

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHARLES B. GRAVES, JR.

APPELLANT

VS.

NO. 2009-CA-0626

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUE

- I. THE TRIAL COURT PROPERLY FOUND THAT GRAVES WAS IN CONTEMPT OF COURT FOR GRAVES' WILFUL ACTIONS WHICH WERE DESIGNED TO PREVENT THE ORDERLY ADMINISTRATION OF JUSTICE.

STATEMENT OF FACTS

On October 29, 2008, the Tunica County Circuit Court, Honorable Albert B. Smith III presiding, called cause number 2008-0211, *State of Mississippi versus Leslie Murphy*, a case that had been continued at least once. T. 5. County Attorney Charles B. Graves, Jr. represented the State, and Robert S. Little, Jr. represented Murphy. Defense counsel informed the trial court that he could not go forward because he had not been given the opportunity to view the videotape of his client's arrest. T. 5-9. It appears from the record that the parties attempted to view the tape in court that day, but were unable due to technical difficulties. T. 6. Judge Smith expressed his dissatisfaction with the unpreparedness of the parties, noting that it was the second or third time the case had been set, and directed defense counsel to draw up an order for continuance. T. 5-6, 8. Little then moved for

dismissal, which was denied by the trial court. T. 8. Judge Smith subsequently entered an order for a continuance, further ordering "the State to comply immediately with the Rules of Discovery and admonished the State and the Affiant to be prepared and ready for trial upon the next Court setting." C.P. 92.

On March 12, 2009, defense counsel was not present in the courtroom when the trial court called the *Murphy* case. T. 33. Graves approached the bench with an agreed order of dismissal. T. 33. The Court informed Graves that the court does not dismiss DUI cases and ordered Graves to proceed. T. 33. Little then entered the courtroom and advised the court that he was not prepared to go forward because he had still not been provided with the tape that was the subject of the continuance ordered nearly five months prior. T. 35-36. Little then state the following.

The prosecutor and I have been in touch just about every day for the last two weeks about this, and the -- I have been expecting this videotape every day for a week. When it finally didn't come by yesterday afternoon at 4 o'clock, he and I talked. I said, "Where are we on this? Are we ready to just enter an agreed order of dismissal?" He said, "I think we are. This has gone on long enough."

T. 36. The court then asked Graves and Little if they were familiar with Rule 2.03 of the Uniform Rules of County and Circuit Court practice. T. 36. The court noted that it had not dismissed or rescheduled the case, and found that both attorneys were in contempt of court and that he would determine their sanctions later. T. 37. Little then responded as follows.

There is -- your Honor, we've been trying to get this case ready, Mr. Graves and I, for the last two weeks. For the last two -- well, for the last six months, actually, on this, and for the last two weeks we have been talking to each other.

"Have you gotten the tape today?"

"No."

"Have you gotten the tape today?"

"No."

Finally yesterday we said we don't have the tape. The Court continued it last time. And if you'll notice, there is an order in the file last time where we didn't have the tape and the Court said, "All right, we're going to give you one more shot to provide the tape." So it was put off again one more shot to provide us the tape. The

tape still isn't here.

That's when the State and I -- the State agreed with me if the tape hadn't been provided, that's enough; it's time for this case to go.

And we had an agreed order waiting for the Court this morning when it got here, and the Court's administrator was advised yesterday afternoon at 4:30 that that was the situation. I believe Mr. Graves and I have done everything that we should have done and could have done on this case to be ready, your Honor.

T. 38-39. Judge Smith then expressed his concern that the parties were not prepared for trial and had not sought a continuance. T. 39. Judge Smith then announced that he would postpone hearing the case until later in the day.

Immediately thereafter, the court called the case of *State of Mississippi versus Keith Allen Woods*. The *Woods* case was also a DUI appeal in which Graves and Little represented the State and Woods. T. 40. Little informed the court that he could not go forward because "this is the same situation. . . . I have never seen the video for the first time. I have been trying to get the video all along, your Honor. Mr. Graves knows that and will speak to that. I don't know the discovery in this case." T. 40. Deputy Ricky Ray then informed the court that he had the tape with him. T. 42. The court then asked Graves why he did not obtain the discovery in question. T. 42. The following exchange then occurred.

