COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2471 **Cir. Ct. No. 2004CF2624**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE FINDING OF CONTEMPT OF ATTORNEY MICHAEL SCHNAKE IN STATE V. OTIS MATTOX:

MICHAEL SCHNAKE,

APPELLANT,

V.

CIRCUIT COURT FOR MILWAUKEE COUNTY AND THE HONORABLE JEFFREY CONEN PRESIDING,

RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Reversed.*

¶1 FINE, J. Michael Schnake, an attorney admitted to practice in this state, appeals from orders entered by the trial court finding him in summary contempt and denying a stay of that order. We stayed the order of contempt pending resolution of the appeal. We reverse.

I.

A. *Prelude to Finding of Summary Contempt.*

¶2 Schnake's alleged contempt was during his trial representation of Otis Mattox on a charge of first-degree reckless injury in connection with Mattox's stabbing of a man whom Mattox claimed attacked him. The State's third and last witness in its case-in-chief, Milwaukee police detective John Karlovich, was testifying. Karlovich had interviewed Mattox following Mattox's arrest, and read to the jury his hand-printed summary of what Mattox had told him about the incident. Some four or five months before he interrogated Mattox, Karlovich had been promoted to detective.

¶3 Before Karlovich took the stand, the trial court told Schnake that he could not ask the detective whether he had ever been disciplined during his career as an officer. There is no evidence or offer of proof in the record that Karlovich had ever been disciplined; indeed, Schnake told the trial court: "I had put in a request for records that was not responded to, so I don't have any records, so I was going to ask --." The trial court interrupted and, after some brief discussion ruled, appropriately: "You're not going to insinuate there's some discipline that's out there that got swept up under the carpet by asking those questions. If you have something, you can bring it to me." *See* ***Oostendorp v. Khanna***, 937 F.2d 1177, 1181 (7th Cir. 1991) (must have good-faith basis to ask question). The trial court, apparently reflecting disputes between it and Schnake earlier in the trial, also

warned Schnake that if he asked Karlovich "about anything with regard to his personal background, I swear this time I will take you into custody." As we see below, the trial court used those earlier disputes, and uses them on appeal, to justify in part its holding Schnake in summary contempt.

¶4 Although Karlovich's interview with Mattox lasted one hour, the detective's hand-printed summary was only two pages—only one of which concerned the substantive aspects of the incident. A defense theme was that Karlovich shaded what he wrote in that summary in order to support the detective's pre-interrogation view that Mattox was guilty of first-degree reckless injury. Thus, Schnake brought out that Karlovich wrote at the top of the interview form the "charge" of first-degree reckless injury before he had asked Mattox any questions, and that the detective began his interrogation armed with the knowledge of "what the elements of the crime of reckless injury were." Karlovich also admitted on cross-examination that he had been asked by superior officers "to re-interview people on numerous occasions," thus supporting the inference that an interrogation is not successful from the standpoint of the police unless it produces inculpatory material. When asked by Schnake whether he knew "what needed to be proved to substantiate" a charge of first-degree reckless injury, Karlovich attempted to negate the inference underlying the question by responding "[t]hat's not what an interview is."

B. *Finding of Summary Contempt.*

¶5 In his attempt to diffuse Mattox's theme that Karlovich had a motive to slant his summary of the one-hour interrogation, the prosecutor asked the following questions during one of his re-direct examinations of the detective:

> Q Do you get paid any less if the person you interview gives a statement supporting self-defense?
>
> A No.
>
> Q Do you get admonished or demoted or anything like that?
>
> A No.
>
> Q Did you try to talk this man out of a self-defense statement?
>
> A No.
>
> Q Did you try and put any of these words into his mouth?
>
> A No.
>
> Q Or does this statement accurately reflect what this man told you that morning?
>
> A Yes.

Immediately after that re-direct examination, Schnake asked the following questions on his further re-cross examination, which the trial court interrupted by finding Schnake in summary contempt:

> Q Detective, you were asked about demotions. Have you ever been demoted on the job?
>
> A No.
>
> Q This is a pretty big promotion for you?
>
> A The next step up from police officer.

Q Well, you've been a police officer for a significant number of years, correct?

A Yes.

Q Is it important to you to keep and maintain this job?

THE COURT: Okay. Now, I'm going to need to see everyone at side bar.

(Discussion at side bar off the record.)

THE COURT: Send the jury out.

THE BAILIFF: All rise.

(Whereupon the jury is excused for a break.)

