9, 2009, an order appears granting a continuance on

1-09-1296, 1-09-1600 cons.

respondent's emergency petition to modify the dissolution agreement and joint parenting agreement. The emergency petition does not appear in the record. On March 10, 2009, the trial court entered an agreed order granting temporary residential possession of the children to respondent. The parties agreed that the minor children would temporarily reside in Georgia with respondent.

On April 7, 2009, respondent filed a motion to strike and dismiss petitioner's amended petition for rule to show cause and for a finding of indirect civil contempt pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2008)). Respondent also filed a motion to dismiss certain parts of petitioner's amended petition for rule to show cause and for a finding of indirect civil contempt pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2008)).

On April 17, 2009, petitioner filed a second amended petition for rule to show cause and for a finding of indirect civil contempt. Respondent filed a motion to dismiss the second amended petition pursuant to section 2-619 of the Code.

On April 22, 2009, the trial court entered an order finding Murphy in "direct civil contempt of the court for ignoring this court [sic] direct instruction what to include in a draft order submitted in the instant proceeding." The order instructed the

1-09-1296, 1-09-1600 cons.

sheriff to take Murphy into custody immediately to begin her "purge," which included one night in custody of the Cook County Sheriff. According to Murphy, she was handcuffed and suffered a panic attack while awaiting transfer to the Daley Center jail. According to Murphy, she was never provided an explanation, warning, or reasoning for her detention. Murphy later was transferred to the Cook County lock-up at 26th and California where she was strip searched, photographed, and fingerprinted before spending the night incarcerated.

On May 20, 2009, the trial court entered three orders: (1) an amended order of contempt; (2) an order detailing the April 22, 2009, proceedings; and (3) a corrected order of the November 5, 2008, hearing.

In the amended contempt order, the trial court corrected its original contempt finding of April 22, 2009, to reflect that Murphy was found in direct criminal contempt instead of direct civil contempt. According to the court's amended direct criminal contempt order, the court instructed Murphy and counsel for Crump, Patricia Bender, to prepare a limited draft order stating only that the hearing on petitioner's petition for rule to show cause was entered and continued to July 9, 2009 at 1:30 p.m. in room 3005. Because the court had "no confidence in Ms. Murphy's ability to prepare a draft order accurately reflecting the

1-09-1296, 1-09-1600 cons.

Court's ruling without embellishment or addition of other extraneous language," the court advised the attorneys that the court would prepare its own draft order describing the proceedings that occurred on April 22, 2009. According to the amended direct criminal contempt order of the court, both attorneys were given "notice that if the order was not drafted as the Court instructed, it would sanction the offending attorney." The judge then left the bench and retired to his chambers.

The court clerk presented the court with each attorney's proposed order because the attorneys failed to agree on the language of the order. After reviewing both of the proposed orders, the trial court learned that Murphy presented a "four-paragraph order *** including language beyond only the continuance date that the Court had specifically limited her to provide." Murphy's proposed order stated:

1. The Motion to Dismiss brought by Thomas Crump is entered and continued generally.

2. This matter [petitioner's second amended petition for rule to show cause and for a finding of indirect contempt and respondent's motion to dismiss] is set for further hearing on arrearages and other pending matters on July 9, 2009 at 1:30 p.m.

3. All other orders remain in full force and

1-09-1296, 1-09-1600 cons.

effect.

4. Counsel for both agreed to stipulate to hear alleged arrearages and Count 1 of Malcolm's Second Amended Rule together."

According to the court's amended direct criminal contempt order, the court then "gave Ms. Murphy an opportunity to speak in her defense." Murphy acknowledged the court's direct order; however, she expressed that she disagreed with the order drafted by Bender and wished to include the day's proceedings in the order. The trial court entered Bender's order, which complied with the court's order, and found Murphy in contempt for ignoring the court's "direct instruction what to include in the draft order submitted in the instant proceeding."

In the order detailing the April 22, 2009, proceedings, the trial court stated that, on that date, the court intended to hold an evidentiary hearing on petitioner's rule to show cause. After presenting her argument, Murphy objected to respondent's responsive argument in which respondent was to present evidence of proof of payments for the alleged arrearage claims. Murphy argued that the issue had been decided by the court's order entered January 21, 2009, memorializing the proceedings held on November 5, 2008. In reviewing all of the draft orders beginning on July 2, 2008, the court determined that the January 21, 2009,

1-09-1296, 1-09-1600 cons.

order drafted by Murphy "wholly misrepresent[ed] the Court's findings at the conclusion of the November 5, 2008 hearing." The court found that Murphy's order was replete with findings of fact not made by the court on November 5, 2008. As a result, the January 21, 2009, order could not support Murphy's argument that the issue of arrearage owed by respondent for medical and extracurricular expenses had been determined. The court vacated Murphy's January 21, 2009, order and held that during the upcoming July 9, 2009, rehearing on petitioner's petition for rule to show cause respondent would have an opportunity to present any evidence showing proof of payments of medical and extracurricular expenses. All other outstanding matters were given future court dates.

