

STATE OF MICHIGAN
COURT OF APPEALS

In re Contempt of DAVID BLACK

LARRY BUILTE,

Plaintiff,

v

DARLENE BUILTE,

Defendant,

MICHAEL GILDNER,

Appellee,

and

DAVID BLACK,

Appellant.

UNPUBLISHED

September 22, 2009

No. 285330

St. Clair Circuit Court

LC No. 07-002728-DO

Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Appellant David Black was convicted of criminal contempt for “deliberately lying” to the trial court and for making “false representation[s]” to opposing counsel. He appeals as of right. Because the trial court’s contempt findings were not clearly erroneous and because its consideration of a videotape not admitted into evidence was harmless error, we affirm.

I. Basic Facts

Black represented Darlene Bulte in her divorce from Larry Bulte. Appellee Michael Gildner represented Larry Bulte. A hearing on Larry Bulte’s motion for entry of a default judgment was scheduled for January 24, 2008, at 10:00 a.m., before St. Clair Circuit Judge Elwood Brown. According to Kathleen Dunleavy, Gildner’s legal secretary, she received a telephone call from Black shortly after 8:00 a.m. on January 24, 2008. Black informed her that he would be late for the 10:00 a.m. hearing and that he had contacted the trial court. Dunleavy

immediately called Gildner's cellular telephone and left Gildner a voice message. Dunleavy informed Gildner that Black had called and stated that he would not be appearing for the hearing until 11:00 a.m. and that he had already called the trial court. Dunleavy also relayed Black's request that Gildner call him. Upon receiving the voice mail, Gildner telephoned Black. According to Gildner, Black told him that he would not be appearing for the hearing any earlier than 11:00 a.m. and that he had already contacted the trial court. It is undisputed that neither Black nor anyone from his office called the court on the morning of January 24, 2008.

Despite his representations to Dunleavy and Gildner, Black arrived at the courthouse in time for the 10:00 a.m. hearing. Gildner did not arrive until approximately 10:45 a.m., but the motion had not yet been called. When the motion was called, Gildner explained that he was late because Black had informed him that Black would not arrive until approximately 11:00 a.m., that Black had spoken with the court, and that he did not need to hurry. When asked by the trial court if he made that representation, Black responded, "Absolutely false." Later during the hearing, Black stated that it was "[a]bsolutely not" true that he had indicated to Gildner that he had spoken with the court earlier in the morning.

The trial court found Black guilty of criminal contempt:

This court finds beyond a reasonable doubt that David Black willfully misrepresented to Michael Gildner that he had contacted this court and that the court had approved a request not to hear the motion on the *Builte v Builte* case until 11:00 a.m. The court further finds beyond a reasonable doubt that David Black deliberately lied to this court when he was asked directly if he had made such a misrepresentation to Michael Gildner.

Therefore, for deliberately lying to this court regarding his contact with Mr. Gildner on January 24, 2008[,] regarding the case of *Builte v Builte*, this court finds beyond a reasonable doubt that David Black willfully violated his obligation and duty as an officer of the court and as a result of that misbehavior of office or trust is guilty of criminal contempt of this court.

The court further finds that by making the false representation to Michael Gildner and to this court, Mr. Black willfully violated his duty imposed by the Michigan Rules of Professional Conduct in his relationships and dealing with third persons and opposing counsel, specifically rule 3.3, 4.1 and 8.4 and as a result tried to improperly manipulate this court[']s scheduling. For this reason the court also finds David Black guilty of criminal contempt.

II. Finding of Contempt

Black argues that there was insufficient evidence to prove that he committed contempt of court. We disagree. We review the issuance of a contempt order for an abuse of discretion. *In re Contempt of Henry*, 282 Mich App 656, 671; 765 NW2d 44 (2009). The trial court's factual findings are reviewed for clear error. *DeGeorge v Warheit*, 276 Mich App 587, 591; 741 NW2d 384 (2007). Clear error exists if we are left with a definite and firm conviction that a mistake has been made. *Id.* We may not weigh the evidence or the credibility of witnesses to determine if

the trial court's factual findings are supported by competent evidence. *In re Contempt of Henry*, *supra* at 668. We review questions of law de novo. *DeGeorge*, *supra* at 591.

A

Black first argues that there was insufficient evidence to prove that he committed contempt of court because there was no evidence that he violated a court order. According to Black, one cannot be held in contempt unless it is proven that the person violated a court order.

Michigan courts have inherent independent authority, as well as statutory authority, to punish a person for contempt. MCL 600.1701; *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 708; 624 NW2d 443 (2000). MCL 600.1701 states in pertinent part:

The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:

(a) Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings or impair the respect due to its authority.

(b) Any breach of the peace, noise, or disturbance directly tending to interrupt its proceedings.