(Proceedings held in open court outside the presence of the jury.)

THE COURT: Okay. Let's make a record.

The Court is finding that Mr. Schnake is in contempt of this Court.

He has gone beyond the Court's order and questioned Detective Karlovich about prior discipline which the Court told Mr. Schnake would not be tolerated. Again he pushes the envelope.

You are found in contempt of this Court. You have violated this Court's order, and you've done so egregiously and continued to do so throughout the course of this trial.

Is there anything you want to say at this time?

ATTORNEY SCHNAKE: Your Honor, I requested at side bar that there be a transcript prepared as to whether I was simply responding to a door that had been opened.

THE COURT: I don't care, Mr. Schnake.

The bottom line is I told you at side bar. Also if I were in your shoes and I was strictly instructed by the Court not to do something and felt that maybe I needed to do so that I do ask prior permission of the Court. Instead, you do it on your

> own and try to get in whatever you feel is appropriate, and you don't care what the rulings of this Court are.
>
> I do not accept your explanation. I do not accept your apology. The Court is sentencing you to two days in jail to be served at the end of the day today.
>
> Let's take a break.
>
> (Recess had.)

The trial court later reduced the sentence to one day. It also declared a mistrial.

II.

¶6 As material to this appeal, a "'[c]ontempt of court' means intentional: (a) Misconduct in the presence of the court which interferes with a court proceeding or with the administration of justice, or which impairs the respect due the court; [or] (b) Disobedience, resistance or obstruction of the authority, process or order of a court." WIS. STAT. § 785.01(1). There are two types of contempt procedure by which a trial court may impose a "punitive sanction": "nonsummary" and "summary." WIS. STAT. § 785.03. Section 785.03(1)(b) controls imposition of a nonsummary punitive sanction:

> The district attorney of a county, the attorney general or a special prosecutor appointed by the court may seek the imposition of a punitive sanction by issuing a complaint charging a person with contempt of court and reciting the sanction sought to be imposed. The district attorney, attorney general or special prosecutor may issue the complaint on his or her own initiative or on the request of a party to an action or proceeding in a court or of the judge presiding in an action or proceeding. The complaint shall be processed under chs. 967 to 973. If the contempt alleged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial of the contempt unless the person charged consents to the judge presiding at the trial.

Section 785.03(2) controls imposition of a summary punitive sanction:

> The judge presiding in an action or proceeding may impose a punitive sanction upon a person who commits a contempt of court in the actual presence of the court. The judge shall impose the punitive sanction immediately after the contempt of court and only for the purpose of preserving order in the court and protecting the authority and dignity of the court.

As noted, the trial court held Schnake in summary contempt and imposed a punitive sanction.

¶7 Our review of a trial court's finding of contempt has, as is often the case, two aspects. First, we uphold a trial court's findings of fact that underlie a contempt if those findings are not clearly erroneous. ***Shepard v. Circuit Court for Outagamie County***, 189 Wis. 2d 279, 286, 525 N.W.2d 764, 767 (Ct. App. 1994). Second, "[w]e independently review a question of law. Whether the facts fulfill a particular legal standard is a question of law." ***Ibid.***[1]

¶8 The facts here are not in dispute. Schnake used the words that he used, and he used them intentionally—that is, volitionally. *See* ***Oliveto v. Circuit Court for Crawford County***, 194 Wis. 2d 418, 427 n.3, 533 N.W.2d 819, 822 n.3

[1] The statement in ***Currie v. Schwalbach***, 139 Wis. 2d 544, 551–552, 407 N.W.2d 862, 865 (1987), that "[a] trial court's finding that a person has committed a contempt of court will not be reversed by a reviewing court unless contrary to the great weight and clear preponderance of the evidence," is not at odds with ***Shepard v. Circuit Court for Outagamie County***, 189 Wis. 2d 279, 286, 525 N.W.2d 764, 767 (Ct. App. 1994), because ***Currie*** also recognized that application of the statute to the facts underlying a contempt finding is a question of law subject to *de novo* review. ***Id.***, 139 Wis. 2d at 552, 407 N.W.2d at 865–866. *See also* ***Oliveto v. Circuit Court for Crawford County***, 194 Wis. 2d 418, 428, 533 N.W.2d 819, 823 (1995) (reviewing *de novo* whether a lawyer's comment "ridiculous" following trial court's imposition of sentence on client could "constitute contempt," even though ***Oliveto*** commented that "[a] trial court's finding that a person has committed a contempt of court will not be reversed by a reviewing court unless the finding is clearly erroneous").

