COURT OF APPEALS
DECISION
DATED AND RELEASED

December 17, 1996

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.

NOTICE

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

No. 95-0254

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

In the Matter of the Finding of Contempt in: State of Wisconsin and City of Milwaukee v. Missionaries to the Preborn, et al.

State of Wisconsin and City of Milwaukee,

Plaintiffs-Respondents,

v.

James R. Donohoo,

Appellant.

APPEAL from an order of the circuit court for Milwaukee County: RAYMOND E. GIERINGER, Reserve Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. James R. Donohoo appeals from an order issuing a contempt citation for violating a permanent injunction enjoining the activities of abortion protesters at various medical clinics in the City of Milwaukee.

Donohoo claims that the trial court erred when it found that he violated the injunction by acting in concert with three individuals who were named defendants in the permanent injunction. He argues that in order to find that he acted in concert with a named defendant, the trial court must find that a named defendant actually violated the injunction at the same time that Donohoo did. Because the trial court did not err in finding that Donohoo acted in concert with a named defendant, we affirm.

I. BACKGROUND

On December 10, 1992, a Milwaukee trial court issued a permanent injunction restraining numerous individuals and anyone acting in concert with those individuals from engaging in certain activities at various medical clinics that provide abortions. The injunction prohibited protest activities within twenty-five feet of the entrance to the clinics and within ten feet of the individuals seeking access to the clinic facilities. Donohoo was not named in the permanent injunction, but he admitted that he had received notice of it. He also admitted that on June 25, 1994, he engaged in protest activities within twenty-five feet of the entrance of one of the clinics named in the injunction; that he spoke with Dale Pultz (who is a named defendant in the injunction); and that after conversing with Pultz, he returned to his protest position within twenty-five feet of the entrance to the clinic.

The trial court found Donohoo in violation of the injunction, ruling that Donohoo engaged in prohibited protest activities while acting in concert with Pultz, Stephen Gaenslen and John Stambaugh. Gaenslen and Stambaugh are also named defendants in the injunction. Donohoo now appeals.

II. DISCUSSION

Whether Donohoo's actions constituted a contempt of court is a finding of fact for the trial court. *See* ***Oliveto v. Cranford Cir. Ct.***, 194 Wis.2d 418, 427-28, 533 N.W.2d 819, 823 (1995). In reviewing the determination, we defer to the trial court's findings of fact, which will not be overturned unless they are clearly erroneous. ***Id.*** Moreover, the question of whether a non-party is acting in concert with a party to an injunction is a question of fact to be

determined by the trial court. *See* ***Dalton v. Meister***, 84 Wis.2d 303, 312, 267 N.W.2d 326, 331 (1978).

Donohoo argues that the trial court erred when it found him in contempt. His argument rests in his definition of "in concert." Donohoo claims that an individual cannot be acting in concert with a named defendant unless a named defendant is violating the injunction at the same time as the non-named individual. Donohoo argues that because the trial court did not find that a named defendant violated the injunction at the same time he did, that the trial court could not find him in contempt. We do not accept Donohoo's interpretation.

"Concerted action" is "action that has been planned, arranged, adjusted, agreed on and settled between parties acting together pursuant to some design or scheme." BLACK'S LAW DICTIONARY 289 (6th ed. 1990). This definition articulates the proper legal standard necessary to determine whether a non-party has acted in concert with a defendant named in the injunction.

The definition does not require what Donohoo proposes—that a named defendant must be found to be violating the injunction at the same time as a non-named individual in order to make the "in concert" finding. To accept such an interpretation would invite the named defendants to solicit non-named individuals to commit the conduct proscribed by the injunction and, in effect, render the injunction meaningless. This is not the intent of the law. *See* ***Roe v. Operation Rescue***, 919 F.2d 857, 871 (3d Cir. 1990) ("The law does not permit the instigator of contemptuous conduct to absolve himself of contempt liability by leaving the physical performance of the forbidden conduct to others.").

We have reviewed the record and conclude that the evidence is sufficient to justify the trial court's ruling that Donohoo acted in concert with named defendant Pultz and participated in proscribed protest activities. The trial court's findings can be discerned from the citation for contempt and are not clearly erroneous with respect to Pultz. *See* § 805.17(2), STATS.

David Ritz, a photographer, testified at the hearing that he observed Donohoo conversing with Pultz and that after this conversation,

Donohoo proceeded to protest within twenty-five feet of the clinic entrance. When Donohoo testified, he admitted that he spoke with Pultz and then protested within twenty-five feet of the clinic entrance. Under these facts, it is reasonable to infer that Donohoo acted in conjunction with a named defendant. The conversation with Pultz followed by engaging in proscribed protest activities is sufficient to support the trial court's determination.

We do not find support in the record to support the trial court's findings that Donohoo acted in concert with Gaenslen or Stambaugh. Although both were present, Donohoo did not have any contact with Stambaugh, and his only contact with Gaenslen was a brief conversation as Donohoo was leaving the scene. The trial court's err in this regard, however, is harmless because Donohoo did act in concert with Pultz, which is sufficient to sustain the contempt finding. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231 (1985). Accordingly, we affirm.[1]

By the Court. – Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[1] We reject the State's assertion that the issue Donohoo raised in this appeal was frivolous.