

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
HANCOCK COUNTY**

JEFFREY J. WHITMAN

**PLAINTIFF-APPELLEE
CROSS-APPELLANT**

CASE NUMBER 5-2000-10

v.

JACQUELYN S. WHITMAN-NORTON

OPINION

**DEFENDANT-APPELLANT
CROSS-APPELLEE**

**CHARACTER OF PROCEEDINGS: Civil Appeal and Cross Appeal from
Common Pleas Court.**

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: November 20, 2000

ATTORNEYS:

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For Plaintiff-Appellee, Cross-Appellant.**

WALTERS, J. Appellant, Jacquelyn S. Whitman, n.k.a. Norton, appeals a judgment of the Court of Common Pleas of Hancock County, finding her in contempt for failing to comply with the terms set forth in a modified child visitation and companionship schedule agreed to by her and Appellee, Jeffrey J. Whitman. For the reasons that follow, we affirm the judgment of the trial court.

This appeal arises from a contempt sanction imposed by the trial court in what represents the parties' continuing inability and unwillingness to resolve domestic disputes since their marriage dissolution. The parties were married on June 24, 1973 in Findlay, Ohio. Three children have been born as issue of the marriage, to wit: Jamie, born August 29, 1977, Jessica, born May 18, 1982 and Justin, born January 26, 1984. On December 10, 1993, the parties petitioned the trial court for dissolution of their marriage, attaching a separation agreement for the court's approval.

Pursuant to the terms of the separation agreement, the parties agreed to joint custody of the minor children with equal visitation rights. By entry dated March 16, 1994, the trial court granted the dissolution petition and approved the

parties' separation agreement. Subsequently, on November 14, 1996, by court order, Appellant was designated as the residential parent and given custody of the parties' minor children, Jessica and Justin. At the time of the order, Jamie had reached eighteen years of age. The trial court also set forth a visitation and companionship schedule for the parties to follow.

Thereafter, on June 11, 1999, the trial court filed a consent judgment entry reallocating the parties' parental rights and responsibilities. Specifically, Appellant was granted custody of Jessica and Appellee was granted custody of Justin. Pursuant to the terms of the consent judgment entry, the parties agreed to the visitation and companionship schedule set forth in the trial court's judgment entry of November 14, 1996.

Subsequently, Appellee filed a motion for contempt on June 23, 1999, alleging that Appellant breached the terms of the entries dated November 14, 1996 and June 11, 1999, by denying him summer visitation rights with Jessica. On January 24, 2000, a hearing was held on this matter. By entry dated February 10, 2000, the trial court found Appellant in contempt and imposed a ninety-day jail sentence.

Appellant now appeals the judgment of the trial court entered February 10, 2000, assigning two errors for our review. Because of their similarity, we will address Appellant's assignments of error together.

Assignment of Error No. 1

The trial court erred as a matter of law when it imposed upon Appellant, Jacquelyn S. Whitman-Norton, an unconditional ninety (90) day jail sentence based upon its finding that Appellant was in contempt as a result of her failure to comply with the recently modified child companionship schedule relating to the commencement of summer visitation between her daughter, Jessica Whitman and the Appellee.

Assignment of Error No. 2

The trial court abused its discretion by imposing upon Appellant, Jacquelyn S. Whitman-Norton, an unconditional ninety (90) day jail sentence based upon her mistaken understanding of the commencement date of the summer visitation between her daughter, Jessica and the Appellee, which mistake resulted in a technical but unintentional violation of the recently modified child companionship schedule.

In his brief, Appellee claims that pursuant to the consent judgment entry dated June 11, 1999, his visitation rights with Jessica were to commence on June 21, 1999. However, Jessica did not appear at his home until June 23, 1999. Appellee argues that Appellant's noncompliance with the visitation and companionship order supports the trial court's finding of contempt in this instance. Appellee also argues that additional support stems from the fact that the trial court has sanctioned Appellant for contempt on two prior occasions. The record demonstrates that Appellant was previously found to be in contempt on August 12, 1997 and July 29, 1998.

Appellant, however, argues that she inadvertently failed to comply with the visitation commencement date and that Appellee failed to establish that she intentionally violated the order beyond a reasonable doubt. Additionally, Appellant argues that the ninety-day jail sentence is extreme under the circumstances.

Regarding noncompliance with visitation orders, R.C. 2705.031 states in pertinent part:

(B)(2) Any person who is granted visitation rights under a visitation order or decree issued pursuant to section 3109.051 [3109.05.1], 3109.11, or 3109.12 of the Revised Code or pursuant to any other provision of the Revised Code, or any other person who is subject to any visitation order or decree, may initiate a contempt action for a failure to comply with, or an interference with, the order or decree.

Acts in contempt of court are defined in R.C. 2705.02, which states in pertinent part:

A person guilty of any of the following acts may be punished as for a contempt:

(A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer.

The appropriate penalties for contempt are set forth in R.C. 2705.05, which states in pertinent part:

(A)(3) For a third or subsequent offense, a fine of not more than one thousand dollars, a definite term of imprisonment of not more than ninety days in jail, or both.