Graves: Judge, I met with the officer and Mr. Little in court about two weeks ago. He had the tape with him then. We agreed to let him show the tapes at that time, both cases. I didn't have to have the tapes. The officer was there and the videotape. The plaintiff was there.

The Court: So you are saying that Little had the option two weeks ago?

Little: No, sir, that's not right. The tapes were not there in court that day. We talked in court that day about the tapes, which were in property.

The Court: You are both in contempt of court! You are not ready. Something is wrong in this thing. That's two contempts you got on the record, two cases.

T. 43.

Graves also represented the State in a third DUI appeal, *State of Mississippi versus Justyna Zylka*, that day. T. 43. Defense counsel did not appear for trial, and the trial court held defense counsel in contempt and dismissed the appeal. T. 47. Later that same day, Judge Smith modified Graves' sentence to time served. C.P. 99.

SUMMARY OF ARGUMENT

Graves' refusal to comply with the trial court's November 6, 2008 order in the *Murphy* case amounts to direct criminal contempt. Certainly there was enough evidence for the State to prosecute Murphy's appeal. Rather than simply provide defense counsel with the incriminating videotape of Murphy's traffic stop and arrest, the existence of which the record shows Graves was aware, Graves openly defied the court's prior order and attempted to have the case dismissed. Such actions could serve no other purpose than to prevent the orderly administration of justice. Graves' actions in the *Woods* case also show that Graves attempted to prevent the orderly administration of justice. Because Graves is guilty of direct criminal contempt, no hearing was required.

ARGUMENT

It is undisputed that the case *sub judice* involves criminal contempt, as Graves "wilfully, deliberately and contumaciously ignored the court, or the court's directive," and the purpose of the contempt citation was to "vindicate the dignity and authority of the court." *In re Smith*, 926 So. 2d 878, 887 (¶13) (Miss. 2006). In cases of criminal contempt, the reviewing court proceeds *ab initio* to determine whether the record supports a finding that the appellant committed contempt beyond a reasonable doubt. *Id.* at 885-86 (¶9).

What is in dispute is the variety of criminal contempt at issue. While Graves argues that the contempt committed was constructive, the State would show that Graves committed direct criminal contempt beyond a reasonable doubt. Direct contempt "involves words spoken or actions committed

in the presence of the court that are calculated to embarrass or prevent the orderly administration of justice.” *In re Hampton*, 919 So.2d 949, 955 (¶17) (Miss. 2006) (quoting *In re Williamson*, 838 So.2d 226, 237-38 (Miss. 2002)). Direct contempt has also been defined as “a resistance to or defiance of power of the court.” *In re Smith* at 888 (¶15). One found in contempt of court may be punished immediately by the judge in whose presence the contumacious conduct was committed. *Id.* This is so “because no evidence other than the court’s own knowledge is required as the conduct was committed in the presence of the court.” *Hampton*. at (¶22). Constructive contempt involves actions which are committed outside the presence of the court. *Id.* Defendants must be provided with a specification of charges, notice, and a hearing in cases of constructive contempt. *Id.*

The Murphy Case

As previously stated, the trial court ordered Graves to comply with the rules of discovery and to be prepared to try the *Murphy* case on the next court setting. C.P. 92-93. Specifically, it is clear from the record of the October 29, 2008 proceedings and the subsequent November 6, 2008 order that the Court directed Graves to provide defense counsel with the videotape of Murphy’s traffic stop and subsequent arrest and directed Graves “to be prepared and ready for trial upon the next Court setting.” T. 5-9, C.P. 92. The Appellant admits that he did not provide defense counsel with the video tape in question as ordered by the trial court. Appellant’s Brief at 35. Graves’ complaint is that he was not given notice or a hearing. However, such was not required as this is a case of direct contempt. Despite being ordered to provide defense counsel with the tape in question and to be prepared to try the case on the next court setting, Graves openly defied Judge Smith’s order by presenting an agreed order for dismissal on the next court setting. This clearly took place in the presence of the trial court and was designed “prevent the orderly administration of justice.” As such, Graves was guilty of direct criminal contempt.