In the corrected order of the November 5, 2008, hearing, the trial court provided that petitioner's motion to reconsider the September 2, 2008, order vacating the July 2, 2008, order was granted in part and denied in part. The court ruled as follows:

"1. The Court finds that [respondent] received notice of the July 2, 2008 proceedings.

2. The Court finds that [respondent's] child support obligation which was set at \$420 biweekly in the July 2, 2008 order shall stand for the period from July 2, 2008 to August 15, 2008.

1-09-1296, 1-09-1600 cons.

3. The record shows [respondent] filed a Motion to Modify his child support obligation on August 15, 2008.

4. The Court finds that [respondent's] child support obligation prior to July 2, 2008 was \$295.26 biweekly. The Court reinstates the support order of \$295.26 biweekly effective August 15, 2008 without prejudice and subject to [respondent's] full evidentiary hearing on his Motion to Modify filed August 15, 2008."

On May 21, 2009, Murphy filed a notice of appeal. The notice lists the judgment being appealed from as the trial court's April 22, 2009, order finding her in direct civil contempt.

DECISION

Contemnor contends the evidence was insufficient to support a finding of contempt. We recognize the trial court initially found Murphy in direct civil contempt; however, the court corrected its ruling to reflect that Murphy was actually found in direct criminal contempt. We, therefore, focus our analysis on whether there was sufficient evidence to support a finding of direct criminal contempt.

The supreme court has succinctly provided the relevant law on this subject. In *People v. Simac*, 161 Ill. 2d 297, 641 N.E.2d

1-09-1296, 1-09-1600 cons.

416 (1994), the supreme court stated:

"It is well established that all courts have the inherent power to punish contempt; such power is essential to the maintenance of their authority and the administration of judicial powers. [Citation.] This court has defined criminal contempt of court 'as conduct which is calculated to embarrass, hinder or obstruct a court in its administration of justice or derogate from its authority or dignity, thereby bringing the administration of law into disrepute.'" [Citations.] A finding of criminal contempt is punitive in nature and is intended to vindicate the dignity of the authority of the court. [Citation.] However, the exercise of such power is 'a delicate one, and care is needed to avoid arbitrary or oppressive conclusions.' [Citation.]

Direct criminal contempt is contemptuous conduct occurring 'in the very presence of the judge, making all of the elements of the offense matters within his own personal knowledge.' [Citation.] Direct contempt is 'strictly restricted to acts and facts seen and known by the court, and no matter resting upon opinions, conclusions, presumptions or inferences

1-09-1296, 1-09-1600 cons.

should be considered.' [Citation.] Direct criminal contempt may be found and punished summarily because all elements are before the court and, therefore, come within its own immediate knowledge. [Citations.] On appeal, the standard of review for direct criminal contempt is whether there is sufficient evidence to support the finding of contempt and whether the judge considered facts outside of the judge's personal knowledge. [Citation.]" *Simac*, 161 Ill. 2d at 306.

A court must find that the contemnor's conduct was willful. *Id.* at 307. The contemnor's state of mind need not be proven; rather, the act or conduct at issue may demonstrate the contemnor's intent. *Id.* at 307.

Contemnor repeatedly argues that she never engaged in disparaging acts directed toward the court, made loud comments, or acted in a boisterous or unprofessional manner. According to Murphy, on April 22, 2009, the court entertained arguments on respondent's motion to dismiss. The motion was denied and the cause was continued to the afternoon for a hearing on the petition for rule to show cause. After the morning session, Murphy completed a draft order pursuant to the court's instruction reflecting that, although the court denied the motion to dismiss, the motion was entered and continued. Later that

1-09-1296, 1-09-1600 cons.

afternoon, Murphy added the outcome of the afternoon proceedings to the draft order and included the judge's requested language indicating a continuance. Murphy concludes that she was held in contempt for also including the language "all other orders remain in full force and effect."

The original civil contempt order and the amended criminal contempt order reflect that the trial court found Murphy in contempt for disobeying the court's direct order. According to the court's amended criminal contempt order, drafted on May 20, 2009, to reflect the April 22, 2009, finding, the trial court gave the direct order because the January 21, 2009, order of the November 5, 2008, proceedings drafted by Murphy and entered by the court contained various factual falsities and inaccurate conclusions. According to the trial court's recitation of the events leading to the contempt finding, the judge warned Murphy that failure to follow the court's direct order could result in sanctions. Upon determining that Murphy failed to follow his direct order, the judge advised Murphy that she was in direct contempt of the court. According to the court's order detailing the April 22, 2009, proceedings, the judge provided Murphy with an opportunity to speak in her defense, but she failed to provide the trial court with "any rational or logical explanation why she disobeyed [the court's] direct order." Murphy denies that she

1-09-1296, 1-09-1600 cons.

was warned of possible sanctions, advised of the basis of the contempt finding, or provided with an opportunity to speak after the contempt ruling. Murphy argues that she included the day's proceedings "as she always does."

