

NO. WR-91,424-01

IN THE
COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

EX PARTE WAYNE DOLCEFINO, APPLICANT

FROM THE COUNTY CRIMINAL COURT AT LAW NO. 16
OF HARRIS COUNTY, TEXAS
ANCILLARY TO CAUSE NO. 2316965

REAL PARTY IN INTEREST THE STATE OF TEXAS' RESPONSE TO
APPLICANT'S ORIGINAL WRIT OF HABEAS CORPUS

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ORAL ARGUMENT WAIVED

IDENTIFICATION OF THE PARTIES AND COUNSEL

Applicant:
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Counsel for Applicant: [Original Writ]
Brian Wice [Lead Counsel]
Dan Cogdell

Counsel for Applicant: [Contempt Proceedings]
Brian Wice
Dan Cogdell
Nicole DeBorde
Cordt Akers
Nick Norris

Respondent:
Judge Darrell Jordan
County Criminal Court at Law No. 16
Harris County, Texas

Real Party in Interest:
The State of Texas [Attorneys Pro Tem]
John Creuzot, Dallas County Criminal District Attorney
Jennifer Balido, Assistant District Attorney

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STATEMENT OF THE CASE

On June 30, 2020, Applicant, a private citizen self-employed as a YouTube reporter, was found in contempt of court by the Honorable Darrell Jordan, Judge of County Court at Law 16 of Harris County, for contumacious conduct in the courtroom, to wit: THE SPECTATOR WAS DISRUPTING COURT. HE WAS WARNED 3X:HAVE A SEAT OR LEAVE COURTROOM. HE REFUSED. KEPT DEMANING TO INTERVIEW JUDGE. UPON FINAL WARNING JUDGE STATED HE WOULD BE HELD IN CUSTODY. TO WHICH SPECTATOR RESPONDED: "DO WHAT YOU HAVE TO DO". Applicant was sentenced to confinement in the Harris County Jail for 180 days and levied a \$500 fine; confinement was probated for six months, but the court also ordered 3 days in jail as a condition of probation to begin June 30, 2020. Applicant filed his Original Writ of Habeas Corpus challenging the judgment of contempt and the sentence on two grounds.

On August 17, 2020, Judge Sedrick T. Walker of County Criminal Court at Law 11, signed an order found that good cause existed to grant the voluntary disqualification of the Harris County District Attorney in this matter and appointed John Creuzot, Criminal District Attorney of Dallas County as Attorney Pro Tem to represent the State of Texas, a real party in interest.

STATEMENT REGARDING ORAL ARGUMENT

Since the State of Texas concedes that Applicant is entitled to relief, no oral argument is necessary.

STATEMENT OF JURISDICTION

This Court has original jurisdiction in this extraordinary matter pursuant to Tex. Const. Art. V, sec. 5(c) and Tex. Code Crim. Proc. art. 11.05.

RESPONSE TO APPLICANT'S GROUNDS FOR HABEAS RELIEF

1. The circumstances surrounding the actions of Applicant and the evidence presented in Applicant's Original Writ of Habeas Corpus do not support Respondent's finding that Applicant was guilty of direct criminal contempt, and Respondent's Judgment of Contempt and Commitment Order should be vacated;
2. Since Respondent's Judgment of Contempt and Commitment Order should be vacated, Applicant's second ground for relief is moot.

STATE' RESPONSE TO APPLICANTS
FIRST GROUND FOR HABEAS RELIEF

The circumstances surrounding the actions of Applicant and the evidence presented in Applicant's Original Writ of Habeas Corpus do not support Respondent's finding that Applicant was guilty of direct criminal contempt

Direct contempt occurs when the words spoken or acts performed constituting contempt occur in the presence of the court where the judge witnesses the conduct. *Ex parte Norton*, 191 S.W.2d 713, 714 (Tex. 1946). Actions of direct contempt are a use of judicial power to "preserve order in the courtroom for the proper conduct of business" and to instantly...suppress disturbance or violence or physical obstruction or disrespect to the court." *Cook v. United States*, 267 U.S. 517, 534-35 (1925).

"Contempt is strong medicine. Use it cautiously and only as a last resort." *Willson v. Johnson*, 404 S.W.2d 870 (Tex. Civ. App.—Amarillo 1966, no writ). The power to punish for contempt should only be exercised with caution, and contempt is not to be presumed, but on the contrary, is presumed not to exist. *Ex parte Taylor*, 807 S.W.2d 746 (Tex. Crim. App. 1991) (*en banc*); *Ex parte Arnold*, 503 S.W.2d 529, 534 (Tex. Crim. App. 1974) and cases there cited; *see also Ex parte White*, 154 Tex. 126, 274 S.W.2d 542 (1955); *Deramus v. Thorton*, 333 S.W.2d 824 (Tex. 1960); *Ex parte Rogers*, 633 S.W.2d 666 (Tex. App.—Amarillo 1982). The essence of contempt is that the conduct obstructs or tends to obstruct the proper administration of justice. *Id.*; *Ex parte Salfen*, 618 S.W.2d 766 (Tex. Crim. App. 1981); *Ex parte Jacobs*, 664 S.W.2d 360 (Tex. Crim. App. 1984).

