

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 2366

FRANCISCO CARVAJAL, II

VERSUS

KELLY J. GEORGE

Judgment Rendered: May 2, 2008

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 2006-11857

Honorable Donald M. Fendlason, Judge

Marti Tessier
Mandeville, LA

In Proper Person

Marti Tessier
Mandeville, LA

Counsel for Defendant/Appellee
Kelly J. George

James E. Moorman, III
Covington, LA

Counsel for Plaintiff/Appellee
Francisco Carvajal, II

BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

Handwritten signatures of Marti Tessier and James E. Moorman, III. Marti Tessier's signature is at the top, and James E. Moorman, III's signature is below it, featuring a circled 'X' above the name.

GUIDRY, J.

Marti Tessier, counsel for defendant/appellee Kelly George, appeals from a judgment of the trial court finding her in contempt of court and sentencing her to serve thirty days in the parish jail, suspended, and ordering her to pay the costs of the contempt proceedings and the cost of the transcript. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Ms. Tessier represented Ms. George in an action wherein Ms. George was named as a defendant. Ms. Tessier filed an answer and reconventional demand and a motion to proceed in forma pauperis on behalf of Ms. George. The trial court indicated on the order for the motion to proceed in forma pauperis that it required a rule to show cause. Thereafter, a notice was sent by the clerk of court that a show cause hearing was scheduled for September 6, 2006. This notice was personally served on Ms. George through Ms. Tessier at Ms. Tessier's law office on July 24, 2006. However, when the case was called for hearing on September 6, 2006, Ms. Tessier was not present, and Ms. George was required to proceed with the hearing on her motion without counsel.

On October 23, 2006, the trial court on its own motion filed a rule for contempt, ordering that Ms. Tessier show cause on November 15, 2006, why she should not be held in contempt of court for her failure to appear at the September 6, 2006 hearing and sanctioned accordingly. Because Ms. Tessier did not receive proper notice of the November 15, 2006 hearing date, the hearing was rescheduled for January 17, 2007.¹ Following the hearing, the trial court signed a judgment

¹ The rule for contempt also mentioned Ms. Tessier's representation of a defendant in suit number 2006-12997, Leimkuhler v. Leimkuhler. The rule alleged that Ms. Tessier failed to appear at an October 18, 2006 hearing to represent her client on various rules that had been filed by the parties. The hearing on the court's rule for contempt addressed this matter, as well as the matter involving Ms. Tessier's representation of Ms. George. However, the judgment currently before us on appeal only pertains to Ms. Tessier's actions in the course of her representation of Ms. George. The judgment finding Ms. Tessier in contempt of court with regard to the other

finding Ms. Tessier in contempt of court and sentencing her to serve thirty days in the parish prison, but suspended that sentence. The court also ordered that Ms. Tessier pay all costs of the proceeding and the cost for the transcript. Ms. Tessier now appeals from this judgment.

DISCUSSION

Authority to punish for contempt of court falls within the inherent power of the court to aid in the exercise of its jurisdiction and to enforce its lawful orders. Rogers v. Dickens, 06-0898, p. 8 (La. App. 1st Cir. 2/9/07), 959 So. 2d 940, 945. A contempt of court is any act or omission tending to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority. La. C.C.P. art. 221. The Louisiana Code of Civil Procedure provides for two kinds of contempt, direct and constructive. A direct contempt is one committed in the immediate view and presence of the court and of which it has personal knowledge, or a failure to comply with a subpoena or summons, proof of service of which appears of record. La. C.C.P. art. 222. A constructive contempt is any contempt other than a direct one. La. C.C.P. art. 224. Failure of an attorney to appear in court on behalf of her client is considered a constructive contempt. See McKee v. McKee, 03-254, p. 5 (La. App. 3rd Cir. 10/1/03), 856 So. 2d 135, 137-138; see also State v. Darrow, 513 So. 2d 278, 279 (La. 1987); Kidd v. Caldwell, 371 So. 2d 247, 253 (La. 1979).

A contempt proceeding may be civil or criminal. If a contempt proceeding is incidental to a civil action, it is a civil matter if its purpose is to force compliance with a court order or the punishment imposed is remedial or coercive. See Rogers, 06-0898 at p. 10, 959 So. 2d at 947 and Estate of Graham v. Levy, 93-0636 (La. App. 1st Cir. 4/8/94), 636 So. 2d 287, 290, writ denied, 94-1202 (La. 7/1/94), 639

matter is the subject of a separate appeal before this panel, Leimkuhler v. Leimkuhler, 2007 CA 2397, also decided on this date.

So. 2d 1167. The burden of proof in a civil contempt case is by a preponderance of the evidence. McKee, 03-254 at p. 5, 856 So. 2d at 137. However, if the purpose of the contempt proceeding is to punish disobedience of a court order or the punishment imposed is punitive and intended to vindicate the authority of the court, it is a criminal matter and the elements of contempt must be proved beyond a reasonable doubt. See Rogers, 06-0898 at p. 10, 959 So. 2d at 947. A jail sentence is punitive/criminal if it is limited to imprisonment for a definite period and it is remedial/civil if the defendant stands committed unless and until she performs the affirmative act required by the court. Hicks ex rel. Feiock v. Feiock, 485 U.S. 624, 632, 108 S. Ct. 1423, 1429, 99 L. Ed. 2d 721 (1988); Estate of Graham, 636 So. 2d at 290.

In the instant case, the trial court judgment finding Ms. Tessier in contempt of court issued a thirty day suspended jail sentence, but did not attach any specific conditions to this sentence or seek any specific compliance on the part of Ms. Tessier in order to purge herself of the contempt.² Accordingly, we find that Ms. Tessier was found guilty of criminal contempt, and therefore, the elements of contempt had to be established beyond a reasonable doubt. See State v. Desselle, 00-2408, p. 10 (La. App. 1st Cir. 10/10/01), 809 So. 2d 460, 466; see also Hicks ex rel. Feiock, 485 U.S. at 639 n. 11, 108 S. Ct. at 1434 n. 11.

