COURT OF APPEALS
DECISION
DATED AND RELEASED

July 18, 1995

NOTICE

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

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

No. 94-2045

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

STATE OF WISCONSIN and CITY OF MILWAUKEE,

Plaintiffs-Respondents,

v.

GEORGE L. WILSON,

Appellant,

MISSIONARIES TO THE PREBORN, ET AL,

Defendants.

APPEAL from an order of the circuit court for Milwaukee County: ROBERT W. LANDRY, Reserve Judge, and PATRICK T. SHEEDY, Judge.[1] *Affirmed.*

[1] Although this case was assigned to Reserve Judge Robert W. Landry, the order which is being appealed from was signed by Judge Patrick T. Sheedy on behalf of Judge Landry.

WEDEMEYER, P.J.[2] George L. Wilson appeals from an order issuing a remedial contempt citation for violating a permanent injunction that was issued on December 10, 1992, enjoining activities of certain abortion protestors at medical clinics throughout the City of Milwaukee.[3] The injunction prohibits certain named individuals and anyone acting "in concert" with those individuals from engaging in particular activities at medical clinics. Wilson claims that the trial court erred in issuing a contempt order against him because: (1) he was not given proper notice of the contempt hearing in violation of due process; (2) he was not informed whether he was cited for violating the December injunction order or the April injunction order; (3) the sanctions imposed were punitive rather than remedial; and (4) the trial court failed to make specific findings regarding what acts constituted "in concert" activity. Because acceptable notice was provided; because the State indicated Wilson was cited pursuant to the December injunction as more fully captioned by the April injunction order; because the sanctions imposed were remedial; and because there was sufficient evidence of "in concert" activity with one named defendant, this court affirms.[4]

I. BACKGROUND

On December 10, 1992, a Milwaukee trial court issued a permanent injunction order prohibiting certain individuals, and anyone acting in concert with those individuals, from engaging in certain activities at medical clinics that provide abortions. On April 15, 1993, an order modifying the caption of the December order, to specifically list by name thirty-eight individuals subject to the injunction, was issued. Matthew Trewhella, John Stambaugh, Daniel Holman and Drew Heiss were among the thirty-eight individuals specifically named in the April injunction order.

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[2] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

[3] The caption of the injunction was modified by order signed by Chief Judge Patrick T. Sheedy on April 15, 1993. The content of the December injunction and the April injunction, however, are identical.

[4] This court does agree with Wilson that the record does not contain any specific findings as to "in concert" activities with named defendants, Matthew Trewhella, John Stambaugh or Daniel Holman. However, there are specific findings that Wilson acted in concert with named defendant, Drew Heiss. Accordingly, this court affirms the order.

The injunctions prohibited the named defendants, and anyone acting in concert with a named defendant, from entering a twenty-five-foot buffer zone around clinic entrances and a ten-foot floating personal zone around individuals seeking access to the clinics.

On January 6, 1994, Wilson blockaded the entrance to the clinic located at 302 North Jackson Street by sitting in front of the door. Wilson observed that Trewhella, Stambaugh and Holman were located across the street from where he was sitting. He denied knowing that Heiss was also present. Despite his disavowal, a photograph of Heiss speaking to Wilson as he blockaded the door was introduced into evidence at the contempt hearing.

The contempt hearing took place on July 27, 1994. A "Notice of Hearing" was mailed to all parties, except Wilson, on July 18, 1994. The notice indicates that it was not mailed to Wilson because the court did not have Wilson's address. The notice also indicates, however, that it was delivered in person to Wilson on July 19, 1994. Wilson was present in court on the scheduled hearing date. He claimed that he did not know his contempt hearing was the purpose for the hearing, but expected that the hearing was solely to determine his motion to dismiss the citation. The trial court denied Wilson's motion to dismiss and instructed all parties that the contempt hearing would commence after lunch.

Wilson objected to the contempt hearing taking place because he did not have an opportunity to subpoena the witnesses he intended to call. He indicated that he would have called Trewhella, Stambaugh and Judge Patrick T. Sheedy. The trial court overruled Wilson's objections and proceeded to hearing.

At the conclusion of the hearing, the trial court determined that Wilson had violated the injunction by acting in concert with certain named defendants. It ordered Wilson to pay a $1,000 forfeiture, with the option to purge the penalty "by swearing under oath or affirming that he [Wilson] w[ould] not violate the conditions of the injunction." The trial court also ordered that if Wilson elected not to purge and did not pay the $1,000 penalty, he must serve forty days in the county jail. Wilson now appeals.

II. DISCUSSION

A. Notice.

Wilson claims that his due process rights were violated because he was not given proper notice that the contempt hearing was to occur on July 27, 1994. He asserts that he believed the hearing scheduled was solely to determine his motion to dismiss. In support of his argument, Wilson points to the document titled "Notice of Hearing," which indicates that he was not mailed a copy. This court rejects Wilson's argument.

Although Wilson is correct in his assertion that the document reveals he was not mailed a copy, the document also indicates that a copy of the document was delivered to Wilson in person. Further, Wilson's testimony belies his assertion on appeal. Wilson conceded that although the document was not mailed to him, he did receive the document and the notice it contained. Section 785.03(1)(a), STATS., which governs remedial sanctions regarding contempt, requires only that the contemnor receive notice. It does not specify whether that notice must be received by mail or by personal delivery. Because Wilson received notice of the contempt hearing, this court rejects his due process claim.

B. December Injunction v. April Injunction.

Wilson next claims that he was never informed as to which injunction he was cited for violating. The State indicates that the injunctions are identical, with the exception of the caption, and that the sole purpose for the April injunction was to identify by name each individual who was subject to the injunction.