Applicant's conduct did not obstruct or tend to obstruct the proper administration of justice. The video evidence presented in Applicant's Original Writ of Habeas Corpus is compelling. When Applicant entered the courtroom, he was greeted by Respondent, and the following friendly exchange occurred:

THE COURT: How can I help you?

APPLICANT: I'm here to see you judge.

THE COURT: Good to see you.

APPLICANT: How are you?

THE COURT: I have no complaints.

APPLICANT: Well, good.

THE COURT: Oh, you are here to see me!

Applicant's Appendix to Application for Writ of Habeas Corpus, Tab 4, p. 1, lines 1-8 (hereinafter "Applicant's Appendix"). Nothing in that conversation would indicate that the court was in session, in a hearing, or conducting any court business. Another person, presumably the bailiff of the court, laughs and then speaks to Applicant, commenting on the fact that nobody could tell who Applicant was with his mask on and tells him to take it off "and then we can see who you are". Applicant's Appendix, Tab 4, p.1, lines 14-16. Again, nothing in that conversation would indicate that the court was in session, in a hearing, or conducting any court business. Respondent initiates more conversation with Applicant when he says, "Uh,

I can't talk to anybody with pending cases in court," to which Applicant replies, "I have no pending cases in court." Applicant's Appendix, Tab 4, p.1, lines 23, 24. Applicant tries to explain why he wants to talk to Respondent, and Respondent tells him that he must sit down and observe but "if you're talking to me...your (sic) done." Applicant's Appendix, Tab 4, p.1, line 27. At no time did Respondent indicate that he was in trial, in a hearing, in docket call, or conducting any other business done by a tribunal, i.e., a "proceeding". See Brian Garner, "Garner's Dictionary of Legal Usage," 714 (3rd ed.).

When Respondent tells Applicant, generally, "We are in the middle of court right now, so either you can leave..." Applicant immediately apologizes, explaining, "I'm sorry Judge, I didn't see anybody in court right now." Applicant's Appendix, Tab 4, p.2, lines 8, 9. Respondent does not explain what type of business the court is conducting, but rather has the following exchange:

THE COURT: I know because you don't understand how court works. So either you can leave—

APPLICANT: I don't—

THE COURT: --or go into custody. Which one is your choice?

APPLICANT: Well, you who what, Judge? You're going to, you can, you have the right to do what you want. I'm simply trying to understand why all our complaints—

THE COURT: Mr. Dolcefino...(unintelligible)...

APPLICANT: --have been appointed to your investigators.

THE COURT: --you are interrupting court. Either you leave or I'm going to hold you in direct contempt.

APPLICANT: Well, then Judge, you do what you got to do. You want to hold me in contempt for simply asking questions? Go ahead. I mean, we're just trying to find out why our complaints have—

THE COURT: Place him—

APPLICANT: --gone unanswered.

THE COURT: in custody.

Applicant's Appendix, Tab 4, p.2, lines 10-20.

The situation is complicated by the fact that any business being conducted by the court was not done in the traditional manner, i.e. in person, but remotely on ZOOM, due to the dangers of COVID-19. Even a casual observer of a court conducting business in the traditional manner, with attorneys, clients and a court reporter present, would understand that he would have to wait his turn to approach the bench; however, in this situation, with those tell-tale indicators absent, it would be difficult, if not impossible, to tell what business, if any, the court may be conducting. Respondent's greeting and invitation to speak when applicant entered the courtroom would further indicate to a reasonable person that the court was not in session or conducting any court business.

To establish contempt of court, it is not the purpose or intent to act which controls, but the act itself must be such as amount to contempt of court. *Ex parte*

Bailey, 142 Tex. Cr. R. 582, 155 S.W.2d 927 (1941); *Ex parte Dowdle*, 165 Tex.Cr. R. 536, 309 S.W.2d 458 (1958). While Applicant's actions may have been inappropriate, they were not implausible in the context of the situation. *See Id.* Whether applicant's statement offended the court is not the test in contempt actions but the act itself must be shown as intentionally disrespectful. *Id.* The State finds no such intent on the part of Applicant. "Trial courts...must be on guard against confusing offense to their sensibilities with obstruction to the administration of justice. *Brown v. United States*, 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed. 2d 589 (1958). Applicant's actions, in the context of the conversation between Applicant and Respondent, fail to show disrespect in the manner of which contempt actions are made. There must be intentional or willful action of an order of the court to be sufficient to support an adjudication of criminal conduct." *Williams v. Estell*, 566 F.Supp. 1376, 1380 (D.C. Tex. 1983). Given the nature of the discussion in the courtroom, there was not flagrant disregard of any court order nor an obstruction of the administration of justice.

