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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-445

Filed 21 February 2023

Lee County, No. 20 CRS 63

STATE OF NORTH CAROLINA

v.

NICOLLE T. PHAIR, Defendant.

Appeal by Defendant from judgment entered 14 February 2022 by Judge James E. Hardin in Lee County Superior Court. Heard in the Court of Appeals 29 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sarah N. Cibik, for the State.

Thomas, Ferguson & Beskind, LLP, by Kellie Mannette, for the Defendant.

GRIFFIN, Judge.

Defendant Nicolle T. Phair appeals from a contempt judgment. Defendant argues the district court erred by finding Defendant in contempt with a summary proceeding and committed several prejudicial errors in the process. Additionally, Defendant asserts that the superior court erred in making several findings, concluding she was willfully and grossly negligent, and by failing to obtain consent of

the parties prior to the superior court issuing its judgment out-of-session and out-of-term. We affirm the superior court's order.

I. Factual and Procedural Background

Defendant is an attorney who has been practicing law for twenty-five years. On the morning of 29 January 2020, Defendant was present in court representing several clients. In one of her cases, Defendant and her client were ordered to return to court at 2:00 p.m., after the trial court denied Defendant's motion to continue the case. Defendant was also counsel of record in several cases which had not been resolved when the court recessed for lunch. Defendant and her client were not present in the courtroom at 2:00 p.m., and there had been no communication from Defendant to indicate the reason for her absence. Accordingly, the district court judge issued an order for arrest for Defendant's client who was not present at 2:00 p.m., and continued Defendant's three unresolved cases. The district court entered a show cause order against Defendant for criminal contempt because she "failed to appear as instructed at [2:00 p.m.] to handle four cases that were left on the docket, three of which were in the Lee County jail."

On 12 February 2020, the district court held a hearing on the matter. Defendant testified that she "had a family emergency related to [her] father's death[.]" and that they "were making arrangements and [she] could not be back at 2:00." Defendant conceded that there was an "obvious miscommunication[]" when

she failed to inform anyone in the district court that day that she would not be back at 2:00 p.m. The district court found Defendant in contempt “because [she] did not make arrangements. [She] did not provide any verification that [she] had any meeting . . . [,] and forced [Lee County] to house three prisoners for two additional weeks[.]” Defendant appealed to superior court.

A *de novo* superior court hearing was held on 9 September 2021. During the hearing, Defendant testified that during the lunch recess on 29 January 2020, she received a “distress call from [her] sister related to [her] mother [] that was extremely alarming” because no one could get in contact with her mother. Defendant further testified that she believed she had asked her husband to communicate with her associate to cover her cases but that Defendant intended to get back to court in time. However, Defendant’s husband testified that he did not recall having been asked by Defendant to communicate her emergency to anyone.

Following the hearing, the superior court judge informed the parties he would “take the matter under advisement[.]” and that it would likely take more than a “couple of weeks” for him to “review everything [to] give it the appropriate deliberative process” before entering an order. On 14 February 2022, the superior court filed a contempt judgment against Defendant. Defendant was censured and fined \$500. Defendant timely appeals.

II. Analysis

A. Superior Court Jurisdiction

Defendant contends the superior court did not have jurisdiction to hear the case because multiple errors committed by the district court deprived Defendant of a hearing.

North Carolina law allows “a person found in criminal contempt” in district court to appeal to superior court for a *de novo* hearing. N.C. Gen. Stat. § 5A-17 (2021). Generally, a defendant appealing from district court to superior court “is effectively writing on a clean slate in the [s]uperior [c]ourt.” *State v. Petty*, 212 N.C. App. 368, 371, 711 S.E.2d 509, 511 (2011). “When an appeal of right is taken to the [s]uperior [c]ourt, in contemplation of law it is as if the case had been brought there originally and there had been no previous trial, so that [t]he judgment appealed from is completely annulled and is not thereafter available for any purpose.” *State v. Sparrow*, 276 N.C. 499, 507, 173 S.E.2d 897, 902 (1970). However, “a court’s lack of subject matter jurisdiction is not waivable and can be raised at any time.” *In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009).

“Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it[,] . . . [and] is conferred upon the courts by either the North Carolina Constitution or by statute.” *Petty*, 212 N.C. App. at 371, 711 S.E.2d at 512 (citations and internal quotation marks omitted). Superior courts possess derivative jurisdiction over appeals from district court, such that a “[d]efendant may not be tried *de novo* in the superior court . . . without a trial and conviction in the district court.” *Id.* at 372, 711 S.E.2d at 512 (citations omitted).

Here, there is no doubt a hearing was held in district court and a contempt judgment was issued against Defendant by the district court. Therefore, we conclude the superior court had proper jurisdiction to hear the matter. Accordingly, we focus our review on the superior court's rulings and do not address the district court proceedings. *See Sparrow*, 276 N.C. at 507, 173 S.E.2d at 902.

B. Challenged Findings

Defendant argues the superior court erred when it allegedly made several unsupported findings of fact, by determining Defendant acted willfully and grossly negligent, and when the superior court did not attain the parties' consent before issuing the order allegedly out-of-session and out-of-term.

We review contempt proceedings to determine whether the findings of fact are supported by competent evidence and whether those findings support the trial court's conclusions of law and judgment. *State v. Robinson*, 281 N.C. App. 614, 619, 868 S.E.2d 703, 708 (2022) (citations omitted). Unchallenged findings and findings supported by competent evidence are binding on appeal, even where there is contrary evidence. *Pascoe v. Pascoe*, 183 N.C. App. 648, 650, 645 S.E.2d 156, 157 (2007) (citation omitted); *State v. Salter*, 264 N.C. App. 724, 732, 826 S.E.2d 803, 809 (2019) (citation omitted).

Defendant challenges numerous findings of fact. In the absence of a challenge, we presume the remaining unchallenged findings are supported by competent evidence and address each of the challenged findings.

1. *Finding of Fact 4*

Defendant takes issue with the part of Finding of Fact 4 stating “[D]efendant still had all of her cases which needed to be addressed in court[]” because those were not the only cases Defendant handled that day. While we agree with Defendant that it is evident she handled cases in the morning session, witness testimony established Defendant had four remaining cases on the docket to address in the afternoon. We agree with the State that this finding is reasonably interpreted to refer to those four remaining cases, and conclude this finding is supported by competent evidence.

2. *Finding of Fact 8*

Defendant challenges the part of Finding of Fact 8 stating that “after waiting for [D]efendant between 30-40 minutes, at approximately 3:30 Judge Faircloth recessed court” Defendant argues this portion of the finding is unsupported because there was no evidence suggesting the district court waited without addressing other business.

The unchallenged portion of the finding states: “[a]fter completing business unrelated to [D]efendant” Further, the deputy clerk testified that the district court gave Defendant about twenty to thirty minutes to show up. The assistant district attorney testified that the district court waited for Defendant “no less than 30 minutes” or longer before adjourning. While the district court judge could not recall exactly how much time had passed waiting on Defendant, he testified that Defendant’s cases were “the majority of what we had left to do that afternoon and we

couldn't find her[,]” and the court adjourned “around 3[] because we had nothing else to do without [Defendant].” Reading the unchallenged portion of the finding and the witnesses’ testimony together, we conclude competent evidence supports the challenged portion of Finding of Fact 8.

3. *Finding of Fact 9*

Defendant argues that two statements in Finding of Fact 9 were unsupported by competent evidence. Defendant first challenges the portion of the finding stating: “it is unclear whether Ms. McElreath asked [D]efendant about her whereabouts at 2:00” We are unable to locate any evidence in the record or trial transcripts to support this part of the finding. Additionally, the parties agree that the testimony suggests that Ms. McElreath, the deputy clerk, did not ask Defendant about her whereabouts at 2:00 p.m. Thus, we conclude this portion of the finding is unsupported by competent evidence and do not consider it in our review.