This court has previously held that contempt sanctions are classified as either direct or indirect. *Federal Land Bank Assn. of Fostoria v. Walton* (1995), 99 Ohio App.3d 729, 733. Direct contempt is misbehavior “committed in the presence of or so near the court as to obstruct the due and orderly administration of justice, and punishment therefor[e] may be imposed summarily without the filing of charges or the issuance of process.” *Id.*, quoting *In re Lands* (1946), 146 Ohio St. 589, 595. In contrast, “[a]n indirect contempt of court is one committed outside the presence of the court but which also tends to obstruct the due and orderly administration of justice.” *Walton*, at 733-734, quoting *Lands*, at 595. Because Appellant violated a court order outside the presence of the court and because this violation obstructs the due and orderly administration of justice, the contempt action is indirect in nature.

Additionally, contempt actions are classified as either criminal or civil in nature. *Walton*, at 733, citing *Denovchek v. Trumbull Cty. Commrs.* (1988), 36 Ohio St.3d 14, 16; *see, also, Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 253. “While both types of contempt contain an element of punishment, courts distinguish criminal and civil contempt not on the basis of punishment, but rather, by the character and purpose of the punishment.” *Brown*, at 253. “The purpose of a civil contempt citation is to coerce, whereas the purpose of criminal contempt is to punish.” *Walton*, at 733.

In determining whether a contempt is criminal or civil in nature, appellate courts are to apply the test set forth in *Shillitani v. United States* (1966), 384 U.S. 364. *State v. Kilbane* (1980), 61 Ohio St.2d 201, 206. “The inquiry to be made under this test is ‘what does the court primarily seek to accomplish by imposing sentence?’” *Id.* A review of the record herein reveals that the purpose of the contempt sanction was to punish Appellant for her noncompliance with the visitation and companionship schedule agreed to by the parties. Additionally, the contempt sanction was punishment for Appellant’s prior contemptuous conduct. Therefore, the contempt sanction was criminal in nature.

“The standard of proof required in a criminal contempt proceeding is proof of guilt beyond a reasonable doubt.” *Brown, supra*, at the syllabus; *see, also, Midland Steel Prods. Co. v. U.A.W. Local 486* (1991), 61 Ohio St.3d 121, 127. When reviewing a trial court’s finding of contempt appellate courts apply an “abuse of discretion” standard. *State ex rel. Ventrone v. Birkel* (1981), 65 Ohio St.2d 10; *see, also, Wooton v. Paxson* (Mar. 28, 1995), Paulding App. No. 11-94-8, unreported. An abuse of discretion by the trial court “connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

In its judgment entry dated February 10, 2000, finding Appellant in contempt, the trial court stated:

The defense offered by Jacqueline Whitman-Norton is that she forgot. This court does not recognize “I forgot” as a valid defense to a failure to afford visitation. It is not necessary to show the act is a willful and wanton act, but merely that there was an order in place and that the other party failed to comply. At that time it is incumbent upon the alleged contemnor to present an appropriate defense and the Court would find that this is not an appropriate defense.

Appellant argues that this is a misstatement of the law by the trial court.

Specifically, Appellant argues that there must be a finding that she deliberately and intentionally engaged in contemptuous conduct. In support, Appellant cites a decision by the Supreme Court of Ohio, wherein the Court stated, “that in cases of criminal, indirect contempt, it must be shown that the alleged contemnor intended to defy the court.” *Midland Steel, supra*, at 127. Accordingly, Appellant argues that the record does not establish she intentionally defied the court’s order of June 11, 1999.

We find, however, that the record is replete with evidence with which the trial court could properly infer that Appellant intentionally defied the court’s order. During the contempt hearing on January 24, 2000, the trial court heard testimony from Appellant and Appellee, Appellee’s wife, Chris, and Jessica regarding several incidents stemming from the parties’ inability to coordinate adherence to the visitation and companionship schedule. Additionally, the trial

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court was well aware of Appellant's prior two contempt sanctions since the marriage dissolution.

Despite the fact that Appellant claims she forgot the commencement date of Appellee's visitation rights with Jessica, the trial court's attitude is not unreasonable, arbitrary or unconscionable. The record reflects that Appellant is very aware of the procedures regarding visitation rights with the parties' minor children. This is evidenced by the fact that the parties have been involved in almost constant litigation since their dissolution in 1994. Essentially, the parties have had ample experience in complying with visitation and companionship schedules set forth by the trial court. Additionally, "the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony."

Seasons Coal Co., Inc. v. City of Cleveland (1984), 10 Ohio St.3d 77, 80.

Therefore, we find that the trial court neither erred as a matter of law, nor abused its discretion in this matter.

Appellant also argues that the ninety-day jail sentence imposed by the trial court is inappropriate considering the fact that her actions were inadvertent. First, we have already found that the trial court did not err in finding that Appellant's actions were not inadvertent. Second, the ninety-day jail sentence is well within

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the trial court's discretion pursuant to R.C. 2705.05(A)(3). Therefore, the trial court did not abuse its discretion in imposing such a sentence.

Accordingly, Appellant's assignments of error are not well taken and are therefore overruled.

Having found no error prejudicial to the Appellant herein, in the particulars assigned and argued, we hereby affirm the judgment of the trial court.

Judgment affirmed.

HADLEY, P.J., and PIETRYKOWSKI, J., concur.

(PIETRYKOWSKI, J., of the Sixth Appellate District, sitting by assignment in the Third Appellate District.)