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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-195

No. COA 20-393

Filed 4 May 2021

From Iredell County, No. 20CRS 000040

STATE OF NORTH CAROLINA

v.

MARK THOMAS BOGER, Defendant.

Appeal by Defendant from order entered 9 January 2020 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 9 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Grace R. Linthicum, for the State.

Sigler Law PLLC, by Kerri L. Sigler, for the Defendant.

GORE, Judge.

¶ 1 Mark Thomas Boger (“Defendant”) appeals from the trial court’s order finding him in criminal contempt. We affirm the order of the trial court.

I. Background

¶ 2 On 6 January 2020 Defendant appeared before the Honorable Joseph N. Crosswhite on the issue of attorney fees.

¶ 3

The court reporter noted, “Before case called, defense counsel and defendant were conferring at counsel table. After hearing raised voices, the following proceedings commenced:”

THE DEFENDANT: You didn’t come see me. I ain’t full of shit; you are. This whole goddamn place is full of shit.

THE COURT: All right.

THE DEFENDANT: Well, I ain’t going to let this motherfucking nigger sit here and call me a goddamn liar.

THE COURT: All right. We’re not going there again.

THE DEFENDANT: You lucky I got the handcuffs on.

THE COURT: Yeah. Mr. Boger.

THE DEFENDANT: He said –

THE COURT: Mr. Boger. Mr. Boger. I’m going to give you one more time to be quiet or then we’re going to address this in some other way. Okay.

¶ 4

At 4:56 pm the following exchange occurred:

THE COURT: Yes, sir. I have reviewed Mr. Darty’s fee affidavit.

THE DEFENDANT: I know you’re going to agree to it because you agree to everything these people do around here.

THE COURT: All right. Listen, I’m going to tell you what. As a matter of fact, I’m going to find – I’m going to set Mr. Darty’s fees at \$3,210.

THE DEFENDANT: Can I appeal it?

THE COURT: I'm going to also consider holding you in contempt. We are going to address that first thing in the morning. Okay.

THE DEFENDANT: -- contempt you. You can contempt all you want.

THE COURT: All right.

THE DEFENDANT: I got a new tattoo called FTJ. "Fuck the judge."

The court then recessed until the following day.

¶ 5 The following day on 7 January 2020, the trial court reconvened and formally advised Defendant, "I am considering holding you in direct criminal contempt for the comments made in court yesterday." Judge Crosswhite also appointed Mark Davis to represent Defendant in the contempt proceedings.

¶ 6 The contempt hearing was held on 9 January 2020. At the hearing, Judge Crosswhite stated the comments at issue were "Those comments specifically . . . made about your then-appointed attorney, Ken Darty, and also comments made about the Court."

¶ 7 Mr. Davis orally moved to continue under N.C. Gen. Stat. § 5A-13 and § 5A-15 so that the matter could be heard by a different judge. In his discretion, Judge Crosswhite denied the motion.

¶ 8 Judge Crosswhite found "beyond a reasonable doubt" that Defendant "willfully behaved in a contemptuous manner." Further, Judge Crosswhite found that

Defendant’s “conduct interrupted the proceedings of this Court and did, in fact, impair the respect due the Court and its authority.” As a result, Judge Crosswhite held Defendant in contempt and ordered an additional 30-day confinement for each of the comments Defendant made about his attorney and the court, resulting in an additional 60 days to be served at the expiration of Defendant’s current sentence.

II. Standard of Review

¶ 9 In a criminal contempt hearing, “[t]he standard of appellate review . . . is whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment. Findings of fact are binding on appeal if there is competent evidence to support them” *State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (2007) (citations omitted). “The trial court’s conclusions of law drawn from the findings of fact are reviewable de novo.” *Id.*

III. Discussion

¶ 10 Defendant argues that the trial court erred by failing to (1) provide immediate notice of its intent to institute immediate plenary contempt proceedings after the alleged contemptuous conduct, (2) provide written notice of the specific allegations against him, (3) grant defense counsel’s motion to recuse without first considering whether it could be impartial, and (4) either orally or in its written judgment explicitly find Mr. Boger guilty. All four of Defendant’s arguments fall under the

statutory mandates required of plenary contempt proceedings in N.C. Gen. Stat. § 5A-15.

¶ 11 Criminal contempt is direct contempt when the act: “(1) [i]s committed within the sight or hearing of a presiding judicial official; and (2) [i]s committed in, or in immediate proximity to, the room where proceedings are being held before the court; and (3) [i]s likely to interrupt or interfere with matters then before the court.” N.C. Gen. Stat. § 5A-13(a) (2020). Direct criminal contempt may be punished through summary proceedings under § 5A-14 or plenary proceedings under § 5A-15. *Id.*

¶ 12 N.C. Gen. Stat. § 5A-14 requires in summary proceedings that the contempt be necessary to “restore order or maintain the dignity and authority of the court” and for the measures to be imposed “substantially contemporaneously with the contempt.” § 5A-14(a). The defendant must be given notice of the charges and an opportunity to respond. § 5A-14(b). The court must find “facts supporting the summary imposition of measures in response to contempt” beyond a reasonable doubt. *Id.*

¶ 13 “[T]he word ‘substantially’ qualifies the word ‘contemporaneously’ and clearly does not require that the contempt proceeding immediately follow the conduct.” *In re Nakell*, 104 N.C. App. 638, 649, 411 S.E.2d 159, 165 (1991). In *Nakell*, this Court found that a contempt hearing held two days after the alleged contempt was “substantially contemporaneous” with the contempt. *Id.*

¶ 14 Here, Defendant's charged contemptuous conduct was committed in the courtroom within the sight and hearing of Judge Crosswhite. Therefore, Defendant's conduct constituted direct criminal contempt. Defendant's contempt hearing was held on 9 January 2020, when the conduct at issue occurred on 6 January 2020. Judge Crosswhite informed Defendant late in the afternoon on 6 January 2020, immediately following the conduct, that he would hold a contempt hearing the following day. On 7 January 2020, Judge Crosswhite appointed counsel to represent Defendant in the contempt hearing and scheduled the contempt hearing for two days later. The two-day period here is similar to that in *Nakell*. Thus, the hearing was substantially contemporaneous with the conduct.

¶ 15 The trial court gave Defendant notice of the charges both at the time he informed Defendant he would hold a contempt hearing and again at the outset of the hearing. The court listened to arguments from Defendant's attorney at the 9 January 2020 hearing providing Defendant with an opportunity to respond. Further, the trial court made findings of fact stating "beyond a reasonable doubt" that Defendant willfully behaved in a contemptuous manner, willfully impaired the respect due the Court, was warned that the charged conduct was improper, and was given summary notice of the charges against him.

¶ 16 This Court notes Defendant's initial conduct and use of a racial slur did not garner a notice of contempt. It was not until Defendant directed his conduct toward

the trial court, that a contempt hearing was ordered. However, the North Carolina Code of Judicial Conduct provides that at all times “[a] judge should maintain order and decorum in proceedings before the judge.” N.C. Code of Judicial Conduct Canon 3(A)(2).

¶ 17 As a result, the court properly held Defendant in direct criminal contempt under § 5A-14. Accordingly, Defendant’s arguments under § 5A-15 are inapplicable.

IV. Conclusion

¶ 18 For the forestated reasons, we affirm the trial court’s Order finding Defendant in criminal contempt.

AFFIRMED.

Judges COLLINS and JACKSON concur.

Report per Rule 30(e).