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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-421

Filed 2 July 2024

New Hanover County, No. 22 CRS 3153

STATE OF NORTH CAROLINA

v.

KHALIL HARDY, Defendant.

Appeal by Defendant from order entered 7 November 2022 by Judge Clinton D. Rowe in New Hanover County Superior Court. Heard in the Court of Appeals 17 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Lisa R. Atwater, for the state-appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David S. Hallen, for the defendant-appellant.

STADING, Judge.

Defendant Khalil Hardy appeals from an order finding him in direct criminal contempt. For the reasons below, we reverse the order.

I. Background

Wilmington police officers arrested Defendant on 21 March 2020 for discharging a firearm in the city limits, possession of a stolen firearm, and possession

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of up to one-half ounce of marijuana. On 23 March 2020, Defendant completed an affidavit of indigency, on which he stated he had no monthly income and expenses. He left portions of the affidavit relating to his assets and liabilities blank. The trial court found that Defendant was indigent and entitled to court-appointed counsel. On 15 February 2022, Defendant pleaded guilty to possession of a stolen firearm, and the State dismissed the remaining charges. The presiding judge suspended Defendant's sentence for twelve months of supervised probation.

On 14 October 2022, Defendant's probation officer filed a report alleging that Defendant violated the terms of his probation and requested him to appear in court on 7 November 2023. At this time, Defendant lived in Georgia and traveled to North Carolina by plane on the day of the hearing. Upon arriving in court, Defendant completed, signed, and dated an affidavit of indigency form in the same way as his first, saying that he had no monthly income, monthly expenses, assets, or liabilities. After he affirmed under oath that "the information on the affidavit is true and accurate[.]" the trial court asked Defendant how he managed to afford a plane ticket from Georgia. Defendant responded that his parents paid for his ticket, and the following exchange ensued:

The Court: And why don't you work?

Defendant: I do work.

The Court: Where do you work?

Defendant: I work for a temp service. I work for Peace (phonetic) Industry.

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The Court: Okay. Do they pay you?

Defendant: Yeah, I take care of bills.

The Court: Well, you put on here you have no bills and you have no income.

Defendant: Yes, sir.

The Court: So explain to me why I shouldn't hold you in contempt for not being truthful on this.

Defendant: I don't know, sir.

The Court: Okay. Well, go ahead and appoint the Public Defender, but I'm going to hold you in contempt and you're going to spend 30 days in jail.

...

The Court: And for the reason, it's perjury.

Thereafter, the trial court completed an order of assignment of counsel and marked the box denoting Defendant as indigent. It then entered and signed the Administrative Office of the Courts form entitled "Direct Criminal Contempt/ Summary Proceedings/ Findings and Order," providing:

The Court finds beyond a reasonable doubt that during the proceeding the above contemnor [Defendant] willfully behaved in a contemptuous manner, in that the above named contemnor did PERJURY[.]

The undersigned gave a clear warning that the contemnor's conduct was improper. In addition, the contemnor was given summary notice of the charges and summary opportunity to respond.

The contemnor's conduct interrupted the proceedings of the court and impaired the respect due its authority.

Through appointed counsel, Defendant timely filed a notice of appeal from the order.

II. Jurisdiction

This Court has jurisdiction to hear Defendant’s appeal of the trial court’s order pursuant to N.C. Gen. Stat. §§ 5A-17(a) and § 7A-27(b) (2023), which collectively authorize appeals of final criminal contempt judgments.

III. Analysis

Defendant raises two issues on appeal: (1) whether the trial court erred in holding him in direct contempt, and (2) whether the trial court provided Defendant with summary notice of the charges. This Court reviews a trial court’s determination of contempt to determine “whether . . . competent evidence support[s] the [court’s] findings of fact and whether the findings support [its] conclusions of law.” *State v. Okwara*, 223 N.C. App. 166, 168, 733 S.E.2d 576, 578 (2012) (citation omitted). This Court reviews “the trial court’s conclusions of law drawn from the findings of fact . . . de novo.” *State v. Baker*, 260 N.C. App. 237, 241, 817 S.E.2d 907, 910 (2018) (citation omitted). We reverse the trial court’s criminal contempt order because Defendant’s acts were not willful and did not impair, impede, or interrupt the proceedings.