(1995). The question thus is whether what Schnake asked Karlovich was contempt of court as that is defined by WIS. STAT. § 785.01(1)(a) or (b). We hold that it is not.

¶9 As we have seen, the trial court appropriately ruled that Schnake could not ask Karlovich whether he had been disciplined during his career as a police officer. As noted earlier, that was a proper ruling because Schnake had not demonstrated that he had a good-faith basis to ask that question. But the scene had shifted by the time Schnake asked the questions that triggered the trial court's finding of summary contempt. The prosecutor had just asked a series of questions that were designed to show that, contrary to Mattox's theme of defense, Karlovich had no motive to be anything but truthful in his summary of what Mattox told him during the one-hour interrogation. The prosecutor's syllogism was that Karlovich would neither benefit from slanting his summary in favor of conviction nor be punished if the interrogation did not produce inculpatory admissions. Schnake had a right to try to show that Karlovich had, despite his responses to the prosecutor's questions, motives to be less than truthful in his testimony. *See* ***State v. Williamson***, 84 Wis. 2d 370, 383, 267 N.W.2d 337, 343 (1978) (bias and improper motive of witness are never collateral). In context, that is all Schnake's questions on re-cross examination addressed: whether Karlovich's desire to keep his job and promotion would give him a motive to slant his summary of what Mattox told him during the hour-long interrogation. In that context, Schnake's question "Detective, you were asked about demotions. Have you ever been demoted on the job?" was part of this syllogism: the detective has not been demoted because he is able to get evidence supporting convictions, and he slanted his summary of Mattox's interrogation in order to keep his detective's shield and not be demoted. This line of questioning, addressed as it was to motive, is wholly different from

what the trial court had earlier forbidden: asking about whether Karlovich had been disciplined, in order to imply from the mere asking of the question that Karlovich had a bad work record as a police officer and was, therefore, a less-than-credible witness. The latter line of inquiry was improper; what Schnake actually asked before he was held in summary contempt was not.

¶10 As alluded to earlier, the trial court attempted to support its holding Schnake in summary contempt by, after the break following its finding Schnake in contempt and sentencing him to incarceration, recounting two earlier instances, which it indicated were but two among many, where it believed that Schnake was playing fast and loose with his responsibilities as an officer of the court. On appeal, the State's brief on the trial court's behalf argues that those instances and others that it documents justified the trial court's summary contempt order. We disagree.

¶11 As we have seen, WIS. STAT. § 785.03(2) limits the imposition of a punitive sanction by summary contempt to instances where both of the following are present: (1) the punitive sanction is imposed "immediately after the contempt"; and (2) the imposition of the punitive sanction must be "only for the purpose of preserving order in the court and protecting the authority and dignity of the court." Thus, what may or may not have happened earlier in the trial is immaterial to use of the summary procedure to find and punish contempt (although it may be material to the type of punitive sanction imposed). As observed by ***Groppi v. Leslie***, 404 U.S. 496, 503–504 (1972), which concerned an alleged contempt of the Wisconsin Assembly by Father James E. Groppi, a prominent social activist of some two generations ago, delay in imposing contempt

vitiates the contention that summary process is necessary to preserve order and authority.[2] The same rationale applies to in-court contempt.

¶12 If, as the trial court submits, what Schnake did in those earlier instances warranted findings of contempt because they both (1) fell within the definition of contempt in WIS. STAT. § 785.01(1), and (2) required immediate action to preserve the court's authority and the effect of its rulings (the prerequisite to the use of summary procedure, WIS. STAT. § 785.03(2)), it should have found Schnake in summary contempt at those earlier times. By waiting, however, the trial court implicitly determined that those earlier instances did not each separately reach the level of contempt that required immediate use of the summary procedure. If, taken together, those earlier instances reflected what the trial court believed was a pattern of contemptuous behavior, it was empowered to commence nonsummary proceedings under § 785.03(1)(b).

III.

¶13 The question for which the trial court held Schnake in summary contempt was not, in its context, contempt; it was both consistent with Mattox's legitimate theory of defense, and was also a proper response to the prosecutor's immediately preceding questions on re-direct. Accordingly, we reverse.

By the Court.—Orders reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[2] For further history of this unique event, see ***State ex rel. Groppi v. Leslie***, 44 Wis. 2d 282, 171 N.W.2d 192 (1969).