The second portion of Finding of Fact 9 challenged by Defendant states the superior court “determined that the domestic [v]iolence [c]ourtroom was not open at 2:00 and had been closed since earlier in the day.” Defendant argues there was evidence that others were present in domestic court that day that confirmed Defendant was not present at 2:00. The evidence presented at trial suggests, and the State concedes, that in an effort to locate Defendant at 2:00 p.m. that day, a bailiff was instructed to call over to the domestic court where it was confirmed that Defendant was not in domestic court. Again, we are unable to find any evidence in

the record or transcript to support the finding that the domestic violence court was not open at 2:00 p.m. We do not consider this portion of the finding in our review.

4. *Finding of Fact 10*

Defendant contends that the portion of Finding of Fact 10 stating that after arriving back to the court, Defendant was told by the assistant district attorney “that a Show Cause Order had been issued for her[,]” is not supported by competent evidence. Again, we are unable to locate any evidence in the record or transcript to suggest the assistant district attorney informed Defendant a show cause order had been issued against her. We do not consider this portion of Finding of Fact 10.

5. *Finding of Fact 11*

Defendant next takes issue with a portion of Finding of Fact 11 recalling that the district court “found, beyond a reasonable doubt, that the elements of contempt had been proven.” This portion of Finding of Fact 11 is a mere acknowledgment of the procedural history leading to its *de novo* hearing. Since this portion of the finding is supported by the district court hearing transcript entered into evidence during the superior court hearing, we conclude this finding is supported by competent evidence.

6. *Finding of Fact 12*

Defendant asserts that portions of Finding of Fact 12 are unsupported. First, Defendant challenges the part of the finding indicating that Defendant did not present any evidence indicating her mother’s lack of response “was a specific concern other than one expressed by” Defendant’s sister. Defendant contends the superior

court was insinuating that Defendant expressed no concern for her mother after hearing from her sister. Rather, we conclude that it can be reasonably inferred that the finding explains that no one other than Defendant's sister expressed to Defendant a specific concern regarding her mother. It is uncontested that no one other than Defendant's sister expressed a concern to Defendant about her mother. We hold this portion of the finding is supported by competent evidence.

Next, Defendant contends the portion of the finding stating that Defendant gave three separate explanations for her absence from court and that none are credible is also unsupported by competent evidence. Based upon the testimony at the hearing, it appears Defendant asserted varied stories as her reasoning for failing to appear. The deputy clerk testified that Defendant told her she was in domestic court at 2:00 p.m. that day.

At the district court hearing, Defendant testified that there was "a family emergency related to [her] father's death," she was "making arrangements," and wasn't able to be back at 2:00 p.m. However, Defendant later testified at the superior court hearing that she received a call from her sister concerning her mother's well-being that caused her absence from court at 2:00 p.m. Thus, the finding that there were three explanations given by Defendant for her absence is supported by competent evidence, such that the superior court judge could make a credibility determination.

Finally, regarding Finding of Fact 12, Defendant challenges the superior

court's finding that she "took no action whatsoever to inform or have someone on her behalf inform the court or any court personnel . . . that she was not going to be present for court . . . at 2:00 as directed." However, Defendant, on cross-examination, admitted that she did not call or inform anyone at the court that she would not be present. Defendant testified she believed she told her husband to make arrangements to cover her, but her husband testified that he did not recall that being the case. Accordingly, we determine competent evidence supports this portion of Finding of Fact 12.

7. *Finding of Fact 13-16*

Defendant challenges the part of Finding of Fact 13, that Defendant did not present credible evidence of a valid excuse, and Findings of Fact 14 through 16 in their entirety, purporting that all of these challenged findings are instead conclusions of law. The State presents no argument against this, arguing only that the alleged error was not prejudicial. Generally, "any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law." *In re Everette*, 133 N.C. App. 84, 85-86 514 S.E.2d 523, 525 (1999) (citation omitted). Since each of these challenged findings required some level of judgment and application of legal principles by the superior court judge, we agree with Defendant that these findings are better categorized as conclusions of law. They will be treated as such for our *de novo* review.