A. Willfulness

1. Conduct

N.C. Gen. Stat. § 5A-11 provides an exhaustive—and exclusive—list of behaviors, each preceded by the word “willful,” that qualify as criminal contempt. N.C. Gen. Stat. § 5A-11(a) (2023). Based on the criminal contempt order, the trial

court cited N.C. Gen. Stat. § 5A-11 (1) – (3), which states the following behavior is criminal contempt:

- (1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
- (2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.
- (3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

Id. § 5A-11(a) (1)–(3). Criminal contempt can either be direct or indirect. A trial court will find that an individual is in 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) (2023).

Here, Defendant makes several arguments as to why the trial court erred by holding him in direct criminal contempt. He first alleges the trial court erred because N.C. Gen. Stat. § 5A-11(a) includes perjury in its exhaustive list of behaviors. He then points to N.C. Gen. Stat. § 7A-456 (2023)—the statute outlining penalties for

false statements of indigency made under oath—noting it does not include contempt as a possible penalty.¹ However, these arguments are misplaced.

This Court has previously held that “[m]aking a false statement under oath may constitute contempt, notwithstanding that the conduct may also be a crime, such as perjury or false swearing.” *In re Edison*, 15 N.C. App. 354, 361, 190 S.E.2d 235, 240 (1972) (internal quotation marks and citation omitted). Holding that perjury could never qualify as a “behavior” properly under N.C. Gen. Stat. § 5A-11(a) would construe the statute too narrowly; the statute’s focus on willfulness more accurately emphasizes the contemnor’s intentions. *See, e.g., In re Hayes*, 199 N.C. App. 69, 78, 681 S.E.2d 395, 401 (2009) (“A fundamental principle of statutory interpretation is that a statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the Legislature did not intend any of its provisions to be surplusage.” (internal quotation marks and citation omitted)). Accordingly, Defendant’s first argument lacks merit.

2. Intent

Next, Defendant contends writing \$0 in all boxes on his affidavit was not a willful contemptuous act and did not interrupt, impede, or interfere with matters

¹ N.C. Gen. Stat. § 7A-456 states “[a] false material statement made by a person under oath or affirmation in regard to the question of his indigency constitutes a Class I felony.” N.C. Gen. Stat. § 7A-456A(a) (2023). Accordingly, had the trial court chosen to punish him under this statute, he would have been subjected to punishment for a Class I felony, rather than the thirty-day sentence allowed for under N.C. Gen. Stat. 5A-12(a) (2023).

being heard in the court. In effect, he asserts that he acted neither “willfully [n]or with gross negligence.” *Okwara*, 223 N.C. App. at 170, 733 S.E.2d at 580. The statutory term “willful” . . . implies” that a defendant “purposefully and deliberately” violated the law with a “knowing[] and . . . stubborn purpose.” *Clayton v. Clayton*, 54 N.C. App. 612, 615, 284 S.E.2d 125, 127 (1981) (citation omitted). “Conduct which is designed and reasonably calculated to interrupt the proceedings of the court then engaged in the administration of justice and the dispatch of business presently before it is punishable as criminal contempt.” *In re Nakell*, 104 N.C. App. 638, 650–51, 411 S.E.2d 159, 166 (1991) (citation omitted). A defendant’s willful intent to impair, interfere, or interrupt court proceedings can be inferred from the circumstances. *See State v. Warren*, 313 N.C. 254, 262, 328 S.E.2d 256, 262 (1985) (“[I]ntent is a mental attitude which . . . must ordinarily be shown by circumstances from which it may be inferred.”).