(c) All attorneys, counselors, clerks, registers, sheriffs, coroners, and all other persons in any manner elected or appointed to perform any judicial or ministerial services, for any misbehavior in their office or trust, or for any willful neglect or violation of duty, for disobedience of any process of the court, or any lawful order of the court, or any lawful order of a judge of the court or of any officer authorized to perform the duties of the judge.

(g) Parties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court.

An unambiguous statute is to be enforced as written. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007).

Pursuant to MCL 600.1701(g), a person may be held in contempt for disobeying a court order. But, pursuant to other sections of the statute, MCL 600.1701(a), (b), (c), a person may be held in contempt for actions that do not necessarily violate a court order. Accordingly, Black's argument that he could not be held in contempt of court because there was no evidence that he violated a court order is without merit. The argument is contrary to the plain language of MCL 600.1701.

B

Black also argues that the evidence does not support the trial court's findings that he willfully deceived the court and Gildner. According to Black, the evidence shows at most that he was careless and disorganized.

An essential element of criminal contempt is that the defendant acted willfully. *People v Matish*, 384 Mich 568, 572; 184 NW2d 915 (1971); *DeGeorge, supra* at 592. See also MCL 600.1701(c) (an attorney may be held in contempt of court "for any willful neglect or violation of duty"). Willfulness "essentially implies knowledge and a purpose to do wrong." *People v Greene*, 255 Mich App 426, 442; 661 NW2d 616 (2003) (quotation omitted).

In determining whether the trial court's factual findings are clearly erroneous, we may not weigh the credibility of the witnesses. *In re Contempt of Henry, supra* at 668. Thus, we must accept the trial court's finding that Dunleavy's and Gildner's testimony that Black told them that he had contacted the trial court about arriving late for the 10:00 a.m. hearing was credible. We must also accept the court's finding that Black's testimony that he was unaware of his schedule for January 24, 2008, was incredible. With this latter finding, the trial court rejected Black's testimony that, in the morning of January 24, 2008, he was initially unaware that the motion for entry of a default judgment was scheduled for 10:00 a.m. before Judge Brown. It was well known that an attorney was not to be late for a hearing scheduled before Judge Brown. Based on the trial court's credibility determinations, the court's findings that Black willfully lied and made false representations to the trial court and Gildner are not clearly erroneous.

III. Right of Confrontation

Black argues that the trial court violated his right of confrontation when it considered the January 24, 2008 video surveillance tape of the courtroom because the videotape was not admitted into evidence at the contempt hearing. We review this constitutional claim de novo. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004).

An accused's constitutional right of confrontation, US Const, Am VI; Const 1963, art 1, § 20, includes the right to have all the evidence used against him placed into evidence, *People v Ramsey*, 385 Mich 221, 224-225; 187 NW2d 887 (1971); *People v Simon*, 189 Mich App 565, 568; 473 NW2d 785 (1991).¹ Thus, a defendant is denied his right of confrontation if, in a bench trial, the trial court relies on extraneous evidence. *Simon, supra*. In this case, in rendering its decision, the trial court considered the January 24, 2008 video surveillance tape, which had not been admitted into evidence at the contempt hearing. Accordingly, Black was denied his right of confrontation.

¹ Black cites no case holding that the right of confrontation applies in a criminal contempt proceeding. However, for purposes of this appeal, we assume that this constitutional right does apply to criminal contempt proceedings. See *United Mine Workers of America v Bagwell*, 512 US 821, 826; 114 S Ct 2552; 129 L Ed 2d 642 (1994) ("Criminal contempt is a crime in the ordinary sense, and criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings.") (quotations and citations omitted).

However, a violation of a defendant's right of confrontation is subject to a harmless error analysis. *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005). A constitutional error is harmless if it is clear beyond a reasonable doubt that a rational trier of fact would have found the defendant guilty absent the error. *Id.* at 347. The videotape showed that Black approached Larry Builte in the courtroom on two occasions while the two men waited for the trial court to hear the motion for entry of a default judgment. However, the issue before the trial court was whether Black should be held in contempt for making false representations to Gildner and the trial court, not for whether he improperly approached Larry Builte, and the videotape provided no direct evidence that Black misrepresented to Gildner that he had contacted the trial court about arriving late for the hearing. While the videotape corroborated Larry Builte's testimony that Black approached him in the courtroom, it did not corroborate Larry Builte's testimony that Black asked to speak to him in the hallway to settle the case,² and it is this portion of Larry Builte's testimony that provides a potential motive for Black's misrepresentation to Gildner. In addition, another possible motive for Black's misrepresentation was presented to the trial court: Black wanted to have the motion heard without Gildner present in the courtroom. Under these circumstances, it is clear beyond a reasonable doubt that if the trial court had not considered the video surveillance tape, it still would have found defendant in contempt of court.

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra

² There is no indication in the contempt order that, in watching the videotape, the trial court was able to hear what Black said to Larry Builte.