Wilson admitted that he was familiar with both the December and the April injunctions prior to the date of the incident in this case. He admitted that he was familiar with the individuals named in the April injunction. Accordingly, this court sees no merit to his contention that due process rights are violated by not naming one injunction or the other. The injunctions are

identical in substance. In citing Wilson for contempt, the State argued that he violated the December injunction, as more fully captioned by the April injunction. From this description, and the fact that Wilson was familiar with both, it was not necessary to delineate any more specifically than was done here.[5]

C. Sanctions: Remedial or Punitive?

Wilson next claims that the sanctions imposed by the trial court were actually punitive, which makes his citation for contempt criminal rather than civil. Accordingly, he continues, he was deprived of the rights afforded defendants in criminal contempt proceedings. The State responds that the sanctions imposed were clearly remedial and that Wilson holds the key to purge. This court concludes that the sanctions imposed were remedial and, therefore, rejects Wilson's argument.

A remedial sanction is defined as a sanction imposed for the purpose of terminating a continuing contempt of court. Section 785.01(3), STATS. A punitive sanction is a sanction imposed to punish a past contempt of court for the purpose of upholding the court's authority. Section 785.01(2), STATS. The purpose of the trial court's sanction in this case was an attempt to convince Wilson to terminate any future contemptuous acts. The penalty imposed requires Wilson to either pay a forfeiture of $1,000 or purge himself of the contempt by affirming that he will not commit any future violations of the injunction order. Failure to take either action will result in forty days imprisonment.

Wilson claims, however, that he cannot pay the forfeiture because he is indigent and he cannot purge himself because of his religious beliefs. Based on these factors, Wilson argues that his jail confinement is punitive

[5] Wilson also argues that the April injunctive order was issued without jurisdiction for doing so because as of that date, the December injunctive order was on appeal. We summarily reject this argument. Section 808.07(2)(a), STATS., provides the trial court with authority to modify an injunction while the order is pending appeal. Hence, modifying the caption of the December injunction so that it included the names of the individuals subject to it was within the authority of the trial court.

because he does not "hold the key" to ceasing his imprisonment. ***State v. King***, 82 Wis.2d 124, 130, 262 N.W.2d 80, 83 (1978). (Penalty is remedial if contemnor holds the key to his jail confinement).

Whether a contemnor has the power to purge is a finding of fact that this court will not overturn unless it is clearly erroneous. ***State ex rel. N.A. v. G.S.***, 156 Wis.2d 338, 343, 456 N.W.2d 867, 869 (Ct. App. 1990). Wilson's initial argument was that his religious beliefs prevented him from taking an *oath*, and thus prevented him from purging. In response to Wilson's religious concerns, the trial court modified its initial purge order--that is, rather than requiring Wilson to take an *oath*, the trial court provided that Wilson could merely *affirm* that he would not violate the injunction in the future. Despite this modification, Wilson adamantly refused. Based on this outright absolute refusal, the trial court determined that, despite his religious beliefs, Wilson was capable of affirming his willingness to refrain from further violations of the injunction. This court cannot say that the trial court's finding that Wilson was capable of purging was clearly erroneous.

Because there is nothing in the record to convince this court that the trial court erred, this court rejects Wilson's claim that he does not hold the key to purge. Accordingly, the sanction imposed was remedial and Wilson's claim that the sanction was actually punitive in nature is rejected.

D. Acting In Concert.

Finally, Wilson claims the trial court did not make any specific factual findings as to what acts constituted "in concert" activities. Instead, Wilson argues, the trial court baselessly concluded that Wilson acted in concert with named defendants, Trewhella, Stambaugh, Holman and Heiss. This court agrees that the trial court did not find any specific acts of concert between Wilson and Trewhella, Stambaugh, or Holman. As properly noted by Wilson, the presence of a named defendant without anything more, does not constitute "in concert" activity. However, the trial court did find that Wilson acted "in concert" with named defendant Heiss. The trial court's findings in this regard are sufficient to uphold the order.

Specifically, the trial court found that the named defendant was "directing activities here as clearly as has been demonstrated" from the testimony, and that "Mr. Wilson vigorously was working in concert with by acting in concert with and aiding and abetting based on the testimony in this case together with the exhibits that have been received." The exhibit referenced by the trial court is a photograph which depicts Heiss standing a few feet from Wilson as Wilson sat, blockading the clinic's door. The photographer who took the picture testified at the hearing that the individual talking to Wilson was in fact Heiss. Wilson contended that the individual depicted in the photo could not be identified and Wilson denied that he spoke with Heiss.

This conflict in the testimony, however, is a question of credibility for the finder of fact. ***Gehr v. City of Sheboygan***, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977); ***Milbauer v. Transport Employes' Mut. Benefit Soc'y***, 56 Wis.2d 860, 865, 203 N.W.2d 135, 138 (1973). An appellate court will not substitute its judgment for that of the trier of fact unless the fact finder relied on evidence that was "inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990). The testimony of the photographer who actually took the photo was not so inherently incredible so as not to be believed and was corroborated by other witnesses. Hence, this court will not substitute its judgment for that of the trial court. The trial court accepted the photographer's version of events and rejected Wilson's. As the arbiter of witness credibility, this was proper for the trial court to do.

This court acknowledges that the trial court's findings with respect to Wilson acting in concert with Heiss are not as detailed as this court might prefer. Nevertheless, the trial court did issue findings that are supported by the evidence. Accordingly, this court rejects Wilson's claim and affirms the order.

By the Court.—Order affirmed.

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