COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP1535 **Cir. Ct. No. 2004CF6133**

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

IN RE THE FINDING OF CONTEMPT OF
JUSTIN SPENCER IN STATE V. COREY MENDRELL WELCH:

JUSTIN A. SPENCER,

APPELLANT,

V.

CIRCUIT COURT FOR MILWAUKEE COUNTY AND
THE HONORABLE WILLIAM W. BRASH, III,

RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed*.

¶1 WEDEMEYER, P.J.[1] Justin A. Spencer appeals from a contempt order entered after he refused to testify in a criminal action on two separate occasions. Spencer claims that the contempt finding arising from December 1, 2005, should be dismissed because the trial court failed to afford him an opportunity for allocution and that the contempt finding arising from December 6, 2005, should be dismissed because it imposed a consecutive sanction for conduct arising from the same conduct. Because Spencer was not prejudiced by any failure to allow specific allocution on December 1, 2005, and because the statute permitted a separate sanction for Spencer's contemptuous conduct on December 6, 2005, this court affirms.

BACKGROUND

¶2 Justin Spencer was involved in a series of armed robberies with several other individuals, including Cory Welch. Spencer was charged with six counts and entered into a plea agreement wherein he pled guilty to four of the counts and the State dismissed the other two counts.

¶3 On November 30, 2005, during the criminal trial of Welch for several of the armed robberies, Spencer was called to testify. Spencer refused to testify on the basis of the Fifth Amendment. The trial court explained to Spencer that he had been granted immunity and could not be prosecuted for anything he testified about. The trial court also explained, however, that if Spencer still refused to testify, he could be found in contempt and could receive a sanction ranging from a fine and up to one year in jail. The trial court spent a substantial

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

amount of time explaining this to Spencer. When Spencer refused to testify, the trial court found him in contempt and had him returned to custody. The trial court did not impose a sanction at that time.

¶4 On December 1, 2005, Spencer was recalled. At this time, the trial court explained that it had arranged for the public defender's office to appoint counsel for Spencer to explain immunity and contempt. An attorney from the public defender's office appeared with Spencer and explained to the court that he had fully discussed the issue with Spencer. Spencer's former criminal defense attorney also appeared and spoke to the court. The trial court then directly addressed Spencer, asked him if he had sufficient time to discuss this with his counsel, whether he had any questions and whether he understood what was going on. Spencer indicated that he understood and he still did not want to testify. At that point, the prosecutor asked Spencer a question and he responded, "I plead the Fifth," and "I will not be testifying." The trial court then again found Spencer to be in contempt.

¶5 The trial court then stated it would give Spencer another opportunity to respond, and offered Spencer an opportunity to respond. Spencer responded that he still would not testify. The trial court then asked Spencer's attorney if he wanted to make any comment. Spencer's counsel stated:

> Judge, my client has a very deep distrust for the system, and he doesn't know what the effect would be either on him in the future if he were to start testifying about matters that he's not even sure what he's going to be asked about. He understands the difference between transactional and testimonial immunity, and there's a chance that he could be charged again in the future for other crimes if he were to testify.
>
> Not only that, but he's got -- but the actions which people take in these courtrooms are known by family

> members of other people in the community. And my client has -- essentially, is fearful of testifying.

The trial court imposed a $500 fine and thirty days in the House of Correction as a sanction for the contempt.

¶6 On December 6, 2005, Spencer was recalled. He again refused to testify. The trial court explained to him that he had immunity and instructed him to answer. Spencer refused to answer. As a result, the trial court again found Spencer to be in contempt. The trial court then offered Spencer an opportunity for allocution, specifically asking, "Is there anything you want to say as to why you're not going to testify, Mr. Spencer?" Spencer replied, "No." Spencer's defense counsel then addressed the court, requesting a sanction which was "something less than the maximum," explaining again Spencer's reasons for refusing to testify—namely, his distrust for the system and fear. The trial court then directly asked Spencer again if he wanted to add anything, to which Spencer responded, "No." The trial court imposed a $500 fine and thirty days in the House of Correction as a sanction for this contempt. An order was entered with respect to both contempt findings/sanctions. Spencer now appeals from that order.