8. *Finding of Fact 17*

Finally, Defendant argues Finding of Fact 17 should be disregarded because it is neither a finding of fact nor a conclusion of law, but a personal opinion of the superior court judge. Alternatively, Defendant contends that in as much as Finding of Fact 17 makes a legal determination regarding the excuse or justification for Defendant's absence, it would be considered a conclusion of law. Finding of Fact 17 states:

While it is laudable that the defendant appeared during the morning session of court on January 29, 2020, given the death of her father, it is inexcusable for her to fail to return to court as directed by The Honorable Resson O. Faircloth, II or to make provision to communicate with court personnel to at least inform them of her decision not to return to court, whatever the reason.

"Trial judges are not barred from expressing their opinions in trials conducted without a jury, especially where the comments are consistent with the court's role as finder of fact." *Hancock v. Hancock*, 122 N.C. App. 518, 528, 471 S.E.2d 415, 421 (1996) (citation omitted). While it was not necessarily error for the superior court to express their opinion regarding the case during the non-jury hearing, Finding of Fact 17 seems to make a legal judgment of how Defendant's actions were "inexcusable." Thus, to the extent that Finding of Fact 17 makes a legal judgment about Defendant's justification for her absence, it will be considered a conclusion of law. In as much as Finding of Fact 17 establishes that Defendant was present during the 29 January 2020 morning session of court, that her father died, that she did not return to court

on time, and that she did not communicate to court personnel any reason for her absence, we conclude that these will be considered as findings of fact supported by testimony at the superior court hearing.

C. Willfulness and Gross Negligence

In accordance with the findings Defendant has challenged, Defendant argues the trial court erred in determining Defendant was guilty of contempt because there was no evidence of willfulness or gross negligence. Defendant was found in violation of N.C. Gen. Stat. §§ 5A-11(a)(3), (6), and (7). The statute defines each as

(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

. . .

(6) Willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction.

(7) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.

N.C. Gen. Stat. §§ 5A-11(a)(3), (6), (7) (2021).

A willful act, in the criminal context, is one done “deliberately and purposefully in violation of law, and without authority, justification or excuse.” *State v. Chriscoe*, 85 N.C. App. 155, 158, 354 S.E.2d 289, 291 (1987) (citations omitted). “Grossly negligent . . . implies recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the rights of others.” *Id.* (citation

omitted).

Defendant relies on this Court's decision in *Chriscoe* to support her position that she did not act willfully or was not grossly negligent. In *Chriscoe*, DSS and the district attorney's office requested that the defendant and her children appear in court before 9:00 a.m. relating to the prosecution of her husband. *Chriscoe*, 85 N.C. App. at 156, 354 S.E.2d at 290. The defendant relied on her mother to pick her and her children up at 8:30 a.m. that morning, but her mother overslept. *Id.*

After calling her mother numerous times, the defendant became upset and worried for her mother's well-being. *Id.* at 156-57, 354 S.E.2d at 290. Eventually, the defendant called her father to use his truck, and arrived at the courthouse between 10:30 and 10:45 a.m. *Id.* The trial court served defendant with a show cause order because she "fail[ed] to return to court as ordered by the Judge[.]" and was subsequently held in contempt of court for "willful or grossly negligent failure to comply with the schedules and practices of the court resulting in substantial interference with the business of the court." *Id.* at 155, 354 S.E.2d at 290.