Graves claims that Judge Smith's on-the-record exchange with Deputy Ray shows that the contempt in question was constructive because Judge Smith had to receive evidence concerning events which did not occur in the court's presence. However, this discussion between Judge Smith and Deputy Ray occurred *after* the trial court determined that Graves had committed direct criminal contempt and *after* the court sentenced Graves. T. 60, 102-108. Again, no hearing is required in cases of direct criminal contempt. Because Graves, after being ordered to provide the tape in question to defense counsel and to be prepared to try the case on the next court setting, showed up on the next court setting without having provided the tape to defense counsel and unprepared to try the case, Graves committed direct criminal contempt. Therefore, the trial court properly meted out Graves' punishment immediately, without notice and a hearing.

By way of analogy, the State would direct the Court to cases in which an attorney fails to appear for a hearing or trial. Generally, "a party's failure to appear in court at the appointed time constitutes constructive contempt." *In re Hampton*, 919 So.2d at 955 (§18). However, where a party's actions show that the party is aware of their obligation to appear before the court and intentionally absent themselves from the hearing, direct contempt has been committed. *Id.* at (§§18-20). Although Graves may have physically shown up in the courtroom at the appointed time, he was fully aware that the trial court expected him to have provided defense counsel with the videotape of his client's arrest and to be prepared to try the case. Despite Graves' awareness of his obligations, the record shows that he openly defied the trial court's order when he appeared before the trial court without having provided the discovery in question and not prepared to try the case.

For the foregoing reasons, this honorable Court should affirm the trial court's order of contempt stemming from Graves' actions in the *Murphy* case.

The Woods Case

Graves' failure to provide discovery in the *Woods* case again shows that Graves' behavior was designed to prevent the orderly administration of justice. Graves' failure to provide discovery in yet another case was made known to the trial court immediately after Graves was held in contempt for failing to provide discovery per court order in the *Murphy* case.

Our supreme court has stated, "Generally speaking, contempt matters are committed to the substantial discretion of the trial court which, by institutional circumstance and both temporal and visual proximity, is infinitely more competent to decide the matter than the Supreme Court." *In re Williamson*, 838 So.2d 226, 237 (¶29) (Miss. 2002) (citing *Cumberland v. Cumberland*, 564 So.2d 839, 845 (Miss. 1990)). The record shows that defense counsel had requested discovery some two months prior to the trial date. T. 42. Graves stated on the record that he did not provide defense counsel with the requested videotape because Graves, Little, and Deputy Ray were in court two weeks prior on another case, and Deputy Ray had the videotapes for the *Murphy* and *Woods* cases in the courtroom, implying that Little should have viewed them then. T. 43. However, Little denied that the tapes were present in the courtroom, and that although there had been a discussion of the tapes that day, he had never been provided with them. T. 43.

The trial court judge properly found that Graves' pattern of behavior was designed to prevent the orderly administration of justice. Accordingly, the trial court had the authority to punish Graves for contempt of court without notice and a hearing.

The Zylka Case

The trial court never conclusively found Graves to be in contempt of court in the *Zylka* case. The written order of contempt references Graves' actions in the *Zylka* case, but does not specifically state that he was in contempt of court. C.P. 136-137. Further, after the trial court found Zylka's

counsel in contempt for failure to appear, the trial court stated, "Spriggs is in contempt for failing to be here; failing to file a motion to continue. And I want to hear from him. I'm sure I will. And that may have a bearing on the two contempts I got on you, Graves!" T. 46. Again, it does not appear to the State that Graves was held in contempt a third time. To the extent that this honorable Court finds otherwise, the State would confess error in any such order of contempt as it relates to the *Zylka* case.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Graves' two contempt citations and corresponding fines and sentences arising from the *Murphy* and *Woods* cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 30th day of December, 2009.



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