Applicant was entitled to notice and an evidentiary hearing

After ordering Applicant into custody, Respondent held a hearing regarding the contempt proceedings later that same afternoon. *See Applicant's Appendix Corpus, Tab 1.* Applicant was represented by counsel, Mr. Cordt Akers, and the State was represented by Harris County Assistant District Attorney James (Jeff)

Sims. Applicant's counsel assured Respondent that Applicant was not aware of any court proceeding being conducted when he entered the courtroom, and then he told Respondent that he did not believe that summary proceedings in this matter were not appropriate, arguing that Applicant was entitled to due process, citing *Ex parte Knable*, 818 S.W.2d 811, 813 n.4 (Tex. Crim. App. 1991) (*en banc*). Applicant's Appendix, Tab 1, p. 6, lines 8-25 and p.7, lines 1-19. Applicant's counsel pointed out that since the exigency of sentencing Applicant in a summary punishment proceeding had extinguished, Applicant was entitled to notice and a hearing. Applicant's Appendix, p. 8, lines 6-25. Respondent continued with the hearing and sentenced Applicant to 180 days confinement probated for six months, assessed a \$500 fine, ordered that he complete 24 hours of community service, ordered that he attend a decision making class, he not consume drugs or alcohol, and that he serve 3 days confinement in the Harris County jail as a condition of his probation. Applicant's Appendix, Tab 1, p. 11, lines 14-19.

Even where a finding of direct contempt is justified, that does not automatically warrant summary punishment of the contemnor without notice and a hearing. *In re Bell*, 894 S.W.2d 119, 129 (Spec. Ct. Rev. 1995). Summary punishment for direct contempt is justified only when the contempt is committed in the presence of the court, *and* there is an exigent situation; that is, one which requires the judge to act immediately to quell disruption, violence, disrespect, or physical

abuse. *Id.* at 129 (emphasis in original), citing *Ex parte Knable*, 818 S.W.2d at 813, n.4 . Once the immediate disturbance has dissipated and a hearing *could* have been held, due process mandates that it *should* have been held. *Id.* at 130, citing *Knable*, 818 S.W.2d at 813-14. Respondent’s refusal to hold a hearing later in the afternoon of June 30, despite a direct request from Applicant’s counsel, was not justified. *See Bell*, 894 S.W.2d at 130.

**Statement in Judgment of Contempt and Commitment Order
Not Supported by the Record**

The Judgment of Contempt and Commitment Order states Respondent warned Applicant that if he persisted in behavior Respondent would hold him in contempt of court. The record supports that statement. The Judgment further states that Respondent also informed Applicant that each act of contempt was punishable by a \$500 fine and up to six months confinement in the Harris County Jail. This statement is not supported by the record. At no time during the initial conversation did Respondent inform Applicant that each act of contempt was punishable by a \$500 fine and up to six months confinement in the Harris County Jail. Moreover, at no time in the contempt hearing held after Applicant was taken into custody did Respondent inform Applicant of the punishment range for contempt.

Conclusion

Given all the circumstances in the present matter and the evidence presented in the Applicant’s Original Writ of Habeas Corpus, the State cannot conclude that

Applicant's actions were disrespectful or disrupting to the trial court to such an extent as to require a finding of direct contempt. The Judgment of Contempt and Commitment Order should therefore be vacated.

STATE'S RESPONSE TO APPLICANTS SECOND ISSUE

Due to the State's belief that Applicant is entitled to relief on its first Issue and that the Judgment of Contempt and Commitment Order should be vacated, the Applicant's Second Issue is moot, and does not require a response.

PRAYER

For these reasons, the State of Texas prays that this Honorable Court grant the relief sought in Applicant’s Petition for Original Writ of Habeas Corpus, and (1) vacate Respondent’s order adjudging Applicant guilty of direct criminal contempt, and discharge him from custody or any further restraint on his liberty; and (2) if necessary, vacate the condition on his appeal bond requiring him to wear a GPS device.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. P. 9.5(d), I certify that this document was served on all counsel of record via electronic filing on September 14, 2020.



JENNIFER BALIDO