2012 IL App (1st) 113456-U

THIRD DIVISION
September 26, 2012

No. 1-11-3456

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

VILLAGE OF ARLINGTON HEIGHTS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 11 ACC 19901
	)	
WAYNE ADAMS,	)	Honorable
	)	Alfred L. Levinson,
Defendant-Appellant.	)	Judge Presiding (Trial)
	)	
	)	Honorable
	)	Thomas F. Fecarotta,
	)	Judge Presiding (Motion).

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Salone and Justice Steele concurred in the judgment.

ORDER

¶ 1 *HELD*: The circuit court erred in denying defendant's motion for substitution of judge where the motion was filed within 10 days of the cause being placed on the trial judge's call and where section 114-5(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-5(a) (West 2010)) is applicable to indirect criminal contempt proceedings.

¶ 2 Following his failure to return to court after a lunch recess to represent his client in a jury trial, defendant-appellant Wayne Adams was found in indirect criminal contempt of court,

sentenced to two days in the Cook County Department of Corrections and fined $500. A judgment was also entered against Adams in the amount of $5,040.86 for costs incurred by plaintiff-appellee Village of Arlington Heights (Village) in the contempt proceedings. On appeal, Adams contends that his due process rights were violated where the judge who initiated indirect criminal contempt proceedings against him presided over his contempt hearing, and, alternatively, that he was entitled to substitution of judge as a matter of right. Adams further contends that the amended petition for adjudication for indirect criminal contempt was inadequate where it did not allege the necessary elements of indirect criminal contempt. Finally, Adams contends that because there is no authority for the award of attorney fees in a criminal contempt proceeding, the judgment of $5,040.86 is properly characterized as a fine; therefore, because the fine assessed against him was greater than $500, he was entitled to a jury trial. For the reasons that follow, we reverse and remand.

¶ 3 BACKGROUND

¶ 4 On October 14, 2011, Adams appeared in court on behalf of his client, who received a traffic ticket following an automobile accident. Adams made a jury demand and the case was assigned to Judge Alfred Levinson for trial. When the case was called, the trial court noted that the case involved a failure to yield on a left turn and said, "Okay. You want a jury, you got it." Adams asked for a little time to prepare and the trial court stated that he could have 10 minutes and that a jury would be selected by noon. Adams stated that he would have to pay a fee for the jury and the trial court told him to go and pay the fee. Adams then stated that he needed to prepare for trial, and the trial court responded:

> "No, no, no, no. You're prepared. You come in and you demand a jury on a turning left, you come in and you demand a jury, you're going to pay for it now because you have to pay for it now. You to [*sic*] have to pay for it now and you're going to get this jury today."

¶ 5 Adams stated that would be fine, and counsel for the Village asked if the court would defer to the Village's request for more time. The Village explained that it had another officer it wanted to bring in as a witness. The trial court stated that the Village could bring the officer in on Monday. Adams asked if Monday was going to be the trial date, and the trial court said no, they would pick the jury that same day and start hearing testimony from the witnesses and then finish on Monday. Adams then objected to picking the jury that day. The trial court replied, "You can object all you want. It's a traffic ticket, it's a minor traffic ticket. I don't even know if you're entitled to one, but it's a minor traffic ticket." Adams explained that he made a jury demand because one of the parties involved worked for the government and was married to a police officer. The trial court said, "I don't care. I suppose none of judges [*sic*] could have heard this. I don't care. If you want a jury, you got a jury."