In *State v. Phair*, a trial court found an attorney in direct criminal contempt after her cell phone went off while court was in session. 193 N.C. App. 591, 593, 668 S.E.2d 110, 111 (2008). This Court reversed the order, holding “that defendant merely made a mistake in not turning her cell phone off before entering the courtroom.” *Id.* at 594. And “[w]hile this was irresponsible,” the Court could not say that the defendant exhibited a “bad faith disregard for the trial court’s authority; indeed, rather than “more than deliberation or conscious choice[.]” the “defendant’s actions here—or rather her inaction—seem to. . . constitute *less* than conscious

choice.” *Id.* (internal quotation mark and citation omitted). Conversely, in *State v. Baker*, this Court held that the defendant willfully intended to interrupt court proceedings when he “used two fingers and his thumb in the shape of a gun pointing at his own head or hand while looking directly at the witness testifying on stand. . . .” 260 N.C. App. at 242, 817 S.E.2d at 911.

The present matter shares a greater similarity to *Phair*, 193 N.C. App. 591, 668 S.E.2d 110, than it does *Baker*, 260 N.C. App. 237, 817 S.E.2d 907. Here, no evidence shows that Defendant filled out his affidavit of indigency form with the requisite willful intent to amount to direct criminal contempt. The record shows that Defendant filled out his first affidavit of indigency form in almost the same way he did the second. Based on the first form, the original trial court assigned him counsel without issue. After filling out his second form in the same way, the trial court questioned Defendant’s form. In response, Defendant answered these questions honestly and without issue. This behavior does not amount to a “bad faith disregard” for the trial court’s authority. . . .” *Phair*, 193 N.C. App. at 594, 668 S.E.2d at 112 (citation omitted). Nor does it implicate any sort of “stubborn resistance.” *Bossian v. Bossian*, 284 N.C. App. 208, 217 (2022) (quotations omitted).

B. Court Disruption

Furthermore, no evidence in the record shows that Defendant’s actions impaired, interrupted, or impeded court proceedings. Generally, a contemnor disrupts the mechanisms of a court by actively impeding its ongoing legal operations.

See, e.g., In re Nakell, 104 N.C. App. 638 (1991) (interrupting judge repeatedly); *State v. Wendorf*, 274 N.C. App. 480 (2020) (disobeying testimonial subpoena); *State v. Ore*, 283 N.C. App. 524 (2022) (swearing at witness), *vacated in part on other grounds*, 383 N.C. 676 (2022). By contrast, mere tardiness in attendance or carelessness of decorum that still allows court proceedings to continue typically falls short of such malicious conduct. *See, e.g., State v. Chriscoe*, 85 N.C. App. 155 (1987) (arriving late to court); *State v. Phair*, 193 N.C. App. 591 (2008) (leaving ringtone on).

Here, the trial transcript documents Defendant's compliance with the trial court's original hearing notice and arrival. *Cf. Wendorff*, 274 N.C. App. at 484, 852 S.E.2d at 903 (2020) ("[F]ailing to appear when subpoenaed can be punished as criminal contempt because it constitutes '[w]illful disobedience of, resistance to, or interference with a court's lawful process[.]'" (citing N.C. Gen. Stat. § 5A-11(a)(3)). The transcript also shows that Defendant did not cause any disruption that impaired the trial court's business or interfered with its essential responsibilities. *See Ore*, 283 N.C. App. at 532 (defendant's conduct interrupted and impaired the proceedings when he spoke over the judge and used profane language at sentencing). It lacks an indication that Defendant was disrespectful toward the trial court or acted inappropriately. After reviewing the record, we conclude that Defendant's conduct at issue did not impair, interrupt, or otherwise impede the trial court's proceedings.

IV. Conclusion

Because Defendant's acts were not willful and did not impair, impede, or interrupt the proceedings, the trial court entered its order of direct criminal contempt in error. Accordingly, we reverse the conviction for contempt against Defendant. Since we are reversing the order on these grounds, we need not address Defendant's remaining arguments.

REVERSED.

Judges ZACHARY and WOOD concur.

Report per Rule 30(e).