

STATE OF MICHIGAN
COURT OF APPEALS

JOYCE HOCKEBORNE,

Petitioner-Appellee,

v

JOANN GOLEMBIEWSKI,

Respondent-Appellant.

UNPUBLISHED

June 13, 2006

No. 258915

Monroe Circuit Court

LC No. 02-014875-PH

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Respondent Joann Golembiewski appeals as of right from the trial court's order finding her in contempt for violating a personal protection order (PPO) that petitioner Joyce Hockeborne, her neighbor, obtained. The trial court imposed a suspended fine of \$100 and ordered Golembiewski to pay Hockeborne's costs of \$163.60 and attorney fees of \$2,462.50. We affirm.

I. Basic Facts And Procedural History

Hockeborne and Golembiewski are next-door neighbors in Lambertville, Michigan. In May 2002, Hockeborne obtained a PPO against Golembiewski and renewed the PPO each year thereafter. In May 2004, the trial court entered an ex parte PPO that prohibited Golembiewski from, among other things, "placing an object on or delivering an object to property owned, leased, or occupied by" Hockeborne. In July 2004, Hockeborne filed a petition in the Monroe Circuit Court requesting Golembiewski be held in contempt for violating the PPO. During the hearing, Golembiewski fired her attorney. After the trial court advised Golembiewski of the risks in representing herself, Golembiewski advised the trial court that she could no longer afford to pay her attorney because she had been unemployed for nine months and had just received her last unemployment check.

The trial court questioned the attorneys about its obligation to appoint counsel for Golembiewski under the circumstances. Hockeborne's counsel advised the trial court that incarceration was an unlikely penalty and further advised that Hockeborne was not seeking to incarcerate Golembiewski, but only requesting fines and attorney fees. Following the three-day hearing in September 2004, the trial court found that Golembiewski violated the PPO by allowing her sons to throw basketballs onto Hockeborne's property and by allowing one of her sons to shoot fireworks that landed on Hockeborne's property. The trial court imposed a fine that was subsequently suspended and ordered Golembiewski to pay attorney fees and costs.

II. Right To Legal Counsel

A. Standard Of Review

Golembiewski argues that the trial court improperly denied her request for court-appointed counsel after she fired her attorney during the contempt proceedings. The trial court considered appointing counsel for Golembiewski, but declined to do so because Hockeborne withdrew her request to have Golembiewski incarcerated if she was found to have violated the PPO. We review de novo a trial court's decision whether to appoint counsel because it involves a question of law.¹

B. Incarceration Requirement

In *Mead v Batchlor*, the Michigan Supreme Court held that under the Due Process Clause² an indigent defendant is entitled to the appointment of counsel in a contempt proceeding that may result in incarceration.³ Thus, "an indigent defendant may not be incarcerated if he has been denied counsel in a contempt proceeding"⁴ MCR 3.708(D)(3) and (4) similarly require that counsel be appointed for an indigent respondent alleged to have violated a PPO if the trial court determines that it might sentence the respondent to jail.

In this case, Hockeborne's attorney made it clear that he was not requesting incarceration, and no term of incarceration was imposed. Thus, there was no due process violation, and the trial court's failure to appoint counsel for Golembiewski does not invalidate the trial court's contempt order.

III. PPO Violation

A. Standard Of Review

Golembiewski argues that the trial court erred in finding that she violated the PPO. "The standard of proof is higher in a contempt proceeding than in other civil proceedings."⁵ "[P]roof of contempt must be clear and unequivocal."⁶ "The petitioner . . . has the burden of proving . . . the respondent's guilt of civil contempt by clear and convincing evidence."⁷ The trial court's order indicates that it found Golembiewski in civil contempt. Although the trial court's order states that it found Golembiewski guilty of civil contempt, this Court appears to have treated the

¹ *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004).

² US Const, Am XIV.

³ *Mead v Batchlor*, 435 Mich 480, 495-498; 460 NW2d 493 (1990).

⁴ *Id.* at 505.

⁵ *In re Contempt of Johnson*, 165 Mich App 422, 427; 419 NW2d 419 (1988).

⁶ *In re Contempt of Robertson*, 209 Mich App 433, 439; 531 NW2d 763 (1995).

⁷ MCR 3.708(H)(3).

order as one involving a finding of criminal contempt. MCR 3.709(C)(1) provides that an appeal by right exists “from a sentence for criminal contempt entered after a contested hearing.” All other appeals concerning violation proceedings are by application for leave.⁸ To the extent that this appeal was improperly characterized as an appeal from a sentence for criminal contempt, because the matter has been fully briefed by Golembiewski without any challenge to this Court’s jurisdiction by Hockeborne, we shall consider Golembiewski’s appeal as on leave granted.