¶ 6 The trial court then conducted an examination of the venire and selected 12 jury members and 2 alternates. Both parties concurred in the selection. A lunch recess followed the selection of the jurors, with the trial court stating that proceedings would resume at 1:15 p.m. Adams did not return to court at 1:15. At approximately 1:30 p.m., Hristina Barganska appeared before the court and explained that she was Adams' assistant. Barganska asked the court if Adams would still be able to represent his client on another day if the jury trial was waived. The trial court

stated that the Village was preparing a petition to have Adams held in indirect criminal contempt for not returning after the jury had been selected. The trial court explained that because Barganska was not an attorney, and because the client had paid for and was entitled to a jury, the court was not going to have her waive the jury trial. The trial court further explained that witnesses had been pulled away from their jobs to come to court and Adams' action had brought the court into disrepute. The trial court then clarified that Adams had not returned because he had a closing to attend downtown. After Barganska answered affirmatively, the court stated:

> "You can tell him, and I'm telling counsel, that I have no intention of sentencing him to more than six months in the county jail or a $500 fine. It'll be considered a minor indirect criminal contempt. I'm not going to give him – I'm not sending him to the penitentiary, so it's minor. It's no more than six months and a $500 fine.
>
> He will not be entitled to a jury, but he will be entitled to proof beyond a reasonable doubt. All of these people can testify. He'll be entitled to a trial, and he'll be entitled to be informed of the charges against him. You can tell him all of that because when he comes in here, he'll be able to know that."

¶ 7 The trial court asked the Village how long it would take to prepare the petition for rule to show cause and then said, "Tell him I'm absolutely serious about this. I've been in practice 44 years, and this is the first time I've ever seen anything pulled like this." The trial court subsequently engaged in the following exchange with Adams' client:

> "THE COURT: *** What is going through your mind right now

aside from, 'My lawyer abandoned me'?

THE DEFENDANT: That's pretty much it. He advised me to ask for a bench trial – I mean a jury trial. I followed his advice, and now he's not here.

THE COURT: Did he tell you he wasn't going to be back?

THE DEFENDANT: No. I got a call over lunch hour.

THE COURT: Well, he didn't call [counsel for the Village]. He didn't call the Court. He didn't tell the clerk. He didn't tell any of the sheriffs. He didn't tell anybody. We all rushed back."

The trial court then spoke with another attorney who was in the courtroom and asked him if he would talk to Adams' client. The client subsequently informed the court she was discharging Adams and the trial proceeded with the new attorney.

¶ 8 On October 21, 2011, Adams filed a motion for substitution of judge for the contempt proceeding. At the hearing on the motion, the motion judge asked Adams if he was filing a petition for substitution for cause or just substitution within 10 days, and Adams responded that it was a petition for substitution within 10 days. The motion judge stated that because it was a contempt citation, Adams would have to have cause, and asked Adams if he would like to amend the caption to add the words "for cause." Adams explained that it was his understanding that he did not need to show cause for substitution of judge and that it was an absolute right. The motion judge replied that Adams was not entitled to 10 days on a contempt citation and Adams subsequently agreed to amend his motion. Adams then argued that the trial judge was prejudiced

against him because he had already decided that Adams was in contempt. Adams pointed to statements made by the trial judge that indicated the judge had already drawn conclusions about Adams' actions outside of his courtroom, prior to any contempt hearing. Adams argued that the trial judge was prejudiced against him on the grounds that his motion for a continuance was denied when both sides agreed to a continuance, and stated that the trial judge wanted to punish him for asking for a jury trial on a traffic ticket. The motion judge ruled that Adams had not shown prejudice and denied the motion. Adams filed a motion for reconsideration and the motion was denied on November 7, 2011.

¶ 9 Adams filed an affirmative defense of necessity on November 14, 2011. He stated that he had a real estate closing for another client on the afternoon of October 14, 2011, and that his efforts during the lunch recess to arrange for coverage of both the real estate closing and the jury trial were unsuccessful. Adams stated that he then notified his client via telephone and contacted his assistant, Barganska, and asked her to inform the court of the situation. He further stated that he was unable to abandon the real estate closing because it would have created a private injury and would potentially have resulted in a malpractice claim.

¶ 10 On November 15, 2011, a hearing was held in front of the trial judge on the petition for adjudication of indirect criminal contempt. Adams informed the court that he had called the attorney for the other party in the real estate closing and was unable to reach him. He had also called the title company and nobody answered. He then called his assistant on her day off and asked her to go to court and explain the situation. Finally, he stated that he called his client and explained the situation to her.