From our review of the record, we find no error in the trial court's determination that Ms. Tessier's conduct constituted a constructive contempt of court beyond a reasonable doubt. Ms. Tessier filed a motion to proceed in forma pauperis on behalf of her client, Ms. George, for which the trial court indicated that a rule to show cause was required. The trial court thereafter notified Ms. George, through personal service upon Ms. Tessier, of the date and time scheduled for the

² We note that the oral reasons for judgment of the trial court somewhat conflict with the written judgment. However, it is well settled that when such a conflict exists, the written judgment controls. Babin v. Burnside Terminal, Greater Baton Rouge Port Commission, 577 So. 2d 90, 98 (La. App. 1st Cir. 1990).

show cause hearing. However, Ms. George testified that Ms. Tessier did not appear at the show cause hearing, and Ms. Tessier did not present any evidence disputing her failure to appear or providing any reasonable explanation for her absence. Accordingly, we find no abuse of the trial court's discretion in adjudging Ms. Tessier in contempt of court.

Ms. Tessier argues on appeal, however, that the trial court failed to follow the procedures required under La. C.C.P. art. 225 for finding a person in contempt of court, and therefore, the trial court's judgment holding her in contempt of court is invalid. Louisiana Code of Civil Procedure article 225 A provides that a rule to show cause as to why a person should not be adjudged guilty of contempt of court and punished accordingly may issue on the court's own motion or on the motion of any party to the action and shall state the facts alleged to constitute the contempt. Additionally, subparagraph B provides that if a person is found guilty of contempt, the court shall render a judgment reciting the facts constituting the contempt, adjudging the person charged with contempt guilty thereof, and specifying the punishment imposed.

According to the record, the rule for contempt issued by the trial court specifically states that in "Francisco Carvajal, [II] v. Kelly J. George, bearing suit number 2006-11857 ... a Motion to Proceed in Forma Pauperis was filed by Ms. Tessier on behalf of Kelly George [and w]hen the case was called on September 6, 2006, Ms. Tessier was not present and her client was required to proceed with the hearing on her motion without counsel." Additionally, the rule states that Ms. Tessier is ordered to "appear and show cause ... why she should not be held in contempt of court for her failure to appear at the above hearin[g] and sanctioned accordingly." Therefore, Ms. Tessier was clearly apprised of the facts alleged to constitute the contempt as required by La. C.C.P. art. 225 A.

Additionally, the written judgment finds Ms. Tessier to be in contempt of court and sentences her to serve thirty days in jail, but suspends said sentence and orders her to pay court costs of these proceedings as well as the cost of the transcript. While the written judgment does not specifically state the facts upon which the contempt finding is based, the trial court stated at the hearing on the rule for contempt that “the record reflects that you were noticed for the [pauper hearing] and you failed to appear ... whether you can contact your client or not, you as an officer of the court have an obligation to be present ... and I find you in contempt of court for the reasons that I have just enumerated.” The jurisprudence has consistently recognized that the requirements of La. C.C.P. art. 225 B are met, despite a failure of the trial court to recite facts constituting the basis for the contempt in the written judgment, so long as such facts are recited by the trial court in open court. See Garrett v. Andrews, 99-1929, p. 4 (La. App. 1st Cir. 9/22/00), 767 So. 2d 941, 942; Estate of Graham, 636 So. 2d at 293. Therefore, based on our review of the record and law as outlined above, we find no abuse of the trial court’s discretion in holding Ms. Tessier in contempt of court.

Ms. Tessier also asserts on appeal that the trial court erred in ordering payment for attorney fees, payment to a litigant, payment to a court reporter for the cost of a transcript, and payment of court costs. We note that the judgment that is the subject of the instant appeal does not mention payment of attorney fees or payment of any amount to a litigant. Rather, these sanctions appear to be the subject of another contempt charge, which according to the record, is the subject of a separate judgment and a separate appeal. Therefore, this argument is not properly before us for consideration.

Further, the remainder of Ms. Tessier’s argument with regard to the punishment imposed asserts that the trial court erred in imposing a punishment that exceeds the statutory cap of \$500.00 pursuant to La. R.S. 13:4611. However, we

find this argument lacks merit. There is no evidence in the record that the amount of court costs or the cost of the transcript exceed the \$500.00 statutory cap. Additionally, according to the facts as alleged in Ms. Tessier's brief on appeal, the court costs only amounted to \$222.00 and the cost of the transcript was \$150.00. Therefore, we find Ms. Tessier's second assignment of error challenging the trial court's assessment of costs to be without merit.

Finally, Ms. Tessier asserts that the trial court erred in failing to grant her application for suspensive appeal. However, we find this argument to be moot, considering that the trial court subsequently granted Ms. Tesseir's motion for devolutive appeal.³

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are to be borne by the appellant, Marti Tessier.

AFFIRMED.

³ We also note that Ms. Tessier's argument regarding the trial court's failure to grant her a suspensive appeal and her subsequent imprisonment for failure to pay the court-ordered attorney fees, payment to a litigant, court costs, and costs of the transcript, is not properly before us. The judgment that is the subject of the instant appeal does not attach any conditions to the jail sentence or to the assessment of court costs and cost of the transcript. Rather, the oral reasons seem to indicate that a condition was placed, ordering Ms. Tessier to pay the required costs and fees within a certain period of time or be ordered to jail, with regard to the separate contempt charge, which is the subject of a separate judgment and a separate appeal.