A trial court’s findings in a contempt proceeding must be affirmed on appeal if there is competent evidence to support them. *Cross Co v UAW Local No 155*, 377 Mich 202, 218; 139 NW2d 694 (1966); *Pontiac v Grimaldi*, 153 Mich App 212, 215; 395 NW2d 47 (1986). However, the issuance of an order of contempt rests in the sound discretion of the trial court and is reviewed only for an abuse of discretion. *Mason v Siegel*, 301 Mich 482, 484; 3 NW2d 851 (1942); *People v Ahumada*, 222 Mich App 612, 617; 564 NW2d 188 (1997).^[9]

Further, when a petitioner requests review of an issue alleging it to be against the great weight of the evidence, “[t]his Court may not substitute its judgment for that of the [fact-finder] unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.”¹⁰

B. The Evidence

There was clear and convincing evidence that Golembiewski knowingly allowed her son to fire illegal fireworks. Although there was testimony that other residents in the neighborhood also lit fireworks around the Fourth of July, there was no testimony that neighbors in close proximity to Hockeborne’s yard were setting off projectile-style fireworks similar to the ones Golembiewski’s son was firing. The trial court’s determination that Golembiewski knowingly allowed her son to fire the fireworks and that there was circumstantial evidence that those spent fireworks were found in Hockeborne’s yard is not against the great weight of the evidence.

Nor did the trial court err in finding that Golembiewski violated the PPO by allowing her children to throw basketballs into Hockeborne’s yard. The evidence indicated that Golembiewski was aware that her children were throwing basketballs over Hockeborne’s fence as early as May 2003, and that this problem continued into June or July 2004. The evidence was sufficient to allow the trial court to find that Golembiewski violated the terms of the PPO by knowingly allowing her children to continue to throw basketballs onto Hockeborne’s property.

⁸ MCR 3.709(C)(2).

⁹ *Brandt v Brandt*, 250 Mich App 68, 73; 645 NW2d 327 (2002).

¹⁰ *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003).

C. Agency

Golembiewski argues that the trial court erred in finding that she violated the PPO through her sons' actions. Although MCL 600.2950a does not expressly state that a person subject to a PPO may be liable for violating the PPO based on the actions of another, it is well settled that a party subject to a restraining order may be liable for contempt if the actions of an agent violate the order.¹¹

In this case, the PPO prohibited Golembiewski from "placing an object on or delivering an object to property owned, leased, or occupied by the petitioner." Thus, if Golembiewski knowingly allowed or used her sons to place an object on Hockeborne's property, the trial court could properly find her in contempt for violating the PPO. As previously stated, there was evidence that Golembiewski purchased fireworks for her son and watched him shoot the fireworks, and the trial court found that there was circumstantial evidence that spent fireworks found in Hockeborne's yard were fired from Golembiewski's property. This evidence was sufficient to enable the trial court to find Golembiewski acted in violation of the PPO.

IV. Trial Court's Improper Admission Of Evidence

A. Standard Of Review

Golembiewski argues that the trial court improperly allowed Hockeborne to testify about damage to a wooded slat in her privacy fence where the petition did not include any allegations about damage to the fence.

We review a trial court's decision to admit evidence for an abuse of discretion.¹² Under the rules of evidence, evidence is relevant if it tends to make the existence of a fact at issue in the action more or less probable than it would be without the evidence.¹³

B. Relevance Of Evidence

When a contempt is committed outside the presence of the court, a respondent is entitled to notice of the charges against her.¹⁴ Although the petition did not include allegations about damage to the fence, it included allegations about the continuing problem of basketballs being thrown into Hockeborne's yard. The evidence was offered to show that the fence was damaged when one of Golembiewski's children attempted to retrieve a basketball from Hockeborne's property. The trial court allowed the evidence only to the extent that it "relates specifically to

¹¹ See *Acorn Bldg Components, Inc v Local Union No 2194 of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW*, 164 Mich App 358, 367-368; 416 NW2d 442 (1987).

¹² *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

¹³ MRE 401.

¹⁴ *In re Contempt of Robertson, supra* at 438.

claims of violations.” Because the trial court admitted the evidence to the limited extent that it was relevant to the allegations in the petition involving the continuing problem with basketballs being thrown into Hockeborne’s yard, we conclude that the trial court did not abuse its discretion in allowing the evidence.

Affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Pat M. Donofrio