¶ 11 The trial court noted that attorneys and even clients themselves have the ability to advance cases when conflicts arise and observed that Adams made no effort to do so. The court further noted that Adams never mentioned to the court that he had a real estate closing on the afternoon of October 14. Adams explained that he did not mention it because he thought he would be able to get someone to cover it for him. Adams stated that it was not his intent to disrespect the court and that he had done everything he could do to try and cover both obligations but could not have abandoned his client at the real estate closing. Adams' client in the traffic case testified that when she told the trial court that she had not spoken to Adams, she meant prior to the lunch recess. She confirmed that she spoke with Adams by telephone during the lunch recess and he informed her at that time that he would not be able to return to the jury trial.

¶ 12 The trial court stated that Adams had alternatives, pointing out that he could have made calls regarding coverage of the real estate closing in the morning before jury selection began. The trial court noted that Adams also could have said something to the court about the scheduling conflict when he knew there would be no continuance, instead of merely arguing that he needed more time to prepare. The trial court noted that there were 14 jurors and witnesses waiting and Adams did not call the court or opposing counsel but instead sent his assistant. The trial court explained that the reason Adams was being charged with indirect criminal contempt was because the court thought Adams might have been in an accident or had a heart attack or something of that nature that prevented him from returning to court. The trial court stated that it could not conceive of anything more disrespectful and contemptuous of a court proceeding than to attend a real estate closing in the middle of a jury trial and abandon a client. The trial court

found that Adams brought the judicial system into disrepute and was in indirect criminal contempt of court. The trial court further stated that Adams should be sanctioned for his contemptuous, willful actions.

¶ 13 The trial court then said that it would assess the costs incurred by the Village against Adams. The trial court clarified that it would only assess the costs related to the contempt hearing and not the trial because the trial had gone ahead despite Adams' absence. The trial court stated that in addition to the court costs, Adams would be fined $500. The trial court then said:

> "I must tell you, Mr. Adams, I am sorely tempted to put you in jail today. You give me one reason why I shouldn't. I am going to give you that opportunity to give me an allocution statement as to why I shouldn't, aside from the fine and costs, why I shouldn't subject you to a jail sentence."

Adams replied that there was nothing more he could tell the court than what he had already stated, that he had done the best he could under difficult circumstances and had made a decision to do what he thought was the right thing to do. He stated that there was no intent to disrespect the court or anyone else. The trial court then sentenced Adams to two days in the Cook County Department of Corrections, and refused Adams' request for a stay pending appeal. Adams asked about his court appearances and the trial court stated that if Adams provided a list of his court appearances for the next two days, the trial court would call to inform the courts and judges involved that Adams would not be able to be there. Adams then told the trial court that he needed to get his medication for a heart condition to take to jail with him and the trial court said the order would indicate that Adams was to go to Cermak Hospital and whatever medication he

needed would be provided by Cermak. Adams asked, "What about my house, Judge, and my dogs, and my office, and my daughter?" The trial court said, "Call her." Adams was subsequently taken into custody and served his two-day sentence.

¶ 14 On December 12, 2011, Adams' motion for a new trial was denied. The trial court stated that it had reviewed the Village's petition for fees. The petition included 7.5 hours for the trial on October 14, 2011. The total for attorney fees was shown as $4,035. The trial court added an additional $225 in attorney fees for the Village's preparation in response to Adams' motion to dismiss, and for the court time on December 12. The trial court stated that it had reduced the time billed for October 14 to four hours because the case actually went to trial for a portion of that time, which reduced the total to $3,435. The addition of $225 brought the fee total to $3,660. The petition also included $264.43 as a witness expense for the police officer who testified at the trial on October 14, and court reporter expenses for October 4, 14 and 21 and November 7 and 15, for a total of $1,114.43. Thus, the trial court entered judgment against Adams for $5,040.86 in court costs. Adams timely filed this appeal.