" 'A vigorous, independent bar is indispensable to our system of justice. [Citation.] Therefore, if a contemnor can show that the conduct was a good-faith attempt to represent his or her client without hindering the court's function or dignity, a finding of direct contempt will be reversed upon review.

[Citation.]' " *Petrakh v. Morano*, 385 Ill. App. 3d 855, 858, 897 N.E.2d 316 (2008). Murphy should have complied with the court's order and merely provided the continuance date in the draft order; however, we cannot say Murphy was not simply acting in good-faith representation of her client when she included the April 22, 2009, proceedings.

The court had demonstrated a habit of failing to draft timely orders accurately reflecting the content of the hearings. In fact, it was not until April 22, 2009, that the trial court reviewed the January 21, 2009, order drafted by Murphy and entered by the court which was to reflect the November 5, 2008, hearing. A month later, in an order entered on May 20, 2009, the court said it learned on April 22, 2009, that the January 21, 2009, order did not accurately reflect the November 5, 2008,

1-09-1296, 1-09-1600 cons.

hearing; however, the January 21, 2009, order contains an additional paragraph initialed by the trial judge that the order was "entered *nunc pro tunc* to November 5, 2008." Accordingly, up until May 20, 2009, all parties could rely on the January 21, 2009, order as *entered by the court*. The facts do not show beyond a reasonable doubt that Murphy was not acting as a zealous advocate in ensuring that the April 22, 2009, order accurately reflected what occurred that day while it was fresh in the minds of those in attendance. Murphy's draft order did not hinder the court's function or dignity nor did the court's order finding Murphy in contempt reflect an intent on the part of Murphy to disrespect or obstruct the court in its proceedings. We further note that a reviewing court may consider "any provocation or error by the trial court which may have triggered" the contemnor's conduct. *People v. Coulter*, 228 Ill. App. 3d 1014, 1021, 594 N.E.2d 1157 (1992). We are not saying that provocation is a defense to contempt; however, the circumstances of the underlying proceedings may be weighed in determining whether the offense of contempt has been proved beyond a reasonable doubt. *Id.* at 1021.

Moreover, the trial court's May 20, 2009, order amending the April 22, 2009, contempt order does not state that Murphy's draft order was inaccurate. The amended contempt order merely provides

1-09-1296, 1-09-1600 cons.

that Murphy's draft order contained extraneous language. The "extraneous" language that "all other orders remain in full force and effect" (emphasis added) modifies the language of the first paragraph noting that respondent's motion to dismiss was entered and continued. This "extraneous" language did not wholly misrepresent the court's order, it merely referenced prior orders entered by the court upon which Murphy should have been able to rely. The "extraneous" language that the parties agreed to a stipulation was not deemed inaccurate and therefore could hardly be a misrepresentation. Overall, even though Murphy's draft order exceeded the trial court's directive to include only the continuance date, her behavior was not contemptuous.

We find support for our conclusion in *Petrakh* and *Coulter*. In *Petrakh*, the contemnor was sanctioned after challenging the trial court's denial of her motion to strike a nonjury trial date. The appellate court held the trial court did not have a sufficient basis to enter its finding of direct criminal contempt where the contemnor was correct inasmuch as the motion to strike was proper (and was subsequently granted) and the facts revealed the contemnor did not demonstrate an intent to embarrass the court, interfere with its proceedings, or the administration of justice where the contemnor was simply making good-faith efforts to represent her client. *Id.* at 859-60. In the concurrence,

1-09-1296, 1-09-1600 cons.

Justice Cahill wrote:

“Judges have an enormous range of remedies for dealing with impertinent lawyers, from subtle to stern admonition. Contempt is always a last resort reserved for the most egregious behavior. *Incarceration of a lawyer as a sanction is almost always an abuse of the contempt power ***.*” (Emphasis added.) *Id.* at 861 (Cahill, J., specially concurring).

In *Coulter*, the appellate court reversed the lower court’s contempt finding where the record failed to provide a basis for meaningful appellate review. *Id.* at 1020. Even assuming the lower court’s contempt order and record were sufficiently specific, the appellate court concluded that a direct criminal contempt finding was not sufficiently supported despite the contemnor having been warned *four times* that his conduct would result in a finding of contempt. *Id.* at 1020. The appellate court relied on the fact that the trial court erred in ruling on a motion to bar expert testimony for an insanity defense when the contemnor refused to disclose the content of the expert testimony after repeated exchanges between the court and the contemnor served as a predicate or provocation for the contemnor’s conduct. *Id.* at 1021-23.

Based on the foregoing, we find that the evidence was insufficient to support the trial court’s finding of direct

1-09-1296, 1-09-1600 cons.

criminal contempt against Murphy. Because of our decision, we need not address Murphy's due process argument.

CONCLUSION

We conclude the evidence did not support the trial court's finding of direct criminal contempt against contemnor beyond a reasonable doubt. We, therefore, reverse the direct criminal contempt finding.

Reversed.