IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
VINTON COUNTY

State of Ohio, ex rel
Anthony J. Celebrezze, Jr.
Attorney General of Ohio,

Plaintiff-Appellee,

vs.

W.R.I., et. al.,

Defendant-Appellants

DECISION & JUDGMENT ENTRY

COUNSEL FOR APPELLANT: Lorene G. Johnston, 111 South Ohio Avenue, Wellston, Ohio 45692

COUNSEL FOR APPELLEE: Edda Sara Post, Assistant Attorney General, Fountain Square, Columbus, Ohio 43224

GREY, P.J.

This is an appeal from a judgment of the Vinton County Common Pleas Court finding appellant, Philip Ison, twice in contempt of court for Ison's failure to pay a civil fine and to repair storage tanks containing saltwater brine, pursuant to R.C. 1509. We affirm.

The record reveals the following facts. On March 8, 1984, the State of Ohio filed a Complaint against W.R.I., a partnership, Lookout Ridge Drilling Company and Philip Ison, individually, as managing partner of W.R.I. The State sought injunctive relief and the asessment of civil penalties for violations of Chapter 1509 at two well sites in Vinton County. The State later dismissed its suit against Lookout Ridge Drilling Company without prejudice.

After a trial to the court, the court found that W.R.I. and Ison were in violation of various sections of Chapter 1509. The trial court assessed W.R.I. and Ison a civil penalty in the amount

of five thousand dollars each. In addition, the court entered a permanent injunction ordering W.R.I. and Ison "to refrain from allowing saltwater and other oil field wastes to overflow said pit, and to refrain from releasing saltwater and other oil field wastes in an uncontrolled manner from the storage tanks in the Crabill-Long and Perry leases in Knox Township, Vinton County, Ohio."

Ison and W.R.I. did not pay the civil penalty assessed on September 11, 1985. On January 22, 1986, the State filed a motion for contempt against W.R.I. and Ison. On March 12, 1986, after a hearing on those charges, the trial court found defendants W.R.I. and Ison to be in contempt, ordered them to comply with its injunctive relief order of September 11, 1985 and to pay the civil penalty no later than May 15, 1986. The court further imposed a ten day imprisonment and a fine of five hundred dollars a day for each day that defendants failed to comply with the court's order. Ison failed to pay the civil penalty by the required date.

On June 6, 1986, an inspector from the Ohio Department of Natural Resources - Division of Oil and Gas, Don Goins, (hereinafter ODNR-DOG) found that more saltwater was flowing from a storage tank on one of the oil leases. Goins gave Ison ten days to repair the tank and clean up the area around the leakage. When Goins returned on June 17, 1986, nothing had been done.

On June 20, 1986, the State filed a second set of charges in contempt. On August 1, 1986, the trial court held a hearing on the charges. Philip Ison did not appear, but was, however, represented by counsel. The trial court found Ison in contempt for

violation of the orders to conduct clean up operations at the Perry lease well-site and for failure to pay fines assessed and sentenced him to ten days in the county jail on each violation. On August 29, 1986, the trial court held a second hearing on the contempt charges to provide Ison an opportunity to present evidence in his defense.

On October 7, 1986, the trial court put on an entry finding Ison in contempt of court and sentenced him to ten days in the county jail for failure to pay the civil penalty and ten days in the county jail for violating its permanent injunction order of September 11, 1985. The court gave Ison the opportunity to purge himself of the first contempt by paying three thousand dollars to the court by November 1, 1986. It is from the October 7, 1986 order of the trial court that Ison appeals and assigns two errors.

FIRST ASSIGNMENT OF ERROR:
"The trial court erred in its imposition of a definite sentence for the contempt of court."

Ison asserts that the trial court erred in imposing a sentence of definite length as a result of a finding that Ison was in contempt. We find Ison's assertion to be untenable.

The contempt power of a court is that which enables a court to vindicate its authority in the face of defiance from one subject to that authority. Brown v. Executive 200, Inc. (1980), 64 Ohio St. 2d 250. Under Ohio law there are two types of contempt, direct and indirect. A court, upon a finding of contempt, may impose either civil or criminal sanctions upon an individual. Thus, an individual may be charged with direct contempt and have criminal sanctions imposed upon him, he may be charged with in-

direct contempt and have civil sanctions imposed upon him or any combination thereof.

