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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-885

Filed: 5 June 2018

Rutherford County, No. 16 CRS 2070

STATE OF NORTH CAROLINA

v.

ROGER GENE COOK, Defendant.

Appeal by Defendant from order entered 6 December 2016 by Judge Marvin P. Pope in Rutherford County Superior Court. Heard in the Court of Appeals 25 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for Defendant-Appellant.

INMAN, Judge.

Roger Gene Cook ("Defendant") appeals from an order holding him in direct criminal contempt for contacting a potential witness who was also the spouse of a juror. Defendant argues that the trial court erred by finding his conduct amounted

to direct criminal contempt and punishing him summarily as opposed to through a plenary proceeding.

After careful review, we reverse the trial court's order.

Facts and Procedural History

On 5 December 2016, Defendant stood trial on nine counts of restraining dogs in a cruel manner and five counts of rabies vaccination violations. Defendant pleaded not guilty to all charges, and the trial court proceeded to impanel the jury. Defendant submitted a proposed witness list, which included Keith Hines as a potential witness for the defense. During jury selection, a prospective juror, Angela Hines, was asked if she knew Keith Hines. She said she did not.

The trial court instructed the jury that they "must not talk about the case with anyone else, including members of [their] family, or allow anyone else to talk with [them] or say anything in [their] presence about the case[,]" and that should this occur the juror must immediately notify the trial court. The trial court also instructed the jury not to "talk or communicate in any way with any of the parties in the case, any of the lawyers, or any of the witnesses."

Following opening statements, the trial court was notified that one of the jurors had just realized that he knew Defendant. The trial court engaged in a *voir dire* with the juror, dismissed him, and replaced him with an alternate before excusing the jury for an evening recess.

The following day, 6 December 2016, Angela Hines, Juror No. 7, indicated to the trial court that her husband, Keith Hines, had been contacted by Defendant the previous evening. Although she acknowledged to the trial court that the prosecutor had asked her if she knew Keith Hines before she was selected as a juror, Ms. Hines testified that she "didn't know the Keith Hines that he was talking about was my husband." She explained that "[t]here is another Keith Hines in the county, so I was assuming that's who it was because people get them mixed up a lot, but I had no idea that he even knew my husband or requested my husband to be a witness in this case."

Keith Hines, Ms. Hines' spouse, is a veterinary technician. Defendant contacted Mr. Hines to ask him to testify about Bully Pits, a specific breed of dog.[1] Ms. Hines did not know the other Keith Hines' occupation.

Following the *voir dire* examination of Ms. Hines, the trial court found that it was unable to proceed with the trial because there were no additional alternate jurors and the communication between Defendant and Mr. Hines was improper. The trial court ordered a mistrial, held Defendant in direct criminal contempt for the communication, and sentenced Defendant to be held for thirty days in the Rutherford County detention facility.

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[1] The American Bully breed is related to the American Pit Bull Terrier breed and has been recognized by the United Kennel Club since 2013. United Kennel Club, http://www.ukcdogs.com/docs/breeds/american-bully-breed.pdf. The American Bully breed is influenced by cross breeding pit bulls with breeds including a variety of bulldogs. *Id.*

Defendant timely appealed the contempt order.[2]

Discussion

Defendant asserts three primary arguments on appeal: (1) his conduct—*i.e.*, contacting a witness on his proposed witness list—cannot amount to criminal contempt; (2) any contact he had with his witness occurred outside the presence of the trial court and therefore it was error for the trial court to hold him in direct criminal contempt; and (3) because the trial court erred in holding him in direct contempt, the trial court likewise erred by sentencing him summarily rather than through a plenary proceeding. We agree with Defendant's arguments.