DISCUSSION

A. December 1st Contempt—Opportunity for Allocution.

¶7 Spencer contends the December 1st contempt finding should be dismissed because the trial court failed to afford him an opportunity for allocution. The State responds that Spencer's attorney exercised the right of allocution and that Spencer failed to establish prejudice. This court concludes that dismissal under all the facts and circumstances presented here is not appropriate.

¶8 In reviewing the entire transcript with respect to Spencer, this court observed the following. Spencer was initially brought in to testify on November 30, 2005. At that time, the trial court spent a significant amount of time explaining what was happening, what immunity was, that Spencer did not have the right to hide behind the Fifth Amendment, what contempt was, and what would happen if Spencer choose not to testify. It was after this explanation, that the trial court found Spencer to be in contempt. The trial court then gave Spencer a "second opportunity." Spencer responded that he would not be testifying.

¶9 Spencer was brought back the following day, December 1, 2005, where additional discussion was held with Spencer and his attorneys. The trial court directly addressed Spencer again, asking him if he had any questions and whether he understood what was going on. Spencer did not have any questions and indicated with a "Yes" that he understood what was going on. Then the trial court held Spencer in contempt for again refusing to testify. After trial, the following exchange occurred:

> THE COURT: I'm going to give you another opportunity, knowing that … you're now held in contempt, is it still --
>
> THE WITNESS: I still will not testify.
>
> THE COURT: Still won't testify at this point in time. So I think I've given him the opportunity to allocate and explain his failure to testify with regards to this matter.

¶10 This court concludes that based on the foregoing, Spencer was given repeated opportunities by this court to explain his reasons for refusing to testify. It is undisputed here that the trial court did not use the "magic words" and specifically say: "Mr. Spencer, this is now your opportunity for allocution. Do you want to give any explanation for your refusal to testify that may aggravate or

mitigate the potential penalty?" But, the record demonstrates that Spencer was afforded an opportunity to explain himself and he elected not to.

¶11 Further, this case does not present a situation where Spencer tried to explain why he was not testifying and the trial court refused to hear him, as was the case in ***Contempt in State v. Dewerth***, 139 Wis. 2d 544, 586, 407 N.W.2d 862 (1987). In addition, the trial court afforded Spencer's counsel an opportunity to explain Spencer's reasons for not testifying before it imposed the sanction. Thus, the trial court was aware of Spencer's reasons so that it could fashion an appropriate sanction. Finally, Spencer offers no evidence that if the trial court had used the "magic words," he would have offered any other explanation for his contumacious act than what was presented by his attorney. Based on the totality of the circumstances in this case, this court concludes that dismissal of the contempt order would not be appropriate. The record demonstrates that general due process concepts of fundamental fairness were satisfied. Accordingly, this court affirms.[2]

[2] This court advises the trial court that a better practice would be to specifically tell the person found to be in contempt that he or she has a right to allocution and then ask if he or she would like to give any explanation for the contumacious act that may aggravate or mitigate the potential penalty. Such a practice would eliminate any question as to whether proper summary contempt proceedings were satisfied. *See* ***Oliveto v. Crawford County Circuit Court***, 194 Wis. 2d 418, 436, 533 N.W.2d 819 (1995) (a summary contempt proceeding is properly conducted when the record reflects: "(1) a statement indicating the judge's decision to hold a person in contempt as well as the factual basis for the holding; (2) a statement from the judge informing the contemnor of the right of allocution and a further statement inviting the contemnor to exercise that right prior to imposition of sanction; and (3) the judge's final decision to impose sanction and the sanction, if any, is imposed.").

B. December 6th Contempt.

¶12 Spencer next argues that the December 6, 2005 contempt finding should be dismissed because it was simply a continuum from the December 1, 2005 refusal to testify. Thus, he argues that the second sanction was unlawful because it was a "consecutive sanction for conduct arising out of the same conduct." This court does not agree.

¶13 WISCONSIN STAT. § 785.04(2)(b) authorizes a court to impose a punitive sanction for "each separate contempt of court." Here, the trial court imposed one sentence of thirty days and a $500 fine for Spencer's refusal to testify on December 1, 2005, and a second sentence of thirty days and a $500 fine for Spencer's refusal to testify on December 6, 2005. The two independent refusals to testify, separated by five days, constitute "separate contempt[s] of court" within the meaning of § 785.04(2)(b). There was no erroneous exercise of discretion based on the facts and circumstances in this case.

By the Court.—Order affirmed.

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