A direct contempt is any act performed in the presence of the court, whether in the court's actual presence or constructive presence, which offends the dignity of the court or impairs its efficient administration of justice. State v. Kilbane (1980), 61 Ohio St. 2d 201. Under Ohio case law a direct contempt includes libeling the court, refusing to appear, violating court rules or perpetrating a fraud on the court. See R.C. 2705.01. In contrast, an indirect contempt is any act performed outside the presence of the court which impairs or interferes with the court's administration of justice. Windham Bank v. Tomaseczyk (1971), 27 Ohio St. 2d 55. R.C. 2705 enumerates the acts punishable as indirect contempt and specifically includes under Division (A) disobedience of, or resistance to, a lawful writ, process, order, rule, judgment or command of a court or an officer.

Contempt is also designated as being either criminal or civil in nature. Essentially, offenses against the dignity or process of the court are criminal contempts, whereas, violations which are, on their surface, offenses against the party for whose benefit the court order was issued, are civil contempts. State v. Local 5760, United Steelworkers of America (1961), 172 Ohio St. 75. The burden of proof necessary to find a person guilty of criminal contempt is proof beyond a reasonable doubt. Brown, supra. The burden of proof necessary to find a person guilty of civil contempt is a clear and convincing evidence standard. Id.

In this case there are two separate and distinct instances of

contempt. The first contempt was indirect since it was committed outside the presence of the court and was civil since Ison failed to comply with the court's order to pay and fix the tanks. The second contempt, was also indirect. However the proceeding was criminal since Ison's behavior in failing to comply with the court's previous contempt order offended the dignity of the court. Thus, the first contempt proceeding incurred a civil penalty and the second proceeding incurred a criminal penalty.

R.C. 2705.05 provides in pertinent part:

> "(A) In all contempt proceedings, the court shall conduct a hearing. At the hearing, the court shall investigate the charge and hear any answer or testimony that the accused makes or offers and shall determine whether the accused is guilty of the contempt charge. If the accused is found guilty, the court may impose any of the following penalties:
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> (1) For a first offense, a fine of not more than two hundred fifty dollars, a definite term of imprisonment of not more than thirty days in jail, or both;
>
> (2) For a second offense, a fine of not more than five hundred dollars, a definite term of imprisonment of not more than sixty days in jail, or both;" (Emphasis added)

The language of the statute is clear. In any contempt proceeding the court, after affording the defendant the full panoply of his constitutional due process rights, may impose any sanction enumerated in the body of R.C. 2705.05, including a fine or a definite term of imprisonment. Thus, the trial court's imposition of a ten day jail term upon Ison was a valid exercise of the discretion granted to it under R.C. 2705.05. Ison's first assignment of error is without merit and is thus, overruled.

SECOND ASSIGNMENT OF ERROR:
"The trial court erred in that its judgment is against the manifest weight of the evidence."

Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. Season's Coal Co. v. Cleveland (1984), 10 Ohio St. 3d 77. In the instant case, there was ample evidence to prove beyond a reasonable doubt that Ison did not pay the civil penalties assessed and had violated the permanent injunction issued by the trial court in its September 11, 1985 judgment. The record shows that Ison admitted that the fine was not paid and that the site was not cleaned up pursuant to the court's order.

Ison offered as a defense that he was financially incapable of complying with the court's order. Generally, an inability to perform is a defense to a contempt charge. Bean v. Bean (1983), 14 Ohio App. 3d 358. Ison submitted an affidavit alleging his deteriorated financial condition, but offered no other credible evidence to support his claimed inability. Absent such evidence, it is clear that the trial court's judgment was supported by competent credible evidence. Ison's second assignment of error is without merit and is overruled.

It is ordered that (~~appellant~~-appellee) recover of (appellant-~~appellee~~) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Vinton County Common Pleas Court to carry this judgment into execution.

Any Stay previously granted by this Court is hereby terminated as of the date of filing of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

JUDGMENT AFFIRMED

Abele, J. & Stephenson, J. Concur in Judgment and Opinion

ORIGINAL SIGNED BY
JUDGE LAWRENCE GREY

Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 9, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.