"The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citing *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997)). "Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (2007) (internal quotation marks and citation omitted). "The trial court's conclusions of law drawn from the findings of fact

[2] Defendant filed a Petition for Writ of Certiorari on 12 September 2017, seeking to cure certain defects in his notice of appeal. This petition was referred to the panel on 20 September 2017. We allow Defendant's petition.

are reviewable de novo." *Curran v. Barefoot*, 183 N.C. App. 331, 335, 645 S.E.2d 187, 190 (2007) (citation omitted).

North Carolina defines contempt as either criminal or civil, and further delineates between direct and indirect in the context of criminal contempt. N.C. Gen. Stat. §§ 5A-11, *et seq.* (2015). Section 5A-11(a) enumerates the specific instances in which grounds exist for a trial court to hold a party in criminal contempt. N.C. Gen. Stat. § 5A-11(a). Among the grounds provided, a trial court may hold a person in criminal contempt when that person engages in either "[w]illful behavior committed during the sitting of a court and directly tending to interrupt its proceedings[,]" or "[w]illful communication with a juror in an improper attempt to influence his deliberations." N.C. Gen. Stat. § 5A-11(a)(1) & (9). Our courts have defined willfulness as "more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law." *State v. Phair*, 193 N.C. App. 591, 594, 668 S.E.2d 110, 112 (2008) (citations omitted).

In the context of criminal contempt, Section 5A-13 provides that

> Criminal contempt is direct criminal contempt when the act:
>
> > (1) Is committed within the sight or hearing of a presiding judicial official; and
> >
> > (2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and

> (3) Is likely to interrupt or interfere with matters then before the court.

N.C. Gen. Stat. § 5A-13(a). All other criminal contempt constitutes indirect criminal contempt. N.C. Gen. Stat. § 5A-13(b). This distinction becomes essential when a trial court seeks to punish an individual for criminal contempt, because only direct criminal contempt may be punished without a plenary hearing. N.C. Gen. Stat. § 5A-13(a).

Here, the trial court failed to specify the ground under Section 5A-11(a) upon which it based its decision to hold Defendant in direct criminal contempt. But the trial court did provide several findings of fact and conclusions of laws that enable our review. The trial court found that "[d]uring the voir dire of the jury on December 5, 2016, inquiry was made of Juror No. 7, Angela Hines, concerning her relationship with Keith Hines, and she revealed that she was married to Keith Hines . . . ." The trial court also found that "Keith Hines was listed on a witness list the defendant submitted to the Court on December 5, 2016; however, upon inquiry of Juror No. 7, Juror No. 7 felt this Keith Hines on the defendant's list was another Keith Hines in Rutherford County community." Defendant at some point following the impaneling of the jury, contacted Keith Hines and requested Mr. Hines to testify on his behalf. From this, the trial court concluded that it was "unable to proceed with the trial of the foregoing action due to the contact and activities of the defendant in

communicating with the spouse of Juror No. 7, Angela Hines[,]" and held Defendant in direct criminal contempt.

Neither Defendant nor the State challenges the evidence as not supporting the facts found. Rather, Defendant asserts that based on the evidence, the facts do not support a conclusion that he could be held in direct criminal contempt. We agree with Defendant. A holding of direct contempt requires the conduct to have occurred in the presence of the trial court. N.C. Gen. Stat. § 5A-13. Nothing in the trial court's findings or conclusions indicates that Defendant's conduct—contacting a witness on his witness list, seeking the witness to testify on his behalf—occurred in the presence of the trial court. Therefore, the trial court erred by holding Defendant in direct contempt and punishing him summarily. Beyond that, Defendant's conduct in the present case does not amount to criminal contempt. The act of contacting a witness on the proposed witness list does not fall within any of the enumerated grounds upon which criminal contempt may be imposed. *See* N.C. Gen. Stat. § 5A-11. Accordingly, we hold the trial court erred in holding Defendant in criminal contempt.

Conclusion

For the foregoing reasons, we reverse the trial court's order holding Defendant in direct criminal contempt. We remand this matter for further proceedings.

REVERSED AND REMANDED.

Judges STROUD and DILLON concur.

Report per Rule 30(e).