¶ 15 ANALYSIS

¶ 16 Adams was found guilty of indirect criminal contempt. The power of courts to punish contempt is essential to maintaining the court's authority and administering its judicial powers. *People v. Simac*, 161 Ill. 2d 297, 305 (1994). Where the purpose of contempt sanctions is to compel the contemnor to perform a particular act, the nature of the contempt is civil. *In re Marriage of Betts*, 200 Ill. App. 3d 26, 43 (1990). Where, as here, the purpose of the contempt sanctions is to punish past misconduct, the contempt is criminal in nature. *Id*. Direct contempt is

strictly limited to conduct which occurs in the presence of a judge. *Id*. at 47. The most common example of direct criminal contempt is an outburst which disrupts judicial proceedings. *Id*. at 45. Indirect contempt includes all contemptuous actions which do not occur in the presence of the judge, such that the judge does not have full personal knowledge of all elements of the contempt. *Id*. at 48. Thus, where indirect contempt is involved, proof of the contemptuous conduct must be presented to support a finding of contempt. *Id*. at 48. An attorney's failure to return to court after a recess, if contemptuous, falls under the category of indirect contempt because, although the attorney's absence is immediately before the court, the reasons for the absence are not. *People v. L.A.S.*, 111 Ill. 2d 539, 544 (1986).

¶ 17 Criminal contempt has been defined by our supreme 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." (Internal quotation marks omitted.) *Simac*, 161 Ill. 2d at 305. "Indirect criminal contempt proceedings must generally conform to the same constitutionally mandated procedural requirements as other criminal proceedings." *Id*. at 58. A person charged with indirect criminal contempt is afforded the presumption of innocence and the right to be proven guilty beyond a reasonable doubt, and is entitled to a trial that conforms to the procedural requirements and rights normally applicable to criminal trials. *Id*.

¶ 18 Adams raises alternative arguments related to the judge who presided over his contempt proceedings. First, Adams contends that a judge who initiates an indirect criminal contempt proceeding may not preside over the contempt hearing. Alternatively, Adams argues that he was

entitled to substitution of judge as a matter of right.

¶ 19 We first address Adams' argument that it is a violation of due process for the judge who initiates an indirect criminal contempt proceeding to preside over the contempt hearing. For this proposition, Adams relies on *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971). We find this reliance to be misplaced. The *Mayberry* case involved contemptuous conduct in which the contemnor insulted the judge in open court on numerous occasions throughout the trial. Although this conduct fell under the category of direct criminal contempt, the trial court waited until the end of the trial to impose punishment for the contempt. The *Mayberry* Court phrased its holding in terms of due process generally, stating that "a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor." *Id*. The Court made it clear, however, that not every personal attack on a judge would disqualify that judge from imposing punishment for contempt. *Id*. at 465. The Court explained that where the judge did not act the instant the contempt was committed (*id*. at 463-64) and where the words leveled at the judge were "highly personal aspersions," the contemnor's due process rights were violated by not having another judge preside over the contempt proceedings (*id*. at 466).

¶ 20 In the case *sub judice*, Adams did not direct any personal insults at the trial court, and thus, the reason for the Court's holding in *Mayberry* is not present here. There is no support in *Mayberry* for the contention that the same judge presiding over a matter in which an apparent contemptuous act occurred can *never* preside over the subsequent contempt hearing. In fact, the Court acknowledged that a hearing before another judge is not even required in every case that

involves a personal insult directed at the trial judge. We agree with Adams that the comments made by the trial judge indicate that he was irritated with Adams for requesting a jury trial in a traffic ticket case, and demonstrate a degree of personal antagonism toward Adams. However, the trial judge's irritation over Adams' request for a jury trial does not raise the same fairness concerns that are present where a contemnor personally insults a trial judge on numerous occasions. Thus, we conclude that it was not a violation of due process for the trial judge to preside over Adams' contempt hearing.