On appeal, this Court reversed the trial court's order holding the defendant in contempt. *Id.* at 156, 354 S.E.2d at 290. This Court reasoned that the defendant was not "subject to any personal instruction or order of the court or under any other legal duty to be present at 9:30 a.m." *Id.* at 157, 354 S.E.2d at 291. Further, we determined that the evidence did not establish the defendant's actions were willful or grossly negligent in violation of the contempt statute because "the record [was] entirely

devoid of any evidence that [the] defendant's delay in arriving at court resulted in any interference with the ongoing prosecution[.]" and that the "defendant's short delay in arriving at court was due, not merely to an absence of transportation, but also to her concern for her mother's safety brought about by her mother's failure to arrive on time or to answer the telephone." *Id.* at 158, 354 S.E.2d at 291.

While we agree that the case before us presents somewhat similar circumstances to those present in *Chriscoe*, there are key distinctions to be made. First, unlike in *Chriscoe*, Defendant, who has been practicing law for twenty-five years, was ordered by the district court judge to return to court at 2:00 p.m. to represent one of her clients. Additionally, Defendant had remaining clients in jail that needed to be addressed in the afternoon. While, like in *Chriscoe*, evidence showed Defendant was concerned for her mother's well-being, Defendant was not dependent on anyone to ensure she was back in court on time and had been present at the district court for the morning session. Instead, Defendant failed to inform any court personnel that she would not return in time. As a result, the district court was forced to wait for a period of time before continuing her jailed clients' cases as well as issuing an order for arrest for one of her clients, and show cause order for Defendant. The superior court found that Defendant made these decisions despite the judge's instructions to return to court at 2:00 p.m. Additionally, the trial court's conclusion that Defendant's justification for her absence was not credible due to the variance in her stories, based on the superior court testimony, was completely within the purview

of the superior court judge and is supported by the findings.

We conclude that the trial court's findings were sufficient to support its conclusions of law determining that Defendant's conduct constituted criminal contempt.

D. Special Session Order

Defendant's final challenge asserts that the superior court erred by entering its contempt order out-of-term and out-of-session.

"Whenever it appears to the Chief Justice of the Supreme Court that there is need for a special session of superior court in any county, he may order a special session in that county, and order any regular, special, or emergency judge to hold such session." N.C. Gen. Stat. § 7A-46 (2021). "An emergency superior court judge has the same powers, 'in open court and in chambers,' 'that regular judges holding the same courts would have.'" *Hockaday v. Lee*, 124 N.C. App. 425, 428, 477 S.E.2d 82, 84 (1996) (quoting N.C. Gen. Stat. § 7A-48 (2021)). "These powers, however, exist only during the period of their assignment." *Id.*

Here, the Chief Justice commissioned Judge Hardin as an emergency superior court judge in Lee County "to begin September 6, 2021 and continue One Week, *or until the business is completed*." (Emphasis added.) This Court has interpreted the phrase "until the business is completed" to mean until the judgment is executed. *See Hockaday*, 124 N.C. App. at 428, 477 S.E.2d at 84 ("The business of the court was not completed, in this case, until the execution of the judgment and the settling of the

costs.”); *see also* *Keesee v. Hamilton*, 235 N.C. App. 315, 321, 762 S.E.2d 246, 250 (2014) (upholding superior court judge’s jurisdiction to enforce compliance with his contempt order because “until the business was completed” included subsequent enforcement of the contempt order).

While Defendant cites to several cases from the Supreme Court of North Carolina to support her contention that orders entered out-of-session and out-of-term render an order legally invalid, none of these cases contemplate the “until business is completed” language found in Judge Hardin’s commission. *See Cap. Outdoor Advert., Inc. v. City of Raleigh*, 337 N.C. 150, 154, 446 S.E.2d 289, 292 (1994); *State v. Trent*, 359 N.C. 583, 585, 614 S.E.2d 498, 499 (2005). We hold that *Hockaday* and *Keesee* are controlling authority in this matter, and conclude that the entering of the contempt order was legally valid.

III. Conclusion

For the foregoing reasons, we affirm the superior court’s contempt order.

AFFIRMED.

Judges TYSON and CARPENTER concur.

Report per Rule 30(e).