¶ 21 We now turn to Adams' argument that he was entitled to substitution of judge as a matter of right. Section 114-5 of the Code of Criminal Procedure of 1963 (Code) provides that within 10 days of a cause being placed on the trial call of a judge, "the defendant may move the court in writing for a substitution of that judge on the ground that such judge is so prejudiced against him that he cannot receive a fair trial." 725 ILCS 5/114-5(a) (West 2010). The cause will then be transferred to another judge. 725 ILCS 5/114-5(a) (West 2010). In addition to the 10 day automatic substitution, a defendant may move at any time for substitution of judge for cause. 725 ILCS 5/114-5(d) (West 2010).

¶ 22 As the Village correctly points out, due to the nature of contempt proceedings, courts are not strictly bound in such proceedings by provisions in the respective codes of criminal or civil procedure. See *In re Matter of Peasley*, 189 Ill. App. 3d 865, 869 (1989). However, this court has long acknowledged that section 114-5 of the Code applies to a motion for substitution of judge in indirect criminal contempt proceedings. See, *e.g.*, *SKS and Associates, Inc. v. Dart*, 2012 IL App (1st) 103504, ¶ 21 (citing *Hoga v. Clark*, 113 Ill. App. 3d 1050, 1059 (1983));

Payne v. Coates-Miller, Inc., 68 Ill. App. 3d 601, 608 n.4 (1979); *People v. Winchell*, 45 Ill. App. 3d 752, 756 (1977); *People v. Wright*, 20 Ill. App. 3d 96, 103 (1974). Our supreme court has also noted that defendants in criminal contempt proceedings have an absolute right to substitution of judge on general allegations of prejudice as long as the requirements of section 114-5(a) are satisfied. *People ex rel. Kunce v. Hogan*, 67 Ill. 2d 55, 63 (1977).

¶ 23 The underlying traffic case was placed on the trial judge's call on October 14, 2011. On October 18, 2011, Adams was served with a summons and a petition for rule to show cause why he should not be held in contempt of court.[1] Adams filed a motion for substitution of judge pursuant to section 114-5(a) of the Code, alleging general prejudice, on October 21, 2011. Thus, Adams' motion was filed within the 10 days required under section 114-5(a). At the hearing on the motion, the motion judge asked Adams if he was filing a motion for substitution for cause or just substitution within 10 days and Adams responded that the motion was for substitution within 10 days. The motion judge then told Adams that because it was a contempt proceeding, he had to have cause, and asked Adams if he would like to amend his motion and put "for cause" in the heading. Adams said that it was his understanding that he did not need to show cause and the motion judge stated that he was not entitled to substitution within 10 days on a contempt citation. We disagree. The motion judge cited no authority for this proposition, and we have found none. In fact, as previously noted, there is clear authority stating that section 114-5(a) is applicable to indirect criminal contempt proceedings. Thus, the motion judge erred in requiring Adams to

[1]The petition was properly amended to a petition for adjudication for indirect criminal contempt of court on October 25, 2011.

amend his motion and present specific evidence of prejudice. Because Adams was entitled to substitution of judge as a matter of right on a general allegation of prejudice within 10 days of the case being placed on the trial judge's call, we reverse the trial judge's finding of indirect criminal contempt and remand for proceedings in front of another judge. Moreover, based on statements in the record made by the motion judge, we further order that on remand, the contempt proceedings be held in front of a judge other than the motion judge.

¶ 24 We will address Adams' remaining arguments because they are likely to arise on remand. Adams contends that the petition for adjudication for indirect criminal contempt of court was inadequate because it did not allege the required elements of indirect criminal contempt. Adams argues that because the petition only alleged that he failed to return to court after the lunch recess, and failure to return to court, in and of itself, is not a crime, the petition was improper. We disagree. The unexplained absence of an attorney at trial constitutes possible grounds for indirect criminal contempt. *People v. Mann*, 122 Ill. App. 3d 66, 69 (1984) (and cases cited therein). Therefore, the petition properly alleged grounds for indirect criminal contempt.

¶ 25 Adams also argues that he was entitled to a jury trial where the aggregate amount of the fine imposed and the judgment against him for costs exceeded $500. Adams contends that Illinois common law does not allow the recovery of attorney fees, nor are such fees authorized by statute or provided for by contract between the parties. Therefore, Adams argues the judgment against him for attorney fees and costs in the amount of $5,040.86 is properly characterized as a fine. We disagree. The award of reasonable costs and attorney fees related to a contempt proceeding has been held to be appropriate in the context of criminal contempt proceedings. *In*

re Marriage of Wilde, 141 Ill. App. 3d 464, 473 (1986). See also *Welch v. City of Evanston*, 181 Ill. App. 3d 49, 56 (1989); *Village of Lakemoor v. First Bank of Oak Park*, 136 Ill. App. 3d 35, 44 (1985). Thus, the award of costs and attorney fees was not a fine and Adams was not entitled to a jury trial. However, in the event that this issue should arise again on remand, we note that the only costs and fees that can be recovered are those related to the contempt proceedings. The record shows that the judgment against Adams for costs and attorney fees included certain items associated with October 4 and 14, such as the time spent selecting the jury and court reporter and witness costs. These costs and fees are not related to the contempt proceedings and it would be inappropriate to include them.

¶ 26 Finally, regardless of the outcome on remand, it is important to emphasize that care should be taken by a court in the exercise of its contempt power. Although a court has the inherent power to punish contemptuous conduct, " 'its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions.' " *People v. Ernest*, 141 Ill. 2d 412, 421 (1990) (quoting *Cooke v. United States*, 267 U.S. 517, 539 (1925)). The potential for abuse in the exercise of a court's summary power to imprison for contempt has long been recognized and individual liberty must be protected from any possible abuse. See *Roth v. St. Elizabeth's Hospital*, 241 Ill. App. 3d 407, 411 (1993) (citing *Bloom v. State of Illinois*, 391 U.S. 194, 202 (1968) and *People v. Wilcox*, 5 Ill. 2d 222, 228 (1955)).

¶ 27 Case law suggests that upon a finding of contempt under similar circumstances, it would be reasonable to assess a fine and costs associated with the contempt hearing. See, *e.g.*, *Davis v. Sprague*, 186 Ill. App. 3d 249, 255-56 (1989) (affirming a finding of contempt and imposition of

a $50 fine where attorney failed to appear at a scheduled hearing); *Mann*, 122 Ill. App. 3d at 70 (affirming a finding of contempt and imposition of a $25 fine and assessing $50 in costs where attorney was two hours late for a jury trial in a traffic case and did not notify the court that he would be late); *People v. Adam*, 15 Ill. App. 3d 669, 671 (1973) (affirming a finding of contempt and imposition of a $100 fine where, after filing multiple requests for a continuance, attorney failed to appear on first day of client's trial and failed to notify the court or the opposing party of a scheduling conflict). However, a period of incarceration, in this context, strikes us as unduly harsh.

¶ 28 Because we are remanding this cause, and because statements made in Adams' appellate brief could be construed as a challenge to the sufficiency of the evidence, we will consider whether the evidence was sufficient to permit a finding of indirect criminal contempt, in order to avoid the risk of subjecting Adams to double jeopardy. See *In re Marriage of Alltop*, 203 Ill. App. 3d 606, 616 (1990) (citing *People v. Taylor*, 76 Ill. 2d 289, 309 (1979)). We conclude that the evidence was sufficient that a court could find Adams in indirect criminal contempt for his failure to return to court after the recess without properly notifying the court of the conflict. However, this conclusion is not binding upon the trial court on retrial. *Id.*

¶ 29 For the foregoing reasons, we reverse the finding of indirect criminal contempt, vacate the sentence of incarceration and the imposition of fees and costs, and remand for further proceedings consistent with this order.

¶ 30 Reversed and remanded.